



Digesting the Final Wellness Regulations and Making them Work for Employers

**Presented by Danielle Capilla, Chief Compliance Officer
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TODAY'S PRESENTER

Danielle Capilla, Chief Compliance Officer United Benefit Advisors



Danielle Capilla joined United Benefit Advisors in February 2015 as Chief Compliance Officer, based in the company's Chicago office.

Bringing her legal experience with a specific emphasis on health care to UBA, Danielle will oversee all compliance initiatives and address the complex issues of health care reform.

Prior to joining UBA, Danielle was an attorney and senior writer analyst for the health law division of Wolters Kluwer Law and Business. She was also the lead editor of the Wolters Kluwer health law blog and a senior writer and analyst of the Health Reform WK-EDGE, the Health Law Daily, the Food, Drug, and Cosmetic Law Reports and the Medical Devices Reports publications. Additionally, Danielle published a number of in-depth strategic perspectives focusing on the Patient Protection and Affordable Care Act's (PPACA) contraception mandate and preventive service requirements. Additional publication credits include a broad array of Medicare and Medicaid references and the CCH Law, Explanation, and Analysis of PPACA.

Danielle graduated from DePaul University College of Law with a health law certificate and she has an undergraduate degree in sociology and business from Tulane University. Danielle is an adjunct professor at DePaul University College of Law where she teaches a course on health care compliance. Furthermore, Danielle serves on DePaul University's Health Law Institute advisory board and regularly lectures at DePaul on a variety of PPACA and other health law issues.

United Benefit Advisors (UBA) is the nation's leading independent employee benefits advisory organization with more than 200 offices throughout the United States, Canada and the United Kingdom. As trusted and knowledgeable advisors, UBA Partners collaborate with more than 2,000 fellow professionals to deliver expertise, thought leadership and best-in-class solutions that positively impact employers and make a real difference in the lives of their employees and families.

AGENDA

- Alphabet Soup of Regulations
- ACA ALE Considerations
- HIPAA Considerations
- ADA & GINA Considerations
- Reasonable Alternatives
- Tobacco Cessation Concerns

WELLNESS REGULATIONS

A wellness program is any formal or informal program that educates employees about health-related issues, promotes healthy lifestyles, or encourages employees to make healthier choices.

Wellness programs can be:

part of or provided by a group health plan, or provided by a health insurance issuer (carrier) offering group health insurance in conjunction with a group health plan, or they can be offered as a benefit of employment by employers that do not sponsor a group health plan or group health insurance.

WELLNESS REGULATIONS

Employers have to determine which parts of the “regulatory alphabet soup” regulate their wellness program.... sometimes these regulations are contradictory, and they are always confusing.

Wellness Programs					
ERISA	IRC	HIPAA	ACA	ADA	GINA

WELLNESS REGULATIONS

- Employers have to determine which regulations apply to them
- Reasonable alternatives obligations must be determined
- Programs involving tobacco cessation need special scrutiny

Is the employer an Applicable Large Employer (ALE) under the ACA? If so, wellness programs can impact affordability and minimum value calculations.

WELLNESS REGULATIONS

Is the employer an Applicable Large Employer (ALE) under the ACA? If so, wellness programs can impact affordability and minimum value calculations.

- When deciding if the employee's share of the premium is affordable (less than 9.66 percent indexed of the employee's safe harbor income), the employer may not consider wellness incentives or surcharges except for a non-smoking incentive.
- Assume no one smokes & no one participates in any other wellness program

WELLNESS REGULATIONS

Is the employer an Applicable Large Employer (ALE) under the ACA? If so, wellness programs can impact affordability and minimum value calculations.

- 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. (Note: deductible and OOP are not the same as premium incentives/penalties)
- Other types of wellness incentives that affect cost-sharing may not be considered.

WELLNESS REGULATIONS

Under HIPAA, is the wellness program considered participatory?

All wellness programs will either be participatory or health contingent under HIPAA.

- A participatory program is a wellness program in which none of the conditions for obtaining the wellness reward require the individual to satisfy a condition related to a health factor.
 - reimbursement of a fitness center membership,
 - a smoking cessation program where the wellness reward is provided whether or not the person actually is a smoker or quits smoking (example: tobacco cessation video for all to watch), and
 - a wellness reward for attendance at a periodic health education seminar.

WELLNESS REGULATIONS

- As long as a participatory program is equally offered to all similarly situated employees, the HIPAA requirements will not apply to the program.
 - This means that there are no limits on the amount of incentives that can be offered, and a reasonable alternative is not required*.
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- *Other regulations may apply though!

