

Wellness Programs – Are you Compliant?

AGENDA

Wellness Programs

- Participatory
- Health Contingent

Quick ACA Review

ADA & Wellness

EEOC Proposed Regulations

Impact of Proposed Regulations

Definitions You Need to Know

- **Participatory Wellness Program**

- Does not provide a reward, or reward not based on a specific health factor or outcome

- **Health Contingent Wellness Program**

- Broken down into 2 types of programs
 - **Activity-only** – requires an individual to perform or complete an activity related to a health factor in order to obtain a reward
 - **Outcome-based** – requires an individual to attain or maintain a specific health outcome to obtain a reward

Effective 1/1/2014

Wellness Programs

Health-contingent
Programs

Participatory
Programs

Activity-only
Programs

Outcome-based
Programs

Does not provide reward,
or reward is not based on a
health factor

Participatory Wellness Program

- **Do not provide a reward, or the conditions for obtaining the reward are not based on a standard related to a health factor**

Examples:

- A program that reimburses employees for all or part of the cost of membership in a fitness center
- A diagnostic testing program that provides a reward for participation and does not base any part of the reward on outcomes
- A program that provides a reward to employees for attending a monthly, no-cost health education seminar

Key Question to Answer

- **Does your wellness program offer wellness rewards based on satisfaction of a health factor?**

Did You Answer No?

- **Your wellness program is considered Participatory.**
- **Do not have to satisfy 5 HIPAA requirements.**
- **No limit on reward.**
- **Must apply to all similarly situated individuals.**

What Does This Mean for Compliance?

- Do not have to satisfy 5 HIPAA requirements
- No limit on reward
- Must all to all similarly situated individuals

Health-contingent Wellness Program

- **Activity-only wellness program**

- A program that requires an individual to perform or complete an activity related to a health factor in order to obtain a reward
- These programs do not require an individual to attain or maintain a specific health outcome
- **In an important change from previous guidance, some programs that previously have been considered participatory programs, such as a walking program, are now classified as a activity health contingent program.**

Examples:

- Walking, diet, or exercise programs

Health-contingent Wellness Program

- **Outcome-based wellness programs**

- A program requiring an individual to attain or maintain a specific health outcome (i.e. not smoking, attaining certain results on biometric screens) to obtain a reward
- Generally comprised of 2 tiers
 - 1) A measurement, test, or screening
 - 2) Followed by a larger program that targets individuals who do not meet the initial standard with wellness activities

Examples:

- Programs that test individuals for specified medical conditions or risk factors such as high cholesterol, high blood pressure, abnormal BMI, or high glucose level

Key Question to Answer

- **Does your wellness program offer wellness rewards based on satisfaction of a health factor?**

Did You Answer Yes?

- **You wellness program is considered a Health-contingent program.**
- **Plans designed to promote health or prevent disease.**
- **5 Requirements to Satisfy HIPAA Compliance**



What Does This Mean for Compliance?

- Plans designed to promote health or prevent disease
- 5 requirements to satisfy HIPAA compliance

5 Requirements Health Contingent Wellness Programs

1. Program gives individuals an opportunity to **qualify** for the reward at least once per year
2. The size of the reward does not exceed 30% of the tier the employee is covered and can be increased an additional 20% (for a total of 50%) to the extent the additional percentage is attributed to tobacco use prevention or reduction*
3. Program is **reasonably designed** to promote health or prevent disease
4. **Uniform** availability and **reasonable** alternative standards*
5. Appropriate plan disclosures*

* Denotes changes from 2006 regulations

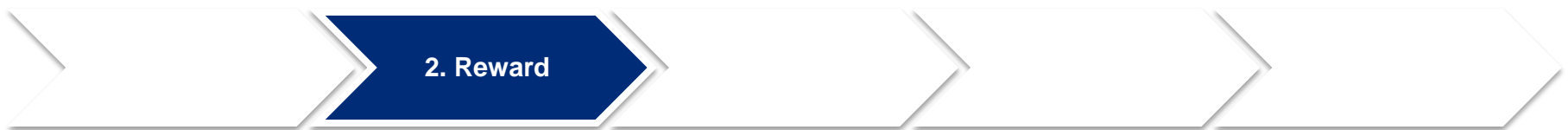
Frequency of Opportunity to Qualify

- Individuals must be given the opportunity to qualify at least **once per year**.



