



## Understanding Wellness Programs and their Legal Requirements

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A wellness program is any formal or informal program that educates employees about health-related issues, promotes healthy lifestyles, or encourages employees to make healthier choices. Wellness programs vary greatly and are not always called wellness programs. Some are purely educational and have no financial incentives. Others have financial incentives that may take the form of reductions in the employee's contribution for medical coverage, reduced deductibles or copays, gift cards, cash or prizes (such as T-shirts, mugs, tickets, etc.). The term "incentives" includes financial and in-kind incentives for participation such as awards of time off, prizes, or other items of value.

Wellness programs can be:

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

Wellness programs are governed by a plethora of laws and regulations. At the forefront are the Patient Protection and Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act (HIPAA), the Americans with Disabilities Act (ADA), the Genetic Information and Nondiscrimination Act (GINA), and the Employee Retirement Income Security Act (ERISA). In addition to these regulations, wellness programs are governed by the Internal Revenue Code, the Consolidated Omnibus Budget Reconciliation Act (COBRA), the Fair Labor Standards Act (FLSA), Title VII of the Civil Rights Act, the Equal Pay Act, the National Labor Relations Act (NLRA), the Age Discrimination in Employment Act (ADEA), state laws, and more.

When reviewing the obligations of the ACA, HIPAA, ADA, GINA, and ERISA, wellness programs are often categorized differently by different regulations. A wellness program plan design that has very little obligation under HIPAA might have significant obligations under the ADA. Sometimes the obligations of a wellness program can come into conflict.

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There are five main questions that wellness program sponsors should ask and work through to determine the obligations of their wellness program. Many wellness programs are required to offer reasonable alternatives. These considerations apply regardless of which set of regulations requires the reasonable alternative to be offered.

There are also a number of considerations for wellness programs that involve tobacco use in any way. Employers who offer a “non-tobacco user” and a “tobacco user” rate for their group health plan must have a wellness program in place that follows all of the regulations for tobacco-related wellness programs.

**Question One:** Is the wellness program part of a group health plan (GHP) or stand alone, and does it affect a GHP’s deductibles, coinsurance, or copays?

## **General ERISA and Summary of Benefits of Coverage (SBC) Obligations**

Wellness program sponsors need to consider a wellness program’s requirements under ERISA as well as the ACA’s requirements for an SBC. Determining these obligations will hinge on whether the wellness program is part of a GHP or is stand alone, and if the wellness program affects the GHP’s deductibles, coinsurance, or copays.

ERISA may require plan documents, summary plan descriptions (SPDs), Form 5500 filings, notices, and appeals rights.

An SBC is a four-page (double-sided) communication required by the federal government. It must contain specific information, in a specific order and with a minimum size type, about a group health plan benefit’s coverage and limitations.

As a general rule, an SBC is needed if the wellness program is a “group health plan.” Generally, a plan is a GHP if it directly or indirectly provides health care to employees. There are no clear rules for how much health care needs to be provided to create a GHP – for instance, flu shots are health care, but it seems unlikely that the government intends to consider a program that simply provides flu shots a GHP. A biometric screening with follow-up care is more likely a GHP. Employers who have a wellness program offering health care to employees should consult legal counsel to determine if their plan design constitutes a group health plan.

## **Wellness Program is Integrated with GHP**

If the wellness program is part of a GHP, it is relatively simple to include the wellness requirements in the GHP documents, including ERISA documents and the SBC. If the wellness program affects deductibles, coinsurance, or copays and the wellness program is part of a GHP, the GHP sponsor should take special care to meet ERISA obligations by including details of the wellness program in the group health plan documents, the SBC, and more. For instance, the SBC’s examples should assume that the person meets the wellness program criteria. The example should briefly explain that the example assumes the person has met the plan’s wellness criteria and, therefore, the person’s deductible (or whatever the plan adjusts) was decreased accordingly.

However, if the wellness program simply affects the group health plan’s premium (whether through a surcharge or a discount), the SBC does not need to address the wellness program at all, since premiums do not need to be shown in an SBC.

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Further, when a wellness program is part of a GHP, HIPAA's privacy, security, and breach notification rules protect information collected from or created about participants that can be used to identify them (such as their address or birth date) and that relates to any past or present health condition. HIPAA also sets limits on the uses and disclosures that may be made of such information. An employer that sponsors a GHP may receive this information but must certify to the plan that it will safeguard and not improperly use or share it. Employees who receive this information (as necessary for health plan administration) should not be in the position of making hiring, firing, or promotion decisions of employees.

### **Stand-Alone Wellness Program**

A wellness program that is not connected to a GHP may be an ERISA plan on its own if it provides significant medical care. At present, "significant medical care" is not well-defined by the regulations.

Further, if the wellness program is not part of a GHP and affects deductibles, coinsurance, or copays, it will need its own SBC. The standard SBC template must be used, even though many of the lines will be completed with "not applicable."

If the wellness program is not part of the GHPs and does not affect deductibles, coinsurance, or copays, but provides significant medical care, ERISA will require plan documents, an SPD, Form 5500 filing, annual notices, and appeal rights.

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

When deciding if the employee's share of the premium is affordable (less than 9.5 percent indexed of the employee's safe harbor income), the employer may not consider wellness incentives or surcharges except for a non-smoking incentive. In other words, the premium for non-smokers will be used to determine affordability (even for smokers).

Any other type of wellness incentive must be disregarded; employers must assume that no one earned the incentive when calculating affordability. If the employer's program is designed to penalize employees that do not participate in the program (provides a surcharge), the penalty must be included in the affordability calculation.

When calculating minimum value, if incentives for nonuse of tobacco may be used to reduce cost-sharing (that is, the deductible or out-of-pocket costs), those incentives may be taken into account when determining minimum value. Other types of wellness incentives that affect cost-sharing may not be considered.

### **Question Three: Under HIPAA, is the wellness program considered participatory? (All wellness programs will either be participatory or health contingent under HIPAA. If the answer is no, move on to Question Four)**

A participatory program is a wellness program in which none of the conditions for obtaining the wellness reward require the individual to satisfy a condition related to a health factor.

