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Employee Wellness Programs after January 1, 2014: HIPAA Nondiscrimination Rules Change, But ADA, GINA, and N.C. Law Remain the Same

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In recent years increasing numbers of public employers have instituted employee wellness programs. Employers may hope for significant savings in health insurance costs, and in time lost to employee sick days, after adopting programs to promote healthier lifestyle choices and preventive medical care. Sometimes health insurers offer employers discounts on group rates if the employer reduces the number and dollar amount of employee claims. Large insurance companies may have their own wellness programs and will discount the group rate if a certain percentage of the employer's workers participate in or complete the program. Even where a health insurer does not offer a direct financial incentive, employers are increasingly offering their employees incentives to take better care of themselves.

Some wellness programs offer discounted membership in health and fitness clubs. In other programs the employer discounts health insurance premiums or awards bonuses when an employee achieves certain health goals, such as stopping smoking or lowering blood pressure. The varieties of incentives are endless, but the basic legal considerations are the same. Wellness programs must comply with

1. the nondiscrimination rules for wellness programs established by the Health Insurance Portability and Accountability Act, or, as it is more commonly known, HIPAA;
2. Section 95-28.2 of the North Carolina General Statutes (hereinafter G.S.), which prohibits employment discrimination against those who engage in the lawful use of lawful products and affects an employer's ability to target employee use of tobacco products;
3. the Americans with Disabilities Act; and
4. the Genetic Information Nondiscrimination Act.

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HIPAA Nondiscrimination Rules for Wellness Programs

Employee wellness programs are sometimes offered in conjunction with the employer's group health plan and sometimes independently of it. The Health Insurance Portability and Accountability Act (HIPAA) nondiscrimination rules apply only to wellness programs affiliated with an employer health plan because HIPAA applies only to group health plans and group health insurers.[1] Thus, for the purposes of local government employers, the HIPAA nondiscrimination rules for wellness programs apply only to those programs offered in direct connection with an employer's group health plan. A wellness program sponsored by an employer that is not connected to a group health plan is not subject to HIPAA's nondiscrimination rules. HIPAA's nondiscrimination rules apply to all employers offering wellness programs in conjunction with health plans, with the exception of local government employers who have self-funded health plans and have chosen to exempt their plans from the nondiscrimination requirements of HIPAA pursuant to 42 U.S.C. § 300gg-21(a)(2) and 45 C.F.R. § 146.180.

Background

The original HIPAA rules for wellness programs were issued in 2006. Supplemental rules reflecting relevant provisions of the Affordable Care Act became effective January 1, 2014. The only section of the original wellness rules the new rules amend is 45 C.F.R. § 146.121(f). For the purposes of this bulletin, all citations will be to the Code of Federal Regulations (C.F.R.) effective January 1, 2014.

Under HIPAA, a wellness program is "a program of health promotion or disease prevention."[2] There are two kinds of wellness programs: (1) those that do not offer a bonus or reward at all or offer a bonus or reward based merely upon participation, not on the participant's achievement of a health-related goal (participatory wellness programs) and (2) those where one of the conditions for obtaining a reward (for example, a discount, a bonus, or a prize) is that the participant meet a health-related goal or standard (health-contingent wellness programs). Participatory wellness programs automatically satisfy HIPAA's nondiscrimination rules if they are offered to all employees or all employees in a certain class (for example, all full-time employees, or all salaried employees) without restriction.[3] Health-contingent wellness programs, by contrast, must satisfy a series of stringent requirements.[4]

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1. The Health Insurance Portability and Accountability Act (HIPAA) nondiscrimination rules for wellness programs are jointly issued by the U.S. Department of the Treasury, Department of Labor, and Department of Health and Human Services (DHHS) because the rules implement changes made by both HIPAA, as amended, and the Patient Protection and Affordable Care Act (PPACA, or Affordable Care Act) to the Internal Revenue Code, the Employee Retirement Income Security Act (ERISA), and the Public Health Service Act (PHSA). HIPAA and the HIPAA wellness regulations apply to local government employers through the PHSA—not through ERISA, which does not apply to government employers. Therefore, citations to the regulations as they apply to local government employers are to the regulations issued by DHHS, which enforces the PHSA, and not to the regulations issued by the Department of Labor, which enforces ERISA. For the regulations as issued by DHHS, see 45 C.F.R. pt. 146. For the regulations as issued by the Department of the Treasury, see 26 C.F.R. pt. 54. For the regulations as issued by the Department of Labor, see 29 C.F.R. pt. 2560.

2. *See* 45 C.F.R. § 146.121(f).

3. *See* 45 C.F.R. §§ 146.121(d)(1) and (f)(2).

