

# **What Employers Need to Know About Wellness Program Administration**



Presented by:  
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# AGENDA FOR TODAY

- *Wellness Trends*
- *Designing a Wellness Program*
- *Compliance Issues*
- *Group Health Plan Status*
- *Administrative Essentials*

# What are employers doing?

## UBA 2016 Trends: How Employers Use Wellness Programs

# What are employers doing?

- **18.4% of all employers offered comprehensive wellness programs in 2016**
  - Employers with 1,000 or more employees → 60.3 %
  - Employers with 500 to 999 employees → 51.1%
  - Employers with 200 to 499 employees → 35.6%
  - Employers with < 25 employees → 6.1%
- **Wellness Program Composition:**
  - 72.5% include health risk assessments (down 10.5% over past 3 years)
  - 67% offer biometric screenings or physical exams
  - 67.7% offer employee incentives for participation
  - 54.6% include on-site or telephone coaching for high-risk employees (up 7.5% from 2015)
  - 38.8% include seminars or workshops (down 8.5% from 2015)



# What are employers doing?

- Wellness Program Incentives:
  - Employers that integrate wellness program incentives into their benefit plan design in the form of reduced medical premiums, or making contributions to an employee's HSA or FSA, see the greatest level of participation and overall behavior change in their employees
  - Larger employers use mostly cash-based incentives, such as cash toward premiums, 401(k)s, flexible spending accounts (FSA), etc. (63.2%)
  - Small employers use more non-cash-based incentives, such as health club dues and gift cards (40%)
  - PTO-based wellness incentives are less common across the board (only 4.5% of employers)



# Design Considerations

- Multiple laws govern wellness programs and employers should not rely on third party vendors or carriers for compliance
- Simplicity is Key – Too many rules and targets result in employees seeking rewards not results
- General education programs rarely provide results – screening and interventions, with incentives provide the best outcomes
- Talk to your health plan advisors - wellness programs come in all shapes and sizes

# Design Considerations

## Insurance Carrier vs. Third Party Vendor:

- No laws prevent carriers from using data collected to increase rates
  - HRAs in particular are predictive of future health care costs and designed to measure risk
  - Make sure you know how the carrier is using your information
- Compare Programs
  - Carriers tend to offer limited individual interventions such as EAPs, online health or nurse lines, discounts for gyms and complimentary health services (e.g. massages) - wellness vendors more likely to assign individual coaches
  - Carriers may not share HRA data with the employer to help track effectiveness of program
  - Third party vendors have fewer conflict of interests – shop around and know where your information is going and how it is being used
  - Make sure you vet your program with your attorney or consultant rather than relying on carrier or TPV

# Compliance Issues



# Multiple Compliance Concerns



# Healthcare Reform/HIPAA

**HIPAA prohibits discrimination by group health plans based on “health factors”**

- **Wellness Program Exception!**

**ACA expanded HIPAA to encourage more wellness programs**

# Healthcare Reform/HIPAA

## Which Plans are Subject to HIPAA and ACA rules?

- Participatory
- Health Contingent (Activity Only)
- Health Contingent (Outcome-Based)

# Healthcare Reform/HIPAA

- To qualify for wellness program exception, the program must meet certain conditions:
  - Participatory programs must only be offered to “similarly situated” individuals
    - No limit on financial incentives – **but ADA/GINA**
  - Health-contingent programs must meet 5 factor test

# Healthcare Reform/HIPAA

- Distinction between participatory and “health contingent” is whether reward is tied to:

## HEALTH STATUS

# Healthcare Reform/HIPAA

- Participatory program examples:
  - Fitness center membership reimbursement
  - Reward for participating in health assessment
  - Waiver of health plan cost-sharing for preventive items or services
  - Reward for attending health education seminar

# Healthcare Reform/HIPAA

- Two types of “health-contingent” programs:
  - Activity-Only
    - Tobacco cessation coaching programs
    - Diet programs (but not biggest loser!)
    - Walking or other exercise programs
    - Health coach meeting required only of employees showing risk factors on HRA
  - Outcome-Based
    - BMI below 30
    - Cholesterol below 200
    - Tobacco-free
    - Weight loss goals met
- *Both must meet 5 factor test*

