



A Benchmark Wellness White Paper

Legal Compliance for Worksite Wellness Programs

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Contents

Introduction	2
Wellness Program Types	3
The HIPAA Applicability Test	4
Terms	4
HIPAA Programs	5
Other Laws to Consider	6
Summary	7
About Benchmark Wellness	7

The Usual Disclaimer

The information presented herein is for general use only and is not intended to provide specific advice or recommendations, legal or otherwise, for any specific individual or organization.

Although we have made every effort to provide up-to-date and correct information, legal compliance for wellness programs can be complicated and regulations may vary from state to state. You need to consult with your own counsel relating to your company's specific circumstances.

Internal Revenue Service Circular 230 Disclosure: As provided for in Treasury regulations, advice (if any) relating to federal taxes that is contained in this handout is not intended or written to be used, and cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Introduction

Without a doubt, employee wellness programs are effective in reducing costs associated with poor employee health. There is no dearth of evidence – either statistically significant or anecdotal – to the contrary. Indeed, the literature emerging from such respected institutions as the Health Management Research Center at the University of Michigan cites conservative returns on investment (ROI) of \$3 for every \$1 spent on employee wellness with documented outliers as high as \$15 for every \$1 spent.

Employee wellness programs are also subject to a multitude of legal compliance issues on federal, state, and (some) municipality levels, especially those that include participation incentives or rewards for certain health achievements such as weight loss or smoking cessation.

Unfortunately, whether employers have designed wellness programs in-house, used “free” programs made available to them by health insurers, or hired an outside wellness vendor; most programs are not legally compliant. Many employers are at risk of increasing scrutiny of such programs by the U.S. Department of Labor (DOL)¹, possible sanctions, and an increased likelihood of employee discrimination lawsuits.

This paper will discuss how the Health Insurance Portability and Accountability Act (HIPAA) is often the “gatekeeper” of the collection of legal issues that must also be considered, such as ADA, ADAAA, GINA, ADEA, ERISA, the Civil Rights Act, the NLRA, DOL and IRS.²

¹ Some estimates project the DOL will increase its review of wellness programs four-fold by the end of 2011.

² ADA (the Americans with Disabilities Act of 1990); ADAAA (the ADA as amended in 2008); GINA (the Genetic Information Nondiscrimination Act of 2008); ADEA (the Age Discrimination in Employment Act of 1967); ERISA (the Employee Retirement Income Security Act of 1974); Title VII of the Civil Rights Act of 1964; NLRA (the National Labor Relations Act of 1935); U.S. Department of Labor (DOL); Internal Revenue Service (IRS).

The Fork in the Road

There are generally two types of wellness programs: “reactive” and “proactive,” and which way an employer chooses will determine its program’s success as well as its legal risk.

Many employers already have some type of wellness programs such as an EAP or disease management program, and these programs fall under what is called a “reactive program” – those that seek to intervene with respect to employee disease management. Reactive programs deal with existing conditions, but if intervention happens early enough, they can reduce the money spent by the health plan to treat the condition. Often, the return on investment is easier to quantify with these programs because the intervention and its results are more immediate, even though the ROI is much lower for these programs, if existent at all.

The other type includes those programs that seek to *prevent* future illness by helping employees to change behaviors. This is where program planners need to decide which path they’re going to take – in one direction are wellness programs not subject to federal nondiscrimination rules under HIPAA (“Non-HIPAA Programs”). The other direction includes programs that trigger a host of HIPAA rules (“HIPAA Programs”).

Wellness Program Types from a Legal Perspective		
Reactive Programs	Proactive Programs	
	Non-HIPAA Programs	HIPAA Programs
Disease management	Rewards unrelated to health care plan -or- Related to health care plan but NOT to a “health factor”	Rewards related to health care plan -and- Related to a “health factor”
Employee assistance (EAP)		
Disability management		
Workers’ compensation		
(Less expensive / lower ROI)	(More expensive / higher ROI)	

The federal laws at the center of this issue include the Health Insurance Portability and Accountability Act (HIPAA) – specifically, its non-discrimination rules – and the Americans with Disabilities Act (ADA) – particularly after the ADA Amendments Act of 2008. Other laws and regulations apply, usually after a wellness program is placed against the HIPAA applicability test.

It is imperative to integrate both types of programs – reactive and proactive – into a comprehensive wellness program because, again, employers are providing employees with *opportunities* for wellness. Remember, wellness programs are not something that we do *to* employees; they are something we do *for* employees.

The HIPAA Applicability Test

A wellness program *avoids* HIPAA applicability if it is available to “similarly situated individuals,” AND one of the following:

1. The reward is unrelated to a healthcare plan. For example, the reward is not a premium discount or reduction in deductible or coinsurance. OR
2. The reward is related to the healthcare plan but it is not contingent on satisfying a standard related to a health factor. Rather, the reward is based on participation, such as completing a health risk assessment without regard to whether the results show the individual is healthy or sick, or a pregnant woman obtaining prenatal care. For example, a reward is offered to an employee who participates in a smoking cessation program regardless of whether he or she actually stops smoking.

