



# New EEOC And ACA Guidance For Wellness Programs: The Good, The Bad, and The Outright Ugly

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# John Hickman



John Hickman is head of the Alston & Bird, LLP Health Benefits Practice where he leads an experienced team of attorneys devoted exclusively to health care reform issues under the ACA, HIPAA privacy, flexible benefits, and other health & welfare benefit issues. Mr. Hickman has been a pioneer in the consumer directed health care arena and has worked closely with health plans, financial institutions, and employers as well as the IRS, Treasury, and DOL in developing guidance for tax-favored health reimbursement arrangements (HRAs) and health savings accounts (HSAs).

Mr. Hickman is a fellow of the American College of Employee Benefits Counsel, and has been listed in *The Best Lawyers in America (Woodward/White)* and *Who's Who Legal in the employee benefits area*. Mr. Hickman has lectured widely and published articles on HSAs, HIPAA, ERISA litigation, cafeteria and health plan issues. He is co-author of the *Cafeteria Plans Manual, Health Care Reform, HIPAA Portability and Privacy, and Consumer-Driven Health Care* (published by the Employee Benefits Institute of America). Mr. Hickman is head of the Technical Advisory Committee and is on the board of the Employers Council on Flexible Compensation (ECFC). Mr. Hickman is also an adjunct professor of law at Emory University School of Law.

# Disease Management vs. Employee Wellness Programs

- Wellness Programs: Designed to improve general health of overall employee population before employees get sick.
  - Example: Weight Watchers
- Disease Management Programs: Designed to improve health of particular employees after they have developed chronic health conditions (e.g., asthma, diabetes, heart condition, hypertension, renal disease).
  - Example: Health coach to advise about options

# Health Risk Assessments

- Health Risk Assessment: Series of medical and health-related questions aimed at obtaining "baseline" information about employees' overall health to identify persons with chronic conditions or who are at risk for developing a condition.
- Additional terms
  - Disability based inquiry
  - Participation based program
  - Health contingent based program
    - Activity based program
    - Outcome based program

# Compliance Issues

- Practical and legal compliance issues may arise with Disease Management and Wellness Programs under . . .
  - HIPAA And ACA Nondiscrimination Requirements
  - Americans With Disabilities Act (ADA)
  - Genetic Information Nondiscrimination Act (GINA)
  - Age Discrimination in Employment Act (ADEA)
  - HIPAA Administrative Simplification (Privacy and Security)
  - COBRA
  - ERISA
  - Income Tax
  - Plan Design/Integration Issues (e.g., HRAs and HSAs)
  - State law

# Carrots and Sticks

- Two Competing Approaches:
  - Carrot:
    - Health club memberships
    - Reduced health care premiums
    - Smoking cessation programs
    - Weight loss programs
    - Free health examinations
    - Healthy eating programs
    - Stress reduction programs
  - Stick:
    - Refusal to hire
    - Disqualification from health care plan
    - Termination



# HIPAA/ACA Implications for Wellness Programs

- Generally cannot vary benefit based on health status . . . but variation allowed for
  - Discrimination in favor of those with health conditions
  - Certain "bona fide" wellness programs
- Non-discrimination Rule does not apply to programs Participation Based Programs:
- Health Standard based programs can survive if they comply with special rules



# HIPAA/ACA Implications for Wellness Programs

- *Participation based*—(i) none of the conditions for obtaining a reward is based on satisfying a standard related to a health factor or (ii) there is no reward associated with the program
  - Incentives to participate in testing (regardless of outcome)
  - Waiver of co-payment/deductible if participate in pre-natal program
  - Reimbursement of health club membership
  - Compensation to fill out health risk assessment

# HIPAA/ACA Implications for Wellness Programs

- Health Standard: Any program that provides a "reward" based on the ability to meet a health standard must satisfy these rules:
  - Limit reward to specified percentage
    - 30 % of *total cost* of employee only coverage
    - 30% of *total cost* of family coverage if family allowed/required to participate
  - Be reasonably designed to promote health or prevent disease
    - Significant employer flexibility
  - Annual qualification requirement/reward must be available for entire year
  - Must be available to all similarly situated participants
    - Alternatives must be made available in certain situations, depending on the type of program
  - Notice of individual accommodations must be provided

