Is it Time for a Wellness Program Checkup?

by P. Brian Bartels and John. J. Westerhaus

As healthcare costs rise, employers may desire to help their employees get—or stay—healthy. One increasingly popular[1] way to incentivize healthy behaviors that may help reduce healthcare costs is through the adoption of an employee benefit known as a "wellness program."[2] A wellness program is a benefit offered by an employer or an insurer that is intended and reasonably designed to incentivize[3] participants[4] in the program to improve their health and fitness, the theory being that providing incentives to engage in healthy behaviors will lower the cost of healthcare claims over time.

There is no such thing as "a" wellness program. Wellness programs are complex: they can be designed in numerous ways and vary considerably in their purpose, size, scope, eligibility, and incentive structure. As such, there is often confusion over what constitutes a wellness program and whether an incentive arrangement qualifies as a wellness program. That complexity is compounded by the fact that different laws may apply to wellness programs, depending on their design. This article does not comprehensively address all the issues or laws relating to wellness programs but instead provides a general overview of key wellness program requirements and some of the important legal and compliance issues that can arise in their design and implementation.[5]

I. The Starting Point: HIPAA

The starting point for evaluating a wellness program is the Health Insurance Portability and Accountability Act of 1996,

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as amended ("HIPAA"), and its implementing regulations. HIPAA generally prohibits a group health plan from varying the cost of premiums or contributions based on an individual's health factors.[6] A "health factor" means, with respect to an individual, certain health status-related factors, such as medical conditions, medical history, disability, and claims experience.[7] However, if a group health plan satisfies HIPAA's wellness program requirements, the plan may vary the amount of premiums or contributions individuals must pay based on whether an individual has met the wellness program's requirements.[8] HIPAA initially divides wellness programs into two categories: "participatory" wellness programs and "health-contingent" wellness programs. Health-contingent wellness programs are further divided into two sub-categories: "activity-only" wellness programs and "outcome-based" wellness programs. As discussed below, HIPAA imposes different requirements for each type of wellness program.[9]

If a wellness program does not condition obtaining a reward based on an individual satisfying a standard that is related to a health factor (or if a wellness program does not provide a reward), the wellness program is a participatory wellness program.[10] Examples of participatory wellness programs include a program that reimburses employees for part or all of the cost of a fitness center membership or a diagnostic testing program that provides a reward for participating but does not base any part of the reward on the testing outcomes.[11] Under HIPAA, a participatory program must be made available to all similarly situated individuals, regardless of their health status.[12] For example, to comply with HIPAA, an employer's fitness center reimbursement program could be offered to all employees classified as full-time, as long as the program is offered to all such employees regardless of their health status or medical conditions.[13] HIPAA does not impose a limitation on the amount of rewards for participatory wellness programs.[14]

Health-contingent wellness programs must satisfy more requirements than participatory wellness programs. A health-contingent wellness program requires an individual to satisfy a standard related to a health factor to obtain a reward.[15] An activity-only wellness program "requires an individual to perform or complete an activity related to a health factor in order to obtain a reward but does not require the individual to attain or maintain a specific health outcome."[16] An example of an activity-only wellness program is an exercise program that provides a reward for exercising a certain number of times each week. Some individuals may not be able to participate or complete the program because of a health factor, such as a broken leg, pregnancy, or asthma.[17] Activity-only wellness programs must comply with five primary requirements under HIPAA, which are summarized below:[18]

- *Opportunity to Qualify*. The program must give individuals eligible for the program the opportunity to qualify for the reward under the program at least once per year.
- *Reward Limitations*. The reward for the activity-only program, together with the reward for other health-contingent wellness programs, must not exceed the "applicable percentage" of the total cost of employee-only coverage under the employer's group health plan. The "applicable percentage" is 30%, except that the applicable percentage is increased by an additional 20 percentage points (to 50%) to the extent that the additional percentage is in connection with a program designed to prevent or reduce tobacco use.[19]
- *Reasonably Designed*. The program must be reasonably designed to promote health or prevent disease, which is determined based on the facts and circumstances. This means the program must have a reasonable chance of improving the health of, or preventing disease in, participating individuals; not be overly burdensome; not be a subterfuge for discriminating based on a health factor; and not be highly suspect in the method chosen to promote health or prevent disease.
- *Uniform Availability of Reward*. The full reward must be available to all similarly situated individuals. To meet that requirement, a wellness program must (i) allow a reasonable alternative standard ("RAS") for obtaining the reward for any individual for whom it is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard, and (ii) allow an RAS for obtaining the reward for any individual for whom it is medically inadvisable to attempt to satisfy the otherwise applicable standard. An RAS must be furnished by the plan upon the individual's request or the condition for obtaining the reward must be waived.
- *Notice of RAS*. A program must disclose in all materials describing the terms of the wellness program the availability of an RAS to qualify for the reward, including contact information for obtaining an RAS and a statement that recommendations of an individual's personal physician will be accommodated.[20]