Size of Reward

- No more than **30%** (or **50%** if the factor is related to tobacco use) of single only cost.
- If dependents are allowed to participate in the program, no more than **30%** of the total cost of coverage in the tier the employee and dependents are enrolled in.
- Total cannot exceed **50%** Maximum!



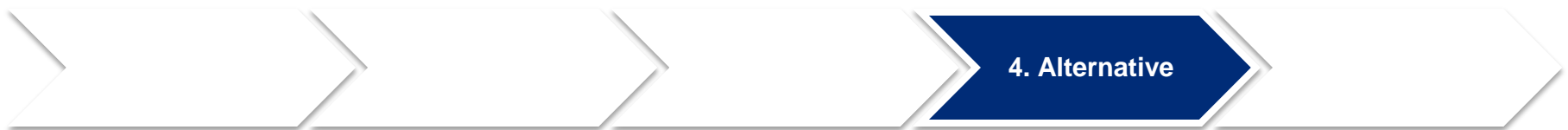
Reasonable Design

- Must be **reasonably designed** to promote health or prevent disease.



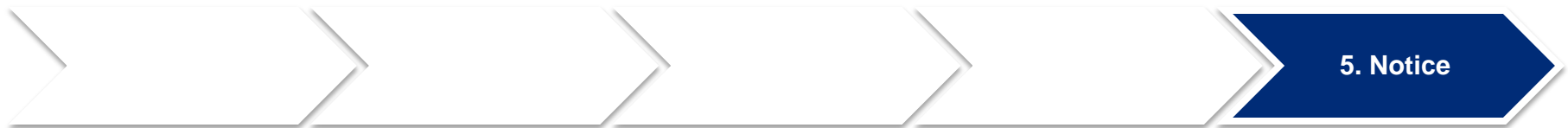
Uniform Availability and Reasonable Alternative Standards

- The **same reward** must be available to all similarly situated individuals and the full reward must be available to individuals who qualify by satisfying a reasonable alternative standard.
- Even if the reasonable standard is satisfied mid-year, they must qualify for the **same reward** as if they qualified at the beginning of the time period.



Notice of Availability of Reasonable Alternative Standard

- **Must be included** in all plan materials describing the terms of a health-contingent wellness program. The disclosure must include:
 1. Contact information for obtaining the alternative
 2. A statement that recommendations of an individual's personal physician will be accommodated.



ACA Examples

Facts

- Employer sponsors a group health plan. The annual premium for employee-only coverage is \$6,000 (employer pays \$4,500 + employee contributes \$1,500).

Example 1

- Plan offers an incentive of \$600 that is tied to a health outcome.

Conclusion

- Program meets the requirement since the incentive does not exceed 30% of total annual employee only coverage, \$1,800 (30% x \$6000).

Source: Final regulations, Affordable Care Act

ACA Examples

Facts

- Employer sponsors a group health plan. The annual premium for employee-only coverage is \$6,000 (employer pays \$4,500 + employee contributes \$1,500).

Example 2

- Plan imposes a \$1,000 surcharge on employees who used tobacco in last 12 months and are not enrolled in a tobacco cessation program.

Conclusion

- Program meets the requirements because the total amount of the incentive (absence of \$1,000 surcharge) does not exceed 50% of total annual employee only coverage (\$3000) ($50\% \times \6000)

Source: Final regulations, Affordable Care Act

ACA Examples

Facts

- Employer sponsors a group health plan. The annual premium for employee-only coverage is \$6,000 (employer pays \$4,500 + employee contributes \$1,500).

