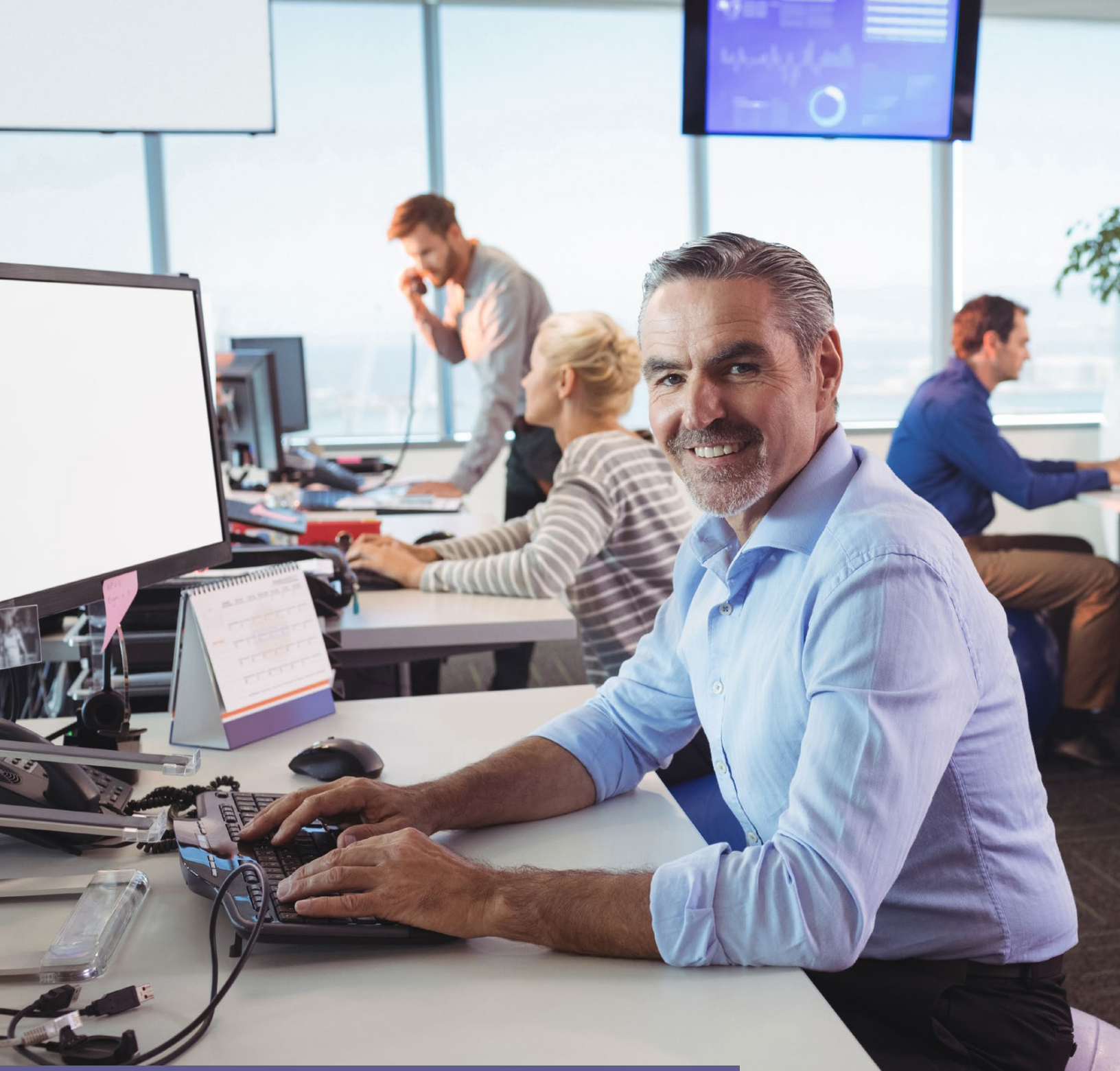

Workplace Wellness Programs – Compliance Guide

CHITTENDEN GROUP
INSURANCE

Contents

Introduction

Workplace wellness programs are initiatives to encourage employees to make voluntary behavior changes that reduce their health risks and enhance their individual productivity. Wellness programs can vary widely in design, but in general, they offer opportunities for employees to enhance their health and wellness, such as by improving fitness, losing weight, managing chronic health conditions or quitting smoking. A well-designed wellness program can help an employer by lowering health care costs, increasing productivity, decreasing absenteeism and raising employee morale. Because employees spend many of their waking hours at work, the workplace is often an effective setting to address health and wellness issues.

Often crucial elements in workplace wellness programs, incentives are rewards that can increase employee engagement and produce changes in behavior. Some commonly incentivized behaviors are the completion of health risk assessments or biometric screenings, participation in wellness program activities (e.g., classes on healthy eating) and achievement of specific lifestyle changes (e.g., quitting smoking). Popular wellness rewards include cash and gift cards, paid time off, fitness gear, nutrition classes or gym memberships, and health plan premium discounts.

There are several compliance issues that are involved with designing workplace wellness plans. For instance, wellness program incentives are subject to federal tax withholding unless a specific tax exemption applies. Wellness plans must be carefully structured to comply with both state and federal laws. The three main federal laws that impact the design of wellness plans are:

- The Health Insurance Portability and Accountability Act (HIPAA)
- The Americans with Disabilities Act (ADA)
- The Genetic Information Nondiscrimination Act (GINA)

These laws each have their own set of legal rules for acceptable wellness program design, which are not always consistent with one another.

In addition to these three main federal laws, there are other compliance considerations for workplace wellness programs. For example, wellness programs that provide medical care (e.g., biometric health screenings) are subject to federal laws for group health plans, such as the Employee Retirement Income Security Act (ERISA), the Consolidated Omnibus Budget Reconciliation Act (COBRA), the Affordable Care Act (ACA), and HIPAA's privacy and security rules.

This guide summarizes key compliance concerns for workplace wellness programs. Employers who implement wellness programs should review their compliance with these legal requirements to avoid potential penalties and lawsuits.

Overview of Legal Requirements

Many federal laws should be considered when designing a workplace wellness program. The legal requirements that apply to a specific wellness program depend on how that program is structured. Simple wellness program designs (e.g., offering nutrition education, providing standing desks or stocking snack stations with healthy food options) have minimal compliance requirements. In contrast, wellness programs that provide medical care (e.g., biometric health screenings) or incentives related to health coverage must be carefully designed to comply with numerous legal requirements.

Quick Summary

Employers should consider the following key legal requirements when implementing wellness programs:

- Wellness programs that **provide medical care or otherwise relate to health coverage** are subject to HIPAA's nondiscrimination rules.
- Wellness programs sponsored by employers with **15 or more employees** are subject to the ADA's fair employment protections. If the wellness program includes **health-related questions or medical exams**, it must satisfy additional requirements to be considered a "voluntary" program under the ADA.
- Wellness programs that ask for **genetic information** (e.g., family medical history) are subject to GINA protections.
- Wellness programs that provide medical care are also subject to employee benefits laws such as ERISA, COBRA and the ACA. To comply with these laws, employers should **incorporate wellness programs that provide medical care into their group health plans.**

What Is Medical Care?

Examples of medical care commonly provided by wellness programs include:

- **Counseling services from trained professionals**
- **Physical exams**
- **Biometric health screenings** (for example, blood pressure or cholesterol screenings)
- **Flu shots or other immunizations**

Wellness programs that only consist of educational services or merely encourage healthy living habits (for example, healthy cooking classes or exercise programs) do not provide medical care.

Additionally, the ADA requires covered employers to maintain the confidentiality of medical information obtained as part of a wellness program. Generally, employers may only receive medical information in aggregate form that does not disclose and is not reasonably likely to disclose the identity of specific employees. Wellness programs that provide medical care (or incentives related to health coverage, such as premium discounts) must also comply with **HIPAA's privacy and security requirements** for individually identifiable health information. Employers should work with their wellness vendors to ensure the privacy and confidentiality of employees' health information.

Further, if the wellness program offers incentives, employers should review the **taxability of wellness rewards**. In general, any wellness incentive that is not medical care is taxable unless it qualifies as a nontaxable fringe benefit.