# HIPAA/ACA Implications for Wellness Programs

- Key Rules/Principles
  - *Health Standard based*-a program that conditions reward on achieving health standard
  - 2 types of health standard based programs:
    - Activity Based
      - » E.g., those identified with risk factors must walk, exercise, diet, etc
      - » Must provide alternative to those who have medical condition that makes it unreasonable to accomplish
    - Health Outcome Based— reward conditioned on achieving certain health related goals or you must jump through additional hoops to get reward if you don't satisfy certain goals
      - » E.g., can you achieve BMI or cholesterol goal
      - » EVERYONE is entitled to an alternative
      - » Must accommodate physician's recommendations with respect to alternative provided

# Age Discrimination in Employment Act (ADEA)

- ADEA prohibits employers from discriminating against individuals on the basis of age with regard to employment and the privileges of employment (e.g., benefits)
  - Generally can't reduce or terminate benefits due to age
    - May reduce benefits based on equal cost/equal benefit rule
  - ADEA impacts both
    - The ability to stop DM/Wellness program incentives /surcharges upon reaching a particular age and
    - Varying incentives/surcharge due to age
    - Imposing additional requirements for incentive based on age

# HIPAA Administrative Simplification

- Are disease management, wellness programs subject to HIPAA Privacy/Security?
  - Only if
    - The DM/Wellness is part of a "Health Plan" or
    - The DM/Wellness vendor is a "Health Care Provider"
  - Most argue that DM/Wellness is part of a "health plan"
    - Facilitates information sharing with health care providers without authorization and marketing concerns
    - Enables VEBA/Trust funding

# COBRA

- Most "group health plans" are required to provide COBRA continuation coverage to qualified beneficiaries if coverage is lost as a result of certain qualifying events
  - "Group health plan" means a plan that provides "medical care" and is maintained by the employer
  - Will DM/Wellness programs provided by the employer be subject to COBRA?
    - If they provide "medical care"
    - General health not medical care

# COBRA

- COBRA considerations:
  - Is Medical care offered?
  - What type of incentive is offered?
    - Impact of cash incentives/premium reductions?
    - Impact of HRA/HSA incentives?
  - Part of overall health program or stand alone arrangement?
    - Participation limited to plan participants or all employees?
  - What benefit must be provided?
  - What is cost of program?



# Tax Issues

- Tax issues arise when
  - Employer pays for coverage that does not constitute "medical care"
    - General health and wellness programs
      - Weight reduction programs not limited to obesity
      - Membership in a gym
    - If not for medical care, the value of such programs must generally be included in gross income and subject to withholding?

# Tax Issues

- Non-health incentives raise tax issues
  - Cash payments
    - Taxable and subject to withholding
  - Gift certificates
    - Likely taxable and subject to withholding
  - If paid through VEBA, could be a disqualified benefit
    - De minimis exception

# Tax Issues

- Health related incentives
  - E.g., contribution to HRA or HSA or Health FSA
  - Generally non-taxable if health plan related
    - No tax exclusion for self-employed individuals
    - Health FSA
    - Possible change of election issues
  - Potentials for health benefit restricted debit card
  - HSA
    - Must be structured to be made "through the cafeteria plan"

# ACA Tax Issues

- Wellness programs and 4980H
  - Treat tobacco use incentives as if complied with for MV and affordability
    - EEO is considering whether unaffordable = involuntary
  - Ignore non-tobacco incentives
- Cadillac tax Implications
  - Impact of Cadillac tax is to “squeeze” out anything other than base “metal” coverage (and maybe even that)
    - Where does that leave Account based plan incentives
    - Should incentives really be treated as “benefit” or cost of coverage ?

# State Law

- Statutory Restrictions:

Smokers' Rights: 20 states, including Arizona, Connecticut, District of Columbia, Indiana, Kentucky, Louisiana, Maine, Missouri, Mississippi, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Virginia, West Virginia, Wyoming



Example: "An employer may not ... require as a condition of employment, an employee or prospective employee to refrain from using; or ... discriminate against an employee with respect to the employee's compensation and benefits or terms and conditions of employment based on the employee's use of tobacco products outside the course of the employee's or prospective employee's employment."

Ind. Stat. 22-5-4-1



# State Law

## Statutory Restrictions:

Lawful Conduct / Lawful Products: 11 states, including California, Colorado, Illinois, Minnesota, Montana, Nevada, New York, North Carolina, North Dakota, Tennessee, and Wisconsin.