4. *See* 45 C.F.R. § 146.121(f)(1)(ii).

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Participatory Wellness Programs

The regulations themselves give several examples of wellness incentives that do not violate HIPAA because they are based only on participation, not on results. These include

- payment by the employer of all or a part of the cost of a health or fitness club membership,
- diagnostic medical tests that reward the employee for participation and not results,
- waiving the co-payments for or co-insurance costs of certain preventive care measures (physical examinations, prenatal care visits, well-child check-ups),
- payment by the employer of all or a part of the cost of a stop-smoking program without regard to whether the employee succeeds in quitting, and
- bonuses or rewards to employees who attend health education seminars without regard to whether the employees adopt recommendations made in the seminars.[5]

Other incentives adopted by local government employers that satisfy the participation-only requirement include bonuses or rewards given to employees who

- receive a flu shot,
- complete a health risk assessment, or
- have their blood pressure checked a certain number of times per year.

In each of these cases, the bonus or reward depends only upon participation, not a result. In this way HIPAA's mandate that employers not discriminate in the provision of health insurance based on any health factor is honored.

A participation-based bonus or reward can take the form of cash; reimbursement of out-of-pocket health expenses; discounts on health insurance premiums; absence of a surcharge; or prizes such as bicycles, cameras, computer equipment, or tickets to sporting or arts events.[6] The reward could also include the grant of additional days of sick or vacation leave. One North Carolina local government employer credits employees who receive a flu shot with two additional days of paid sick leave. Wellness programs may—without violating HIPAA—award increasing incentives based on a scale of points given for participation in activities or health checks chosen from a menu of options. For example, an employer might offer ten wellness measures. Employees who participate and meet four measures might receive a $100 prize; employees meeting six measures might receive $150, while employees meeting all ten measures might receive $250.[7]

Health-Contingent Wellness Programs

The rules are different, and stricter, for health-contingent programs. Employer group health plan–sponsored wellness programs that offer rewards to participants who meet a health factor–related standard or goal must satisfy the requirements set forth in the HIPAA nondiscrimination rules at 45 C.F.R. § 146.121(f). Health-contingent wellness programs are divided into two subcategories: activity-only wellness programs and outcome-based wellness programs. Activity-only programs are similar to participatory wellness programs in that they do not require employees to reach or maintain a specific health-related result. They do,

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5. *See* 45 C.F.R. § 146.121(f)(1).

6. See 45 C.F.R. § 146.121(f)(1)(i), which defines "reward" as including "a discount or rebate of a premium or contribution, a waiver of all or part of a cost-sharing mechanism, an additional benefit, or any financial or other incentive."

7. Employers should remember that to the extent that an employer's wellness program is independent of its group health plan, HIPAA does not apply at all.

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however, require employees to perform or complete an activity related to a health factor, such as participating in a walking, exercise, or diet program.[8] An outcome-based wellness program requires a person to attain or maintain a specific health outcome, such as a target cholesterol level or body mass index.[9] Examples of outcome-based wellness programs include

- giving an annual premium discount of 30 percent of the cost of employee-only coverage to participants who achieve a cholesterol count under 200;[10]
- waiving a $250 annual deductible for the following year for participants who have a body mass index between 19 and 26, determined shortly before the beginning of the year;
- providing a form for participants to certify that they have not used tobacco products in the preceding twelve months and assessing a surcharge that is 50 percent of the cost of employee-only coverage to participants who cannot certify they have not used tobacco;[11]
- using a biometric screening or a health risk assessment to identify employees with specified medical conditions or risk factors (such as high cholesterol, high blood pressure, unhealthy body mass index, or high glucose level) and providing a reward to employees identified as within a normal or healthy range for biometrics (or at low risk for certain medical conditions), while requiring employees identified as outside the normal or healthy range (or at risk) to take additional steps (such as meeting with a health coach, taking a health or fitness course, adhering to a health improvement action plan, or complying with a health care provider's plan of care) to obtain the same reward.

Limits on the Amount of a Health-Contingent Wellness Plan Reward

The rules cap how large the reward may be in a health-contingent wellness plan. Effective January 1, 2014, the maximum allowable reward for achieving one or more health-related goals will increase from 20 percent to 30 percent of the cost of employee-only coverage under the plan.[12] The rule specifies that the cost of coverage includes the total cost of coverage, adding together both the employer and the employee share of premium contributions. Where an employee has enrolled a spouse or dependents in the health plan and they are eligible to participate in the wellness program, the reward for achieving a health-related goal must not exceed 30 percent of the total cost (employer and employee share) of employee/spouse or employee/family coverage, as the case may be.[13] Where the health-related goal is the cessation of tobacco use or a reduction in the employee's use of tobacco, the maximum allowable reward will be 50 percent of the cost of employee-only coverage.[14] Where a wellness program has both a health-related goal unrelated to tobacco use and a tobacco-cessation component, the program must satisfy the 30 percent test and the 50 percent test both separately and together.[15]

