



Wellness Compliance for 2017

A review of regulations that your plan should be following

What We're Going to Cover

1. Updates on ACA and the New Administration
2. Defining a Wellness Plan
3. Who regulates Wellness plans
 - a) ACA
 - b) HIPAA
 - c) EEOC
4. Incentives as Taxable Income
5. An Increasingly Holistic Approach to Wellness
6. Questions & Answers

Updates on ACA & The New Administration

What is a Wellness Plan?

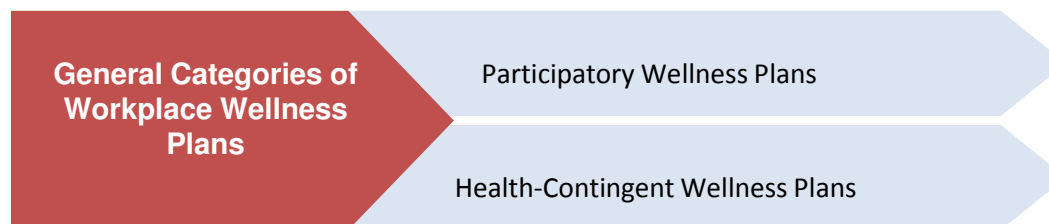


Affordable Care Act

- If the employer is an Applicable Large Employer (ALE) , then wellness plans can impact affordability
- When deciding if the employee's share of the premium is affordable (less than 9.69 percent in 2017 of the employee's W-2 income), the employer may not consider wellness incentives or surcharges except for a non-smoking incentive
- When calculating minimum value, if incentives for nonuse of tobacco may be used to reduce cost-sharing (deductible/out-of-pocket costs), those incentives may be taken into account when determining minimum value
- Assume no one smokes and no one participates in any other wellness program

HIPAA

- HIPAA was the source of the original set of regulations issued in 2006
- These regulations have, for the most part, remained intact when they were incorporated into the Affordable Care Act in 2012 and thus changed from regulation to statute
- Some changes did occur
- All wellness plans will be considered either participatory or health-contingent under HIPAA



HIPAA – Participatory Wellness Plans

- There is no inducement
 - Example: Lunch and learn classes on stress or nutrition
- There is an inducement but there are no health related conditions for obtaining the reward
 - Example: Fitness center reimbursement
 - Example: Incentive for diagnostic testing with no reward based on outcome
- Participatory wellness plans have to be available to all similarly situated individuals, regardless of health status

HIPAA – Health-Contingent Wellness Plans: Activity-Only

- A plan which bases any part of an inducement on satisfying a standard related to a health factor or requires an individual who fails to satisfy the standard to do more than one who meets the standard
- Activity-only wellness plan: an individual has to complete an activity related to a health factor in order to obtain the inducement but does not have to achieve or maintain a specific health outcome
 - Example: exercise program or walking program
- The employer has to provide a reasonable alternative for those who can't meet the standard due to a medical condition

HIPAA – Health-Contingent Wellness Plans: Outcome-Based

- A plan which bases any part of an inducement on attaining an outcome
 - Example: BMI level
- A reasonable alternative standard is required and has to be made available to all individuals who didn't meet the standard
 - Example: BMI level of 35; if not met, individual must attend a nutrition class
- Employer can't ask for substantiation of a health condition from the individual

5 Requirements of Health-Contingent Wellness Plans

	Requirement	Description
✓	Frequency of opportunity to qualify for reward	Eligible individuals must be given the opportunity to qualify for inducement at least once per year
✓	Size of reward	The size of the inducement cannot exceed 30% of the cost of the tier employee is enrolled in If tobacco use is a criteria, the inducement can be up to 50%
✓	Reasonable design	Plan must be reasonably designed to promote health or prevent disease Plan must not be overly burdensome and cannot be a subterfuge for discrimination based on health factors
✓	Uniform availability & reasonable alternative	Full reward must be available to all similarly situated individuals. To meet this requirement, a reasonable alternative (or waiver) must be available The alternative does not need to be established in advance but upon request, the employer must disclose what the alternative is
✓	Employee Notice	The plan must disclose the availability of the other means of qualifying or avoiding the inducement

EEOC Concerns

The EEOC alleged violations of the Americans with Disabilities Act (ADA) by three employers:

- August 2014: Orion Systems was sued for requiring employees to submit to medical tests as part of a wellness plan and then allegedly firing an employee who objected
- September 2014: Flambeau Inc. was sued for allegedly unlawfully threatening insurance cancellation and discipline if employees did not submit to medical tests as part of a wellness plan
- October 2014: Honeywell was sued to prevent the implementation of penalties if employees or spouses don't submit to biometric testing

Notices from Multiple Agencies

- EEOC issued a Notice of Proposed Rulemaking (NPRM) describing how the Americans with Disabilities Act (ADA) applies to employer wellness plans
- DOL, IRS, HHS jointly issued FAQ's relating to Wellness Plans
- CMS issued FAQ's on Wellness plans as they relate to HIPAA Privacy and Security

April 2015

- EEOC issued notice that they would clarify the Genetic Information Nondiscrimination Act's (GINA) rules as they apply to spouses' participation in wellness plans

October 2015

- EEOC issued FINAL RULE on Wellness Plans that fall under Title I of the Americans with Disabilities Act (ADA)
- At the same time they issued a Final Rule for plans subject to Title II of the Genetic Information Non Discrimination Act (GINA)

May 2016

EEOC ADA Final Rule: What it Applies to

- EEOC rules apply to both participatory and health-contingent wellness plans in which an employee is:
 - Asked disability related questions such as in Health Risk Assessment or,
 - Asked to take a medical examination such as Biometric Screening
- EEOC rules also apply to these wellness plans regardless of whether they are part of a group health plan or not
- Reminder: EEOC reasonable accommodation rules apply to all wellness plans

EEOC ADA Final Rule: “Reasonably Designed”

- The plan must be reasonably designed to promote health and prevent disease and cannot contain “overly burdensome” requirements such as:
 - Overly intrusive procedures
 - Distance to travel to participate
 - Unreasonable cost
 - Unreasonable amount of time required
 - Be a “subterfuge” for violating the ADA
- EEOC Reasonably Designed requirement is substantially similar to ACA Reasonably Designed requirement for Health-Contingent plans but EEOC rules apply to Participatory Plans as well

EEOC ADA Final Rule: “Reasonably Designed”

- If the plan asks questions about health conditions (an HRA or biometric screening), there must be an outcome such as alerting the member to health risks, providing programs to address conditions, etc.
- Not providing any feedback or information would **not** be considered reasonably designed

EEOC ADA Final Rule: Must be Voluntary

- Employees cannot be required to participate
- Employer cannot deny health coverage because employee did not participate
- Employer cannot prohibit an employee from choosing a particular plan due to not participating
- Employers cannot retaliate or take “adverse action” against an employee who did not participate
- Employees must receive a notice of what information will be obtained, how it will be used, who will get it and restrictions on disclosure (similar to HIPAA Notice of Privacy).
- Template available from EEOC:
<https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm>

EEOC ADA Final Rule: Inducements

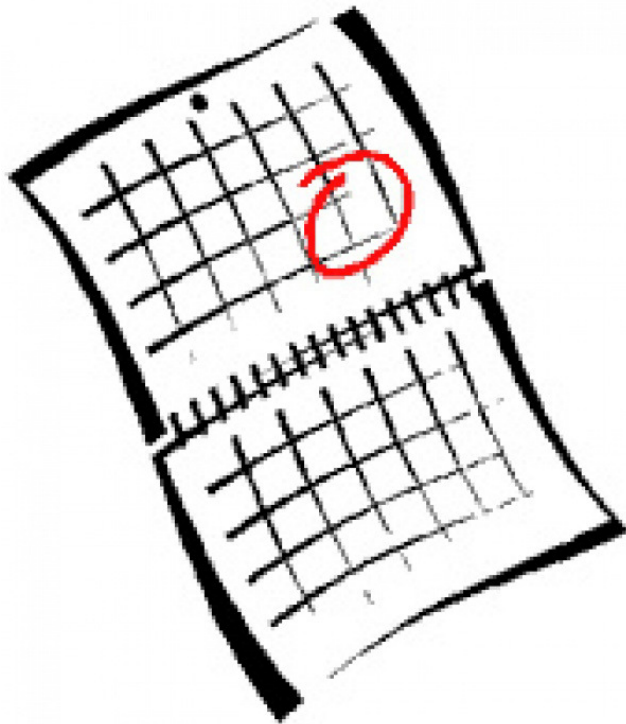
- If the wellness plan is available to only those participating in the health plan, then maximum inducement is 30% of the Self-Only option in which the employee is enrolled*