Example 3

- Plan offers an incentive of \$600 that is tied to a health outcome, PLUS plan imposes a \$2,000 surcharge on employees who used tobacco in last 12 months and are not enrolled in a tobacco cessation program.

Conclusion

- Program meets the requirements because the total amount of the incentive (\$2,600) does not exceed 50% of total annual employee only coverage (\$3000) ($50\% \times \6000) and the health outcomes incentive, \$600 does not exceed the 30% requirement, \$1800.

Source: Final regulations, Affordable Care Act

ACA Examples

Facts

- Employer sponsors a group health plan. The annual premium for employee-only coverage is \$5,000 (including employer + employee contributions).

Example 4

- Plan offers an incentive of \$250 for completing an HRA and screening and a \$1,500 incentive that is tied to a health outcome.

Conclusion

- Program meets the requirements even though the total amount of the incentive (\$1,750) exceeds the 30% threshold (\$1,500).
- Only the amount that is tied to an outcomes based incentive is factored into the 30% threshold.
- In this case, \$1,500 is within the limits of the 30% threshold.
- Source: Final regulations, Affordable Care Act

Americans With Disability Act (ADA)

- Purpose: Prohibit discrimination based on disabilities
- As it applies to employers: Employer shall **NOT** require a medical examination and **SHALL NOT** make inquiries of an employee **UNLESS IT IS JOB RELATED** and consistent with business
- Medical Examination includes blood tests – i.e. wellness screenings
- Medical Inquiries include well being questions – i.e. health questionnaires

What does the ACA have to do with the ADA and why do we care?

Answer:

- Compliance with nondiscrimination rules, including the wellness program requirements as previously mentioned, is not determinative of compliance with any other state or federal law, INCLUDING THE ADA

Translation:

- ACA Compliance does not equal ADA compliance

ADA

Safe Harbor Exceptions

Employers are permitted to make disability related inquiries or conduct medical examinations as part of a **voluntary wellness** program.

A wellness program is **voluntary** as long as the employer **neither requires participation nor penalizes** an employee who does not participate.

The Dilemma

The ACA guidelines **don't apply** to participatory based programs – meaning there are no financial boundaries.

Under the ADA, Employers are permitted to make disability related inquiries or conduct medical examinations as part of a **voluntary wellness** program.

What is the meaning of “voluntary”

New Wave of Activity Driven by the EEOC

Three Cases, same question:

- If an employer penalizes an employee for not participating in a wellness program, is this a “voluntary” wellness program within the ADA exception or is it a violation of the ADA?

Orion Energy System – employee terminated after not participating

Flambeau Inc. – employer cancelled benefits for non participant

Honeywell – Non participant incurred up to a \$4000 penalty for non participation

Honeywell, Inc.

2014

Facts:

If an Employee or their spouse do not take the biometric tests, the following penalties applied:

- EE will lose HSA contribution (up to \$1500)
- EE charged a \$500 surcharge that will be applied to 2015 plan year
- EE charged a \$1000 tobacco surcharge even if the employee chooses not to go through the screening for reasons other than smoking
- EE charged another \$1000 tobacco surcharge even if the spouse chooses not to go through the screening for reasons other than smoking
- Total Potential Penalty - \$4000

Honeywell, Inc.

- EEOC made two claims: Violation of ADA and GINA

ADA Claim

- The biometric testing and health risk assessment constituted "disability-related inquiries and medical examinations" that were not job-related and consistent with business necessity as defined by ADA.
- The potential penalty of \$4000 was so punitive that it could no longer be looked upon as "voluntary" within the safe harbor provisions.

Honeywell, Inc.

GINA Claim

Honeywell is offering an inducement within the meaning of GINA to obtain medical information relating to conditions of spouses.

Medical Information is family medical history – or genetic information, and therefore impermissible under GINA.

Honeywell, Inc.