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8. *See* 45 C.F.R. § 146.121(f)(1)(iv).
9. *See* 45 C.F.R. § 146.121(f)(1)(v).
10. The original rule limited the discount to 20 percent of the cost of coverage.
11. The original rule limited the amount of a discount or surcharge related to tobacco use to 20 percent.
12. *See* 45 C.F.R. § 146.121(f)(5).
13. *See* 45 C.F.R. §§ 146.121(f)(3)(ii) and (4)(ii).
14. *See* 42 U.S.C. § 300gg-4(j)(3)(A) and 45 C.F.R. § 146.121(f)(5). The 50 percent limit applies to self-insured and grandfathered plans as well, even though they may be exempt from other provisions of the Affordable Care Act and the new wellness provisions.
15. *See* 45 C.F.R. § 146.121(f)(5)(ii), Example 3.

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Additional Requirements for Health-Contingent Wellness Plans

A health-contingent wellness program must also satisfy these additional criteria effective January 1, 2014:

- The program must be reasonably designed to promote health or prevent disease.[16]
- Employees must be given the opportunity to qualify for the reward at least once a year.[17]
- A reasonable alternative method of obtaining the reward, or a waiver of the standard, must be available for any individual for whom it is unreasonably difficult to meet the standard because of a medical condition or for whom it is not medically advisable to attempt to meet the standard.[18]
- The fact that a reasonable alternative method or waiver of the standard is available must be set forth in all materials describing the terms of the wellness program.[19]

There must be a reasonable alternative method of obtaining the reward, or a waiver of the standard, for any individual for whom it is unreasonably difficult to meet the standard because of a medical condition, or for whom it is not medically advisable to attempt to meet the standard. The alternative method of obtaining the award or waiver of the standard must be available to all similarly situated individuals.[20] The employer need not determine in advance what the reasonable alternative will be (and a reasonable alternative may differ for employees with different medical conditions) but may wait to do so until an alternative is requested.[21] The new rule adds some qualifications to what constitutes a reasonable alternative standard. First, where the employer decides that completion of an educational program is a reasonable alternative standard for an employee who cannot satisfy the original health-contingent goal, the employer is responsible for identifying and paying for that educational program.[22] The time commitment associated with participating in the educational program must be reasonable. A reasonable program could not, for example, require an employee to attend a one-hour session each evening.[23] Next, where the employer decides the reasonable alternative standard should be a diet program, the employer must bear the cost of membership in the program, although the employer is not required to cover the cost of meals associated with it.[24] Finally, if the employer or health plan's medical professionals recommend a reasonable alternative standard and an employee's personal physician concludes that the alternative standard is not medically appropriate for that employee, the employer must find another reasonable alternative.[25]

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16. *See* 45 C.F.R. §§ 146.121(f)(3)(iii) and (f)(4)(iii).
17. *See* 45 C.F.R. §§ 146.121(f)(3)(i) and (f)(4)(i).
18. *See* 45 C.F.R. §§ 146.121(f)(3)(iv)(A)(1) and (2) and (f)(4)(iv)(A).
19. *See* 45 C.F.R. §§ 146.121(f)(3)(v) and (f)(4)(v).
20. *See* 45 C.F.R. §§ 146.121(f)(3)(iii)(A) and (f)(4)(iii)(A).
21. *See* 45 C.F.R. §§ 146.121(f)(3)(iii)(B) and (f)(4)(iv)(B).
22. *See* 45 C.F.R. §§ 146.121(f)(3)(iv)(C)(1) and (f)(4)(iv)(C)(1).
23. *See* 45 C.F.R. §§ 146.121(f)(3)(iv)(C)(2) and (f)(4)(iv)(C)(2).
24. *See* 45 C.F.R. §§ 146.121(f)(3)(iv)(C)(3) and (f)(4)(iv)(C)(3).
25. *See* 45 C.F.R. §§ 146.121(f)(3)(iv)(C)(4) and (f)(4)(iv)(C)(4).