Common Compliance Mistakes

Employers should consider the following common mistakes when reviewing their existing wellness programs for compliance or implementing a new wellness program:

- Failing to notify employees about the availability of a reasonable alternative standard (or waiver of the otherwise applicable standard) for health-contingent wellness programs under HIPAA.
- Not recognizing when a wellness program is providing medical care and must comply with applicable group health plan requirements like ERISA, COBRA and the ACA
- Structuring a wellness program that provides medical care as a stand-alone plan instead of integrating it with the employer's group health plan
- Failing to offer COBRA coverage with respect to a wellness program that provides medical care or is part of a group health plan
- Offering an incentive that exceeds the applicable limits under HIPAA's nondiscrimination rules
- Not having a HIPAA business associate agreement in place with the wellness vendor if the program is subject to the HIPAA rules and collects or creates individually identifiable health information
- Failing to recognize when a wellness incentive or reward is taxable compensation

Comparison Chart

The following chart provides a high-level summary of the legal requirements for workplace wellness programs under the three main federal laws impacting their design: HIPAA, the ADA and GINA. More information on these requirements is provided later in this guide.

REQUIREMENT	HIPAA	ADA	GINA
Covered employers or programs	Wellness plans that provide medical care or relate to group health plans. Wellness plans are divided into two separate categories for compliance purposes: 1. **Participatory Wellness Plans:** Do not require individuals to meet health-related standards to obtain rewards or do not offer rewards at all. Also, these programs generally do not require individuals to complete physical activities. 2. **Health-contingent Wellness Plans:** Require individuals to satisfy standards related to health factors to obtain rewards.	Wellness programs sponsored by employers with **15 or more employees.** All wellness programs sponsored by covered employers are prohibited from discriminating against individuals with disabilities. Additional compliance rules apply to wellness programs that include **questions about employees' health or medical exams**.	GINA prohibits discrimination based on genetic information in health plan coverage (Title I) and employment (Title II). • Title I applies to wellness programs offered under **group health plans**. • Title II applies to employers with **15 or more employees**. GINA's restrictions apply to **wellness programs that request genetic information**—for example, family health history.
Reasonable design	• **Participatory Wellness Plans:** No reasonable design requirement. • **Health-contingent Wellness Plans:** Must be reasonably designed to promote health or prevent disease.	Must be reasonably designed to promote health or prevent disease.	Must be reasonably designed to promote health or prevent disease.
Frequency of reward	• **Participatory Wellness Plans**: No requirement. • **Health-contingent Wellness Plans**: Must provide eligible individuals with the chance to qualify at least once per year.	No requirement.	No requirement. Cannot offer reward or incentive to provide genetic information (including family medical history) as part of a wellness program.

REQUIREMENT	HIPAA	ADA	GINA
Voluntary	No requirement. *HIPAA's rules for wellness plans are intended to ensure that every participant can receive the full amount of any reward or incentive, regardless of any health factor.	Participation in programs that include health-related inquiries or medical exams must be voluntary. Employers cannot: • Require employees to participate • Deny health insurance or reduce health benefits for not participating • Take adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten employees to get them to participate or achieve certain health outcomes.	Employees can provide family medical history voluntarily under wellness programs (that is, individuals cannot be required to provide information and cannot be penalized for not providing it). Under Title II, an employee must provide prior, knowing, voluntary and written authorization for the collection of genetic information. Cannot require employees to agree to the sale or waive the confidentiality of their genetic information as a condition for receiving incentives or participating in wellness programs.
Limit on incentives	• **Participatory Wellness Plans**: No limit on incentives. • **Health-contingent Wellness Plans**: Incentives cannot exceed **30%** of the cost of coverage (**50%** for programs designed to prevent or reduce tobacco use). The reward limit is based on the total cost of employee-only coverage. But if dependents may participate in the wellness programs, rewards can be based on the total cost of coverage in which employees and any dependents are enrolled.	To comply with the ADA's voluntary requirement for wellness programs that collect health information, the incentives cannot be so substantial as to be coercive. Currently, there is no established incentive limit for ADA compliance. Due to this legal uncertainty, employers should carefully consider the level of incentives they use with their wellness programs that include disability-related inquiries or medical exams.	Cannot offer incentives for employees to provide their genetic information (including family medical history) as part of wellness plans.

REQUIREMENT	HIPAA	ADA	GINA
Uniform availability	• **Participatory Wellness Plans:** Must be available to all similarly situated individuals. • **Health-contingent Wellness Plans:** Must make the full rewards available to all similarly situated individuals.	No requirement (but see the reasonable accommodation requirement below).	No requirement.
Reasonable accommodation	• **Participatory Wellness Plans**: No requirement. • **Health-contingent Wellness Plans**: The full reward under a health-contingent wellness program must be available to all similarly situated individuals. To meet this requirement, employers must provide a reasonable alternative standard (or waiver of the otherwise applicable standard) in certain circumstances.	Employers must provide reasonable accommodations that enable employees with disabilities to fully participate and earn any rewards or avoid any penalties offered as part of the programs.	No requirement.
Notice	• **Participatory Wellness Plans:** No requirement. • **Health-contingent Wellness Plans:** Must disclose the availability of a reasonable alternative standard to qualify for the reward (and, if applicable, the possibility of waiver of the otherwise applicable standard) in all plan materials describing the terms of a health-contingent wellness program.	For wellness programs that collect health information, employers must provide employees with a notice that describes what medical information will be collected, who will receive it, how the information will be used and how it will be kept confidential.	Must obtain employee authorization when a wellness program requests genetic information (family medical history). Authorization form must be written in an understandable way, describe the type of genetic information that will be obtained and the general purposes for which it will be used, and it describe the restrictions on disclosure of genetic information.

HIPAA Requirements

A workplace wellness program that is provided as part of an employer's group health plan must comply with HIPAA's nondiscrimination requirements. A stand-alone wellness program that provides (or pays for) medical care or is connected with a group health plan (e.g., it offers a premium reduction as an incentive) is also subject to HIPAA's nondiscrimination requirements.

HIPAA generally prohibits group health plans from using health factors to discriminate among similarly situated individuals regarding eligibility, premiums or contributions. However, HIPAA includes a special rule that allows employers to provide incentives or rewards as part of a wellness program if the program follows certain guidelines. Final rules issued by the U.S. Departments of Labor, Health and Human Services, and the Treasury (Departments) address HIPAA's requirements for nondiscriminatory wellness programs.

Workplace wellness programs are divided into two general categories for HIPAA compliance purposes—participatory wellness plans and health-contingent wellness plans. This distinction is important because participatory wellness plans are not required to meet the same nondiscrimination standards that apply to health-contingent wellness plans.

Two Categories of Workplace Wellness Programs

Participatory Wellness Plans	Health-contingent Wellness Plans

Violations of HIPAA can trigger excise taxes of $100 per individual per day, as well as civil penalties and enforcement action by the Department of Labor (DOL).

Participatory Wellness Plans

Participatory wellness plans either do not require individuals to meet health-related standards to obtain rewards or do not offer rewards at all. Also, these plans generally do not require individuals to complete physical activities. For example, a program that provides a reward for attending a free health education seminar is a participatory wellness plan.

Participatory wellness plans comply with HIPAA's nondiscrimination requirements without having to satisfy any additional standards if participation is made available to **all similarly situated individuals regardless of health status**. There is no limit on financial incentives or rewards for participatory wellness plans under HIPAA.

Health-contingent Wellness Plans

Health-contingent wellness plans require individuals to satisfy standards related to health factors to obtain rewards. There are two types of health-contingent wellness plans:

1. **Activity-only wellness programs** require individuals to perform or complete activities related to health factors (e.g., walking or diet and exercise programs) to obtain rewards. Activity-only wellness programs do not require individuals to attain or maintain specific health outcomes.

2. **Outcome-based wellness programs** require individuals to attain or maintain certain health outcomes (e.g., not smoking, attaining certain results on biometric screenings or meeting exercise targets) to obtain rewards.