Terms to Know

Similarly Situated Individuals

Employers can draw distinctions between individuals and create different benefit and cost-sharing structures based on:

- Participant status (i.e., participant or spouse)
- Categories of beneficiaries (i.e., spouse, child, student status of dependents)
- Employment-based classifications (i.e., hourly vs. salaried, length of service, full-time vs. part-time, collectively bargained, etc.)

Reward

A reward can take many forms, including:

- Cash payments
- Prizes
- Rebates
- Contributions to a health savings account
- Reduction in health insurance premium
- Reduction or elimination of deductible
- Reduction or elimination of co-payment

Health Factor

- Health status
 - Nutrition habits
 - Obesity
 - Nicotine addiction
 - Physical activity habits
- Medical condition
- Claims experience
- Receipt of health care
- Medical history
- Genetic information
- Disability
- Evidence of insurability

Non-HIPAA Programs	HIPAA Programs
Participatory-based	Achievement-based
<p>Examples are programs that:</p> <ul style="list-style-type: none"> ➤ Provide incentives for completing an HRA regardless of results ➤ Reimburse fitness center dues ➤ Encourage preventive care by waiving co-payments or deductibles ➤ Reward employees for attending monthly health-education webinars ➤ Provide free on-site flu shots ➤ Provide fresh fruit in the workplace 	<p>Examples are programs that:</p> <ul style="list-style-type: none"> ➤ Offer different coinsurance rates, co-pays or deductibles for smokers vs. non-smokers ➤ Offer premium discounts based on an employee's acceptable body mass index ➤ Offer discounts based on maintaining low cholesterol levels as checked by annual health risk assessments

HIPAA Programs

It is important to note that employers can discriminate against unhealthy employees with respect to things like health insurance premiums, but the employer must follow certain additional HIPAA rules to do it under the umbrella of “HIPAA-compliant wellness programs.” There are five (5) prerequisites to this kind of “discrimination”:

1. The size of the reward or penalty can't exceed 20% of the total premium cost for the employee's health coverage. This amount will be raised to 30% in 2014.
2. The program must be reasonably designed to promote good health. Examples include on-site chair massage, aromatherapy or nutrition coaching.
3. Eligible individuals must have the opportunity to qualify for a reward at least once each year.
4. The reward must be available to all similarly situated individuals.
5. The employer must publicize its willingness to provide an alternative standard for receiving the award. The final regulations suggest the following language on all program materials:

“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.”

U.S. Department of Labor

Other Laws to Consider



DOL

When planning your wellness program, ensure that you (or your vendor) produces thorough program design and administration documentation!

ERISA

If the wellness program provides a medical benefit such as nicotine patches for smoking cessation, it is probably either an ERISA plan or part of one, and must follow ERISA rules. Many employers simply eliminate any “medical benefits” from their wellness programs.

ADA

Wellness programs may not make any inquiries about disabilities unless they are job-related and consistent with business necessity. This includes questions on a health risk assessment.

GINA

Designed to pick up where HIPAA left off by prohibiting the use of genetic information for purposes of underwriting and prohibits a group health plan from discriminating on the basis of an individual’s genetic information. All health risk assessments (HRAs) must not contain questions such as “Is there any family history of diabetes?”

ADEA

Prohibits discrimination based on age. Create alternative standards to achieve certain health goals, such as a higher cholesterol threshold for older adults (50+) who have a harder time achieving certain levels.

Civil Rights Act (Title VII)

Prohibits discrimination based on race, color, religion, sex, or national origin. Wellness programs may not discriminate based on gender, so offer rewards for appropriate weight goals for women and men, not the same weight (or BMI, cholesterol level, etc.).

NLRA

Wellness programs may be (and often are) subject to collective bargaining.

Internal Revenue Service

All rewards are taxable over a nominal amount, such as \$5. Clearly communicate this or employees will be upset if they didn’t know their incentives would be taxed from the beginning.

Increased Program Value

Wellness programs that are well-designed and positioned to take advantage of the newest health reform and tax credit incentives will continue to see increased value beginning in 2011. Employers are advised to review health promotion programs annually for legal compliance as a way to protect their investment.

About Deanna Moncrief

Deanna Moncrief was the wellness program coordinator for a large hospital system 2002 when she founded Benchmark Wellness. As a formally-trained nutritionist and in the wellness industry for the past decade, Ms. Moncrief has broad expertise in the dynamics of wellness program design and management. Through her firm, Ms. Moncrief has trained human resources professionals from Fortune 500 companies, small employers, non-profit organizations and state agencies on best practices for wellness programs.

About Benchmark Wellness

For the past eight years Benchmark Wellness has been helping companies design, implement and sustain effective wellness programs. It provides innovative tools, training, evaluation services, and on-demand, real-time management reports. Benchmark works with employers who are ready to break away from low participation rates and embrace wellness programs that are customized to add business value and are sensitive to the culture of the organization. As employees become tired of off-the-shelf wellness programs and wary of the conflict of interest by programs offered by insurance companies, employers are looking for better ways to engage employees in healthy behaviors.