

Employment Checklists
Federal Compliance Checklists
Health and Welfare Benefits

Checklist: Wellness Programs

Purpose: In May 2016, the Equal Employment Opportunity Commission (EEOC) issued two sets of wellness program final regulations, one concerning wellness program interaction with the dictates of the Americans with Disabilities Act (ADA) and the other regarding interaction with the Genetic Information Nondiscrimination Act (GINA). These new rules added another level of complexity for employers already coping with wellness program requirements relating to the Affordable Care Act (ACA) as well as the Health Insurance Portability and Accountability Act (HIPAA). The ADA and GINA regulations were, generally, effective as of the first plan year beginning on or after Jan. 1, 2017. These new rules are focused on whether employers can offer incentives for employee participation in health-contingent wellness programs, a practice that typically requires employees to provide personal health information or undergo certain procedures such as a health risk assessment (HRA), medical examination, disability-related inquiry, or biometric screening in order to satisfy the terms and conditions necessary to receive the incentive reward (usually in the form of a health insurance premium discount) without violating the ADA or GINA.

The American Association for Retired Persons (AARP) sued the EEOC on the basis that the new rules, in effect, coerced the sharing of personal health information in violation of the ADA and GINA. In September 2017, the U.S. District Court for the District of Columbia ruled for AARP and found that with respect to defining the meaning of “voluntary,” neither the ADA nor GINA supported the EEOC’s construction that such term permits a 30% of the premium cost incentive reward and also found that a 30% of premium cost discount incentive or 30% of premium cost penalty was not nominal, therefore making an employee’s decision to participate not voluntary. Accordingly, the court ordered the EEOC to revisit its rules relating to incentive rewards. On Dec. 20, 2017, the same court ordered the rules vacated, but in order to avoid disruption, stayed the mandate until Jan. 1, 2019, so that the current regulations remain in effect today.

In its December 2017 order, the court had told the EEOC that it must inform the public whether it intended to amend the wellness rules by Aug. 31, 2018; on Jan. 18, 2018, the court issued an order eliminating that requirement on the basis that the EEOC’s decision on amending regulations is within its decision-making authority. However, the court’s mandate to revoke the ADA and GINA provisions of the regulations by Jan. 1, 2019 remains in effect as do other reporting obligations the court has placed upon the EEOC regarding the status of changes to the regulations.

Recent judicial developments and the fact that the EEOC is reworking its regulations makes preparing a wellness program compliance checklist for 2018 difficult. However, the checklist below represents a reasonable effort at doing so, in light of the impending law changes. It should be noted that this checklist is by no means intended to be exhaustive and is only meant to highlight possible key areas of noncompliance with the various laws applicable to wellness programs (e.g., EEOC regulations, HIPAA, ACA, ADA and GINA). In many instances, employers may need to consult with legal counsel to verify compliance of their wellness programs on account of the very detailed wellness program rules.

Matthew I. Whitehorn and Stephanie Searles Vogel of Dilworth Paxson LLP prepared this checklist.

Matthew I. Whitehorn is a Partner in the Firm's Tax Group, Chair of the Employee Benefits Group, and Chair of the Pro Bono Committee, and was the 2016-2017 Chair of the IRS Advisory Committee on Tax Exempt and Government Entities (ACT). Matt works with clients on a broad range of benefits matters and has spent over 25 years focusing his practice on ERISA issues. In addition to ERISA and retirement plan fiduciary requirements, Matt regularly addresses benefits issues such as: Affordable Care Act compliance; governmental and tax-exempt employer pension and 457(b) plans; employee benefits in bankruptcy; compliance reviews of qualified retirement plans; and non-qualified deferred compensation plans and compliance with Code Section 409A and Code Section 457(f) requirements.

Stephanie Searles Vogel is an Associate in the Tax, Employee Benefits, and Trusts & Estates Departments. She represents individuals, small and large businesses, and tax-exempt entities in a broad range of tax areas, including tax planning, charitable planning, trusts and estates, and employee benefits issues. Stephanie previously served as a Senior Associate at PricewaterhouseCoopers in Philadelphia, where she worked in the Mergers and Acquisitions tax group with large, multinational, corporate clients.



I. Threshold Issues

a) Does the employer have a wellness program?

- Essentially, this is an arrangement that promotes health and disease prevention.

Y [] N []

b) Is the wellness program part of a group health plan?

- If so, the wellness program may be/can be subject to Part 7 of Title I of ERISA (e.g., HIPAA requirements)

Y [] N []

c) Is the wellness program part of a participatory arrangement?

- A wellness program is “participatory” if it does not require satisfaction of a standard relating to health. For example, providing nutrition counseling with no requirement to change the employee's diet, reimbursement of a gym membership without a weight loss goal, reimbursement of a smoking cessation program with no requirement to stop smoking, etc.

Y N

If the answer to any of the above questions is “no,” then the arrangement is likely not subject to the wellness program rules as a health-contingent arrangement and there are no incentive reward limitations.

II. HIPAA Compliance for Health-Contingent Arrangements [including “Activity-Only” programs and “Outcome-Based” programs.]

(a) Is the program designed with the goal of promoting wellness? e.g., prevent disease or to promote good health

Y N

(b) Can eligible persons qualify for an incentive reward at least once a year?