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Verification of Medical Conditions Affecting Employee Participation in Health-Contingent Programs

The new rule allows employers to seek verification from an employee's personal physician that the employee has a health factor that makes it inadvisable or unreasonably difficult for that employee to satisfy the standard of a health-contingent activity-only program.[26] Although HIPAA permits the request for physician verification, it does not authorize the employer or the group health plan to inquire into the nature or diagnosis of the condition that limits the employee's ability to meet the standard. An inquiry into the details of an employee's health condition remains prohibited by the Americans with Disabilities Act.[27] In contrast, the rule does not allow employers to seek physician verification where a medical condition prevents an employee from meeting the standard of a health-contingent health-outcome program.[28] That is because the new rule requires employers to offer all employees who do not meet an initial standard a reasonable alternative standard without consideration of why they could not meet the initial standard.[29]

Reasonable Alternative Standards

The regulation taking effect on January 1, 2014, requires significantly more of employers who offer health-contingent wellness programs than did the original rule, regardless of whether the programs are activity-only or outcome-based. As the Departments of Treasury, Labor, and Health and Human Services explain in the Supplementary Information section that precedes the new rule itself as first published in the Federal Register, a health-contingent program that does not provide a reasonable alternative standard to qualify for a reward cannot meet the requirement that the program be reasonably designed. With the reasonable alternative standard requirement, the departments seek to ensure "that outcome-based programs are more than mere rewards in return for results in biometric screenings or responses to a health risk assessment, and are instead part of a larger wellness program designed to promote health and prevent disease, ensuring the program is not a subterfuge for discrimination or underwriting based on a health factor."[30]

The new rule requires employers to engage in a theoretically never-ending cycle of providing reasonable alternative standards for qualifying for a reward. If, for example, an employer offering an activity-only program offers another activity-only program as a reasonable alternative for employees who for medical reasons cannot participate in the first program, it must offer a third reasonable alternative for those who also cannot participate in the second program for the same or a different medical reason. The requirement to offer a reasonable alternative continues without end, until the employer decides to waive the program requirement and allow the employee to receive the reward—something an employer may do at any point in the process.[31] Imagine the following hypothetical:

> The town of Paradise, North Carolina, decides to offer its employees a 10 percent discount on their monthly health insurance premium contribution if they participate in a lunchtime aerobic exercise class. Carol, whose physician has told her to avoid exercise classes because they strain the ligaments supporting her knees, will require a reasonable alternative standard to enable her to qualify for the

26. *See* 45 C.F.R. § 146.121(f)(3)(iv)(E).
27. *See* 42 U.S.C. § 12112(d)(4)(A).
28. *See* 45 C.F.R. § 146.121(f)(3)(iv)(E).
29. *See* 45 C.F.R. § 146.121(f)(4)(iv)(A).
30. *See* 78 Fed. Reg. 33,158, 33,163 (June 3, 2013).
31. *See* 45 C.F.R. § 146.121(f)(3)(iv)(D).

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> 10 percent premium contribution discount. The town considers two potential alternatives, either participating in a walking program requiring 150 minutes of walking per week or attending a weekly nutrition class. The town decides to make the walking program the reasonable alternative. Carol, however, also suffers from plantar fasciitis, a painful heel condition, which makes her medically unable to participate in the walking program. The town therefore must offer a reasonable alternative to the walking program. This time it tells her she may qualify for the premium contribution discount by attending a weekly nutrition class. As required by the rule, the town has identified several different classes for which it will pay the cost of enrollment. Carol attends one of the classes on a regular basis and earns the reward.

The same requirements apply to outcome-based wellness programs. If an employee cannot meet the measurement, test, or screening standard necessary to receive a reward, the employer must either provide a reasonable alternative standard or waive the requirement.[32] The reasonable alternative may be participation in a participation-only program (such as attendance at an education program on obesity or smoking) or completion of an activity-only program (twelve weeks following a diet program without regard to how much weight is lost). If the reasonable alternative measures the same health outcome (weight or blood pressure, for example), the employer must provide the employee who could not meet the initial standard with a modified or lower benchmark to meet.[33] If an employer chooses as its reasonable alternative a requirement to meet a different level of the same standard, it must also give the employee an additional, realistic period of time to meet the new level.[34] In the discussion in the Supplementary Information section preceding the rule in the Federal Register, the departments also advise that employees who meet a reasonable alternative standard at a later date than those employees who have met the initial standard must receive the full reward nonetheless, even if payment of the full reward involves a retroactive discount. The departments provide the following explanation:

> For example, if a calendar year plan offers a health-contingent wellness program with a premium discount and an individual who qualifies for a reasonable alternative standard satisfies that alternative on April 1, the plan or issuer must provide the premium discounts for January, February, and March to that individual . . . . In some circumstances, an individual may not satisfy the reasonable alternative standard until the end of the year. In such circumstances, the plan or issuer may provide a retroactive payment of the reward for that year within a reasonable time after the end of the year, but may not provide pro rata payments over the following year.[35]

Consider the following scenario:

> The town of Paradise decides to offer a reward of $150 each year to employees whose cholesterol readings are 160 or lower. The initial blood test is performed on January 15. Will has a cholesterol level of 140 and receives his $150 with his next paycheck. Rick's cholesterol level is 250. Rick's doctor thinks that he can

32. *See* 45 C.F.R. § 146.121(f)(4)(iv)(A).
33. *See* 45 C.F.R. § 146.121(f)(4)(iv)(D).
34. *See* 45 C.F.R. § 146.121(f)(4)(iv)(D)(2).
35. *See* 78 Fed. Reg. 33,158, 33,163 (June 3, 2013).