Health-contingent wellness plans are required to comply with the following five requirements:

1	**Frequency of opportunity to qualify for reward**	Eligible individuals must be provided with an opportunity to qualify for the reward **at least once per year**.
2	**Size of reward**	The maximum permissible reward is **30%** of the cost of health coverage (**50%** for wellness programs designed to prevent or reduce **tobacco use**).
3	**Reasonable design**	The wellness program must be reasonably designed to promote health or prevent disease.
4	**Uniform availability and reasonable alternative**	The full reward must be available to all similarly situated individuals. To meet this requirement, all health-contingent wellness programs must provide a **reasonable alternative standard** (or waiver of the otherwise applicable standard) in certain circumstances.
5	**Employee notice**	Employers must disclose the availability of a reasonable alternative standard to qualify for the reward (and, if applicable, the possibility of waiver of the otherwise applicable standard) in all plan materials describing the terms of a health-contingent wellness program.

Size of Reward

The total reward offered to an individual under an employer's health-contingent wellness program cannot exceed 30% of the cost of health coverage. However, this limit increases to 50% for wellness programs that are designed to prevent or reduce tobacco use. If only employees participate in the wellness program, the reward limit is based on the cost of employee-only health coverage. If, in addition to employees, any class of dependents (such as spouses) may participate in the wellness program, the reward limit is based on the cost of coverage in which the employee and any dependents are enrolled.

Reasonable Alternative Standard

The full reward under a health-contingent wellness program (whether activity-only or outcome-based) must be available to all similarly situated individuals. To meet this requirement, all health-contingent wellness programs must provide a **reasonable alternative standard** (or waiver of the otherwise applicable standard) to qualify for the full reward in certain circumstances.

Employers have flexibility in designing reasonable alternative standards and determining whether to provide the same alternative standard for an entire class of individuals or on an individual-by-individual basis. In addition, employers are not required to establish an alternative standard before an individual requests one if a reasonable alternative standard is provided (or the condition for obtaining the reward is waived) upon request.

HIPAA's reasonable alternative standard requirements apply differently depending on whether the program is activity-only or outcome-based.

- **Activity-only wellness programs** must provide a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward to any individual for whom it is unreasonably difficult due to a medical condition or medically inadvisable to satisfy the otherwise applicable standard. An employer may seek verification (such as a statement from an individual's personal physician) that a health factor makes it unreasonably difficult to satisfy, or medically inadvisable to attempt to satisfy, the otherwise applicable standard if it is reasonable under the circumstances.
- **Outcome-based wellness programs** must provide a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward to any individual who does not meet the initial standard based on the measurement, test or screening, regardless of any medical condition or other health status. An employer cannot require verification that a health factor makes it unreasonably difficult for the individual to satisfy or medically inadvisable for the individual to attempt to satisfy the otherwise applicable standard.

All the facts and circumstances are considered to determine whether an employer has provided a reasonable alternative standard, including the following factors:

- If the reasonable alternative standard is the completion of an educational program, the employer must make the educational program available or assist the employee in finding such a program (instead of requiring an individual to find a program unassisted) and may not require an individual to pay for the cost of the program.
- The time commitment must be reasonable (for example, requiring attendance nightly at a one-hour class would be unreasonable).
- If an individual's personal physician states that a plan standard is not medically appropriate for that individual, the employer must provide a reasonable alternative standard that accommodates the recommendations of the individual's personal physician regarding medical appropriateness.

Notice of Alternative Standard

Employers are required to **disclose the availability of a reasonable alternative standard** to qualify for the reward (and, if applicable, the possibility of waiver of the otherwise applicable standard) in all plan materials describing the terms of a health-contingent wellness program (both activity-only and outcome-based). The disclosure must include contact information for obtaining the alternative standard and a statement that recommendations of an individual's personal physician will be accommodated.

For outcome-based wellness programs, this notice must also be included when an individual is informed that they did not satisfy the program's initial outcome-based standard. If plan materials merely mention that a wellness program is available without describing its terms, this disclosure is not required.

ADA Requirements

The ADA is a federal civil rights law that prohibits employers with **15 or more employees** from discriminating against individuals based on disability. It also restricts employers from obtaining medical information from applicants and employees but allows them to make inquiries about employees' health or do medical exams that are part of a voluntary employee health program.

To comply with the ADA's requirements:

- Wellness programs cannot discriminate against individuals with disabilities.
- Medical information obtained as part of a wellness program must be kept confidential.
- Wellness programs that involve medical exams or health-related questions must satisfy additional requirements.

The ADA is enforced by the U.S. Equal Employment Opportunity Commission (EEOC). Violations may result in EEOC investigations, lawsuits, damages, injunctive relief and awards of reasonable attorney's fees.

General Rules

To comply with the ADA, covered employers must structure their wellness plans to ensure qualified individuals with disabilities have equal access to the program's benefits and are not required to complete additional requirements to obtain equal benefits under the wellness program.

Employers must also provide **reasonable accommodations** that enable employees with disabilities to fully participate in wellness programs and earn any rewards or avoid any penalties offered as part of those programs.

What Qualifies as a Disability Under the ADA?

Under the ADA, a person has a disability if they have a **physical or mental impairment that substantially limits a major life activity** (such as walking, talking, seeing, hearing or learning, or the operation of a major bodily function, such as brain, musculoskeletal, respiratory, circulatory or endocrine functions). A medical condition does not need to be long-term, permanent or severe to be substantially limiting. Also, if symptoms come and go, what matters is how limiting the symptoms are when they are active.

In addition, **medical information obtained as part of a wellness program must be kept confidential**. Generally, employers may only receive medical information in aggregate form that does not disclose, and is not reasonably likely to disclose, the identity of specific employees. Also, employers cannot require employees to agree to the sale, exchange, transfer or other disclosure of their health information to participate in a wellness program or to receive an incentive.

Health Inquiries or Medical Exams—Voluntary Wellness Programs

Under the ADA, an employer may make disability-related inquiries and require medical examinations after employment begins only if they are job-related and consistent with business necessity. However, these inquiries and exams are permitted if they are part of a **voluntary wellness program**.

A final rule issued by the EEOC establishes the following requirements for permissible voluntary wellness program designs:

- The program must be reasonably designed to promote health or prevent disease.
- Employees cannot be required to participate in the program.
- Employers cannot deny access to health coverage under any of their group health plans (or particular benefits packages within a group health plan) or limit the extent of benefits for employees who do not participate in the program.
- Employers cannot take any other adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten employees who choose not to answer health-related questions or undergo medical exams.
- Employers must provide employees with a notice that describes what medical information will be collected, who will receive it, how the information will be used and how it will be kept confidential.

Incentive Limits

The EEOC's final rule provides that, to comply with the ADA's voluntary requirement, the incentives for participating in a wellness program cannot be so substantial as to be coercive.

However, the EEOC's current guidance does not specify an incentive limit for voluntary wellness programs. The EEOC's final rule established a **30% limit** on permissible incentives. However, that incentive limit was removed from the final rule due to a court ruling that invalidated the limit. The EEOC has indicated that the issue is still under consideration. **For now, due to this legal uncertainty, employers should carefully consider the level of incentives they use with their wellness programs that collect health information.**

Employee Notice

To satisfy the EEOC's requirements for voluntary wellness programs, employers must provide employees with a notice that describes what medical information will be collected, who will receive it, how the information will be used and how it will be kept confidential.

Employees must receive the notice before providing any health information and have enough time to decide whether to participate in the program. Employers cannot wait until after an employee has completed a health risk assessment or medical exam to provide the notice. The EEOC has provided a sample notice to help employers comply with this ADA requirement.

Smoking Cessation Programs

According to the EEOC, a smoking cessation program that merely asks employees whether they use tobacco (or whether they ceased using tobacco upon completion of the program) is not a wellness program that includes health-related inquiries or medical exams. Thus, the ADA's additional requirements for voluntary wellness programs would not apply to this type of program. The ADA's general requirements would still apply, such as the need to provide reasonable accommodations to allow employees with disabilities equal access to benefits.

By contrast, a biometric screening or other medical examination that tests for the presence of nicotine or tobacco is a medical exam. The ADA's requirements for voluntary wellness programs discussed above would apply to a wellness program that includes this type of screening.