# Healthcare Reform/HIPAA

- **Five Factor-Test:**

1. **Qualify for the reward at least once/year**
2. **Total reward may not exceed 30% (50% for tobacco prevention programs) of total cost of coverage (EE or Family)**
3. **Reasonable design to promote health or prevent disease**



# Healthcare Reform/HIPAA

- **Five Factor Test (cont.):**

4. Full reward must be available to all similarly situated individuals
  - Must provide reasonable alternative standard (or waiver of standard)
    - For Activity-Only may require proof unreasonably difficult to participate due to medical condition
    - Must allow reasonable alternative to any outcome-based program to anyone who does not meet the initial standard (effectively eliminates employer's ability to enforce any outcome-based standard against a participant)
5. Disclosure of reasonable alternative standard (or waiver) in all plan materials describing the wellness program terms
  - SPD
  - Open Enrollment
  - Sample language on DOL website

# Americans with Disabilities Act (ADA)

- Prohibits discrimination by employers on basis of disability in regard to terms, conditions and privileges of employment
  - Discrimination includes:
    - Requiring **medical examinations**; and
    - Making inquiries as to whether employee has disability unless such exam or inquiry is:
      - Job-related and consistent with business necessity
- Must provide **equal opportunity** for disabled employees to participate in programs and offer reasonable accommodations
- Employers should be cautious in how use information obtained in wellness programs – document employment records!!

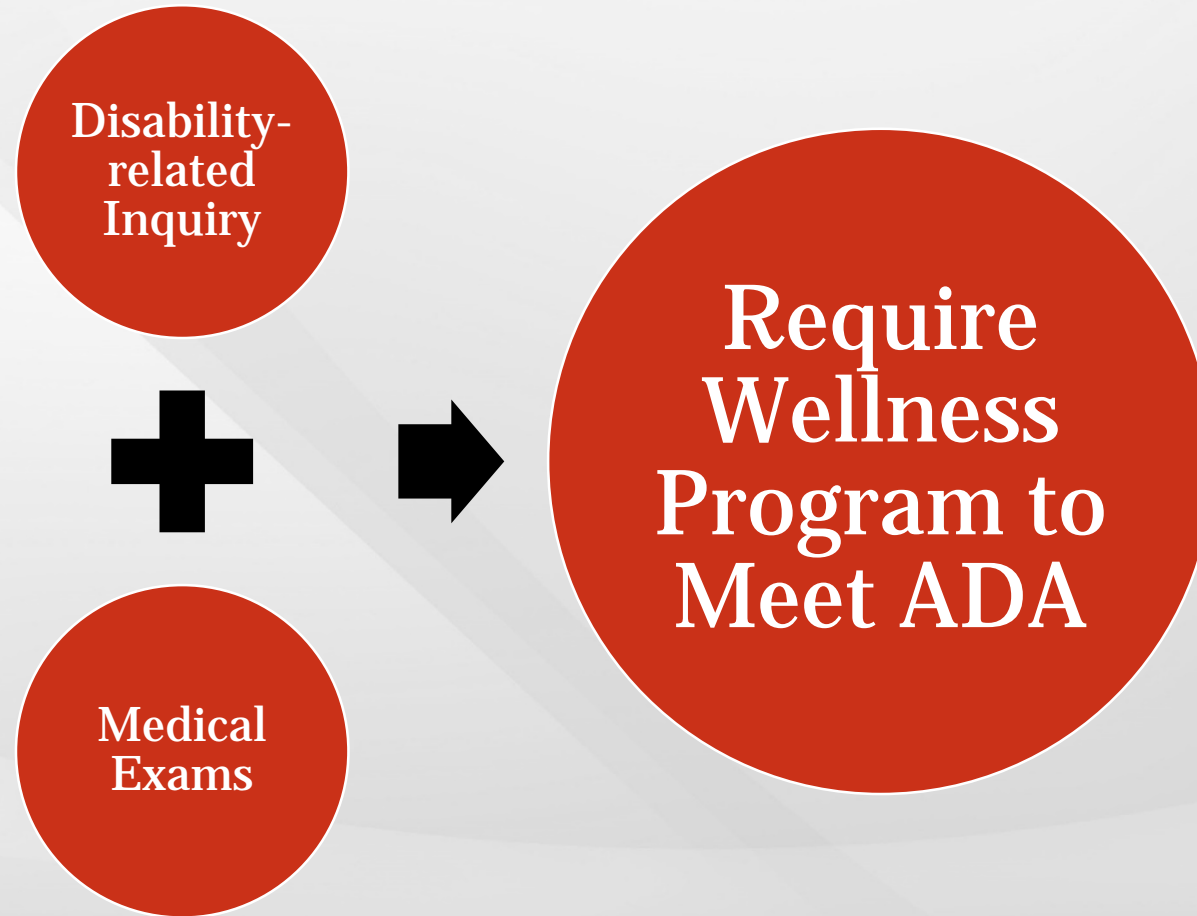
# Americans with Disabilities Act (ADA)