An outcome-based wellness program generally requires an individual to attain or maintain a specific health outcome in order to obtain a reward. For example, if a wellness program tests individuals for specified medical conditions or risk factors and provides a reward to individuals identified as within a normal or healthy range for these medical conditions or risk factors, while requiring individuals who are identified as out-

side the normal or healthy range (or at risk) to take additional steps to obtain the same reward, the program is an outcome-based wellness program.[21] While the HIPAA requirements for outcome-based wellness programs are similar to those for activity-only wellness programs, there are a few differences, including, for example, the following:[22]

- *Reasonably Designed*. An outcome-based wellness program must ensure that it is reasonably designed to improve health and does not act as a subterfuge for underwriting or reducing benefits based on a health factor. To meet that requirement, an RAS must be provided to any individual who does not meet the initial standard based on a measurement, test, or screening that is related to a health factor.[23]
- *Availability of Reward*. The reward for an outcome-based wellness program is available to all similarly situated individuals if the program allows an RAS for obtaining the reward for any individual who does not meet the initial standard based on the measurement, test, or screening.[24]

II. Considerations Under the ADA

The Americans with Disabilities Act of 1990, as amended ("ADA"), includes nondiscrimination provisions that can apply to wellness programs.[25] The ADA restricts employers from obtaining medical information from employees and prohibits discrimination against individuals on the basis of disability in regard to compensation and other terms, conditions, and privileges of employment, including fringe benefits.[26] However, employers may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at their worksite.[27] The ADA's wellness program regulations apply to wellness programs that ask employees to respond to disabil-

ity related inquiries and/or undergo medical examinations.[28] Wellness programs that do not include a disability-related inquiry or medical examination, such as those that provide general health and educational information, are not subject to the ADA's wellness program regulations.[29]

While the ADA includes wellness program requirements that are similar to those under HIPAA,[30] there are some important differences. For example, under the ADA, wellness programs that include measurements, tests, screenings, or the collection of health-related information must use that information in certain ways for the program to be reasonably designed.[31] The ADA also includes specific standards for a wellness program to be considered "voluntary," including different reward limitations than those under HIPAA.[32] Unlike HIPAA, the reward limitations apply to both participatory and health-contingent wellness programs.[33] The ADA also requires that participants be provided a specific notice[34] and limits how information obtained from a wellness program may be used or disclosed.[35] Employees cannot be required to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information,[36] or to waive any confidentiality protections under the ADA's regulations as a condition for participating in a wellness program or for earning any reward.[37]

III. Considerations Under GINA

The Genetic Information Nondiscrimination Act of 2008 ("GINA") generally restricts employers from requiring, requesting, or purchasing "genetic information."[38] Among other things, the term "genetic information" means the manifestation[39] of disease or disorder in family members of the individual (family medical history).[40] GINA also generally prohibits an employer from discriminating against an individual on the basis of the genetic information of the individual in regard to compensation, terms, conditions, or privileges of employment.[41] However, GINA includes an exception to its general prohibition against requesting, requiring, or purchasing genetic information where an employer offers health or genetic services as part of a voluntary wellness program.[42] GINA includes wellness program requirements that are similar to those under the ADA.[43] Differences under GINA include a requirement that individuals provide a written authorization in certain circumstances, limitations on how genetic information may be used and disclosed, limitations on the amount of rewards a wellness program may provide, and confidentiality requirements.[44]

IV. Other Important Considerations

A. Tax Issues

In addition to ensuring compliance with the various wellness program requirements, employers must also consider the tax treatment of any wellness program rewards. Some wellness programs offer cash or cash equivalents (e.g., gift cards) for completing wellness-related activities, such as walking a certain number of miles each month or completing a specified number of gym workouts each week. Cash and cash-equivalent rewards are subject to federal income tax and employment taxes and withholding.[45] Similarly, a wellness program that reimburses employees for the cost of a gym membership typically results in taxable income for the employee.[46] In contrast, a wellness program that reduces an employee's premiums or contributions under the employer's group health plan is generally not taxable.[47] Employers must examine the specific rewards a wellness program offers to determine the appropriate tax treatment and reporting requirements.