Said another way, a participatory program is one that either has no reward or penalty (such as a program that provides free flu shots to employees who want one) or that does not include any conditions for obtaining the reward that are based on or related to a health factor (such as attending a series of lunch-and-learns that virtually anyone can do regardless of health). Most educational programs that are offered

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either to all employees or to all plan participants will be considered participatory. The regulations provide these participatory program examples:

- Reimbursement of a fitness center membership
- A smoking cessation program where the wellness reward is provided whether or not the person quits smoking
- A wellness reward for attendance at a periodic health education seminar

As long as a participatory program is equally offered to all similar employees, the HIPAA/ACA requirements will not apply to the program. This means that there are no limits on the amount of incentives that can be offered, and a reasonable alternative is not required. (Similar employees include, for example, all employees in a certain location, all those hired before or after a certain date, or all hourly employees.)

Participatory program rewards for participating in diagnostic testing programs, like a cholesterol screen that does not base any part of the reward on the outcome of the test, were not subject to HIPAA or the ACA. However, participatory programs are still subject to the ADA and GINA, and have regulatory limits as a result of those regulations.

HIPAA does not require employers to offer reasonable alternative standards for participatory-only programs, but the ADA requires reasonable alternatives for HIPAA's participatory-only programs for individuals with disabilities. An example of this could include offering a sign language interpreter during an educational class for an employee who has a hearing loss.

**Question Four: Under HIPAA, is the wellness program considered health contingent? (All wellness programs will either be participatory or health contingent under HIPAA. If the answer is no, go back to Question Three)**

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

## Health Factors

A "health factor" is very broad and includes anything that considers or affects a person's physical condition. This includes exercise programs, diet programs, programs that consider tobacco use, and programs with biometric targets. A program that requires persons with a particular health condition to attend a specific educational program is considered a health-contingent program.

## Activity-Only Programs

An activity-only program is a program that requires the individual to perform or complete an activity related to a health factor in order to obtain the wellness reward. However, the person simply needs to complete the activity, and not achieve specific results, to receive the reward.

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An activity-only program includes things like:

- A walking program
- Nutrition counseling
- A smoking cessation program, if the program does not have a target health measure

It also includes programs that require individuals with certain health factors – such as those who have unhealthy body mass indexes (BMIs), blood pressure levels, etc. – to participate in educational programs, even though they only need to attend the programs, because those individuals are required to do more to get the reward than those who have healthy levels.

## **Outcome-Based Programs**

An outcome-based program requires the individual to achieve or maintain a specified health outcome, such as reaching or maintaining a healthy weight or blood cholesterol level, or not using tobacco.

## **Health-Contingent (Activity- or Outcome-Based) Program Requirements**

A health-contingent wellness program must meet all five of these requirements:

1. Be reasonably designed to promote health or prevent disease (the same rules apply to activity-only and outcome-based programs).
2. Give employees a chance to qualify for the incentive at least once a year (the same rules apply to activity-only and outcome-based programs).
3. Cap the reward or penalty at 50 percent of the total cost of coverage for avoiding tobacco and at 30 percent for all other types of wellness incentives (the same rules apply to activity-only and outcome-based programs).
4. Provide an alternative way (reasonable alternative) to qualify for the incentive for those who have medical conditions (different rules apply to activity-only and outcome-based programs).
5. Describe the availability of the alternative method of qualifying for the incentive in written program materials (the same rules apply to activity-only and outcome-based programs).

## **Reasonable Design**

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

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

This means, for example, that a plan cannot simply charge non-smokers less, without also helping smokers to quit.

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## Annual Opportunity

A plan offers employees an annual opportunity to qualify if the tracking period is one year or less and each person has an equal chance to qualify each year. For example, these programs provide an annual opportunity for employees to qualify:

- A person who has not used tobacco in the past year can receive the non-smoker premium.
- Biometric testing occurs each year as part of open enrollment and anyone who has reached the blood pressure, cholesterol, and blood glucose targets receives an HRA contribution.
- An exercise program requires a person to exercise 150 minutes per week during any eight months during the calendar year and provides a premium reduction if a person meets the exercise target for the required eight months.

## HIPAA Incentive Limits

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

The reward or penalty for not using tobacco can be up to 50 percent of the cost of coverage. If the program includes non-tobacco rewards or penalties, too, the maximum total reward or penalty is 50 percent of the cost of coverage.

The cost of coverage includes both the employer's share and the employee's share of the premium (that is, employers may use the COBRA premium, excluding the two percent administrative charge, as the cost of coverage).

## Family Premium Considerations under HIPAA

An employer may use the family premium if the whole family is eligible to participate in the wellness program. If the wellness program is only available to employees, the reward or incentive may only be based on the cost of single coverage. If the spouse and employee are eligible, the incentive may be based on the employee plus spouse rate. If family members other than the spouse may participate, the employer may base the awarded incentive on both the employee's and applicable family members' results. The employer may use any reasonable method to allocate the incentive if some, but not all, covered persons who are eligible meet the goal.

The surcharge may be added to the employee's share of the premium.

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

If the answer is yes, then the ADA and GINA now also regulate the wellness program. These regulations have a series of complex requirements that sometimes contradict the requirements under HIPAA. In the event of conflict, an employer should follow the more stringent set of requirements. In the event of separate, but non-conflicting requirements under HIPAA and the ADA or GINA, an employer should follow both sets of requirements.

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In August 2014, the Equal Employment Opportunity Commission (EEOC) filed a lawsuit against a company (Orion Energy) claiming that the penalty for not participating in the wellness program was so large that, as a practical matter, the employee's decision to participate or not in the program was not voluntary. The program was designed so that the company paid 100 percent of the health insurance premium for employees who participated in the wellness program and paid nothing toward the premium of any employee who did not participate.