- Final Regulations Issued in May of 2016
- Effective July 18, 2016; employers must comply for plan years beginning on or after January 1, 2017
- Addresses primary concerns of EEOC:
  - Employer's use of disability-related inquiries
  - Incentives rendering "voluntary" program involuntary
- In August, a U.S. District Court remanded the regs back to the EEOC for reconsideration because the EEOC failed to adequately explain why it determined that an incentive/penalty of up to 30% was the appropriate maximum that would be considered "voluntary" (but the rules were not vacated!)

# Final Rules: ADA

- Primary Requirements:
  - Voluntary
  - 30% incentive limits (*no increases for tobacco/dependents*)
    - Applies to participatory programs
  - Reasonable Alternatives
  - Employee notice regarding medical information collection
  - Reasonably designed to promote health
  - Privacy/security protections with regard to wellness information

# Final Rules: ADA



# Genetic Information Nondiscrimination Act (GINA)

- Prohibits discrimination by GHPs, insurers, and employers due to individual’s “genetic information”
  - Title I restricts collection and use of genetic information by GHPs and insurers
    - Enforced by DOL, IRS, and HHS
  - Title II prohibits employment discrimination based on genetic information
    - Enforced by EEOC

# Genetic Information Nondiscrimination Act (GINA)

- “Genetic Information” includes
  - Manifestation of disease or disorder in family members (“family medical history”)
    - Can be discerned from family medical history questions or biometric screenings of family members
    - “Family” includes **spouses** and **adopted children** and dependents of spouses; as well as biological family.

# GINA – Title I

- Title I generally prohibits group health plans from:
  - Adjusting premium or contributions amounts based on genetic information;
  - Requesting/requiring genetic testing;
  - Requesting/requiring/purchasing genetic information for **underwriting** purposes or in connection with open enrollment.
- No HRA during open enrollment



# GINA – Title II

- Title II generally prohibits **employers** from discriminating against employees or applicants because of genetic information
  - DOL/HHS/IRS enforce GINA Title I
  - EEOC enforces GINA Title II (employment)
- Exception for voluntary wellness program.
  - Individuals must provide prior knowing, voluntary and written authorization.
- Final Regulations issued May 2016

# GINA: Final Rules

- Wellness program must be —
  - Reasonably designed to promote health or prevent disease
    - Same standard as HIPAA and ADA rules
  - Voluntary
    - No penalties for withholding genetic information
    - No incentives for providing genetic information
  - Authorized
    - Individual must give voluntary, knowing, and written authorization after proper notice, before providing genetic information
      - Notice must describe information that will be obtained, general purposes for which it will be used, and disclosure restrictions
      - Similar to notice requirements in ADA regulations (although ADA regulations do not require prior written authorization)

# GINA: Final Rules

- Incentives for family members
  - Medical history of spouse or other family member is employee's genetic information
  - Offering incentives in return for a spouse providing health information would seem to violate GINA
  - Final GINA regulations provide a compromise for spouses under Title II, but not Title I

# GINA: Final Rules

- Final regulations: Employer may offer incentive in return for spouse's information if—
  - Part of wellness program providing health or genetic services
  - Questions ask only about spouse's past or current health status (“manifestation of disease and disorder”)
    - No family medical history or genetic test results
    - No health or genetic information about employee's children
  - Maximum incentive does not exceed 30% of total cost of self-only coverage for each of the employee and spouse
    - Total combined incentive cannot exceed twice the amount of 30% of the cost of self-only coverage - Calculation method differs based on whether employee is enrolled in employer's GHP (same calculation method as ADA)
  - Spouse provides written authorization