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> reasonably be expected to meet a cholesterol standard of 200 if he exercises more and reduces his intake of fatty foods. In June his cholesterol remains stuck at 250. In December, though, Rick reaches his alternative goal of 200. Rick receives the same $150 reward that Will received back in January even though it has taken him all year to reach 200.

The new rule revises the language that must be used to publicize the fact that a reasonable alternative method or waiver is available. The approved language reads as follows:

> Your health plan is committed to helping you achieve your best health status. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at [insert contact information] and we will work with you to find a wellness program with the same reward that is right for you in light of your health status.[36]

One Final Note. The HIPAA definition of *health factor* is broad: it means health status, medical condition, claims experience, receipt of health care, medical history, genetic information, and evidence of insurability or disability.[37] Therefore, a wellness program that seeks to reduce the number of employee visits to a healthcare provider, or to reduce the total dollar amount of claims the health plan incurs on behalf of an individual employee, must satisfy the wellness program requirements to the same extent as one that seeks to reduce employees' cholesterol readings or blood pressure.

Health Insurance Discounts for Nonsmokers

Employers who wish to contain health insurance costs by encouraging employees to stop smoking may, of course, offer smoking cessation programs to employees free of charge or at a reduced rate. Unless a waiver of the program fee or a discount in the employee's share of health insurance premiums is tied to the employee actually quitting, a smoking cessation program would not violate HIPAA's nondiscrimination requirements, even if offered in conjunction with the employer's health plan. Where, however, the employer seeks to tie an employee's status as a nonsmoker to a discount in the cost of health insurance for the employee or any dependents (that is, by reducing the amount of a premium, reducing co-payments or co-insurance, or avoiding a surcharge based on tobacco use), caution and legal counsel are advisable. Under HIPAA's nondiscrimination rules, an employer who gives a benefit to employees who certify they do not smoke must offer a reasonable alternative method for achieving the discount to those medically unable to meet the goal of not smoking. An employer must offer a reasonable alternative method for achieving the nonsmoker reward whether that reward is in the form of a discount on health insurance fees or the elimination of a surcharge on employees who do smoke. The new rule expressly states that

> [r]eferences in this section to a plan providing a reward include both providing a reward (such as a discount or rebate of a premium or contribution, a waiver of all or part of a cost-sharing mechanism, an additional benefit or any financial or

36. *See* 45 C.F.R. § 146.121(f)(6).
37. *See* 42 U.S.C. § 300gg-1(a)(1); 45 C.F.R. § 146.121(a)(1).

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> other incentive) and imposing a penalty (such as a surcharge or other financial or nonfinancial disincentive).[38]

The rules themselves cite addiction to nicotine as a possible reason why an employee might be unable to provide a nonsmoker certification. In such a case, the employer must offer the employee alternative ways to earn the health insurance discount. Employers can pay for smokers to participate in a smoking cessation program, for example, and waive the premium or other type of surcharge if they complete the program, even if they do not manage to stop smoking.[39]

G.S. 95-28.2: The Lawful Use of Lawful Products and Insurance Requirements

The Health Insurance Portability and Accountability Act (HIPAA) and its nondiscrimination rules are just the first of four legal constraints on employer wellness programs. The second comes from North Carolina law. North Carolina employers must comply with a state statute regulating health insurance premium differentiation based on smoking. G.S. 95-28.2(d) provides that an employer may make distinctions between smokers and nonsmokers in the price or type of coverage it offers if three requirements are met. First, and most importantly, the differential rates must reflect actuarially justified differences. An employer may not simply assume that the differential it is adopting (or that has been offered by a third-party insurer) is correct or reasonable. The employer must support the difference between the rates for smokers and nonsmokers with actuarial data. Insurance companies will generally have this information, but employers must ensure it exists and is available before offering a differential rate. Second, the employer must set forth the differentials in a written notice to employees. Third, and most importantly, the employer must itself contribute the same dollar or percentage amount toward the premium for each employee, whether smoker or nonsmoker.[40] The logical consequence of this third requirement is that most employers will not achieve any direct savings on their own insurance costs. In fact, they will likely incur additional costs, since HIPAA requires them to offer smoking cessation or educational programs as alternative ways for smokers to earn a health insurance discount. Employers should nevertheless consider the long-term indirect cost savings that a healthier, nonsmoking workforce may achieve. All employee wellness programs with a discount for nonsmokers must comply with G.S. 95-28.2 whether or not the programs are subject to HIPAA.