B. Affordability for Affordable Care Act Purposes

Employers must also consider how a wellness program affects the affordability of offered health plan coverage under the Patient Protection and Affordable Care Act, as amended ("ACA"). Among other things, under the ACA, if a large employer offers minimum value, minimum essential coverage to its full-time employees but the cost of self-only coverage is not affordable,[50] the employer may be subject to an assessable payment if the employee enrolls in health insurance coverage through an Exchange and receives a premium tax credit.[51] Wellness program rewards can affect whether the offered coverage is "affordable" for ACA purposes. If a wellness program includes tobacco-related incentives that affect premiums, those incentives will be treated as earned in determining whether the offered coverage is "affordable."[52] For example, if the monthly health insurance premium is $2,000 and the wellness program reduces the cost to $1,700 for employees who do not use tobacco or complete a tobacco cessation course, the premiums are $1,700 for determining whether the coverage is "affordable," regardless of whether an employee is a tobacco user or has completed the tobacco cessation course.[53] In contrast, wellness program rewards that do not relate to tobacco use are not treated as earned for determining whether the offered coverage is "affordable."[54] Employers should carefully review their wellness programs and their rewards when determining whether the offered coverage is affordable under the ACA.

C. Shifting Regulatory Landscape

Offering a wellness program is also challenging because of a shifting regulatory landscape. In 2016, the U.S. Equal Employment Opportunity Commission ("EEOC") issued final regulations and interpretative guidance under the ADA[55] and GINA[56] describing the extent to which employers may use incentives to encourage employees to participate in wellness programs. To qualify as a "voluntary" wellness program under the ADA and GINA, the offered incentives could not exceed 30% of the total cost of coverage.[57] However, the AARP sued the EEOC,[58] arguing (among other things) that these regula-

tions were coercive, as employees who could not afford to pay the increase in premiums would effectively be forced to disclose their protected information to avoid higher costs, thus making a wellness program involuntary. The court agreed[59] and ordered the EEOC to vacate the incentive limits, effective January 1, 2019.[60]

On January 7, 2021, the EEOC released new proposed rules regarding wellness plan incentive limits under the ADA and GINA,[61] to address the concerns raised in the *AARP* litigation. Under those proposals, the incentive limits would be more restrictive than the 2016 regulations, varying depending on whether the wellness plan is participatory or health-contingent. Under both the ADA and GINA, a covered entity[62] could not provide more than a *de minimis* conditional incentive (such as a water bottle, or gift card of "modest value") to an employee undergoing a medical examination in a participatory program. For health-contingent wellness programs, a covered entity could generally offer incentives that mirror the HIPAA incentive limits described above. However, these rules were never formally published in the Federal Register, and the newly-inaugurated Biden Administration withdrew the proposed regulations on January 20, 2021, pending further review.[63] As of the date of this article, the EEOC has not published new proposed wellness program regulations under the ADA or GINA. The absence of regulatory guidance under the ADA and GINA can make it challenging to determine the appropriate reward limitations under the ADA and GINA.

V. Summary

Wellness programs occupy an important part of the healthcare landscape and play an increasing role in helping to control healthcare costs. However, the design, implementation, and operation of one or more wellness programs involve a number of overlapping, non-harmonized, and rapidly changing rules. Employers should take care when designing and implementing their wellness programs to ensure compliance with HIPAA, GINA, the ADA, and other laws that govern wellness programs.

Endnotes

1 Press Release, U.S. Centers for Disease Control and Prevention, Half of Workplaces Offer Health/Wellness Programs (April 22, 2019). Available here: https://www.cdc.gov/media/releases/2019/p0422-workplaces-offer-wellness.html.

2 *See, e.g.*, Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 78 Fed. Reg. 33157, 33159 (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 146, and 45 C.F.R. pt. 147) (noting that "appropriately designed wellness programs have the potential to contribute importantly to promoting health and preventing disease.").