# Consideration of Other Laws

- ERISA
- Tax Laws
- COBRA
- HIPAA privacy and security rules apply to GHPs
- Employment discrimination laws (e.g., Title VII)
- State laws (e.g., smoker protection laws)
- NLRB – employers with union employees may need to bargain for wellness incentives
- Wage Hour – Compensatory Time

# Administration

# Confidentiality Requirements

- ADA
  - Employer may only receive medical information in aggregate form except as needed for administration of a health plan
  - Employee may not be required to agree to sale, exchange, sharing, transfer, or other disclosure of medical information except to extent permitted to carry out specific activities related to wellness programs
  - Employer may not require employee to waive ADA's confidentiality protection as condition for participating in wellness program or receiving incentive
- GINA
  - Individually identifiable information must be kept confidential (similar to ADA restrictions)
- HIPPA
  - Privacy/Security Rules

# Security of Employee Information

- Comply with HIPAA privacy requirements/separate those who handle individually identifiable health information from those who make employment related decisions
  - use TPAs (obtain Business Associate Agreements)
  - health information generally may not be disclosed to an employee's supervisor or manager
- Not all wellness programs are subject to HIPAA – but ADA and state law privacy rules apply



# Security of Employee Information

- Establish clear privacy/security protocols (breach notification procedures, data encryption, etc.)
- Educate employees designated to have access to health information of their obligations under all applicable laws (ADA, GINA, HIPAA)
- Periodically review and audit your privacy/security procedures

# Payroll Deduction Administration

- Applying a discount to an employee's premium
- Changing premium amounts
- Giving money back to employees based on their participation in the wellness program
  - Cash or gift cards of any amount are taxable
- Rewards may not be paid in subsequent plan year and employer must provide retroactively to plan year for which incentive is earned
- Beware of FICA Savings Wellness Programs – no double dipping!

# Tobacco Cessation Programs

- *Acosta v. Macy's Inc.* , DOL complaint filed 8/16/17
  - DOL challenging Macy's Tobacco Surcharge Wellness Program based on the program's failure to offer "a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual for whom, for that period, it is either unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard . . . or medically inadvisable to attempt to satisfy the otherwise applicable standard."
  - Macy's Tobacco Cessation Program: *"I understand that the tobacco surcharge will apply unless: (1) it is unreasonably difficult for the Tobacco Users identified above to quit using tobacco to avoid the tobacco surcharge; or (2) it is medically inadvisable for the Tobacco Users identified above to quit using tobacco to avoid the surcharge. I understand that if the Tobacco Users designated above meet either of these criteria, Macy's, Inc. will make available a reasonable alternative standard, which must be satisfied by all Tobacco Users in order to avoid the tobacco surcharge. I understand that I may contact HR Services . . . to learn more about the availability of a reasonable alternative standard" and "I understand that the tobacco surcharge will not be changed retroactively and no refunds or credits will be issued."*
  - DOL alleging HIPAA violations because no refunds or reimbursements are available to participants who completed the reasonable alternative and because the program ultimately required the employee to stop smoking to earn the reward.



# Other Administration

- Notice requirements (under ADA, GINA, COBRA, etc.)
- For “reasonable alternative standard”:
  - Assist employees in finding & paying for educational or smoking cessation classes (but may require employee to pay for cost of food in weight reduction program, e.g.)
  - Time commitment required must be reasonable (beware FLSA issues in requiring employees to devote unpaid time to wellness activities)
- Don’t forget about compliance requirements for ERISA plans (e.g., Form 5500, SPD, claims procedures)
  - Stand-alone wellness program can be a separate group health plan

# Administrative Best Practices

- Have a written wellness program that is reviewed by
- For “reasonable alternative standard”:
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  - Time commitment required must be reasonable (beware FLSA issues in requiring employees to devote unpaid time to wellness activities)
- Don’t forget about compliance requirements for ERISA plans (e.g., Form 5500, SPD, claims procedures)
  - Stand-alone wellness program can be a separate group health plan

# Final Questions

**HRCI – ???**

**SHRM – ???**



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# Thank You



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