In October 2014, the EEOC filed a lawsuit against another company (Flambeau, Inc.) because that company required employees to complete a health risk assessment and biometric testing in order to obtain group health coverage. Employees who completed these requirements were only asked to pay 25 percent of the premium; an employee out on leave who failed to participate had his coverage cancelled. The EEOC suit says that having to choose between health coverage and participating in a wellness program makes the wellness program involuntary, in violation of the ADA.

In 2016, the EEOC issued two final regulations that address which wellness programs are subject to the ADA and GINA. Wellness programs that include medical examinations, biometric screenings, or HRAs are subject to the rules under the ADA and GINA. The majority of the rules under the ADA and GINA require compliance by the first day of the plan year beginning on or after January 1, 2017. The requirements relating to reasonable design, the prohibition retaliation, and the requirement to keep information confidential went into effect in July of 2016.

Title I of the ADA applies to employers with 15 or more employees, prohibits discrimination against people with disabilities, and requires equal opportunity in promotion and benefits, among other things.

## **Voluntary Programs and Notice Requirements**

The ADA says that a current employee may not be required to answer disability-related questions or submit to medical examinations, unless the questions or examinations are job-related. Many wellness programs ask employees to answer questions about medical history or to take biometric screenings, which may be considered medical examinations. Voluntary disclosures and examinations are allowed.

The EEOC defines "voluntary" as meaning that a covered entity:

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

The second requirement of a voluntary wellness program prohibits the outright denial of access to a benefit available by virtue of employment. When an employer denies access to a health plan because the employee does not answer disability-related inquiries or undergo medical examinations, this is discrimination by virtue of requiring the employee to answer questions or undergo medical examinations that are not job-related, are inconsistent with business necessity, and are not voluntary. This means that employees cannot be forced or required to fill out an HRA in order to enroll in a group health plan.

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Practically speaking, this also means employers cannot offer a “basic” group health plan and a more comprehensive group health plan, with the comprehensive health plan only being offered to employees who participate in the wellness program that involves an HRA or biometric screening.

Further, employers must provide a notice that clearly explains what medical information will be obtained, who will receive that medical information, how the medical information will be used, the restrictions on its disclosure, and the methods the covered entity will employ to prevent improper disclosure of the medical information. The employer must also notify the employee whether it complies with privacy and security measures established by HIPAA. The information must be written so that the employee whose medical information is being obtained is reasonably likely to understand it.

## Reasonable Design

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

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

This means, for example, that a plan cannot simply charge non-smokers less, without also helping smokers to quit.

Further, a wellness program with a biometric screening or HRA requirement will not be able to show that it is reasonably designed to promote health if it merely claims that the collection of information is useful. Conversely, asking employees to complete an HRA in order to alert them to health risks they might have been unaware of would meet the standard of promoting health.

Employers that use aggregated information from HRAs or biometric screening to design programs to meet the needs of their employee population (for example, a program for individuals with diabetes or high blood pressure) would be sufficient.

Collecting information without meaningful follow-up and advice is not sufficient. Employers must ensure that any wellness program involving medical screenings or HRAs is sufficient to promote health; any program that merely collects information should be avoided.

## Confidentiality of Data from HRAs and Biometric Screenings

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

An employer may not require an employee to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information, or to waive confidentiality protections under the ADA as a condition for participating in a wellness program or receiving an incentive for participating, except to the extent permitted by the ADA to carry out specific activities related to the wellness program.

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## ADA Safe Harbor Is Not Applicable

The ADA's safe harbor provision allows insurers and plan sponsors (including employers) to use information, including actuarial data, about risks posed by certain health conditions to make decisions about insurability and about the cost of insurance. Such practices have to be consistent with laws governing insurance and cannot be a subterfuge to evade compliance with the ADA. Without the safe harbor, these practices would violate the ADA by treating some individuals with disabilities less favorably than individuals without those disabilities.

The safe harbor provision does not apply to employer wellness programs, since employers are not collecting or using information to determine whether employees with certain health conditions are insurable or to set insurance premiums. This is the case even when the wellness program is integrated with the GHP.

## Incentive Limits under the ADA

The ADA had different, stricter incentive limits than HIPAA. Prior to January 1, 2019, financial incentives for wellness programs regulated by the ADA were limited to:

1. 30 percent of the **total cost of self-only coverage** (including both the employee's and employer's contribution) of the group health plan in which the employee is enrolled when participation in the wellness program is limited to employees enrolled in the plan;
2. 30 percent of the **total cost of self-only coverage** under the covered entity's group health plan, where the covered entity offers only one group health plan and participation in a wellness program is offered to all employees regardless of whether they are enrolled in the plan;
3. 30 percent of the total cost of the **lowest cost self-only coverage** under a major medical group health plan where the covered entity offers more than one group health plan but participation in the wellness program is offered to employees whether or not they are enrolled in a particular plan; and
4. 30 percent of the cost of **self-only coverage under the second lowest cost Silver Plan** for a 40-year-old nonsmoker on the state or federal health care exchange in the location that the covered entity identifies as its principal place of business if the covered entity does not offer a group health plan or group health insurance coverage.

## ADA Incentive Limits Will Not Apply on January 1, 2019

In August 2017, the United States District Court for the District of Columbia [held](#) that the U.S. Equal Employment Opportunity Commission (EEOC) failed to provide a reasoned explanation for its decision to allow an incentive for spousal medical history under the Genetic Information Nondiscrimination Act (GINA) rules and adopt 30 percent incentive levels for employer-sponsored wellness programs under both the Americans with Disabilities Act (ADA) rules and GINA rules.

In December 2017, the court [vacated](#) the EEOC rules under the ADA and GINA effective January 1, 2019, and ordered the EEOC to promulgate any new proposed rules by August 31, 2018.

In January 2018, the EEOC asked the court to reconsider the portion of the court's order that required the EEOC to promulgate new proposed rules by August 31, 2018. The court [vacated](#) that portion of its order.