WELLNESS REGULATIONS

Under HIPAA, is the wellness program considered health contingent?

All wellness programs will either be participatory or health contingent under HIPAA.

- A health-contingent wellness program is a program that either requires the participant to satisfy a standard related to a health factor (such as maintaining a healthy weight, blood pressure, blood sugar, or cholesterol level) or requires the individual to do more than other similarly situated individuals in order to attain the reward because of the person's health status.
- Health-contingent programs are divided into "activity-only" programs and "outcome-based" programs.

WELLNESS REGULATIONS

What is a health factor?

A “health factor” is very broad and includes anything that considers or affects a person’s physical condition.

This includes exercise programs, diet programs, programs that consider tobacco use, and programs with biometric targets.

- An activity-only program includes things like:
 - a walking program,
 - nutrition counseling, or
 - a smoking cessation program, if the program does not have a target health measure.
- An outcome-based program requires the individual to achieve or maintain a specified health outcome, such as reaching or maintaining a healthy weight or blood cholesterol level, or not using tobacco.

WELLNESS REGULATIONS

Health contingent (Activity-Only or Outcomes – Based Wellness Programs

Individual must be able to qualify for program at least once per year

Wellness Program must be designed to promote health or prevent disease

The program must offer a reasonable alternative with notice

The reward program must not exceed 30% or the total cost of employee only coverage (50% for programs designed to prevent or reduce tobacco use (** see GINA changes)

WELLNESS REGULATIONS

A program is considered reasonably designed to promote health or prevent disease if it:

- Has a reasonable chance of improving the health of, or preventing disease in, the participating individual;
- Is not overly burdensome;
- Is not a subterfuge for discriminating on the basis of a health factor; and
- Is not highly suspect in its methods.

WELLNESS REGULATIONS

HIPAA Incentive Limits

- The reward or penalty can be as much as 30 percent of the cost of coverage if the incentive is not related to tobacco usage.
- If there are multiple parts to the program (such as meeting certain BMI, blood pressure, cholesterol, and exercise targets), the maximum total reward or penalty for all parts of the program is 30 percent.
- The reward or penalty for not using tobacco can be up to 50 percent of the cost of coverage.
- If the program includes non-tobacco rewards or penalties, too, the maximum total reward or penalty is 50 percent of the cost of coverage.

WELLNESS REGULATIONS

Does the wellness program include a medical examination, a biometric screen, or a health risk assessment (HRA)?

- If the answer is yes, then the ADA and GINA now also regulate the wellness program.
- The ADA says that a current employee may not be required to answer disability-related questions or submit to medical examinations, unless the questions or examinations are job-related.
- Voluntary disclosures and examinations are allowed.

WELLNESS REGULATIONS

The EEOC defines “voluntary” as meaning that a covered entity:

- (1) does not require employees to participate;
- (2) does not deny coverage under any of its group health plans or particular benefits packages within a group health plan for non-participation; and
- (3) does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees within the meaning of Section 503 of the ADA.

You cannot (beginning Jan 1 2017)

- Require employees to complete an HRA or physical to enroll in the GHP
- Limit enrollment in richer plan to employees who complete an HRA or physical

WELLNESS REGULATIONS

If your wellness program has a medical exam, HRA, or biometric screening....

...you now have an annual notice requirement on the use of information

...and you must provide information regarding HIPAA compliance

Model EEOC Notice:

<https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm>

(Requires editing to include applicable HIPAA requirements)

WELLNESS REGULATIONS

The ADA requires wellness programs to be reasonably designed. A program is considered reasonably designed to promote health or prevent disease if it:

- Has a reasonable chance of improving the health of, or preventing disease in, the participating individual;
- Is not overly burdensome;
- Is not a subterfuge for discriminating on the basis of a health factor; and
- Is not highly suspect in its methods.

The ADA requires wellness programs to be reasonably designed.

Collecting information without meaningful follow-up and advice is not sufficient.

WELLNESS REGULATIONS

- Employers that obtain information from HRAs and biometric screenings can only access the data in aggregate form, except as needed to administer the health plan.
- This means that an employer cannot be told an individual's results (good or bad) from an HRA or screening.
- The information cannot be reasonably likely to disclose the identity of specific individuals.