Some employers, such as the State of North Carolina, through the North Carolina State Health Plan for Teachers and State Employees, have added a surcharge to the amount paid for coverage under the plan by smokers. Is this surcharge lawful under HIPAA and G.S. 95-28.2(d)? It is not clear that denoting an increased out-of-pocket cost to smoking employees and dependents a "surcharge" satisfies G.S. 95-28.2(d)'s first requirement that the differential rates reflect actuarially justified differences unless the employer can point to data that correlates with the specific amount of the surcharge it has adopted. And, imposition of a surcharge violates HIPAA's nondiscrimination rules for wellness programs if the employer does not provide a reasonable alternative way for smokers to avoid the surcharge.[41]

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38. *See* 45 C.F.R. § 146.121(f)(1)(i).

39. *See* 45 C.F.R. § 146.121(f)(4)(E)(vi), Examples 6, 7, and 8.

40. *See* Section 95-28.2(d) of the North Carolina General Statutes.

41. The state's program does not provide a reasonable alternative way for smokers to avoid the surcharge, but as a self-funded plan, the State Health Plan is exempt from this requirement pursuant to 42 U.S.C. § 300gg-21(a)(2) and 45 C.F.R. § 146.180.

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The ADA and Wellness Programs

The Americans with Disabilities Act (ADA) sets up the third legal constraint on employee wellness programs. The Equal Employment Opportunity Commission (EEOC) has provided relatively little guidance to employers about how to make wellness programs ADA-compliant. In this respect, an employer's greatest risk in adopting and running a wellness program may be liability under the ADA. The ADA generally prohibits disability-related questions and medical examinations of current employees unless the inquiries or examinations are job-related and consistent with business necessity.[42] This prohibition protects all employees, disabled and non-disabled alike.[43] The ADA makes an exception, however, for "voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site."[44] In an Enforcement Guidance, the EEOC observes that wellness programs often include blood pressure screening, cholesterol testing, glaucoma testing, and cancer detection screening and notes that all of these tests may be given to an employee participating in an employer wellness program, provided the employee's participation is voluntary.[45]

The key is "voluntariness." What makes participation voluntary as opposed to involuntary is not entirely clear. In the Enforcement Guidance, the EEOC says only that "a wellness program is 'voluntary' as long as an employer neither requires participation nor penalizes employees who do not participate."[46] In its annual informal question-and-answer sessions with the American Bar Association's Joint Committee on Employee Benefits, EEOC staff have repeatedly said that the commission will consider any wellness program that requires an employee to take a health risk assessment as a condition of participating in the group health plan to be "involuntary" and thus unlawful under the ADA.[47] EEOC staff have also noted that when penalties (or the loss of

42. *See* 42 U.S.C. § 12112(d)(4)(A).

43. *See id.*; 29 C.F.R. § 1630.14(c); Equal Employment Opportunity Commission (EEOC), *Enforcement Guidance*: *Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA)*, No. 915.002 (July 27, 2000), (hereinafter *Enforcement Guidance*) in discussion under "General Principles," www.eeoc.gov/policy/docs/guidance-inquiries.html.

44. *See* 42 U.S.C. § 12112(d)(4)(B).

45. *See* EEOC, *Enforcement Guidance, supra* note 43, at Question #22.

46. *See id. See also* EEOC, Informal Discussion Letter entitled *ADA: Voluntary Wellness Programs & Reasonable Accommodation Obligations*, Jan. 18, 2013, www.eeoc.gov/eeoc/foia/letters/2013/ada_wellness_programs.html.