GINA Requirements

GINA prohibits discrimination based on genetic information in health plan coverage (Title I) and employment (Title II). "Genetic information" means information about:

- An individual's genetic tests
- The genetic tests of the individual's family members
- The manifestation of a disease or disorder in the individual's family member (i.e., family medical history)

Genetic information also includes an individual's request for or receipt of genetic services (including genetic research, counseling regarding the genetic condition and genetic education).

GINA's restrictions apply to a wellness program when it requests genetic information—for example, family health history.

Violations of GINA can trigger excise taxes of $100 per individual per day, enforcement action from the DOL or EEOC, civil penalties and lawsuits.

Group Health Plans—GINA Title I

GINA Title I applies to genetic information discrimination in health plan coverage. In general, GINA prohibits group health plans and health insurance issuers from:

- Adjusting group premium or contribution amounts based on genetic information.
- Requesting or requiring individuals (or their family members) to undergo a genetic test (with limited exceptions, such as for determinations regarding payment based on medical appropriateness).
- Collecting genetic information prior to or in connection with enrollment or at any time for underwriting purposes. "Underwriting purposes" is broadly defined to include rules for eligibility for benefits and for the computation of premium or contribution amounts.

GINA's prohibition on collecting genetic information prior to or in connection with enrollment or for underwriting purposes affects the use of health risk assessments. Health risk assessments are tools commonly used in connection with wellness programs. Interim final rules under GINA provide that group health plans and issuers may not:

- Request genetic information as part of a health risk assessment that must be completed **before enrollment in the plan or for eligibility for additional benefits under the plan**, such as a disease management program.
- Provide a **reward or incentive** to an individual for completing a health risk assessment that requests genetic information, such as family medical history. This is the case even if rewards are not based on the outcome of the assessment.

Example: An employer provides a health plan premium reduction to enrollees who complete a health risk assessment. The assessment, which includes questions about an individual's family medical history, is requested after enrollment. This request violates GINA even though the completion of the health risk assessment has no effect on an individual's enrollment status or the enrollment status of members of the individual's family. This is because the assessment includes a request for genetic information (that is, the individual's family medical history) and its completion results in a premium reduction.

However, it is permissible for a wellness program to collect genetic information (i.e., family medical history) after enrollment in the health plan if no reward or incentive is given for providing the information.

Employment—GINA Title II

Wellness programs offered outside of a group health plan are not subject to GINA Title I but may be subject to the employment discrimination requirements of GINA Title II.

Under Title II of GINA, it is illegal for covered employers (**15 or more employees**) to discriminate against employees or applicants because of genetic information. GINA also restricts covered employers' ability to request, require or purchase genetic information with respect to employees or employees' family members.

The prohibition on requesting genetic information is subject to several exceptions, one of which applies to voluntary wellness programs. An employer may request genetic information as part of a wellness program if all the following requirements are met:

- The acquisition of genetic information must be reasonably designed to promote health or prevent disease.
- The employee must provide the information voluntarily.
- The employee must give voluntary, knowing and written authorization before providing genetic information.
- Individually identifiable information may be provided only to the individual (or family member) receiving genetic services and the health care professionals or counselors providing the services.
- Individually identifiable information can be available only for the purposes of the services and may not be disclosed to the employer except in aggregate terms.

An employer's authorization form must be written in an understandable way, describe the type of genetic information that will be obtained and the general purposes for which it will be used, and describe the restrictions on disclosure of genetic information.

Under the EEOC's final rules, genetic information is not provided voluntarily if the individual is required to provide the information or is penalized for not providing it. However, financial incentives can be offered for completing a health risk assessment that includes information about family medical history or other genetic information, provided that the assessment clearly states that the incentive is available regardless of whether the individual answers the questions regarding genetic information.

Other Compliance Requirements

An employer's wellness program that provides **medical care** is subject to many employee benefits laws, such as ERISA, COBRA, the ACA and HIPAA. These employee benefit laws include numerous compliance requirements. For example, they require employers to:

- Explain the wellness program's terms in a summary plan description (SPD).
- Provide qualified beneficiaries with the opportunity to elect COBRA coverage after experiencing a qualifying event.
- Satisfy certain ACA market reforms.
- Protect the individually identifiable health information collected from or created about participants in the wellness program.

In general, **employers should incorporate wellness programs that provide medical care into their group health plans** to simplify their compliance obligations.

ERISA

ERISA sets minimum standards for employee benefit plans maintained by private-sector employers. ERISA exempts only two types of employers from its requirements: governmental and church employers.

Many plans or programs that provide benefits to employees are considered employee benefit plans that are subject to ERISA. In general, a wellness program's status as an ERISA-covered benefit depends on the services or care provided by the program. If a wellness program provides medical care, it will be considered a group health plan subject to ERISA.

Under ERISA, employers are required to take the following steps with respect to their employee benefit plans:

- Adopt an official plan document that describes the plan's terms and operations.
- Explain the plan's terms and rules to participants through an SPD.
- File an annual report (Form 5500) for the plan unless a filing exemption applies.
- Comply with certain fiduciary standards of conduct with respect to the plan.
- Establish a claims and appeals process for participants to receive benefits from the plan.

Wellness programs that provide medical care are commonly offered as a component of an employer's group health plan. Under this approach, only individuals who participate in the employer's group health plan are eligible for the wellness program. Many ERISA requirements for a wellness program (for example, the plan document and SPD) can be satisfied by incorporating the program into the group health plan's ERISA compliance.

COBRA

COBRA requires covered group health plans to offer continuation coverage to employees, spouses and dependent children when group health coverage would otherwise be lost due to certain specific events, called qualifying events. COBRA generally applies to group health plans maintained by private-sector employers who had at least **20 employees** on more than 50% of typical business days in the previous calendar year.

COBRA does not apply to group health plans maintained by small employers (those with fewer than 20 employees) or churches. There are also special coverage rules for government employers; however, as a practical matter, most government group health plans are required to offer continuation coverage.

A wellness program that provides medical care is considered a group health plan subject to COBRA unless the employer sponsoring the program qualifies for the exemption for small employers or churches.

Offering COBRA

If a wellness program is subject to COBRA, qualified beneficiaries must be given the opportunity to elect COBRA coverage for the program after experiencing a qualifying event (for example, a termination of employment). Certain notices must also be provided to plan participants, including an initial notice when participation begins and an election notice after a qualifying event occurs.

Employers often bundle their wellness programs with their group health plans so that only employees who participate in the group health plan are eligible for the wellness program. In these cases, the employer may design its COBRA practices so that only qualified beneficiaries who elect COBRA coverage for the group health plan are eligible to continue coverage under the wellness program.

COBRA Premiums

In general, the maximum COBRA premium is 102% of the cost to the plan for similarly situated beneficiaries who have not experienced a qualifying event. In calculating premiums for continuation coverage, a plan can include the costs paid by both the employee and the employer, plus an additional 2% for administrative costs.

Unfortunately, the IRS has not issued much guidance on calculating COBRA premiums and has not specifically addressed how to calculate the premium for a wellness program. However, plan sponsors are expected to calculate COBRA premiums "in good faith compliance with a reasonable interpretation" of COBRA's requirements.

Employers may offer premium discounts as a wellness program reward. An employer's premium discount does not affect the COBRA premium because the cost to the plan for purposes of setting COBRA premiums combines the cost to both the employer and employee.

ACA

In general, a wellness program that provides medical care is considered a group health plan subject to the ACA's market reforms, such as the ACA's prohibition on annual limits and first-dollar coverage requirements for preventive care benefits. To satisfy these market reforms, most wellness programs that provide medical care must be **integrated with the employer's group health plan**, which means that only employees who participate in the group health plan can be eligible for the wellness program.

Employers should consider how the following ACA requirements are impacted by their wellness programs.

W-2 Reporting (Cost of Coverage)

Large employers (those who file 250 or more Forms W-2) must report the aggregate cost of employer-sponsored health plan coverage on their employees' Forms W-2. According to IRS Notice 2012-9, coverage under a wellness program should be included in the aggregated cost reported on Forms W-2 if the program is provided under a group health plan and the employer charges a COBRA premium for wellness program coverage.