(5 employee, 4 run marathons together and the 5th is in a wheelchair and has ongoing health problems)

WELLNESS REGULATIONS

Incentive Limits Under the ADA

30 percent of the total cost of self-only coverage (including both the employee's and employer's contribution) of the group health plan in which the employee is enrolled when participation in the wellness program is limited to employees enrolled in the plan;

30 percent of the total cost of self-only coverage under the covered entity's group health plan, where the covered entity offers only one group health plan and participation in a wellness program is offered to all employees regardless of whether they are enrolled in the plan;

WELLNESS REGULATIONS

Incentive Limits Under the ADA

30 percent of the total cost of the lowest cost self-only coverage under a major medical group health plan where the covered entity offers more than one group health plan but participation in the wellness program is offered to employees whether or not they are enrolled in a particular plan; and

30 percent of the cost of self-only coverage under the second lowest cost Silver Plan for a 40-year-old nonsmoker on the state or federal health care Exchange in the location that the covered entity identifies as its principal place of business if the covered entity does not offer a group health plan or group health insurance coverage

WELLNESS REGULATIONS

Title II of GINA protects job applicants, current and former employees, labor union members and apprentices, and trainees.

- It prohibits employers and other covered entities from using genetic information in making decisions about employment.
- It restricts employers from requesting, requiring, or purchasing genetic information, unless one or more of six narrow exceptions applies.
- Under GINA, questions about family history are prohibited if there is an incentive for completing those questions; this affects many health risk assessment questionnaires.
- An employer also may not require that a health risk assessment that asks about family history be completed at the time of enrollment

WELLNESS REGULATIONS

Family members include certain blood relatives (such as parents, grandparents, and children) and also spouses and adopted children.

- There is an exception to GINA's general prohibition against acquiring genetic information of applicants or employees where employers offer voluntary health or genetic services to employees or their family members (spouses).

Like the ADA, GINA requires wellness programs that collect genetic information to be reasonably designed (same rules apply- same incentive limits apply as well)

WELLNESS REGULATIONS

- The federal government considers information about the current or past health status of a spouse or child of an employee to be genetic information about the employee.
- There is a wellness program exception for spouses, but NOT for children (adopted, biological, adult, etc.)
- Spousal Signed Consent Required
- Employers are required to show that the spouse provided prior, knowing, written, and voluntary authorization for the employer to collect genetic information, just as the employee must do, and that inducements in exchange for this information are limited.

WELLNESS REGULATIONS

HIPAA, the ADA, and GINA have various requirements that employers offer certain employees reasonable alternatives. A reasonable alternative standard is an alternative means of receiving the incentive

Reasonable Alternatives

If the program is activity-only (under HIPAA) the reasonable alternative only needs to be offered to a person for whom it would be unreasonably difficult due to a medical condition or medically inadvisable to attempt to satisfy the activity-based standard.

WELLNESS REGULATIONS

Reasonable Alternatives

If the program is outcome-based, a reasonable alternative must be offered to all participants who do not meet the initial standard, regardless of their health status.

This means, for example, that a plan with a non-smoker discount must automatically provide all smokers with a reasonable alternative

WELLNESS REGULATIONS

Reasonable Alternatives

- The ADA and GINA require that employers offer a reasonable alternative to anyone who cannot undergo a medical examination, a health risk assessment, or a biometric screening.
- If a biometric screening requires a blood draw, a reasonable alternative would need to be offered for employees who have a medical condition that make a blood draw difficult or risky.
- The ADA also requires employers to provide a reasonable alternative to disabled employees for any wellness program component, including those only regulated by HIPAA.
- This means an employer might offer a sign language interpreter for an nutrition education class, if there were employees who are deaf or hard of hearing.

WELLNESS REGULATIONS

Reasonable Alternatives

- When an employee completes a reasonable alternative, the employee must receive the same reward as the employee would have received if the employee had met the original standard.
- Employers must provide notice that a reasonable alternative standard is available in all materials that describe the program. The notice does not need to include details of the alternative, but it does need to describe how to get more information about the reasonable alternative.
- A communication that discusses a premium reduction or surcharge must include the reasonable alternative notice. Also, if the plan sends any type of a notice to participants stating they have not met the standard, that notice must include the reasonable alternative disclosure.

WELLNESS REGULATIONS

Tobacco Cessation

- Employers who wish to charge employees different premiums for the GHP based on their use or abstention from tobacco can only do so with a bona fide wellness program in place, including reasonable alternatives.
- Failure to do so is a violation of HIPAA's nondiscrimination regulations.
- How big of a penalty? \$100 a day per smoker (Over 36K a year!)
- There is also no acceptable method for employers to require employees to “prove” that they have quit using tobacco, by virtue of the reasonable alternative requirements.

QUESTIONS?

You may ask your question in the questions box at any time. Any questions that we do not answer in the time permitted will be posted on the compliance corner webpage in the coming weeks.



Thank You!

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