**Note that this differs from HIPAA Rules*

- If the wellness plan is open to all employees regardless of participation, maximum inducement is 30% of the Self-Only option of the lowest cost plan
- Smoking inducement is limited to 30% of Self-Only unless the plan doesn't require nicotine test or other medical test. Then reverts to HIPAA/ACA limit of 50%

EEOC ADA Final Rule: Effective Date

All plans must come into compliance as of the first day of the first plan year on or after January 1, 2017



EEOC GINA Final Rule

- GINA has a general prohibition against acquiring genetic information from applicants or employees
- EEOC wanted to clarify that it is acceptable under GINA to offer an inducement for a spouse to voluntarily answer questions about past or current health status as part of a wellness plan
- The final rule makes clear that a wellness plan is permitted to offer inducement to spouses to provide information but not for children

EEOC GINA Final Rule

General Requirements

- The plan must be reasonably designed (same as ADA rule)
- The rule applies to only those plans, participatory or contingent, in which the inducement is to answer questions about current or past health status
- Inducements cannot exceed 30% of Self-Only
 - 30% can apply separately to spouse and employee

As a Reminder...

IRS Reporting Requirements

There are IRS reporting requirements for gifts and incentives paid through a Wellness Program –

- If an employee earns a cash reward under a wellness program, the amount of the cash reward is included in the employee's gross income and is subject to employment taxes
- If an employee earns a reward of a benefit under a wellness program that is not otherwise excludable from the employee's income (such as the payment of gym membership fees), the fair market value of the reward is included in the employee's gross income and is subject to employment taxes

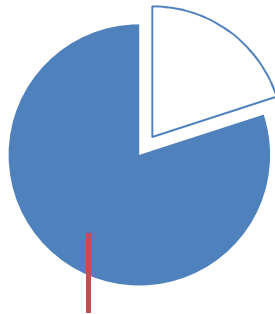
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IRS Reporting Requirements

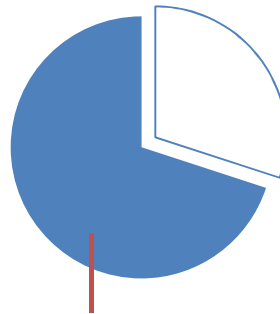
- The De Minimis Fringe exception
- Cash or cash equivalent items provided by the employer are never excludable from income
 - Gift certificates that are redeemable for general merchandise or have a cash equivalent value are not de minimis benefits and are taxable

Wellness Today

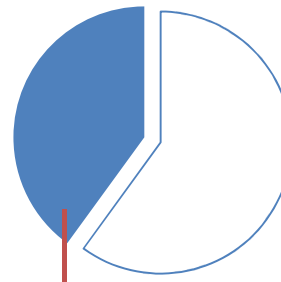
FAST FACTS: SHRM 2015 Employee Benefits Report



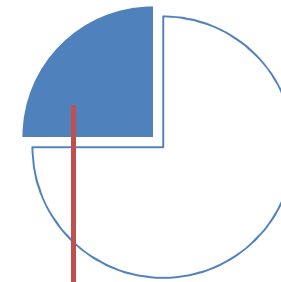
80% of employers provide wellness resources and information



70% of organizations offer wellness programs



40% of programs offer rewards or bonuses



25% of programs offer health care premium discounts

Today's workplace wellness programs reflect a holistic approach, caring for employees' physical, mental and social well-being

Wellness Today

Mental Wellness

- Mindfulness and resiliency programs to reduce stress, improve employee engagement and avoid workplace conflict
 - Break areas, relaxation techniques, office environment & culture

Financial Wellness

- Growing area of focus as finances can play a large role in stress
- Goal is to go beyond providing basic financial education and to focus on the achievement of optimal financial wellness through behavioral change
 - Minimize financial stress, establish a strong financial foundation, and create an ongoing plan to help reach future financial goals
- In targeting programs, recognize employee demographics and different needs; student loan debt, retirement savings, etc.

Wellness Today

A four-year study of employer group wellness programs found that health care costs **rose at a 15 percent slower rate** among wellness program participants when employers consistently offered a wellness program to their employees. *American Journal of Health Promotion, April 2014*

- Successful efforts don't always require large financial commitment. Utilize existing partnerships to help expand your wellness initiatives
 - RK Healthy Workforce
 - Insurance Carrier
 - Retirement Plan Providers
 - Employee Assistance Program (EAP)



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