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In March 2018, the EEOC reported that it had not decided whether to promulgate new regulations. In December 2018, the EEOC issued a [final rule](#) that removes the incentive section of the ADA wellness rule vacated by the court. The EEOC also issued a [final rule](#) that removes the incentive section of the GINA wellness rule vacated by the court. Both final rules are effective on January 1, 2019.

For 2019 and until the EEOC issues any new final rules regarding incentive limits, risk-averse employers should consider discontinuing wellness programs that require a medical exam, biometric screening, or health risk assessment for participants to receive an incentive. When the ADA incentive limits are vacated, the less restrictive ACA-amended HIPAA regulations will continue to apply. However, using these less restrictive incentive limits may be risky because these regulations predated the EEOC's wellness regulations.

## GINA

Title II of GINA protects job applicants, current and former employees, labor union members and apprentices, and trainees. It prohibits employers and other covered entities from using genetic information in making decisions about employment. It restricts employers from requesting, requiring, or purchasing genetic information, unless one or more of six narrow exceptions applies. In addition, it strictly limits entities covered by GINA from disclosing genetic information.

Under GINA, questions about family history are prohibited if there is an incentive for completing those questions; this affects many health risk assessment (HRA) questionnaires. An employer also may not require that an HRA that asks about family history be completed at the time of enrollment. "Genetic information" includes, but is not limited to, information about the "manifestation of a disease or disorder in family members of an individual." This is sometimes referred to as "past or current health status." Family members include certain blood relatives (such as parents, grandparents, and children) and also spouses and adopted children.

There is an exception to GINA's general prohibition against acquiring genetic information of applicants or employees where employers offer voluntary health or genetic services to employees or their family members. Because some employers want to offer inducements for employees and their family members to answer questions about their health or to take medical examinations as part of a wellness program, the EEOC has provided regulations to help employers understand when they may offer a limited incentive for an employee's spouse to provide information about the spouse's past or current health status as part of a voluntary wellness program.

GINA regulates wellness programs with health risk assessments, a medical exam, or biometric screenings.

## Reasonable Design

Like the ADA, GINA requires wellness programs that collect genetic information to be reasonably designed. A program is considered reasonably designed to promote health or prevent disease if it:

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

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Wellness programs are not reasonable if they are designed to shift costs from an employer to employees based on their health, are used only to predict future health costs, are unreasonably intrusive, overly burdensome, or have significant costs related to medical exams. Wellness programs are not reasonable if health information is collected and is not used to provide results, follow-up information, or advice to participants.

## Incentive Limits under GINA

Like the ADA, GINA had different, stricter incentive limits than HIPAA. Prior to January 1, 2019, financial incentives for wellness programs regulated by GINA are the same as the ADA, and they were limited to:

1. 30 percent of the **total cost of self-only coverage** (including both the employee's and employer's contribution) of the group health plan in which the employee is enrolled when participation in the wellness program is limited to employees enrolled in the plan;
2. 30 percent of the **total cost of self-only coverage** under the covered entity's group health plan, where the covered entity offers only one group health plan and participation in a wellness program is offered to all employees regardless of whether they are enrolled in the plan;
3. 30 percent of the total cost of the **lowest cost self-only coverage** under a major medical group health plan where the covered entity offers more than one group health plan but participation in the wellness program is offered to employees whether or not they are enrolled in a particular plan; and
4. 30 percent of the cost of **self-only coverage under the second lowest cost Silver Plan** for a 40-year-old nonsmoker on the state or federal health care Exchange in the location that the covered entity identifies as its principal place of business if the covered entity does not offer a group health plan or group health insurance coverage.

## GINA Incentive Limits Will Not Apply on January 1, 2019

In August 2017, the United States District Court for the District of Columbia [held](#) that the U.S. Equal Employment Opportunity Commission (EEOC) failed to provide a reasoned explanation for its decision to allow an incentive for spousal medical history under the Genetic Information Nondiscrimination Act (GINA) rules and adopt 30 percent incentive levels for employer-sponsored wellness programs under both the Americans with Disabilities Act (ADA) rules and GINA rules.

In December 2017, the court [vacated](#) the EEOC rules under the ADA and GINA effective January 1, 2019, and ordered the EEOC to promulgate any new proposed rules by August 31, 2018.

In January 2018, the EEOC asked the court to reconsider the portion of the court's order that required the EEOC to promulgate new proposed rules by August 31, 2018. The court [vacated](#) that portion of its order. In March 2018, the EEOC reported that it had not decided whether to promulgate new regulations. In December 2018, the EEOC issued a [final rule](#) that removes the incentive section of the ADA wellness rule vacated by the court. The EEOC also issued a [final rule](#) that removes the incentive section of the GINA wellness rule vacated by the court. Both final rules are effective on January 1, 2019.

For 2019 and until the EEOC issues any new final rules regarding incentive limits, risk-averse employers should consider discontinuing wellness programs that require a medical exam, biometric screening, or health risk assessment for participants to receive an incentive. When the GINA incentive limits are

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vacated, the less restrictive ACA-amended HIPAA regulations will continue to apply. However, using these less restrictive incentive limits may be risky because these regulations predated the EEOC's wellness regulations.

### **Incentives for Family Members**

The federal government considers information about the current or past health status of a spouse or child of an employee to be genetic information about the employee. This means there is a possibility that an employee may be discriminated against based on health information of an employee's child (regardless of the child's biological/foster/adopted status). The chance of discrimination based on information from an employee's spouse is less likely.

Employers may offer children the opportunity to participate in wellness programs, as long as they are not offered inducements in exchange for information about their current health status or about their genetic information. The prohibition on offering inducements in exchange for information about the current or past health status of children applies to adult and minor children.

Practically speaking, this means that employers cannot offer wellness programs that involve incentives for an employee's child undergoing an HRA, a medical examination, or a biometric screening.

