

HIPAA, GINA, ERISA, DOL, ADA, ADA ... and of course Taxes

A Summary of
Wellness Programs: Legal Do's & Don'ts
presented by Edward Fensholt, J.D. on May 6, 2009,
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It would be great if the intersection of wellness programs, ERISA, COBRA, and HIPAA privacy, security, and portability was obvious and well-defined. Sadly, it's anything but. These regulatory schemes do not fit together well. To the extent they fit at all, the fit is clumsy, uncomfortable, and most significantly, outright impractical.

What's HIPAA?

The Health Insurance Portability and Accountability Act. HIPAA is a broad law that protects the privacy of individually identifiable health information. It is intended to protect employees from discriminatory practices.

What's GINA?

The Genetic Information Nondiscrimination Act of 2008 (P.L. 110-233, 122 Stat.881)¹ is a Federal law that prohibits discrimination in health coverage and employment based on genetic information.

What's ERISA?

The Employee Retirement Income Security Act of 1974, ERISA, is a federal law that sets minimum standards for pension plans in private industry. ERISA does not require any employer to establish a pension plan. It only requires that those who establish plans must meet certain minimum standards. The law generally does not specify how much money a participant must be paid as a benefit. ERISA requires plans to regularly provide participants with information about the plan including information about plan features and funding; sets minimum standards for participation, vesting, benefit accrual and funding; requires accountability of plan fiduciaries; and gives participants the right to sue for benefits and breaches of fiduciary duty.

ERISA also guarantees payment of certain benefits through the Pension Benefit Guaranty Corporation, a federally chartered corporation, if a defined plan is terminated.

The Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) enforces ERISA.

Non-HIPPA Programs

A wellness program avoids HIPAA applicability if it is available to similarly situated individuals and:

- ❖ The reward is unrelated to a healthcare plan (e.g., the reward is not a premium discount or reduction in deductible or coinsurance; for example, the reward might be a gift certificate, or raffle tickets, or cash; nor is the reward made available only to health plan participants), or
- ❖ The reward is related to the healthcare plan (e.g., it's a premium discount or deductible waiver, etc., or is available only to health plan participant), but is **NOT** contingent on satisfying a standard related to a "health status factor" such as:
 - obesity
 - smoking addiction
 - hypertension
 - diabetes
 - adverse medical history

Health status factors or health risk factors include health status, medical condition (physical or mental), claims experience, receipt of healthcare, medical history, genetic information, disability or evidence of insurability.

Self-insured governmental plans may opt out of HIPAA's nondiscrimination rules by filing an annual election with the federal government and notifying employees.

See: <http://www.cms.hhs.gov/SelfFundedNonFedGovPlans/>

Examples of non-HIPAA Wellness Programs

- ❖ waiver of deductibles and co-pays on preventive prescription drugs
- ❖ smoking cessation
- ❖ on-site workout facilities
- ❖ adding healthier menu items
- ❖ obesity/weight reduction/diet groups
- ❖ subsidized gym programs
- ❖ work time for exercise
- ❖ flu shots
- ❖ healthier vending machine choices
- ❖ wellness websites
- ❖ waiving co-pays and deductibles on certain care

The most vexing issue facing employers who install a non-HIPAA wellness program is avoiding disability discrimination requirements. The most practical way to avoid that problem is to design the program so "everyone can play."

Health assessments are the most common non-HIPAA wellness programs. They're "non-HIPAA" programs, even if they supply a reward related to a health plan, because the reward

is available simply by participating; that is, the reward is not contingent on the employee proving that he or she is healthy.

A HIPAA Wellness Program

A program that is subject to HIPAA's nondiscrimination rules is one where the reward (or penalty, if you want to look at it from the other side of the coin) is both (1) related to a healthcare plan (it's a premium discount or deductible waiver) and (2) contingent upon the employee satisfying a standard related to a health status.

For example, premium discounts granted to people who don't smoke, who are not obese or hypertensive, or who have low cholesterol, are health plan-related rewards tied to having or attaining favorable health risk factors, and while not prohibited, they are subject to a more complicated regulatory scheme under HIPAA.

Some employers require employees to take a health risk assessment as a condition of enrolling in the health plan. The Equal Employment Opportunity Commission, EEOC, has informally warned that this practice appears to violate the Americans with Disabilities Act because it's not voluntary. Denying enrollment is a "penalty" sufficient to pose an ADA problem. On the other hand, nobody is forced to enroll in health coverage.

Compliance with HIPAA does not necessarily mean a program is compliant with other laws (like ADA) or state laws.

A HIPAA compliant wellness program must meet five requirements:

1. The size of the reward may not exceed 20% of the total cost of coverage for an employee or family.
2. The program must be reasonably designed to promote good health.
3. Individuals who are eligible for the program must have the opportunity to qualify for the reward under the program at least once each year.
4. The reward must be available to all similarly situated individuals.
5. The wellness program materials must disclose the availability of an alternative standard for those who need it.