Court ruled in favor of Honeywell (TRO not granted)

- Judge Montgomery asked the EEOC the question that the corporate wellness world has been waiting for much more than a decade to ask: **“At what point does a monetary penalty result in a compulsion?”** The EEOC responded that the agency cannot draw a clear line but that Honeywell had crossed it. At least three times during the oral argument, the Court pressed the EEOC to define the point at which voluntary wellness plan becomes involuntary because of the penalties involved. Each time, **the EEOC responded that it cannot draw a line but that Honeywell had crossed it.**
- In contrast, **Honeywell pointed to the clear guidance on acceptable incentives** for wellness plans and acceptable employee contributions in the **Affordable Care Act.** Honeywell also argued that whether its wellness program was voluntary was irrelevant since it was protected by the ADA “safe harbor” for insurance plans.

EEOC STRIKES BACK

On April 16, 2015, the EEOC issued its highly anticipated proposed regulations on the application of the ADA to employer wellness programs.

TOPICS ADDRESSED

1. Meaning of Voluntary in general
2. Meaning of Voluntary, financially speaking
3. Tobacco Implications
4. Notice Implications

WHAT IS VOLUNTARY?

The proposed regulations emphasize that participation in employer wellness programs must be completely “voluntary.” For a program to be considered voluntary, an employer generally **cannot**:

1. Mandate employee participation;
2. Deny employee benefit coverage or certain benefit packages for non-participation or limit benefits for non participation;
3. Take adverse employment action against any employee who chooses not to participate in the wellness programs.

“At what point does a monetary penalty result in a compulsion?”

- The proposed EEOC regulations permit employers to offer financial incentives as a way to encourage employee participation in wellness programs that are part of a group health plan.
- These financial incentives, however, **may only be up to 30 percent of the total cost of employee-only coverage** under the group health plan.

How does this differ from the ACA?

- Under the ACA guidelines, the 30 percent limit only applies to health contingent wellness programs (no financial impact on participatory programs).
- The EEOC proposed rule extends the 30 percent limit to include **both** health contingent **and** participatory wellness programs (aggregates the amount).
- Under the ACA guidelines, the size of the reward is based on the total premium of the tier the employee is covered.
- Under the EEOC proposed rule, the size of the reward is based solely on the **employee only total premium**, regardless of whether it is employee + spouse, etc.

What about tobacco?

- Under the ACA, employers are allowed to increase the wellness incentive from 30 percent to 50 percent with respect to tobacco cessation programs.
- The EEOC's proposed regulations provide that if a smoking cessation program merely asks employees whether or not they use tobacco (or whether or not they ceased using tobacco upon completion of the program), then such a program will not be viewed as one which includes disability-related inquires or medical examinations, and the wellness program may offer incentives up to 50 percent without violating the ADA.
- On the other hand, if a smoking cessation program requires a biometric screening or other medical examination that tests for the presence of nicotine or tobacco, then the test will be considered a medical examination and the aggregate financial incentive may not exceed 30 percent, even though 50 percent may be allowed under the ACA .

Notice Requirements

ACA Regulations:

For Health Contingent Wellness Programs, Employers must:

- Disclose the availability of the reasonable alternative standard in plan materials;
- Must provide contact information and statement that physician recommendations will be accommodated;
- Must include in any disclosure to individual that he/she did not satisfy the outcomes-based standard.

Sample Model Notice Language

“Your health plan is committed to helping you achieve your best health. 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 (and, if you wish, with your doctor) to find a wellness program with the same reward that is right for you in light of your health status.”

Notice Requirements

Proposed EEOC Regulations:

If an employer wellness program is a part of a group health plan, employers must provide employees with a specific notice stating:

- (1) what medical information will be obtained;
- (2) how it will be used;
- (3) who will receive the medical information;
- (4) the restrictions on disclosure of information; and
- (5) the methods taken to prevent improper disclosure

So what are employers support to do?

WAIT AND SEE

There is no effective date for the proposed regulations

Comments were due to the EEOC on June 19,2015

Other than that, be aware that the potential regulations are lurking

Plan ahead – create an alternative plan B if need be

Hope for the best, expect the worst

THANK YOU



Legal/regional regulatory statement to be added here if required.