### **Spousal Signed Consent**

Employers are permitted to request information about the current or past health status of an employee's spouse who is completing an HRA on a voluntary basis, as long as the employer follows GINA's rules about requesting genetic information when offering health or genetic services. Employers are required to show that the spouse provided prior, knowing, written, and voluntary authorization for the employer to collect genetic information, just as the employee must do, and that inducements (offered prior to January 1, 2019) in exchange for this information are limited.

Per the court order vacating the EEOC's rule that allowed an incentive for spousal medical history under GINA and per the EEOC's recent final rule removing that section of the wellness regulations, employers will no longer be able to offer inducements for spousal medical history as of January 1, 2019, and until the EEOC issues new final rules regarding incentive limits.

### **Reasonable Alternatives**

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

### **Who must be offered a reasonable alternative standard?**

The reasonable alternative requirements are different for activity-only and outcome-based programs. GINA and the ADA also have reasonable alternative requirements.

If the program is activity-only (under HIPAA) the reasonable alternative only needs to be offered to a person for whom it would be unreasonably difficult due to a medical condition or medically inadvisable to attempt to satisfy the activity-based standard. Keep in mind that medical conditions that might affect a person's ability to perform an activity range from temporary conditions such as pregnancy or a recent injury or surgery to chronic conditions like arthritis or asthma.

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If the program is outcome-based, a reasonable alternative must be offered to all participants who do not meet the initial standard, regardless of their health status. This means, for example, that a plan with a non-smoker discount must automatically provide all smokers with the non-smoker discount if they complete a smoking cessation program (or other reasonable alternative).

The ADA and GINA require that employers offer a reasonable alternative to anyone who cannot undergo a medical examination, a health risk assessment, or a biometric screening. If a biometric screening requires a blood draw, a reasonable alternative would need to be offered for employees who have a medical condition that make a blood draw difficult or risky.

The ADA also requires employers to provide a reasonable alternative to disabled employees for any wellness program component, including those only regulated by HIPAA. This means an employer might offer a sign language interpreter for an nutrition education class, if there were employees who are deaf or hard of hearing.

The reasonable alternative standard does not have to be determined in advance. In some situations, the reasonable alternative may vary based on the employee's health status.

### **Medical Evidence of Reasonable Alternative Needs**

An activity-only program may require verification from the participant's personal physician that the participant needs a reasonable alternative standard because of his or her medical condition, but only if it is reasonable to determine that medical judgment is required to evaluate the validity of the request. (If it is obvious that a reasonable alternative standard is required, such as a running program where the participant is wheelchair-bound, then the plan cannot require verification from the participant's physician of the need for a reasonable alternative standard.) An outcome-based program may not require medical verification.

### **Physician's Recommendations**

The plan must accommodate the recommendations of the participant's personal physician as to the medical appropriateness of the reasonable alternative. This applies to both activity-only and outcome-based reasonable alternatives.

Neither the employee nor the employee's spouse who is participating in a wellness program may earn a wellness program reward (or avoid a penalty) by submitting an attestation that the participant is under the treatment of a physician for identified health risks.

### **Responsibilities**

The plan sponsor must find the reasonable alternative. For example, if the reasonable alternative for failing to meet a cholesterol standard is a class on diet and exercise, the employer must find a class on using diet and exercise to reduce cholesterol levels.

The plan sponsor must pay for an educational program. If the alternative is a weight loss program, the employer must pay the program fees (but not pay for any food costs). The reasonable alternative may not require an unreasonable amount of time or otherwise be too burdensome. For example, requiring attendance at a class that meets every evening, or is a long distance, would not be acceptable.

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## **May an employer limit the number of times a person can get a reasonable alternative?**

No, but it may require a different reasonable alternative if previous ones have failed. For example, if an employee completes a smoking cessation program but continues to smoke, the employer could require use of a nicotine patch as the reasonable alternative in the next program year.

## **Can a reasonable alternative be a physical activity?**

Yes, but if the reasonable alternative also is an activity-only wellness program (for example, a walking program substituted for a running program), another alternative must be made available to an employee who provides a doctor's note stating that because of the employee's health the reasonable alternative is medically inappropriate.

## **Can a reasonable alternative be another outcome?**

Yes, but if the reasonable alternative is a different level of the same standard, additional time must be provided to meet that alternative standard. For example, if the initial outcome-based standard is to maintain a BMI of 30 or below, and the participant measures a BMI of 40 on a health screen, the plan might offer, as a reasonable alternative, a requirement to reduce the BMI level by 10 percent. In this case, the plan must allow a reasonable amount of additional time for the participant to meet the incremental alternative standard; the regulations offer an example of one year.

## **Employee Uniformity in the Reasonable Alternatives**

The rules state that the employer may provide different reasonable alternatives to different classes of employees, or to different employees. For example, the reasonable alternative the first year an employee is in a non-smoking alternative program may be a smoking cessation class, but the second year it might be use of a nicotine patch. Of course, employers should be sure that employees are not treated worse than others because of a protected status such as age, race, gender, or health.

## **Waiving Reasonable Alternatives**

An employer can treat employees with a health condition more favorably than those without a health condition, which includes simply waiving the requirement. The waiver can be for all employees who do not meet the standard or just certain employees. (If the standard is just waived for some employees, the employer should write a memo to file explaining why the standard was waived for certain people.)

## **Examples of Reasonable Alternatives**

For non-use of tobacco, options would include smoking cessation classes, required use of nicotine gum or patches for a period of time, hypnosis, or biofeedback programs.

For a walking program, reasonable alternatives might include a reduced frequency or distance, a substitute activity (for example, swimming or water aerobics for an employee with arthritis), or a requirement to watch a video on stretching.

For a lower cholesterol level, alternatives would include a percentage reduction in the person's current cholesterol level, an exercise program, or nutrition counseling.

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## Completing a Reasonable Alternative

When an employee completes a reasonable alternative, the employee must receive the same reward as the employee would have received if the employee had met the original standard. If it took time to meet the reasonable alternative, the employer must make sure the employee receives the full incentive in a reasonable amount of time. Generally, the incentive must be provided in the current year, although the incentive may be provided early in the following year if the standard was met late in the year. The employer may not pay the incentive over the course of the following year.

