



Wellness Compliance Checklist – As of August 2, 2011

Wellness Programs¹

The Fair Labor Standards Act (FLSA) which governs wage and hour employment practices does not require that employers provide wellness benefits.

Employers generally understand that a healthier work force makes for a more productive work force with lower incidents of injury and time off from work. Accordingly, employee wellness programs² have grown tremendously in the last decade. According to a survey conducted by Fidelity Investment Group and the National Business Group on Health incentives averaged \$430/per employee which is an increase of 65% from 2009. <http://hr.blr.com/HR-news/Benefits-Leave/Employee-Wellness/Wellness-Program-Survey-Shows-Importance-of-Incent/> Employee wellness programs vary a great deal and should ideally be tailored to the particular needs of the employees. Additionally, there are laws that impact the design and implementation of employee wellness programs that employers need to be aware of.

Health Insurance Portability and Accountability Act of 1996 (HIPAA)

The HIPAA nondiscrimination provisions generally prohibit group health plans from charging similarly situated individuals different premiums or contributions or imposing different deductible, copayment or other cost sharing requirements based on a health factor. Health factors include: health status; medical condition, including both physical and mental illnesses; claims experience; receipt of health care; medical history; genetic information; evidence of insurability; and disability. However, there is an exception that allows plans to offer wellness programs.

If none of the conditions for obtaining a reward under a wellness program are based on an individual satisfying a standard related to a health factor, or if no reward is offered, the program complies with the nondiscrimination requirements (assuming participation in the program is made available to all similarly situated individuals). For example:

- A program that reimburses all or part of the cost for membership in a fitness center.

¹ Employee assistance programs on the other hand, provide employees referral services or counseling concerning the following: Alcoholism, Drug abuse, Marital difficulties, Financial problems, Emotional problems, and Legal problems.

² The Department of Labor National Compensation Survey explains that nationally wellness programs offer employees two or more of the following benefits: Smoking cessation clinics, Smoking cessation clinics, Exercise/physical fitness programs, Weight control programs, Nutrition education, Hypertension tests, Periodic physical examinations, Stress management courses, and Back care courses.

- A diagnostic testing program that provides a reward for participation rather than outcomes.
- A program that encourages preventive care by waiving the copayment or deductible requirement for the costs of, for example, prenatal care or well-baby visits.
- A program that reimburses employees for the costs of smoking cessation programs without regard to whether the employee quits smoking.
- A program that provides a reward to employees for attending a monthly health education seminar.

Wellness programs that condition a reward on an individual satisfying a standard related to a health factor must meet five requirements described in the final rules in order to comply with the nondiscrimination rules. Dep't of Labor FAQs about the HIPAA Nondiscrimination Requirements; http://www.dol.gov/ebsa/faqs/faq_hipaa_ND.html

These standards include:

1. The total reward for such wellness programs offered by a plan sponsor is limited to 20 percent of the total cost of employee-only coverage under the plan. (However, if any class of dependents can participate in the program, the limit on the reward is modified so that the 20 percent is calculated with respect to the total cost of coverage in which the employee and any dependents are enrolled.)
2. The program must be reasonably designed to promote health or prevent disease. For this purpose, it must: have a reasonable chance of improving health or preventing disease, not be overly burdensome, not be a subterfuge for discriminating based on a health factor, and not be highly suspect in method.
3. The program must give eligible individuals an opportunity to qualify for the reward at least once per year.
4. The reward must be available to all similarly situated individuals. For this purpose, a reasonable alternative standard (or waiver of the original standard) must be made available to individuals for whom it is unreasonably difficult due to a medical condition to satisfy the original standard during that period (or for whom a health factor makes it unreasonably difficult or medically inadvisable to try to satisfy the original standard.)
5. In all plan materials describing the terms of the program, the availability of a reasonable alternative standard (or waiver of the original standard) is disclosed.

A wellness program³ is subject to the HIPAA nondiscrimination rules only if it is, or is part of, a group health plan.

³ Permitted Wellness Programs according to EEOC Informal Discussion Letters (1) a group health plan that provides a premium discount of 50% dependent on attending a monthly health seminar does not violate the HIPAA nondiscrimination regulations; (2) a group health plan that gives an annual premium discount of 20% to participants who adhere to a wellness program consisting of an annual cholesterol exam to participants; participants who achieve a cholesterol count of 200 or lower receive the annual premium discount. The plan also provides that if it is unreasonably difficult or medically inadvisable to achieve the targeted cholesterol count

If an employer operates a health program as an employment policy separate from its group health plans(s), the program may be covered by federal or state nondiscrimination laws.

Genetic Information Nondiscrimination Act (GINA) (effective November 21, 2009)

This law was enacted to protect individuals who may be at risk of losing health insurance coverage or employment if insurers or employers based their coverage and employment decisions on genetic information.

There are two parts to GINA:

- Title I prohibits group health plans or health insurers from requesting, requiring disclosure of or purchasing genetic information for underwriting purposes to deny coverage.
- Title II of GINA prohibits employers from using genetic information to discriminate in employment. This includes the use of health risk questionnaires which seek genetic information, including family medical history.

Genetic information includes:

- Information about an individual's genetic tests;
- Information about the genetic tests of a family member;
- Family medical history;
- Requests for, and receipt of, genetic services by an individual or a family member; and
- Genetic information about a fetus carried by an individual or family member, or about an embryo legally held by the individual or family member using assisted reproductive technology.