Patient-centered Outcomes Research Institute (PCORI) Fees

The ACA imposes PCORI fees on health insurers and employers with self-insured health plans. Wellness programs that do not provide **significant benefits** for medical care or treatment are not subject to the PCORI fees. The IRS has not provided guidance on the meaning of "significant" medical benefits for purposes of this PCORI fee exception.

ACA Reporting of Health Coverage (Section 6055)

Internal Revenue Code (Code) Section 6055 requires employers with self-insured health plans to file an annual return with the IRS reporting health coverage information and provide related statements to individuals. Reporting is not required for coverage that provides benefits as an addition or supplement to the employer's primary health plan. Final IRS rules clarify that separate reporting is not required for wellness programs that are a part of other health coverage, such as wellness programs offering reduced premiums or cost sharing under a group health plan.

Affordability—Impact of Wellness Incentives

The ACA's employer shared responsibility rules require applicable large employers (ALEs) to offer affordable, minimum-value health coverage to their full-time employees or risk paying penalties. An ALE's health coverage is considered affordable if the employee's required contribution to the plan does not exceed 9.5% (as adjusted) of the employee's household income for the taxable year. Final IRS rules address how wellness incentives impact affordability. According to these rules, the affordability of an employer-sponsored health plan is determined by assuming that each employee fails to earn the wellness program's incentive unless the wellness program is related to tobacco use.

HIPAA Privacy and Security Rules

The HIPAA privacy and security rules protect individuals' identifiable health information—called protected health information (or PHI)—held by covered entities or their business associates. Health plans are a type of covered entity.

Wellness programs that provide medical care (or provide an incentive related to health coverage, such as a premium reduction) are generally considered health plans that are subject to HIPAA's privacy and security rules. There is a **narrow exemption for certain small, self-funded health plans**. Under this exemption, a wellness program with fewer than 50 eligible employees that is administered by the employer who sponsors the program is exempt from the HIPAA rules.

The Department of Health and Human Services issued frequently asked questions (FAQs) that address the applicability of the HIPAA privacy and security rules to workplace wellness programs. According to these FAQs:

- **Where a wellness program is offered as part of a group health plan** (i.e., it provides medical care or incentives related to health coverage), the individually identifiable health information collected from or created about participants in the wellness program is PHI and protected by the HIPAA rules. HIPAA also protects PHI that is held by the employer as plan sponsor on the plan's behalf when the plan sponsor is administering aspects of the plan, including wellness program benefits offered through the plan.
- **Where a workplace wellness program is offered by an employer directly and not as part of a group health plan**, the health information collected from employees by the employer is not protected by HIPAA rules. However, other federal or state laws may apply and regulate the collection and use of the information.

Employers with wellness programs subject to the HIPAA privacy and security rules should ensure they have **business associate agreements** in place with their wellness vendors if the programs involve the collection or creation of individually identifiable health information.

The HIPAA privacy and security rules also **restrict the circumstances under which a group health plan may allow an employer as plan sponsor access to PHI**, including PHI about participants in a wellness program offered through the plan, without individuals' written authorization.

Often, the employer as plan sponsor will be involved in administering certain aspects of the group health plan, which may include administering wellness program benefits offered through the plan. Where this is the case, and absent written authorization from the individual to disclose the information, the group health plan may provide the employer as plan sponsor with access to the PHI necessary to perform its plan administration functions, but only if the employer as plan sponsor amends the plan documents and certifies to the group health plan that it agrees to, among other things:

- Establish adequate separation between employees who perform plan administration functions and those who do not.
- Not use or disclose PHI for employment-related actions or other purposes not permitted by the privacy rule.
- Implement, where electronic PHI is involved, reasonable and appropriate administrative, technical and physical safeguards to protect the information, including by ensuring firewalls or other security measures are in place to support the required separation between plan administration and employment functions.
- Report any unauthorized use or disclosure or other security incident of which it becomes aware to the group health plan.

Employers who sponsor fully insured medical plans often do not perform plan administration functions on behalf of the group health plan. These employers have limited compliance responsibilities under the HIPAA rules if the information they receive from the health insurance issuer or health plan is limited to enrollment information and summary health information (if requested for purposes of modifying the plan or obtaining premium bids for coverage under the plan). However, sponsoring a self-funded or self-administered wellness program may subject the employer to additional HIPAA compliance requirements unless the program qualifies for the exemption for small plans.

Wellness Incentives

Workplace wellness programs often incorporate incentives or rewards to encourage participation and promote healthy lifestyle choices. Federal law may limit the amount of permissible wellness incentives, depending on the program's design.

Wellness incentives can take a variety of forms. Employers may want to make contributions to health flexible spending accounts (FSAs), health reimbursement arrangements (HRAs) or employees' health savings accounts (HSAs) as a wellness incentive. Before implementing this type of wellness program design, employers should consider the nondiscrimination rules that apply to health FSAs, HRAs and HSAs.

Employers should also understand the tax rules for wellness incentives, as many types of common incentives are taxable compensation.

Nondiscrimination Rules

Employers who provide wellness incentives in the form of health FSA, HRA or HSA contributions should design these rewards to satisfy applicable nondiscrimination requirements. Because nondiscrimination testing is complex, most employers use outside vendors to perform the tests. Health FSAs are also subject to a special limit on overall employer contributions, as explained below.

Section 105(h) Rules

As self-insured health plans, health FSAs and HRAs are subject to the nondiscrimination rules of Code Section 105(h). Under these rules, self-insured health plans cannot discriminate in favor of highly compensated employees (HCEs) with respect to eligibility or benefits. The eligibility test examines whether enough non-HCEs benefit under a self-insured health plan. The benefits test analyzes whether the plan provides HCEs with better benefits, either in terms of how the plan is designed or how it operates. Benefits provided by a discriminatory self-insured health plan are taxable to the HCEs.

Section 125 Rules

Health FSAs are also subject to the nondiscrimination rules for cafeteria plans under Code Section 125. HSA contributions are subject to these rules when employees are allowed to make pre-tax HSA contributions through a cafeteria plan. In general, Code Section 125 imposes the following three nondiscrimination tests:

1. **Eligibility Test:** This test examines whether enough non-HCEs are eligible to participate in the cafeteria plan.
2. **Benefits and Contributions Test:** This test is designed to make sure that a plan's contributions and benefits are available on a nondiscriminatory basis and that HCEs do not select more nontaxable benefits than non-HCEs select.
3. **Key Employee Concentration Test:** This test examines whether key employees impermissibly use the plan's benefits more than non-key employees.

If a cafeteria plan fails to pass nondiscrimination testing, HCEs lose the tax benefits of participating in the plan (that is, benefits are taxable).

Comparability Rules

The comparability rules apply to employer **HSA contributions** when employees are not allowed to make pre-tax HSA contributions through a cafeteria plan. To satisfy these rules, all HSA-eligible employees in the same employee category (i.e., current full-time, current part-time or former employees) with the same HDHP coverage category must receive comparable employer HSA contributions. Employer contributions are comparable if they are the same dollar amount or the same percentage of the health plan deductible.

Wellness rewards that are based on meeting a program goal would likely violate the comparability requirements. Employers who violate the comparability requirements are subject to an excise tax equal to 35% of the aggregate amount contributed by the employer to the HSAs of its employees during that calendar year.

Special Health FSA Limit

To satisfy certain ACA market reforms, employer contributions to health FSAs must be limited. The maximum annual benefit payable to the employee under the health FSA cannot exceed two times the employee's salary reduction under the health FSA for that year (or, if greater, the amount of the employee's salary reduction election plus $500). Employers who provide health FSA contributions as a wellness incentive should consider this limit when designing their wellness rewards.

Taxability of Incentives

Unless a specific tax exemption applies, all employee compensation (including fees, commissions, fringe benefits and similar items) is taxable. When compensation is taxable, it must be included in gross income on the employee's Form W-2, and it is subject to federal income tax withholding. It is also generally subject to federal employment tax withholding (i.e., FICA and FUTA).