3 Incentives can take the form of a financial reward (e.g. cash, gift cards, company merchandise, or reduced premiums for health insurance). They can also be punitive (e.g. increased premiums for health insurance). HIPAA includes a specific definition of "reward" for wellness program purposes. Treas. Reg. § 54.9802-1(f)(1)(i).

4 A wellness program may apply only to employees, or can extend to an employee's spouse, domestic partner, children, extended family members, or others.

[5] Wellness programs should be evaluated for compliance with HIPAA, ERISA, COBRA, GINA, the ADA, and ADEA, among other laws.

[6] Treas. Reg. § 54.9802-1(c)(1).

[7] Treas. Reg. § 54.9802-1(a)(1).

[8] *See, e.g.*, Treas. Regs. §§ 54.9802-1(c)(3) and (f).

[9] Treas. Reg. § 54.9802-1(f)(2), (3), and (4).

[10] Treas. Reg. § 54.9802-1(f)(1)(ii).

[11] Treas. Reg. § 54.9802-1(f)(1)(ii)(A)-(B).

[12] Treas. Reg. § 54.9802-1(f)(2). "Similarly situated individuals" is defined in Treas. Reg. § 54.9802-1(d).

[13] *See generally* § 54.9802-1(d) and (f)(2); *see also* § 54.9802-1(d)(4), Example 1.

[14] *See, e.g.*, Equal Opportunity Employment Commission, EEOC's Final Rule on Employer Wellness Programs and Title I of the Americans with Disabilities Act Q/A-4, https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm (last visited February 16, 2021). However, other laws, such as the ADA, may limit the amount of wellness program rewards.

[15] Treas. Reg. § 54.9802-1(f)(1)(iii).

[16] Treas. Reg. § 54.9802-1(f)(1)(iv).

[17] *Id*.

[18] The five requirements are set forth in Treas. Reg. § 54.9802-1(f)(3).

[19] Treas. Reg. § 54.9802-1(f)(5)(i). If, in addition to employees, any class of dependents may participate in the wellness program, the reward must not exceed the applicable percentage of the total cost of the coverage in which an employee and any dependents are enrolled. *Id*.

[20] The HIPAA regulations include a model notice that can be customized for this purpose. Treas. Reg. § 54.9802-1(f)(6).

[21] Treas. Reg. § 54.9802-1(f)(1)(v).

[22] *Compare* Treas. Regs. §§ 54.9802-1(f)(3) and (f)(4).

[23] Treas. Reg. § 54.9802-1(f)(4)(iii).

[24] Treas. Reg. § 54.9802-1(f)(4)(iv)(A).

[25] *See, e.g.*, 42 U.S.C. § 12112(b)(2), (4).

[26] 42 U.S.C. § 12112(d)(4)(A), § 12112(a); 29 C.F.R. § 1630.4(a)(1)(vi).

[27] 42 U.S.C. § 12112(d)(4)(B).

[28] Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. 31126 (May 17, 2016) (codified at 29 C.F.R. pt. 1630). EEOC guidance defines "disability-related inquiries" and "medical examinations." EEOC Notice, "Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA)" (No. 915.002, July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html (last visited February 16, 2022).

[29] 81 Fed. Reg. at 31126.

[30] *Compare* Treas. Reg. § 54.9802-1(f) *with* 29 C.F.R. § 1630.14(d).

[31] 29 C.F.R. § 1630.14(d)(1).

[32] 29 C.F.R. § 1630.14(d)(2).

[33] *Compare* ADA reward limits, 81 Fed. Reg. at 31140 (modifying 29 C.F.R. § 1630.14(d)(1)(3)), *with* HIPAA reward limits for health-contingent wellness programs, Treas. Reg. § 54.49802-1(f)(3)(ii), (f)(4)(ii). As further discussed in this article, the ADA's regulations relating to wellness program reward limitations are currently in flux.

[34] 29 C.F.R. § 1630.14(d)(2)(iv).

[35] 29 C.F.R. § 1630.14(d)(4)(i).

[36] 29 C.F.R. § 1630.14(d)(4)(iv) (stating "…except to the extent permitted by this part to carry out specific activities related to the wellness program.").