47. *See* American Bar Association Joint Committee of Employee Benefits, *Questions for the EEOC Staff for the 2006 Joint Committee of Employee Benefits Technical Session* (May 4, 2006), Q/A 3, www.americanbar.org/content/dam/aba/migrated/2011_build/employee_benefits/2006_qa_eeoc.authcheckdam.pdf; *Questions for the EEOC Staff for the 2008 Joint Committee of Employee Benefits Technical Session* (May 8, 2008), Q/A 2, www.americanbar.org/content/dam/aba/migrated/2011_build/employee_benefits/eeoc_2008_.authcheckdam.pdf; *Questions for the EEOC Staff for the 2009 Joint Committee of Employee Benefits Technical Session* (May 6, 2009), Q/A 2, www.americanbar.org/content/dam/aba/migrated/2011_build/employee_benefits/eeoc_2009.authcheckdam.pdf; *Questions for the EEOC Staff for the 2010 Joint Committee of Employee Benefits Technical Session* (May 6, 2010), Q/A 4, www.americanbar.org/content/dam/aba/migrated/2011_build/employee_benefits/2010eeoc_qa.authcheckdam.pdf; *Questions for the EEOC Staff for the 2012 Joint Committee of Employee Benefits Technical Session* (May 10, 2012), Q/A 1, www.americanbar.org/content/dam/aba/events/employee_benefits/2012_eeoc_final.authcheckdam.pdf. *See also* EEOC, Informal Discussion Letter entitled *ADA: Health Risk Assessments*, Aug. 10, 2009, www.eeoc.gov/eeoc/foia/letters/2009/ada_health_risk_assessment.html; EEOC, Informal Discussion Letter entitled *ADA: Disability-Related Inquiries and Medical Examinations; Health Risk Assessment*, March 6, 2009, www.eeoc.gov/eeoc/foia/letters/2009/ada_disability_medexam_healthrisk.html.

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a reward) become large enough, they may make wellness programs for all practical purposes involuntary.[48]

One question posed to the EEOC staff concerned employers who have disease management programs integrated into their group health plans. Those employers are sometimes frustrated with employees who fail to follow—or refuse to follow—the treatment recommendations of the disease management case workers. The question posed the example of a diabetic who refuses a diabetes case manager's offer to help the employee control her diet, check her blood sugar, take insulin, and make sure that she has both her hemoglobin and her eyes checked once a year—steps that are part of a generally accepted standard of treatment for diabetes and that could lead to lower long-term costs in treating the disease. Under the ADA, are employers permitted to require uncooperative employees to pay higher out-of-pocket premiums or deductibles as a form of punishment for failure to follow the disease professional's recommendations? The EEOC legal staff's response to this question noted that the EEOC has not taken a formal position on this particular issue, but that any sort of punitive measure would seem to be designed to coerce the employee into participating in the disease management program. That, of course, would violate the ADA's requirement that participation in a wellness program be voluntary.[49]

More recently the EEOC has expressed an opinion, through the publication of an informal discussion letter, on an employer's duty to provide a reasonable accommodation to an employee who wishes to participate in a wellness program but who cannot engage in an activity-only program or meet a health-related outcome because of a disability. Although it does not refer to HIPAA's nondiscrimination rule for wellness programs, the EEOC's position is consistent with it. In the opinion letter, the EEOC advises that a reasonable accommodation in the form of some alternative activity or standard must be made available to allow an individual with a disability to participate in the program and earn a reward.[50] Further guidance from the EEOC may be forthcoming. On May 8, 2013, the EEOC convened a panel of experts on wellness programs.[51] Such a meeting is frequently a precursor to the development of an enforcement guidance.

All employee wellness programs, whether they are subject to HIPAA or not, must comply with the ADA's voluntariness standard.

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48. *See* American Bar Association Joint Committee of Employee Benefits, *Questions for the EEOC Staff for the 2007 Joint Committee of Employee Benefits Technical Session* (May 10, 2007), Q/A 4, www.americanbar.org/content/dam/aba/migrated/2011_build/employee_benefits/2007_eeoc.authcheckdam.pdf; *2009 Joint Committee of Employee Benefits Technical Session* (May 6, 2009), Q/A 2, *supra* note 47; *Questions for the EEOC Staff for the 2011 Joint Committee of Employee Benefits Technical Session* (May 5, 2011), Q/A 2 and Q/A 3, www.americanbar.org/content/dam/aba/events/employee_benefits/2011_eeoc_final_qas.authcheckdam.pdf; *2012 Joint Committee of Employee Benefits Technical Session* (May 10, 2012), Q/A 1, *supra* note 47. *See* EEOC, Informal Discussion Letter entitled *ADA & GINA: Incentives for Workplace Wellness Programs*, June 24, 2011, www.eeoc.gov/eeoc/foia/letters/2011/ada_gina_incentives.html.

49. *See 2006 Joint Committee of Employee Benefits Technical Session* (May 4, 2006), Q/A 2, *supra* note 47. The EEOC staff indicated that they were continuing to study the issue at their 2007 meeting with the Joint Committee. See *2007 Joint Committee of Employee Benefits Technical Session* (May 10, 2007), Q/A 4, *supra* note 48.

50. *See* EEOC, Informal Discussion Letter entitled *ADA: Voluntary Wellness Programs & Reasonable Accommodation Obligations*, *supra* note 46..