Federal tax law does not include a specific exemption for wellness program incentives. While coverage by an employer-provided wellness program that provides medical care is generally excluded from an employee's gross income, wellness incentives are subject to the same tax rules as any other employee rewards or prizes. That is, unless a specific tax exemption applies to the incentive, the amount of the incentive (or its fair market value) is included in an employee's gross income and subject to payroll taxes.

The two main tax exemptions that apply to wellness incentives are the exclusions for **medical care** under Code Sections 105 and 106 and **employee fringe benefits** under Code Section 132.

Key Points

- Any wellness incentive that is not medical care is taxable unless it is a nontaxable fringe benefit.
- Nontaxable benefits may include T-shirts, water bottles and sports tickets.
- Gym or health club memberships are generally taxable.
- Cash and cash equivalents (e.g., gift cards) are always taxable.

Specific Tax Exclusions

Medical Care

Amounts paid by employers or received by employees for medical care are nontaxable under Code Sections 105 and 106. "Medical care" for federal tax purposes is defined in Code Section 213(d). This definition includes amounts paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body." Expenses that are merely beneficial to an individual's general health and well-being are generally not medical care expenses.

Coverage under an employer-provided wellness program that provides medical care is generally nontaxable, and any medical care provided by the program (for example, high blood pressure screenings and vaccinations) is also nontaxable.

Similarly, wellness program rewards that take the form of reductions in employee cost sharing (for example, premiums or deductibles) for health plan coverage or additional employer contributions to a health FSA, HRA or HSA are generally nontaxable. Before implementing this type of wellness plan design, however, employers should confirm that these reductions in cost sharing or additional health FSA, HRA or HSA contributions will not raise problems with nondiscrimination testing.

Fringe Benefits

Code Section 132 excludes certain types of additional employee compensation, called nontaxable "fringe benefits," from income. Fringe benefits that are nontaxable are not included in employees' gross income and are not subject to income and employment tax withholding.

De Minimis (Minimal) Benefits—Code Section 132(e)

De minimis (or minimal) benefits are one type of nontaxable employee fringe benefit. A de minimis benefit is any property or service that has so little value (taking into account how frequently similar benefits are provided to employees) that accounting for it would be unreasonable or administratively impracticable. Cash and cash equivalent fringe benefits (for example, gift certificates and gift cards), no matter how little, are never excludable as a de minimis benefit.

The law does not specify a value threshold for benefits to qualify as de minimis. The determination will always depend on facts and circumstances. Examples of benefits that may qualify as de minimis fringe benefits include small gifts; occasional movie, theater or sports tickets; water bottles; coffee cups; and T-shirts.

On-site Athletic Facilities—Code Section 132(j)(4)

An employee's use of an on-premises gym or other athletic facility is nontaxable if substantially all use of the facility during the calendar year is by employees, their spouses and their dependent children. The athletic facility must be located on a site that is owned or leased by the employer, and the facility must be operated by the employer.

Qualified Employee Discounts—Code Section 132(c)

An employee discount allows an employee to obtain property or services from their employer at a price below that available to the general public. This benefit is nontaxable if it meets the requirements of a qualified employee discount. A qualified employee discount is a price reduction an employer gives to an employee on property or services offered to customers in the ordinary course of the line of business in which the employee performs substantial services.

A nontaxable qualified employee discount generally cannot exceed:

- For services, no more than 20% of the price charged to the general public for the service
- For products or merchandise, the employer's gross profit percentage multiplied by the price charged to the public for the property

If the discount exceeds this amount, only the excess is included in the employee's gross income. This exclusion does not apply to discounts on real property or discounts on personal property of a kind commonly held for investment (such as stocks or bonds). Also, a qualified employee discount is taxable to HCEs if the discount is not available on the same terms to all employees (or to a group of employees defined under a reasonable classification that does not favor HCEs).

Common Mistakes

Common tax mistakes employers make when it comes to their wellness program incentives include:

- Incorrectly assuming that because coverage under a wellness program is nontaxable to employees, any incentives that employees receive under the program are also nontaxable
- Incorrectly assuming that because wellness program incentives tend to be small, they are nontaxable
- Failing to communicate the incentive's taxability to employees, which may disappoint employees who were not expecting to pay taxes on the incentive

Tax Rules for Common Incentives

Cash and cash equivalents	Cash and cash equivalents (e.g., a $100 gift card for taking a health risk assessment) are always taxable. The cash amount (or gift card value) must be included in the employee's income and is subject to payroll taxes.
Gym or health club memberships	An employer's payment of gym or health club membership fees is taxable unless the membership qualifies as medical care. Gym or health club memberships typically do not qualify as medical care unless they are prescribed by a doctor to treat a specific illness.
Healthy snacks, water bottles and T-shirts	An employer may be able to exclude these items from employees' income as a nontaxable de minimis fringe benefit, depending on the value of the benefit and its frequency.
Health seminars or classes	An employer may be able to exclude these items from employees' income as a nontaxable de minimis fringe benefit, depending on the value of the benefit and its frequency.
Use of an on-site athletic facility	An employee's use of a gym or other athletic facility on the employer's premise is a nontaxable fringe benefit if substantially all the facility's use during the calendar year is by employees and their spouses and dependent children and the facility is operated by the employer on premises owned or leased by the employer.
Employee discounts	An employee discount on property or services the employer offers for sale to customers may be nontaxable if it meets the requirements for a qualified employee discount.
Paid time off	Any wages paid for the additional time off are taxable (that is, included in the employee's gross income and subject to payroll taxes).
Reduction of cost sharing under a group health plan (e.g., premiums, deductibles or copayments)	Reductions or waivers of employee cost sharing under a health plan are nontaxable medical care expenses. When employees pay their health coverage premiums on a pre-tax basis under a Section 125 cafeteria plan, a reduction in the premium the employee pays for health coverage typically results in an increase in taxable take-home pay for the employee as a result of paying less in premiums.
Employer contributions to a health FSA, HRA or HSA	An employer's contributions to a health FSA, HRA or HSA are nontaxable medical care expenses. However, each of these medical accounts is subject to nondiscrimination rules. If employer contributions fail these nondiscrimination tests, there will be adverse tax consequences.

Appendix

CHECKLIST | Designing Workplace Wellness Programs

Presented by Chittenden Group

Employers implement wellness programs for a variety of reasons, such as encouraging healthier lifestyles, reducing absenteeism and controlling health care spending. Although wellness programs can take many forms, they often provide incentives or rewards to motivate employees to participate. Wellness programs must be carefully structured to comply with applicable state and federal laws. The three main federal laws that impact the design of wellness plans are:

1. The Health Insurance Portability and Accountability Act (HIPAA);
2. The Americans with Disabilities Act (ADA); and
3. The Genetic Information Nondiscrimination Act (GINA).

These laws each have their own set of legal rules for acceptable wellness program design, which are not always consistent with one another.

This checklist provides a step-by-step analysis of the HIPAA, ADA and GINA rules employers should consider when designing workplace wellness programs.

Determining Which Federal Laws Apply

HIPAA, ADA and GINA	Yes	No
Does the wellness program relate to a group health plan? A wellness program relates to a group health plan if it is provided as part of a health plan. Stand-alone wellness programs relate to group health plans if they provide (or pay for) medical or health benefits or are otherwise connected with a group health plan (e.g., offer a premium reduction as an incentive). *If you select "Yes," your wellness program must comply with HIPAA's nondiscrimination rules. If you select "No," HIPAA's nondiscrimination rules do not apply, and you can skip the HIPAA Requirements section below.*	☐	☐
Is your organization subject to the ADA? Select "Yes" if your organization is any of the following: • A private sector employer with **15 or more employees** for at least 20 weeks in the current or preceding calendar year; • A state or local government agency with **15 or more employees** for at least 20 weeks in the current or preceding calendar year; • An employment agency (such as a temporary staffing agency or recruitment company) of any size; or • A labor organization that operates a hiring hall or has at least 15 members. *If you select "Yes," your wellness program must comply with the ADA's requirements. If you select "No," the ADA does not apply, and you can skip the ADA Requirements section below.*	☐	☐

HIPAA, ADA and GINA	Yes	No
Does the wellness program collect genetic information (e.g., does it include a health risk assessment that asks for family medical history)? *If you select "Yes," your wellness program must comply with GINA's requirements. If you select "No," GINA does not apply, and you can skip the GINA Requirements section below.*	☐	☐

HIPAA Requirements

A wellness program that provides (or pays for) medical or health benefits or relates to a group health plan must comply with HIPAA's nondiscrimination rules. These rules allow employers to provide rewards or incentives as part of a wellness program, provided the program follows certain guidelines.