It might be the better part of valor to offer incentives to entice participation rather than penalties for failure to cooperate. Federal authorities have informally cautioned against this punitive approach.

Incentives, Carrots – The Role of Positive Incentives

Most employers who have headed down the road to wellness would say that incentives are critical to driving behavioral change.

Incentives are often necessary to change behavior. They must be large enough to make employees want to do something they would not otherwise do.

Nearly all of 150 top execs at large U.S. companies said recently, in a survey, that they believe the best option to reduce healthcare costs is financial incentives to encourage healthier behavior.

At least half of employers with wellness programs offer incentives. Almost all employers with wellness programs say the biggest problem is inducing employees to participate.

Conventional wisdom is that the incentive for taking a health assessment be between \$50 and \$100.

It's always prudent to be as inclusive as possible with wellness programs, even non-HIPAA programs, and reward employees for the effort as opposed to only for a specific result.

The employer generally takes on the burden of HIPAA compliance with respect to a self-insured health plan, unless the plan is very small (fewer than 50 participants) and self-administered.

Keep it Secret Sam, KISS

It's critical that identifiable or individualized employee data acquired by an employer or its vendors, in the context of a wellness program, be maintained in strict secrecy.

Taxes

Cash incentives and cash equivalents (like gift cards) are taxable. Don't forget to make this clear to employees when you communicate the wellness program incentive.

Non-cash incentives might be tax free if they can be considered "de minimis" fringe benefits under the federal Tax Code.

Incentives provided under a health plan should be nontaxable. Here's a list of common incentives:

- Cash
- Cash contributions to flexible spending accounts (FSA), health reimbursement arrangements (HRA), or health savings accounts (HSA)
- Reduced co-pay costs
- Rebate of program costs
- Free gym memberships (taxable; might be an argument that the value is nontaxable if the employee is under a doctor's orders to exercise as part of a treatment plan for an existing sickness, like obesity; but the IRS has been pretty clear that health club memberships are not "medical care" and cannot be provided on a tax favored basis by the employer)
- Cash equivalents (movie passes, etc.)
- Work time to exercise
- Sizeable rewards based on points, accumulated through a variety of activities

COBRA

In theory, a COBRA beneficiary would have the right to pay for continuation “coverage” under the wellness program (whether it be health screenings, a smoking cessation program, etc.) A COBRA beneficiary should be offered the opportunity, at his or her own cost, to continue “coverage” under the wellness program.

ADA (Americans with Disabilities Act)

The ADA, which applies to employers with 15 or more employees, prohibits discrimination in terms and conditions of employment against a person with a protected disability, a record of a disability, or perception of a disability.

Generally, an employer may not subject employees to “medical examinations” unless the examinations are relevant to the employee’s duties or they are voluntary. Many wellness programs, even health screenings, could rather easily be construed as “medical examinations” if they involve medical examinations or questions concerning disabilities. Since they will rarely be relevant to an employee’s duties, they must then be “voluntary”. A program will not be “voluntary” if employees are penalized for not participating.

We think almost all wellness programs would be (and should be) considered “voluntary”.

ADAAA (Americans with Disabilities Amendments Act)

The ADAAA makes diabetes, hypertension, etc., protected disabilities under the ADA, even though the conditions can be controlled by medication.

In 2008 Congress passed the ADAAA to restore what they saw as an erosion by the courts of the protections originally intended by the ADA.

The ADAAA:

- Significantly expands the concept of “major life activity”. An “impairment” is protected under the ADA only if it substantially limits one or more “major life activities”. The definition is now so broad that virtually everyone is disabled. For example, major life activities now include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
- In addition, the ADAAA adds “major bodily functions” to the universe of major life activities. Thus, normal cell growth, and body systems such as the immune, digestive, bladder, bowel, neurological, brain, respiratory, circulatory, endocrine and reproductive systems are all “major life activities.”

An impairment that substantially limits such a function is now a protected disability.

- A diabetic person is now considered to be disabled, even if insulin controls his/her diabetes. The same goes for a hypertensive employee, even though medication can easily control his high blood pressure.

Genetic Information Nondiscrimination Act (GINA)

GINA is designed to pick up where HIPAA left off. HIPAA prohibits a group health plan from discriminating against an individual under the plan on the basis of the individual's genetic information. Genetic history includes a family history of disease or illness. GINA prohibits the use of genetic information for the purposes of underwriting, with respect to the plan as a whole. In addition, a group health plan is also prohibited from requesting, requiring or purchasing genetic information for any purpose BEFORE an individual's enrollment under the plan. This would pose problems for a health risk assessment supplied with initial or perhaps even open enrollment materials. It is permitted if it is not used for underwriting.

An employer that uses a third-party vendor to collect HA data, where the data will have nothing to do with underwriting, should be permissible. If the plan is insured, and the data is not shared with the carrier, it would seem to pose no issue under GINA.