## Publicizing the Reasonable Alternative

Employers must provide notice that a reasonable alternative standard is available in all materials that describe the program. The notice does not need to include details of the alternative, but it does need to describe how to get more information about the reasonable alternative. The notice also must say that the recommendations of the person's physician will be accommodated.

The regulations suggest a notice such as: "Your health plan is committed to helping you achieve your best health. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at [insert contact information] and we will work with you (and, if you wish, with your doctor) to find a wellness program with the same reward that is right for you in light of your health status."

Materials that simply state a wellness program is available do not need to include the reasonable alternative disclosure.

A communication that discusses a premium reduction or surcharge must include the reasonable alternative notice. Also, if the plan sends any type of a notice to participants stating they have not met the standard, that notice must include the reasonable alternative disclosure.

## Tobacco Cessation Programs

Employers who wish to charge employees different premiums for the GHP based on their use or abstinence from tobacco can only do so with a bona fide wellness program in place, including reasonable alternatives. Failure to do so is a violation of HIPAA's nondiscrimination regulations.

There is also no acceptable method for employers to require employees to "prove" that they have quit using tobacco, by virtue of the reasonable alternative requirements.

An employer may require an employee to certify that he or she is not a smoker and provide that the company's usual rules for falsification apply. Some employers require confirmation through a blood, breath, or urine test; employers considering this should consult with local counsel as some states prohibit this. Some employers require a note from the employee's physician certifying the employee does not use tobacco.

Because of the ACA's anti-rescission rules, if an employee misrepresented his or her smoker status, the employer could not terminate the employee's coverage for falsification, but it likely could charge the smoker premium retroactively. Employers should also avoid any program design that includes "random" tobacco checks. This would likely violate the ADA and GINA, as well as HIPAA.

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## Defining “Tobacco Free”

Self-funded and large insured plans may use any definition they prefer, although because of the annual qualification requirement the tobacco-free period should not exceed 12 months. Employers should clearly explain what is meant by tobacco use, including whether it includes smokeless tobacco like chewing tobacco and e-cigarettes.

Insurers that differentiate between tobacco and non-tobacco users in the small group and individual markets may not define tobacco use more strictly than using tobacco in any form an average of four or more times per week during the past six months. While employers are not required to use this standard, it may provide a starting place.

## How HIPAA Views Common Wellness Plans

| Participatory   | Health-Contingent (activity-only)   | Health-Contingent (outcome-based)  |
|---|---|--|
| <ul style="list-style-type: none"> <li>• Incentive to undergo a screening or complete a health risk assessment (HRA)</li> <li>• Attend a lunch-and-learn on a wellness topic</li> <li>• Free flu shots</li> <li>• Reimbursement of fitness center fees</li> </ul> | <ul style="list-style-type: none"> <li>• Tobacco cessation coaching programs</li> <li>• Diet programs</li> <li>• Walking or other exercise programs</li> <li>• Meeting with health coach required only of employees who do not meet weight, blood pressure, or glucose goals</li> </ul> | <ul style="list-style-type: none"> <li>• Body Mass Index (BMI) below 30</li> <li>• Cholesterol below 200</li> <li>• Blood pressure below 130/85</li> <li>• Tobacco-free</li> </ul> |

## How the EEOC Views Common Wellness Plans

| Not Subject to ADA/GINA  | Subject to ADA/GINA   | Dependent Upon Design  |
|--|---|--|
| <ul style="list-style-type: none"> <li>• Attend a lunch-and-learn on a wellness topic</li> <li>• Reimbursement of fitness center fees</li> <li>• Tobacco cessation coaching programs</li> <li>• Diet programs</li> <li>• Walking or other exercise programs</li> <li>• Health coach meeting required only of employees who do not meet weight, blood pressure, or glucose goals</li> </ul> | <ul style="list-style-type: none"> <li>• Incentive to undergo a screening or complete a health risk assessment (HRA)</li> <li>• Incentive to complete a biometric screening</li> <li>• Incentive to undergo an annual physical</li> </ul> | <ul style="list-style-type: none"> <li>• Free flu shots</li> <li>• Body Mass Index (BMI) below 30</li> <li>• Cholesterol below 200</li> <li>• Blood pressure below 130/85</li> </ul> |

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## Examples

**Example 1:** The owner of Cole's Dry Cleaner is concerned that many of his employees smoke cigarettes while on break. To combat this, Cole decides to charge tobacco users an additional \$50 a month for the employee portion of premium for the group health plan. The total cost of the group health plan is \$5,000 annually, and the employees regularly pay \$125 a month for their portion of the premium. Smokers will pay \$175 a month. What regulations are implicated?

Cole cannot charge employees who smoke any more than non-smokers unless he implements a bona fide wellness program. If the only goal is to encourage participants to stop using tobacco, Cole will likely implement an outcome-based tobacco cessation program. It must meet the five requirements under HIPAA for health-contingent programs, it must meet the HIPAA requirements for reasonable design, and it must meet the requirements of providing an annual opportunity to earn the incentive or avoid the surcharge. Cole's program must ensure it has reasonable alternatives in place, and that those alternatives are advertised. Cole's surcharge cannot exceed \$2,500 annually, which is 50 percent of the total cost of employee only coverage.

**Example 2:** Ann's Autoshop is next door to Cole's Dry Cleaner. Ann has 60 full-time employees. Ann hears from Cole that his tobacco cessation wellness program has encouraged some of his employees to quit smoking. Ann decides she would also like to implement a tobacco cessation program, but she is uncomfortable with employees simply attesting to their tobacco use status. She decided she wants employees to undergo a biometric screening that tests for nicotine in an individual's blood as part of the wellness program. The total cost of Ann's group health plan is \$7,500 annually, and the employees pay \$200 a month for their portion of the premium. Ann decided that if someone's biometric screen indicates the person is not a tobacco user, or if the person completes the reasonable alternative, Ann will only charge them \$100 a month for that employee's portion of the premium. What regulations are implicated?