There are two types of wellness programs under HIPAA: participatory wellness programs and health-contingent wellness programs. This distinction is important because participatory wellness programs are not required to meet the same nondiscrimination standards that apply to health-contingent wellness programs.

Violations of HIPAA can trigger excise taxes of $100 per individual per day, as well as civil penalties and enforcement action by the U.S. Department of Labor (DOL).

Types of Wellness Programs	Participatory Wellness Program	Health-contingent Wellness Program (Activity Only)	Health-contingent Wellness Program (Outcome-based)
What type of wellness program does your company offer?	☐	☐	☐

Participatory wellness programs do not require individuals to meet a health-related standard to obtain a reward or do not provide a reward at all. Examples of these programs include:

- A diagnostic testing program that provides a reward for participation (and does not base any part of the reward on outcomes);
- A program that reimburses employees for the cost of smoking cessation programs (not based on whether the employee quits smoking);
- A program that provides rewards for attending a free health education seminar; or
- A program that rewards employees who complete a health risk assessment without any further action (educational or otherwise) required by the employee regarding the health issues identified as part of the assessment.

Health-contingent wellness programs require individuals to satisfy a standard related to a health factor to obtain a reward. A health-contingent wellness program may be an activity-only wellness program or an outcome-based wellness program.

- **Activity-only wellness programs** require an individual to perform or complete an activity related to a health factor to obtain a reward (for example, walking, diet or exercise programs). Activity-only wellness programs do not require an individual to attain or maintain a specific health outcome.

- **Outcome-based wellness programs** require individuals to attain or maintain a certain health outcome to obtain a reward (for example, not smoking, attaining certain results on biometric screenings or meeting exercise targets).

Each type of wellness program has its own requirements under HIPAA. Answer the questions below that pertain to your type of wellness program.

Participatory Wellness Programs	Yes	No
Is participation in the program made available to all similarly situated individuals, regardless of health status? *This is the only requirement for participatory wellness programs under HIPAA. If you select "No," your wellness program may violate HIPAA's nondiscrimination requirements.*	☐	☐

Health-contingent Wellness Programs (Activity-only and Outcome-based Programs)		Yes	No
Frequency of Reward	**Are eligible individuals provided with an opportunity to qualify for the reward at least once per year?**	☐	☐
Size of Reward	**Is the maximum reward limited to 30% of the total cost of health coverage (50% for wellness programs designed to prevent or reduce tobacco use)?** Total cost includes both employer and employee contributions towards the cost of coverage. If, in addition to employees, any class of dependents (such as spouses) may participate in the wellness program, the reward cannot exceed the specified percentage (i.e., 30% or 50%) of the total cost of the coverage in which the employee and any dependents are enrolled (such as family coverage or employee-plus-one coverage).	☐	☐
Reasonable Design	**Is the program reasonably designed to promote health or prevent disease?** A wellness program is reasonably designed if it has a reasonable chance of improving the health of (or preventing disease in) participating individuals and is not overly burdensome, a subterfuge for discrimination based on a health factor, or highly suspect in the method chosen to promote health or prevent disease.	☐	☐
Reasonable Alternative Standard	**For outcome-based programs, is a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward provided to all individuals who do not meet the initial standard?**	☐	☐

Health-contingent Wellness Programs (Activity-only and Outcome-based Programs)		Yes	No
	For activity-only programs, is a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward provided for any individual for whom it is: • **Unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard; or** • **Medically inadvisable to attempt to satisfy the otherwise applicable standard?** Employers have flexibility in designing reasonable alternative standards and determining whether to provide the same alternative standard for an entire class of individuals or on an individual-by-individual basis. In addition, employers are not required to establish an alternative standard before an individual requests one if a reasonable alternative standard is provided (or the condition for obtaining the reward is waived) upon request.		
Notice of Availability	**Is the availability of a reasonable alternative standard for reward qualification (and, if applicable, the possibility of waiver of the otherwise applicable standard) disclosed in all plan materials that describe the terms of the wellness program?** The disclosure must include contact information for obtaining the alternative standard and a statement that recommendations from an individual's personal physician will be accommodated. For outcome-based wellness programs, this notice must also be included in any disclosure that an individual did not satisfy an initial outcome-based standard.	☐	☐
If you select "No" for any of the above requirements, your wellness program may violate HIPAA's nondiscrimination requirements.			

ADA Requirements

To comply with the ADA, covered employers should structure their wellness plans to ensure qualified individuals with disabilities have equal access to the program's benefits and are not required to complete additional requirements to obtain equal benefits under the program. Employers must also provide **reasonable accommodations** that enable employees with disabilities to fully participate in employee health programs and earn any rewards or avoid any penalties offered as part of those programs.

There are additional requirements for wellness programs that make **health-related inquiries or require medical exams,** as summarized below.

The ADA is enforced by the U.S. Equal Employment Opportunity Commission (EEOC). Violations may result in EEOC investigations, lawsuits, damages and injunctive relief.

Additional ADA Requirements	Yes	No
Does the wellness program ask for health information or involve medical exams? *If you select "No," you can stop here, as your wellness program is not subject to the additional ADA requirements.*	☐	☐
Is the wellness program reasonably designed to promote health or prevent disease? To satisfy this requirement, the program must meet all the following requirements: • It has a reasonable chance of improving the health of, or preventing disease in, participating employees; • It must not require an overly burdensome amount of time for participation or involve unreasonably intrusive procedures; • It does not require employees to incur significant costs for medical examinations; and • It is not a subterfuge for violating the ADA or other laws prohibiting employment discrimination, nor is it highly suspect in the method chosen to promote health or prevent disease.	☐	☐
Is employee participation in the wellness program voluntary? To satisfy this requirement, employees cannot be required to participate in the program, and employers cannot: • Deny access to health coverage under any of their group health plans (or particular benefits packages within a group health plan) or limit the extent of benefits for employees who do not participate in the program; or • Take any other adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten employees who choose not to answer health-related questions or undergo medical exams. Also, as detailed below, **employers should carefully consider the level of incentives** they use with their wellness programs due to the lack of guidance from the EEOC on permissible incentives.	☐	☐
Has a notice been provided to employees explaining what medical information will be collected, who will receive it, how the information will be used and how it will be kept confidential? This notice must be provided before employees provide any health information and with enough time to decide whether to participate in the program. The EEOC has a sample notice that employers may use.	☐	☐

Is medical information obtained as part of a wellness program kept confidential? Generally, employers may only receive medical information in aggregate form that does not disclose, and is not reasonably likely to disclose, the identity of specific employees. Also, employers cannot require employees to agree to the sale, exchange, transfer or other disclosure of their health information to participate in a wellness program or to receive an incentive.	☐	☐
Incentive Limits: The EEOC's final rule on wellness programs provides that, to comply with the ADA's voluntary requirement, the incentives for participating in a wellness program cannot be so substantial as to be coercive. The rule also established a 30% limit on permissible incentives; however, that incentive limit was removed from the final rule due to a court ruling that invalidated the limit. The EEOC has indicated that the next steps are under consideration. For now, due to this legal uncertainty, employers should carefully consider the level of incentives they use with their wellness programs that collect health information or involve medical exams.		
If you select "No" for any of the above requirements (other than the first question), your wellness program may violate the ADA's requirements.		

GINA Requirements

GINA prohibits discrimination based on genetic information in health plan coverage (Title I) and employment (Title II). "Genetic information" means information about:

- An individual's genetic tests;
- The genetic tests of the individual's family members; and
- The manifestation of a disease or disorder in the individual's family member (that is, family medical history).

GINA's restrictions apply to a wellness program when it requests genetic information—for example, **family health history**.

Violations of GINA can trigger excise taxes of $100 per individual per day, as well as enforcement action from the DOL or EEOC, civil penalties and lawsuits.