GINA applies to private and state and local government employers with 15 or more employees, employment agencies, labor unions, and joint labor-management training programs as well as Congress and federal executive branch agencies.

GINA permits an employer to acquire genetic information about an employee or his or her family members when it offers health or genetic services, including wellness programs, on a voluntary basis. The individual receiving the services must give prior, voluntary, knowing, and written authorization. Nevertheless, because Hawaii's employment discrimination laws are stringent it is advisable that an employer contact their employment attorney prior to requesting any genetic information. In Hawaii, an

within a 60-day period, the plan will make available reasonable alternative standards that take the relevant medical condition into account.

employer may not discriminate against an employee based on a disability which includes an employer's consideration of an individual's genetic information, including genetic information of any family member of an individual. Hawaii Revised Statutes (HRS) 378-1 & -2. Even if the employer does not receive the genetic information, rather the data is given to the insurance company, Hawaii law prohibits any insurer or mutual benefit society from using an individual's or a family member's genetic information, or request for genetic services to deny or limit any coverage or establish eligibility, continuation, enrollment or premium payments. HRS 431:10A-404.5, 431:10A-118 & 432:1-607.

While individualized genetic information may be provided to the individual receiving the services and to his or her health or genetic service providers, genetic information may only be provided to the employer in aggregate form. However, if information provided in the aggregate makes identification of specific individuals' genetic information possible because of the small number of participants in a wellness program, the employer **will not** violate GINA.

Although employers may offer certain kinds of financial inducements to encourage participation in health or genetic services under certain circumstances, they may not offer an inducement for individuals to provide genetic information. Thus, it would not violate GINA for an employer to offer individuals an inducement for completing a health risk questionnaire that includes some questions about family medical history or other genetic information, as long as the employer specifically identifies those questions and makes clear, in language reasonably likely to be understood by those completing the health risk assessment, that the individual need not answer the questions that request genetic information to receive the inducement. Still, because of Hawaii's stringent employment laws, it is advisable that an employer consult with their employment attorney prior to collecting any genetic information.

GINA allows employers to offer financial inducements for participation in disease management programs or other programs that encourage healthy lifestyles, such as programs that provide coaching to employees attempting to meet particular health goals (e.g., achieving a certain weight, cholesterol level, or blood pressure). To avoid a violation of GINA, however, employers who offer such programs and inducements to individuals based on their voluntarily provided genetic information must also offer the programs and inducements to individuals with current health conditions, and/or to individuals whose lifestyle choices put them at risk of acquiring a condition.

Americans with Disabilities Act (ADA)

Historically, many employers asked employees to provide information concerning their physical and/or mental condition. This information often was used to exclude and otherwise discriminate against individuals with disabilities - particularly, non-visible disabilities such as diabetes, epilepsy, heart disease, cancer and mental illness – despite

their ability to perform the job. Under Title I of the ADA, employers generally may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity or when following up on a request for reasonable accommodation or where examination or monitoring is required of the employee because of specific circumstances (e.g., their position affects public safety).

Under the ADA, the employer is permitted to conduct “*voluntary*” medical examinations as part of an employee health program, including obtaining “voluntary” medical histories. **In order to be considered voluntary, a wellness program neither requires an employee to participate nor penalizes the employee for non-participation.** Still, neither the ADA nor the Equal Employment Opportunities Council (EEOC) which interprets and enforces the ADA, has provided a comprehensive analysis on how to determine whether medical examinations or inquiries are voluntary. It appears from informal discussion letters from the EEOC that any requirement to complete a health risk assessment in order to receive medical benefits or medical expense reimbursements is considered involuntary and therefore such action would violate the ADA. In informal discussion letters the EEOC has stated that the ADA is violated when:

- An employer requires its employees to take health risk assessments in order to be eligible for coverage under an employer’s group health plan (March 6, 2009); and
- An employer requires that employees complete a health risk assessment in order to receive medical expense reimbursement from the employer’s health reimbursement arrangement (August 10, 2009).

Whether rewards for completing health risk assessments affects the voluntariness of answers to medical inquiries is not clear. The EEOC has indicated that the agency does not have any specific policy position on the level of reward that would be appropriate and in compliance with the ADA. Additionally, the EEOC rescinded an informal discussion letter to the extent that it seemed to suggest that a wellness reward of 20% or less of the cost of the applicable health plan coverage would be permissible (as permitted under the HIPAA requirements) under the ADA. Therefore, whether providing a reward and the amount and type of the reward that would be in compliance with the ADA remains undetermined.

It is also important to note that information gathered in relation to a wellness program must be done in compliance with ADA confidentiality provisions and cannot be used in any discriminatory manner.

To the extent that the medical inquiries are unrelated to a permissible request for medical information, questions that appear to be otherwise permissible according to the EEOC are questions regarding:

- Self Care (e.g., whether an employee sees a personal doctor for routine care or has a health care directive).

- Health Choices (e.g., how many servings of vegetables or fruit an employee eats, whether an employee takes vitamin supplements or eats breakfast, or exercises).

If you have additional questions about wellness compliance, contact Bonnie Pang at Atlas Insurance Agency, Employee Benefits Department at:

E: bpang@atlasinsurance.com

P: 808-533-8651