51. See the EEOC's press release, *Employer Wellness Programs Need Guidance to Avoid Discrimination,* May 8, 2013, www.eeoc.gov/eeoc/newsroom/release/5-8-13.cfm.

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GINA and Wellness Programs

The Genetic Information Nondiscrimination Act of 2008 (GINA) is the last of the four legal constraints that an employer must consider when designing a wellness program. It has added another wrinkle to the analysis of whether a wellness program is legally compliant. Title II of GINA prohibits discrimination in employment on the basis of genetic information and medical history and expressly prohibits employers from asking for genetic information as part of a routine medical history.[52] In contrast to the Americans with Disabilities Act (ADA), GINA does not permit employers to ask for genetic information after a contingent offer of employment, nor does it allow employers to ask current employees for genetic history even where the information is arguably job-related and consistent with business necessity. Under GINA, genetic information includes family medical history as well as information obtained through an individual's or family member's genetic tests.[53]

GINA does recognize an exception that allows an employer to acquire genetic information about an employee or family members—when it offers health or genetic services, including wellness programs, on a voluntary basis.[54] The individual receiving the services must give prior voluntary, knowing, and written authorization. In contrast to the unwillingness of the Equal Employment Opportunity Commission (EEOC) to take a position on whether financial incentives can be construed to make participation in a wellness program involuntary under the ADA, the commission's GINA regulations make clear that employers may not offer financial inducements for individuals to provide genetic information, including their medical history and that of their spouses and family members, as part of a wellness program.[55]

Thus, in including any form of health risk assessment in a wellness incentive, employers must ensure that the physicians or other medical professionals performing an examination or evaluating the results of a questionnaire do not ask for family medical history or the results of any genetic testing the employee has had. Employers should not assume medical professionals have any knowledge of the employment provisions of GINA. The employer must ensure the medical professionals involved in health risk assessments do not ask for any information protected by GINA. An employer does not have to set out intentionally to ask for genetic information to violate GINA: violation occurs if an employer unintentionally obtains genetic information or family history.

But what if the medical provider an employer uses does in fact ask for family medical history or genetic test results even though the employer has told the provider not to do so? On its website page on GINA, the EEOC advises,

> If a covered entity tells its health care provider not to collect genetic information and the health care provider does so anyway, the employer will not be liable for that particular collection of genetic information, but the covered entity must take additional reasonable measures within its control to prevent this behavior

52. The Genetic Information Nondiscrimination Act (GINA) is codified at 42 U.S.C. §§ 2000ff–2000ff-11. The EEOC's GINA regulations are at 29 C.F.R. pt. 1635.

53. Under GINA, a genetic test is an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, and chromosomal changes. A test that does not do these things is not a genetic test. A test to detect the presence of disease that does not involve analysis of genotypes, mutations, or chromosomes is not a genetic test. *See* 29 C.F.R. § 1635.3(f).

54. *See* 29 C.F.R. § 1635.8.

55. *See* 29 C.F.R. § 1635.8(b)(2)(ii).

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in the future. This could include no longer using the services of that health care provider.[56]

The EEOC's GINA regulations give employers a safe harbor by providing that if an employer uses the EEOC's suggested language or something similar in documents requesting medical information, any genetic information that the employer receives in response to the request will be deemed an inadvertent, rather than an unlawful, acquisition. The language the EEOC recommends is as follows:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.[57]

All employee wellness programs, whether they are subject to HIPAA or not, must comply with GINA.

Conclusion

Employee wellness programs carry significant legal risks if they are not designed with the assistance of knowledgeable legal counsel. Although the new Health Insurance Portability and Accountability Act (HIPAA) nondiscrimination rule, effective January 1, 2014, makes significant changes to the original rule, it is not likely to be the end of the story for wellness programs. Employers could see guidance from the Equal Employment Opportunity Commission (EEOC) within the next few years. The EEOC may find that the possibility of earning a substantial reward renders health-contingent wellness programs involuntary because of an overwhelming financial inducement. If that is the EEOC conclusion, employers may be unable to continue such programs even when they are HIPAA compliant.

56. *See* EEOC, *Background Information for EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008*, www.eeoc.gov/laws/regulations/gina-background.cfm. This follows from 29 C.F.R. § 1635.8(b)(1)(i)(A), which says, "If a covered entity acquires genetic information in response to a lawful request for medical information, the acquisition of genetic information will not generally be considered inadvertent unless the covered entity directs the individual and/or health care provider from whom it requested medical information (in writing, or verbally, where the covered entity does not typically make requests for medical information in writing) not to provide genetic information."

57. *See* 29 C.F.R. § 1635.8(b)(1)(i)(B).

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