Incentive Prohibition (Title I and Title II)	Yes	No
Does your wellness program provide a reward to employees for providing their genetic information (e.g., family medical history)? *If you select "Yes," your wellness program may violate GINA.* To comply with GINA (Title I or Title II), a wellness program cannot reward employees for providing their genetic information, such as family medical histories.	☐	☐

Wellness programs that **collect genetic information and are part of group health plans** must comply with the following additional requirement under GINA Title I.

Additional Title I Requirement	Yes	No	N/A
Does your wellness program request genetic information (e.g., family medical history) as part of an assessment that must be completed before enrollment in the health plan or eligibility for additional benefits under the plan? *If you select "Yes," your wellness program may violate GINA Title I.* To comply with GINA Title I, a wellness program cannot collect genetic information prior to or in connection with enrollment, or at any time for underwriting purposes.	☐	☐	☐

Wellness programs that **collect genetic information and are offered outside of group health plans** must comply with the following additional requirements under GINA Title II.

Additional Title II Requirements	Yes	No	N/A
Is the collection of genetic information reasonably designed to promote health or prevent disease? The program must have a reasonable chance of improving the health of or preventing disease in participating individuals. The program also cannot be overly burdensome or a subterfuge for violating Title II of GINA or other laws prohibiting employment discrimination.	☐	☐	☐
Do employees provide the genetic information voluntarily? Employers cannot require employees (or employees' spouses or dependents) to agree to the sale or waive the confidentiality of their genetic information as a condition for receiving incentives or participating in wellness programs.	☐	☐	☐
Are employees required to give voluntary, knowing and written authorization before providing genetic information? The authorization form must be written in an understandable way, describe the type of genetic information that will be obtained and the general purposes for which it will be used, and describe the restrictions on disclosure of genetic information.	☐	☐	☐
Is any individually identifiable information provided only to the individual receiving genetic services and the health care professionals or counselors providing the services? Individually identifiable information can be available only for the purposes of the health care services and may not be disclosed to the employer except in aggregate terms.	☐	☐	☐
If you select "No" for any of the above requirements, your wellness program may violate GINA Title II.			

WORKPLACE WELLNESS SCORECARD

A healthy workforce is demonstrably more productive, engaged and cost-efficient. Unhealthy employees cost employers billions of dollars each year from things like lost productivity and emergency room visits. However, simple wellness initiatives can help lower expenses and establish a more secure bottom line. Are you taking the appropriate steps to save money at your organization?

INSTRUCTIONS: Begin by answering the questions below. Each response will be given a numerical value depending on the answer. After completing the questions, total your score using the scale at the bottom of the page.

- **YES:** 0 points - **NO:** 2 points - **UNSURE:** 2 points

QUESTION	YES	NO	UNSURE	SCORE
1. Are educational wellness posters featured visibly around the office?	☐	☐	☐	
2. Do employees have ready-access to health care education materials?	☐	☐	☐	
3. Does your organization utilize wellness programs or initiatives, focused on employee health?	☐	☐	☐	
4. Does your organization offer any disease management programs?	☐	☐	☐	
5. Does your organization offer any nutritional education programs?	☐	☐	☐	
6. Is your organization doing enough to lower employee stress?	☐	☐	☐	
7. Is your organization actively promoting smoking cessation practices?	☐	☐	☐	
8. Has your organization recently benchmarked its wellness programs against industry competitors?	☐	☐	☐	
9. Has your organization ever conducted a health fair?	☐	☐	☐	
10. Do you communicate regularly with employees about ways to stay healthy?	☐	☐	☐	
TOTAL SCORE:				

Low risk. Contact Chittenden Group to confirm: 0-6

Moderate risk. Contact Chittenden Group today: 7-13

High risk. Contact Chittenden Group today: 14-20

ROAD TO WELLNESS

WHAT IS WORKPLACE WELLNESS?

Workplace wellness refers to the education and activities a company may sponsor in order to promote healthy lifestyles for their employees and their families.

HOW TO MEASURE

There's more **return on investment (ROI)** hidden in wellness than just lower health care costs. Take time considering the goals you want employees to achieve, and use metrics appropriate for those goals.

Reduced sick days

Increased productivity

Higher morale

Better eating habits

Weight-loss goals

WHAT'S IT WORTH?

A **wellness program** can benefit your company by doing the following:

- Lowering health care costs
- Increasing productivity
- Decreasing absenteeism
- Raising employee morale

EMPLOYEE BENEFITS

Beyond helping your bottom line, employees utilizing wellness programs report the following:

- Higher self-esteem
- Improved job satisfaction
- Reduced risk for developing chronic or life-threatening conditions
- Increased motivation to improve health

QUESTIONS?

For more wellness information and turn-key wellness programs, please contact Chittenden Group today.

NOTICE REGARDING WELLNESS PROGRAM

[Name of wellness program] is a voluntary wellness program available to all employees. The program is administered according to federal rules permitting employer-sponsored wellness programs that seek to improve employee health or prevent disease, including the Americans with Disabilities Act of 1990, the Genetic Information Nondiscrimination Act of 2008, and the Health Insurance Portability and Accountability Act, as applicable, among others. If you choose to participate in the wellness program you will be asked to complete a voluntary health risk assessment or "HRA" that asks a series of questions about your health-related activities and behaviors and whether you have or had certain medical conditions (e.g., cancer, diabetes, or heart disease). You will also be asked to complete a biometric screening, which will include a blood test for [be specific about the conditions for which blood will be tested.] You are not required to complete the HRA or to participate in the blood test or other medical examinations.

However, employees who choose to participate in the wellness program will receive an incentive of [indicate the incentive] for [specify criteria]. Although you are not required to complete the HRA or participate in the biometric screening, only employees who do so will receive [the incentive].

Additional incentives of up to [indicate the additional incentives] may be available for employees who participate in certain health-related activities [specify activities, if any] or achieve certain health outcomes [specify particular health outcomes to be achieved, if any]. If you are unable to participate in any of the health-related activities or achieve any of the health outcomes required to earn an incentive, you may be entitled to a reasonable accommodation or an alternative standard. You may request a reasonable accommodation or an alternative standard by contacting [name] at [contact information].

The information from your HRA and the results from your biometric screening will be used to provide you with information to help you understand your current health and potential risks, and may also be used to offer you services through the wellness program, such as [indicate services that may be offered]. You also are encouraged to share your results or concerns with your own doctor.

Protections from Disclosure of Medical Information

We are required by law to maintain the privacy and security of your personally identifiable health information. Although the wellness program and [name of employer] may use aggregate information it collects to design a program based on identified health risks in the workplace, [name of wellness program] will never disclose any of your personal information either publicly or to the employer, except as necessary to respond to a request from you for a reasonable accommodation needed to participate in the wellness program, or as expressly permitted by law. Medical information that personally identifies you that is provided in connection with the wellness program will not be provided to your supervisors or managers and may never be used to make decisions regarding your employment.

Your health information will not be sold, exchanged, transferred, or otherwise disclosed except to the extent permitted by law to carry out specific activities related to the wellness program, and you will not be asked or required to waive the confidentiality of your health information as a condition of participating in the wellness program or receiving an incentive. Anyone who receives your information for purposes of providing you services as part of the wellness program will abide by the same confidentiality requirements. The only individual(s) who will receive your personally identifiable health

information is (are) [indicate who will receive information such as "a registered nurse," "a doctor," or "a health coach"] in order to provide you with services under the wellness program.

In addition, all medical information obtained through the wellness program will be maintained separate from your personnel records, information stored electronically will be encrypted, and no information you provide as part of the wellness program will be used in making any employment decision. [Specify any other or additional confidentiality protections if applicable.] Appropriate precautions will be taken to avoid any data breach, and in the event a data breach occurs involving information you provide in connection with the wellness program, we will notify you immediately.

You may not be discriminated against in employment because of the medical information you provide as part of participating in the wellness program, nor may you be subjected to retaliation if you choose not to participate.

If you have questions or concerns regarding this notice, or about protections against discrimination and retaliation, please contact [insert name of appropriate contact] at [contact information].