Ann's program must meet HIPAA's five requirements for reasonable design, and it must meet the requirement of providing an annual opportunity to earn the incentive or avoid the surcharge. Ann's program must have reasonable alternatives in place, and those alternatives must be advertised. Ann's program also involves the ADA and GINA because of the biometric screening. Ann's program must meet the ADA requirements for reasonable and voluntary design. Ann must ensure that individuals who are identified as smokers by the biometric screening are offered assistance to quit smoking.

Ann must provide a notice that clearly explains what medical information will be obtained from the biometric screening, who will receive that medical information, how the medical information will be used, the restrictions on its disclosure, and the methods the covered entity will employ to prevent improper disclosure of the medical information. Ann must also notify the employees whether the program complies with privacy and security measures established by HIPAA.

Ann's surcharge or incentive cannot exceed \$2,250, which is 30 percent of the total cost of employee-only coverage under the group health plan. When Ann calculates her health plan's affordability under the ACA, she can report that the lowest cost employee only premium is \$100, as though all employees earned the tobacco-free premium.

**Example 3:** Richard's Printing Press has 150 employees. Richard is concerned about his employees' health and offers a robust wellness program for his employees and their families. His program is available to anyone enrolled in the group health plan and requires participants to participate in various activities in order to earn points. Once an individual earns 5 points or more, the monthly premium for the group health

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plan is reduced by \$50. Each member of an employee's family can participate, and if an employee's spouse or child earns 5 points or more, the family premium will be reduced by an additional \$50 per person that earns 5 points. The annual cost of employee only coverage is \$5,000; the annual cost of family coverage is \$9,000. Employees pay a premium of \$200 a month for employee-only coverage, and \$350 a month for family coverage.

There are many activities that individuals can participate in to earn points, including preventive care appointments with their physicians, taking a smoking cessation class, tracking steps with a pedometer, lowering BMI or cholesterol by certain amounts, attending nutrition seminars, undergoing a biometric screening, completing a health risk assessment, meeting with a wellness coach, and more. Anyone who earns 1 or more points during the year can also earn a \$10 a month reimbursement for a gym membership. What regulations are implicated?

Richard's program is subject to both HIPAA regulations and the ADA and GINA. Because the activities run the gamut from participatory, health-contingent activity-based, health-contingent outcome-based, and include medical exams, biometric screenings and health risk assessments, the wellness program as a whole will need to follow the strictest sets of requirements. Richard can no longer offer this program to his employees' children; he can only offer the program to employees and their spouses. If spouses are able to participate, they must provide signed, knowing consent and they must not be offered inducements for their medical history.

Richard's program must meet HIPAA's five requirements for reasonable design, and it must meet the requirement of providing an annual opportunity to earn the incentive or avoid the surcharge. Richard's program must have reasonable alternatives in place for every health-contingent activity, and for all of the medical examinations, biometric screenings and health risk assessments, and those alternatives must be advertised. Richard's program must meet the ADA requirements for reasonable and voluntary design.

Richard must provide a notice that clearly explains what medical information will be obtained from the biometric screening, who will receive that medical information, how the medical information will be used, the restrictions on its disclosure, and the methods the covered entity will employ to prevent improper disclosure of the medical information. Richard must also notify the employees whether the program complies with privacy and security measures established by HIPAA. Richard must ensure that the employees who participate in the medical examinations, biomedical screenings, or health risk assessment are offered meaningful follow-up for any identified health risks or conditions.

Richard's program does not provide a practical way to differentiate between a reward for tobacco cessation and a reward for other wellness activities. As a result, when determining the health plan's affordability under the ACA, Richard must assume that none of his employees participate in the wellness program (that is, they pay \$200 a month for employee-only coverage). Richard must also ensure that the reward for an employee's participation does not exceed \$1,500 a year (which is 30 percent of the *total cost of self-only coverage* (including both the employee's and employer's contribution) of the group health plan in which the employee is enrolled when participation in the wellness program is limited to employees enrolled in the plan.)

**Example 4:** Lynn's Accounting Agency has 200 employees. The annual premium for employee-only coverage under Lynn's group health plan is \$6,000. Lynn pays \$4,500 per year and the employee pays \$1,500 per year.

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The plan offers employees a health-contingent wellness program focused on exercise, blood sugar, weight, cholesterol, and blood pressure. There are no health risk assessments, biometric screenings, or medical examinations. The reward for meeting all five targets is an annual premium reduction of \$600. The plan also has a \$2,000 tobacco premium surcharge on employees who have used tobacco in the last 12 months and who are not enrolled in the plan's tobacco cessation program. Those who participate in the plan's tobacco cessation program are not assessed the \$2,000 surcharge. What regulations are implicated?

Lynn's program must meet the five requirements under HIPAA for health-contingent programs, it must meet the HIPAA requirements for reasonable design, and it must meet the requirements of providing an annual opportunity to earn the incentive or avoid the surcharge. Lynn's program must ensure it has reasonable alternatives in place, and that those alternatives are advertised. Lynn's program must provide an annual notice that clearly explains what medical information will be obtained, who will receive that medical information, how the medical information will be used, the restrictions on its disclosure, and the methods the covered entity will employ to prevent improper disclosure of the medical information. Lynn must also notify the employee whether the program complies with privacy and security measures established by HIPAA. The information must be written so that the employee whose medical information is being obtained is reasonably likely to understand it.

Lynn's program is permissible because the total of all rewards is \$2,600 ( $\$600 + \$2,000 = \$2,600$ ), which does not exceed 50 percent of the total annual cost of employee-only coverage (\$3,000), and, tested separately, the \$600 reward for the wellness program unrelated to tobacco use does not exceed 30 percent of the total annual cost of employee-only coverage (\$1,800). When calculating the plan's affordability for ACA purposes, Lynn can report that the lowest cost employee-only plan is \$125 a month (\$1,500 annually) even for employees who are assessed the \$2,000 tobacco premium surcharge. Lynn must disregard the availability of the \$600 reduction when calculating affordability.