Y N

Note: An activity-based program requires an activity related to some health factor(s), but not any specific program result. In contrast, an outcome-based program requires a specific result, for example, lowering of blood pressure or BMI.

(c) Is the incentive reward limited to 30% of employee-only coverage cost (50% if tobacco cessation is involved) if only employees participate or 30% (50% if tobacco cessation is involved) of the total cost of coverage where the employees and dependents participate? [Cost includes both the employee and employer share of premiums.]

Y N

(d) Does the program offer reasonable alternatives to meeting a health factor standard in order for an employee to still obtain an incentive reward or receive a waiver of the health factor standard with a full incentive reward being uniformly available with identical benefits to the original non-alternative incentive reward?

Y N

(e) Does the employer provide a notice of the existence of the program, its reasonable alternative standards and a list of program benefits in the program materials?

Y N

If the answer is “yes” to all of the questions (a) - (e) above, then it is likely there are no violations of the HIPAA wellness program compliance rules. If the answer is “no” to any of the questions (a) – (e) above, that is indicative that the wellness program may have a compliance issue.

III. Multiple Wellness Arrangements

(a) Does the arrangement consist of more than one wellness program?

Y N

(b) If so, does the 30% limit apply to all options that require an individual to meet a health factor standard, including both activity-only and outcome-based arrangements?

Y N

(c) If yes, and tobacco cessation is included in the arrangement, does the incentive reward percentage increase to no more than 50% where the 30% threshold is exceeded due to meeting tobacco reduction or cessation standards?

Y N

If the answer is “yes” to all of the questions in (a) – (c) above, then the wellness program should not run afoul of the HIPAA wellness program rules. If the answer is “no” to any of questions (a) – (e) above, that is indicative that the wellness program may have a compliance issue.

IV. ADA Compliance

[The ADA rules apply only to wellness programs that feature disability-related inquiries or medical examinations.]

(a) If nicotine testing is used, does the incentive reward not exceed 30% of the cost of self-only coverage?

Y[]N[]

(b) Does the program provide a notice of what information any medical exam or similar inquiry will provide and what it will be used for?

Y[]N[]

(c) Does medical information provided through a third party provider to the employer only come in de-identified format containing only that information necessary to administer the wellness program, e.g., the information necessary to process an incentive reward and must such information be kept in a separate medical file?

Y[]N[]

(d) If the employer offers multiple options and non-health plan enrollees can participate in the wellness program, is the 30% of total cost employee-only coverage limit based on the least expensive option and if only health plan enrollees can participate, is the 30% of employee-only coverage cost limit based on the health plan coverage option in which the employee has enrolled?

Y[]N[]

(e) If an incentive reward is in a form other than cash or a premium adjustment, has the employer assigned a reasonable value to such reward?

Y[]N[]

If the answer is “yes” to all of the questions (a) – (e) above, then the program is likely ACA-compliant. If the answer is “no” to any of questions (a) – (e) above, that is indicative that the wellness program may have a compliance issue.

V. ACA Compliance Issues Other Than Those Otherwise Addressed in Section II of this Checklist

(a) Does the wellness program prohibit an incentive reward for a non-tobacco user from exceeding 50% of the total cost of self-only insurance?

Y[]N[]

(b) Is the employer's health plan ACA affordability limit determined by reference to the cost for an employee as if he or she were not enrolled in a wellness program, except for non-smoking incentive rewards, which may be taken into account in the calculation?

Y N

If the answer is "yes" to questions (a) and (b) above and the answers to all of the questions set forth in Section II of this Checklist are also "yes," then the wellness program is likely ACA-compliant. If the answer is "no" to either question (a) or (b), that is indicative that the wellness program may have a compliance issue.

VI. GINA Compliance – Family Medical History Issues

(a) Does the program prohibit requiring a spouse's participation in an HRA or deny coverage to the spouse or dependent for refusal to participate?

Y N

(b) Does the program prohibit an incentive reward for disclosure of a spouse's own genetic information?

Y N

(c) Is an incentive reward for a spouse to take an HRA subject to the same reward cap, e.g., 30% of the total cost of employee-only coverage?

Y N

(d) Does the program require the employee, and, if applicable, his/her spouse, to provide prior written or electronic authorization for an HRA and biometric screening or other collection of health information?

Y N

(e) Does the program prohibit reward participation by dependent children in HRAs and biometric or similar screenings?

Y N

(f) Is third-party provider HRA testing data supplied to the employer in de-identified aggregate form?

Y[]N[]

If the above answer is “yes” to all of the questions (a) – (f) above, then the program is likely GINA-compliant. If the above answer is “no” to any of questions (a) – (f), that is indicative that the wellness program may have a compliance issue.

VII. Permitted Discrimination

(a) Does the arrangement allow for discrimination in favor of an individual with an already existing adverse health factor? e.g., diabetes or some other chronic condition.

Y[]N[]

(b) If “yes,” is the waiver of a health plan's deductible or some other requirement limited solely to those who participate in disease management education and follow a doctor's orders?

Y[]N[]

If the answer is “yes” to questions (a) and (b) above, then the wellness program should not run afoul of the EEOC wellness program discrimination rules. If the answer is “no” to either of questions (a) and (b) above, that is indicative that the wellness program may have a compliance issue.
