

**Benefit Comply, LLC**

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**Compliance Whitepaper**

# **Compliance Issues for Wellness Plans**

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## Compliance Issues for Wellness Plans

### Introduction

As employer's struggle to hold down health care costs, more and more are turning to employee wellness related initiatives. While the goal of helping employees improve their health is a good one, employers must pay attention to a number of different legal and regulatory rules that could affect their wellness programs.

### HIPAA Discrimination Rules

HIPAA prohibits group health plans from discriminating with regard to eligibility, premiums, or contributions on the basis of specified health status-related factors. Final HIPAA nondiscrimination and wellness regulations (the Final Regulations) providing detailed requirements were issued in 2006. The Final Regulations apply to plans on the first day of the first plan year beginning on or after July 1, 2007.

HIPAA recognizes that the nondiscrimination provisions were not meant to prevent an employer from establishing legitimate wellness programs. Thus, the regulations include an exception to HIPAA's general nondiscrimination requirement if a wellness program meets certain requirements.

More significant requirements apply to wellness plans which provide a reward (or penalty) that is contingent on satisfaction of a standard related to a health factor rather than for participation-only wellness programs.

#### Participation-Only Programs

Wellness programs that do not condition eligibility for a reward upon a participant's ability to meet a health standard are permissible as long as participation in the program is available to all similarly situated individuals. Examples of participation-only programs include:

- incentives to participate in a health fair or testing (regardless of outcome);
- waiver of co-payment/deductible for well-baby visits;
- reimbursement of health club membership;
- reimbursements for smoking-cessation programs as long as the reward is not tied to an outcome; and
- a program that rewards employees for attending a monthly health education seminar.

#### Standard-Based Programs

Standard-based wellness programs that condition eligibility for a reward upon a participant's ability to meet a standard related to a health factor are permissible only if they meet the specific requirements set forth in the Final Regulations. Standard-based wellness programs must satisfy each of the following five requirements.

1. The Reward Must Be No More Than 20% of the Cost of Coverage (30% starting in 2014). The Final Regulations provide that a reward (or penalty) must not exceed 20% of the cost of coverage. If only the employee is eligible to participate in the wellness program the reward must not exceed 20% of the cost of employee-only coverage. If the employee and dependents may participate in the wellness program, then the reward must not exceed 20% of the cost of the coverage in which the employee and dependents are enrolled.
2. The Program Must Be Designed to Promote Health or Prevent Disease
3. The Program Must Give Individuals an Opportunity to Qualify for the Reward at Least Once a Year.

4. The Reward Must Be Available to All Similarly Situated Individuals
  - a. General Similarly Situated Standard - Certain groups of individuals may be treated separately as distinct similarly situated groups if the distinction is based on a bona fide employment classification (such as full-time versus part-time status, current employees versus former employees, and different geographic locations).
  - b. Reasonable Alternative Standard Required - In order for the reward to be considered available to all similarly situated individuals, the wellness program must allow a reasonable alternative standard (or waiver of the otherwise applicable standard) to obtain the reward for individuals for whom it is unreasonably difficult to meet the standard due to a medical condition, or for whom it is medically inadvisable to attempt to satisfy the standard. The Final Regulations provide that a plan is allowed to ask for verification, such as a physician's statement, that a health factor makes it unreasonably difficult or medically inadvisable for an individual to satisfy or attempt to satisfy the otherwise applicable standard.
5. The Plan Must Disclose That Alternative Standards (or Waivers) Are Available. A health plan must disclose, in any plan materials describing the standard-based wellness program, that reasonable alternative standards are available. The Final Regulations provide that the following language will satisfy the notice requirement:

If it is unreasonably difficult due to a medical condition for you to achieve the standards for the reward under this program, or if it is medically inadvisable for you to attempt to achieve the standards for the reward under this program, call us at [insert telephone number] and we will work with you to develop another way to qualify for the reward.

If the plan materials merely mention the availability of the wellness program without describing its terms, then the reasonable alternatives do not need to be described in the plan materials.

### **ADA Considerations**

There are two rules under the ADA that employers offering wellness programs should carefully consider. First, the ADA generally prohibits employment discrimination against disabled individuals. A wellness program that requires disabled individuals to participate in order to attain benefits equal to those offered to nondisabled individuals might be found to violate this provision—even if the HIPAA nondiscrimination requirements are satisfied.

Second, the ADA limits the circumstances under which an employer may require physical examinations or answers to medical inquiries. More specifically, employers are only permitted to conduct voluntary medical examinations and inquiries as part of an employee health program (e.g., a wellness or disease-management program that offers medical screening for high blood pressure, weight control, or cancer detection), provided that participation in the program is voluntary, information obtained is maintained according to the confidentiality requirements of the ADA, and the information is not used to discriminate against an employee.

EEOC enforcement guidance under the ADA notes that a wellness program is voluntary “as long as an employer neither requires participation nor penalizes employees who do not participate. The EEOC has not provided a detailed roadmap on how to determine whether a wellness program is “voluntary” for ADA purposes. Informal EEOC guidance has addressed whether requiring employees to take health risk

assessments in order to qualify for employer-provided health benefits violates the ADA requirement that medical exams and inquiries must be voluntary.

## Wellness and ERISA

Employers must also determine when their Wellness Program may be an ERISA Plan. The DOL has informally expressed the view that the framework provided in DOL Advisory Opinions addressing employee assistance programs (EAPs) would be appropriate in determining whether a particular wellness program is an ERISA plan. The DOL guidance for EAPs makes it clear that if the plan provides or pays for medical care the plan should be considered a health plan.

Wellness programs often go beyond the mere promotion of good health to provide medical care including physical examinations, cholesterol screening, flu shots, nutrition counseling, and similar benefits. It would be hard to argue that this type of plan is not subject to ERISA. To the extent that a wellness program is subject to ERISA it would be subject to ERISA rules such as 5500 filing, COBRA, HIPAA Privacy and SPD requirements. Essentially it would need to be treated by the employer as just another health plan offering with all of the requirements that go with that distinction.

Many employers will feel that the regulatory burden of treating their wellness plan as a stand-alone ERISA plan is excessive. As an alternative an employer could consider making the wellness program an integrated part of a more comprehensive health benefit already subject to ERISA and let the wellness plan “ride the coat-tails” of the other plan in meeting the ERISA requirements. An employer taking this approach must consider a number of issues:

- The combined plan document should clearly articulate that the wellness benefits are part of the larger plan.
- Employers will often have different eligibility rules for wellness participation than for other health benefits, In this case the eligibility rules must be carefully articulated in the plan document
- Smaller employers must be careful pursuing this strategy since in a combined plan the participant count in the wellness program could affect 5500 filing requirements. For example, an employer may have only 75 employees actually participate in their health plan, but over 100 actually receive benefits though the wellness plan forcing the employer to file a 5500 for all benefits in the combined plan.

## Summary

At the end of the day if a wellness plan provides any medical care, employers should treat it as either a stand alone “health plan” subject to ERISA or an integrated part of the employers comprehensive health plan benefits.

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