**Example 5:** Acme Oyster Restaurant has a wellness program that reduces premiums by \$300 for employees who do not use tobacco products or who complete a smoking cessation course. Premiums are reduced by \$200 if an employee completes cholesterol screening during the plan year. The annual employee premium is \$4,000. Jane does not use tobacco and completed the cholesterol screen, so the cost of her actual premium is \$3,500 [ $\$4,000 - 300 - 200$ ]. John uses tobacco and does not do the cholesterol screen, so the cost of his actual premiums is \$4,000. For purposes of affordability, Acme will use \$3,700 as the cost of coverage for both Jane and John [ $\$4,000$  less the available \$300 non-smoker discount].

**Example 6:** Smith's Bakery has a wellness program that increases premiums by \$200 for employees who do not participate in its walking program. The annual employee premium is \$4,000. Dan decides not to participate in the walking program, so the cost of his actual premium is \$4,200. For purposes of affordability, Smith's Bakery will use \$4,200 as the cost of coverage for all employees, even if they participate and are not charged the additional \$200.

**Example 7:** Employers can set wellness incentives as a percentage rather than a dollar figure. Johnson Bros. offers coverage that costs \$500, with the cost split equally between the employee and the company. Employees who use tobacco (and don't complete the reasonable alternative) are assessed a 35 percent surcharge, and those who do not meet BMI standards (or complete the reasonable alternative) are assessed a 15 percent surcharge. Tom smokes and did not meet the BMI target or reasonable

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alternatives. Assuming the wellness program meets all federal requirements under HIPAA, ADA, and GINA, and the tobacco use is not part of the BMI screening, Tom's premium is calculated:

\$250 base premium  
+ \$175 smoker surcharge [35 percent of the total \$500 cost of coverage]  
+ \$ 75 BMI surcharge [15 percent of the total \$500 cost of coverage]  
\$500 premium charge

**Example 8:** Lulu's Coffee Shop offers a group health plan that costs \$7,000 annually. Employees pay \$150 a month for their portion of the premium, or \$1,800 annually. Employees who undergo an annual physical with their primary care physician receive a \$240 discount on their portion of the premium, or \$20 a month. What regulations are implicated?

Under HIPAA, Lulu offers a participatory wellness plan, so there are no HIPAA concerns for Lulu. The plan involves a medical screening, though, so the program is subject to the ADA and GINA. Lulu's program must meet the ADA requirements for reasonable and voluntary design. It must provide an annual notice that clearly explains what medical information will be obtained, who will receive that medical information, how the medical information will be used, the restrictions on its disclosure, and the methods the covered entity will employ to prevent improper disclosure of the medical information. The employer must also notify the employee whether the plan complies with privacy and security measures established by HIPAA. The information must be written so that the employee whose medical information is being obtained is reasonably likely to understand it.

Lulu cannot offer an incentive that is greater than \$2,100 annually, which is 30 percent of the lowest cost employee-only plan.

**Example 9:** Charlie's Hamburger House has a group health plan with a wellness program. The wellness program measures BMI in the fall and participants who meet the target have their premium reduced by \$60 per month over the next calendar year. The target outcome is a BMI below 27. The reasonable alternative for those who do not meet the target is three meetings with a health coach during the first quarter of the year. An employee who has a BMI above 27, but who completes the coaching sessions by March 31, must receive the \$60 per month for the entire year. After the employee completes the health coaching, the employer may either pay the amounts due for January through March in a lump sum of \$180 with a \$60 per month premium reduction from April through December or it may pay the reward for the first quarter pro rata for the rest of the year, with monthly premium reductions of \$80 for April through December.

**Example 10:** Blue Lake Bank has a group health plan with a wellness program. Blue Lake's plan measures cholesterol in December and those who meet the target have their premium reduced by \$90 per month over the next calendar year. The target outcome is a cholesterol level below 200. The reasonable alternative for those who do not meet the target is an 8 percent reduction in their cholesterol level at the next December screening. Employees with disabilities preventing them from reducing their cholesterol are provided with individual reasonable alternatives on an as-needed basis.

An employee who has a cholesterol level of 220 in December 2016 but who has reduced his or her cholesterol to 202 in the December 2017 screening must receive the \$90 per month for the entire 2017 plan year. Because it is so late in 2017, the employer is not required to pay the employee the \$1,080 reward by December 31, 2017, but it must do so shortly after that – the employer may not simply reduce the employee's monthly premium for the 2018 plan year.

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**Example 11:** Walter's Car Wash has a group health plan with a wellness program. Walter imposes a 25 percent smoker surcharge on plan participants who smoke. The reasonable alternative is use of a nicotine patch for three months. Jane smokes and has a heart condition; because of Jane's heart condition, her physician recommends a biofeedback program instead. Because the physician's recommendation is based on Jane's medical condition, the plan must follow the physician's recommendation.

Sue does not want to use a patch and wants to go to a smoking cessation class instead. She asks her doctor to provide a note saying she should be excused from the patch requirement, which he does. Because there is no medical reason for this request, the employer most likely does not have to honor it. (The regulations are not entirely clear on how far a plan must go to honor a physician's recommendation.)

**Example 12:** Joey's Pastrami Shop offers a group health plan. During open enrollment, Joey's requires employees to complete a health risk assessment as part of the enrollment process. The health risk assessment is not used to deny, restrict, or delay eligibility or benefits, or to determine individual premiums. Joey's Pastrami Shop does not have a wellness program tied to the health risk assessment, but if individuals do not complete it, they cannot enroll in the group health plan.

Joey's Pastrami Shop is using a health risk assessment as "gatekeeper" to the group health plan, and is not using the information from the health risk assessment in a reasonable manner. Both of these are prohibited. Joey's Pastrami Shop must restructure its wellness program to ensure that the health risk assessment is not a gatekeeper, and that the program meets all the requirements of the ADA and GINA.

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