[37] 29 C.F.R. § 1630.14(d)(4)(iv).

[38] 29 C.F.R. § 1645.1(a)(3); 29 C.F.R. § 1635.8(a).

[39] "Manifestation" or "manifested" means, with respect to a disease, disorder, or pathological condition, that an individual has been or could reasonably be diagnosed with the disease, disorder, or pathological condition by a health care professional with appropriate training and expertise in the field of medicine involved. In general, for purposes of the GINA regulations, a disease, disorder, or pathological condition is not manifested if the diagnosis is based principally on genetic information. 29 C.F.R. § 1635.3(g).

[40] 29 C.F.R. § 1635.3(c)(1)(i), (ii), and (iii).

[41] 29 C.F.R. § 1635.4(a).

[42] 29 C.F.R. § 1635.8(b)(2).

[43] *Compare* 29 C.F.R. § 1630.14(d) *with* 29 C.F.R. § 1635.8.

[44] *See generally* 29 C.F.R. § 1635.8(b)(2); for reward limitations, *compare* GINA reward limits, 81 Fed. Reg. at 31158-31159 (modifying 29 C.F.R. § 1635.8(b)(2)(iii)), *with* HIPAA reward limits for health-contingent wellness programs, Treas. Reg. § 54.49802-1(f)(3)(ii), (f)(4)(ii). As further discussed in this article, GINA's regulations relating to wellness program reward limitations are currently in flux.

[45] Code §§ 61, 3121(a), 3306(b), and 3401(a).

[46] *See id.*; *see also* I.R.S. Chief Counsel Advice Memorandum 201622031 (May 27, 2016); FAQS ABOUT AFFORDABLE CARE ACT IMPLEMENTATION (PART XXV) (April 16, 2015), Q/A-2.

[47] *See* Code §§ 105 and 106. However, such arrangements should be reviewed for compliance with applicable nondiscrimination rules, such as those under Code § 105(h).

[48] A large employer generally means an employer that had at least 50 full-time employees (including full-time equivalents) on business days during the prior calendar year. Treas. Reg. § 54.4980H-1(a)(4).

[49] For this purpose, coverage must also be offered to the dependents of full-time employees. Code § 4980H(b).

[50] Affordability is determined under Code § 4980H(b) and Treas. Reg. § 54.4980H-5(e).

[51] Code § 4980H(b); *see also* Treas. Reg. § 54.4980H-1 for definitions.

[52] Treas. Reg. § 1.36B-2(c)(3)(v)(A)(4).

[53] *See* Treas. Reg. § 1.36B-2(c)(3)(v)(D), example 9.

[54] Treas. Reg. § 1.36B-2(c)(3)(v)(A)(4).

[55] Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. 31126 (May 17, 2016) (to be codified at 29 C.F.R. pt. 1630).

[56] Genetic Information Nondiscrimination Act, 81 Fed. Reg. 31143 (May 17, 2016) (to be codified at 29 C.F.R. pt. 1635).

[57] 81 Fed. Reg. at 31140 (modifying 29 C.F.R. § 1630.14(d)(1)(3)); 81 Fed. Reg. at 31158-31159 (modifying 29 C.F.R. § 1635.8(b)(2)(iii)).

[58] *AARP v. EEOC*, No. 16-2113, 2016 WL 6211326 (D.D.C. Oct. 24, 2016).

[59] *AARP v. EEOC*, 267 F. Supp. 3d 14, 2017 WL 3614430 (D.D.C. Aug. 22, 2017).

[60] *AARP v. EEOC*, 292 F. Supp. 3d 238, 2017 WL 6542014 (D.D.C. Dec. 20, 2017). The EEOC complied. Removal of Final ADA Wellness Rule Vacated by Court, 83 Fed. Reg. 65296 (Dec. 20, 2018); Removal of Final GINA Wellness Rule Vacated by Court, 83 Fed. Reg. 65296 (Dec. 20, 2018).

[61] RIN 3046-AB10 (ADA); RIN 3046-AB11 (GINA). Both of these documents have since been rescinded.

[62] A covered entity means an employer, employment agency, labor organization, or joint labor management committee. 29 C.F.R. § 1630.2.

[63] Memorandum for the Heads of Executive Departments and Agencies, 86 Fed. Reg. 7424 (Jan. 28, 2021) (issuing regulatory freeze).