NY Example: "It shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of: ... an individual's legal use of consumable products prior to the beginning or after the conclusion of the employee's work hours, and off the employer's premises and without the use of the employer's equipment or other property.



# Americans With Disabilities Act (ADA)

- Americans With Disabilities Act

- Coverage: 15 or more employees
- Substantive Provisions:
  - Non-discrimination / Accommodation
  - Restrictions on Medical Examinations
  - Confidentiality of Medical Information





# Americans With Disabilities Act

- Non-Discrimination/Accommodation
  - Provisions only apply to "disabled" individuals
    - Definition: Physical or mental impairment that substantially limits one or more major life activities.
  - Most behaviors targeted by wellness programs do not rise to the level of a "disability" under the ADA
    - Smoking – No
    - Weight – Maybe
    - Alcohol Consumption – Yes
  - Beware: "Regarded As" Disabled Claims

# Americans With Disabilities Act

- Rules for Medical Examinations and Inquiries:
  - Applicants:
    - Pre-Offer: No examinations or inquiries allowed
    - Post-Offer: Examinations permitted, but must apply to all employees
  - Employees: Must be "job-related and consistent with business necessity"
    - Applies to all employees (whether disabled or not).
    - "Job-related" = Ability to perform essential job functions

# Americans With Disabilities Act

## • Voluntary Wellness Program Exception:

- Statute: "A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site."
- Regulation: **Prior to this spring**, EEOC had not promulgated any regulation about meaning of "voluntary"— **or how incentives fit in**
- Prior Enforcement Guidance: "Voluntary" means no penalty can be imposed for not participating; anything other than "de minimis" incentive is prohibited.

# Case Law Prior to New Regulations

- *EEOC v. Honeywell*: EEOC contends the financial "penalties" for those who do not complete biometric tests include: (1) a \$500 surcharge for the employee; (2) a \$1,000 tobacco surcharge for the employee; (3) a \$1,000 tobacco surcharge if the employee's spouse refused to complete the tests; and (4) non-receipt of a Health Savings Account (HSA) contribution up to \$1,500
- *EEOC v. Orion Energy Systems, Inc.*, (E.D. Wis., 8/20/14) – loss of employer subsidy plus \$50 "surcharge" if no biometrics (incl blood work)
- *EEOC v. Flambeau, Inc.*, (W.D. Wis., 9/30/14) – loss of coverage if no biometrics (incl blood work)
- *Seff v. Broward County*, 691 F. 3d 1221 (11th Cir. 2012)
  - ADA's bona-fide group health plan safe harbor provision allowed wellness incentives (no review of "voluntariness" issue).

# Proposed EEO Regulations

- Programs **with disability-related inquiries/ medical exams** must be “**voluntary:**”
  - No exclusion from health plan (or ANY plan options) or limiting coverage based on refusal to answer disability based inquiry
  - No requiring participation
  - No retaliation for not participating

# Proposed EEO Regulations

- If wellness program makes disability related inquiries/requires medical exam and is part of group health plan, then “voluntary” element also includes:
  - 30% Limit on all incentive based wellness programs that are part of group health plan and make disability related inquiries/require medical exam
    - Based on total cost of self only (no rule for family members)
    - Applies to HIPAA’s participation based program
    - Does not apply to tobacco cessation if tobacco use determined through certification
  - If part of a group health plan, must provide specific notice of programs terms

# Proposed EEO Regulations

- Other rules applicable to all wellness programs:
  - Accommodation applies to ALL wellness programs (absent undue hardship)
    - Regs contemplate waivers if under treatment plan
  - Heightened confidentiality requirements
    - Can only receive aggregate, unidentified info unless identifiable info is necessary for plan administrative purposes
    - Basically the same as HIPAA requirements (if part of group health plan)
  - Must be “reasonably designed to promote health and prevent disease”
    - Can’t be overly burdensome, a subterfuge for violating the ADA or highly suspect in method chosen



# Question & Answer



## Thank You for Attending

### **Frequently Asked Questions**

Have a question on the employer responsibility requirements? Perhaps your burning question is about PPACA's subsidies. Now you can get answers 24 hours a day, seven days a week with NAHU's newest Compliance Corner benefit: Frequently Asked Questions. We've posted dozens of the questions that you've been asking along with the answers [legislative@nahu.org](mailto:legislative@nahu.org)

