Participatory Programs

Participatory wellness programs do not include any conditions for obtaining a reward that are based on satisfying a standard related to a health factor. Examples in the final regulations include, a program that reimburses employees for all or part of the cost of a gym membership; a program that reimburses employees for the costs of a smoking cessation program even where the employee does not quit smoking, and a program that provides a reward to employees who complete a Health Risk Assessments (HRA) without any further action required by the employee. Some of these examples blur the line as to when a wellness program is participatory as opposed to not being connected to a health plan at all and not subject to HIPAA.

Participatory wellness programs are permissible under HIPAA if they are made available to all

Health-Contingent Programs

Health-contingent wellness programs can be: (1) activity-only, or (2) outcomes-based. Activity-only programs require individuals to complete an activity related to a health factor and can include diet or exercise programs. Outcomes-based programs require individuals meet a certain health metric, for example having a certain Body Mass Index (BMI), cholesterol level, or be tobacco free.

All health-contingent programs must meet the following 5 compliance requirements:

1. Eligible individuals must be given the opportunity to qualify for the reward at least once per year,
2. The total reward offered cannot exceed **30%** of the total cost of coverage under the plan (both employee and employer contributions) or **50%** for tobacco prevention programs,
3. Programs must be reasonably designed to promote health or prevent disease,
4. The full reward must be available to all similarly situated individuals, which requires a reasonable alternative standard be offered to anyone who does not meet a health-contingent outcomes-based standard and anyone for whom an activity based program is unreasonably difficult or medically inadvisable, and
5. Plans must disclose the availability of a reasonable alternative standard in all plan materials.

The requirement that eligible individuals must be given the opportunity to qualify for the reward at least once per year often gives rise to questions on what employers can and should do with respect to new hires. For eligible employees hired after open enrollment or the annual window provided to complete a reasonable alternative standard the employer can: (1) allow new hires to earn the reward (administrative challenges), (2) give new hires the reward automatically, or (3) Make new hires wait until the next standard annual opportunity to earn reward.

Reasonable Alterative Standards and the Full Reward Rule

The two most challenging compliance requirements for health-contingent programs are the mandate that the full reward be available to all similarly situated individuals AND offering an appropriate reasonable alternative standard. The requirements surrounding a reasonable alternative standard differ significantly for outcomes based and activity based programs. A reasonable alternative standard must be offered to anyone who does not meet a health-contingent outcomes-based standard and anyone for whom an activity based program is unreasonably difficult or medically

Regulations also address how to determine whether a reasonable alternative standard is in fact "reasonable." This is generally a facts and circumstances analysis. The regulations identify the following facts and circumstances which plans should consider:

- If the reasonable alternative standard is the completion of an educational program, the plan or issuer must make the program available or assist the employee in finding such a program. The plan cannot require the individual to find such a program unassisted. Also, the plan may not require an individual to pay for the cost of the program.
- The time commitment required must be reasonable. For example, requiring attendance nightly at a one-hour class would be unreasonable.
- If the reasonable alternative standard is a diet program, the plan or issuer is not required to pay for the cost of food but must pay any membership or participation fee.
- If an individual's personal physician states that a plan standard (including, if applicable, the recommendations of the plan's medical professional) is not medically appropriate for that individual, the plan must accommodate the recommendations of the individual's personal physician with regard to medical appropriateness.
- If the reasonable alternative standard is a requirement to meet a different level of the same standard a reasonable amount of additional time must be provided to comply (e.g., "first-level" RAS is BMI less than 30; "second-level" RAS cannot be BMI less than 32 on same day or even weekth r a son4(m)2 (e)5.8 ( )alter9-1.8 (n)2.55 (di)-5 (v)9.5 (e)-.3 (s)-5.9 (tan)2.5 (dar)-1.8 (d)10.9 (s)-5.9 (,)

Plans and issuers have flexibility to determine how to provide the portion of the reward

Incentive Limits Under Proposed Rules Continue to Differ from HIPAA Rules

Notably, HIPAA establishes incentive limits for "health-contingent" wellness plans but has no

data, but if a wellness plan that provides medical care is also self-funded, HIPAA's privacy and security rules will also apply. These rules do not necessarily require any greater safeguards but they do require certain documentation and training as well as formal HIPAA policies and procedures. Employers that already self-fund components of their health and welfare plan will not need to do anything additional

Affordability under the ACA

Employers subject to the ACA's Pay or Play mandate can face penalties if full-time employees decline the employer plan and purchase subsidized Exchange coverage. To be eligible for subsidized Exchange coverage the employee must have an income above Medicaid eligibility and below 400% of the Federal Poverty Level (400% threshold waived through 2025). They must also show that the ER plan is unaffordable or does not provide at least a 60% minimum value. For a plan to be unaffordable, an employee

Additional Issues and Potentially Problematic Designs

Gateway Designs

Employers should avoid any wellness plan design where eligibility for benefits or for richer benefit options is conditioned on either completing a health risk assessment or medical screening or on a health factor like being tobacco-free. The EEOC has indicated repeatedly and confirmed in final regulations that these gateway or gatekeeper designs violate the ADA. To the extent eligibility is conditioned on a health factor, these designs would also violate HIPAA.

Complex Menus

Another potentially problematic wellness plan design involves the use of complex menus that blend participatory options, health-contingent activity-based options, and health-contingent standards. These types of menu-based programs usually allow activities to take place or achievements to be earned throughout the *current* plan year. To the extent these menus include a participatory HRA or biometric screening (no required standard or outcome), the ADA's *proposed* de minimis incentive standard would apply. Also, under HIPAA, reasonable alternative standards must be offered in connection with any health-contingent options throughout the year or coverage period of the program. This is complicated to administer and the full reward must be due to anyone who completes a reasonable alternative standard at any point in the plan year or coverage period. Requiring completion of items or activities before the start of the plan year simplifies administration. More

Cash Incentive for Completing a Health Screening or Health Risk Assessment

In this example, participants get a $50 gift card from their employer for completing a Health Risk assessment (HRA) and/or participating in a biometric screening regardless of the results of the screening. Under HIPAA, this is a **participatory program** — so the HIPAA nondiscrimination rules do not apply. The cash incentive amount will be taxable to the employee unless it is placed in a tax-favored account based plan like a Health Flexible Spending Account, Health Reimbursement Arrangement, or Health Savings Account. Although the ADA restricts an employer's right to ask disability-related questions or require medical exams, this would qualify as a voluntary wellness program as long as the incentive at issue is *reasonable*. Here, the modest value gift card meets the EEOC's *proposed* de minimis standard under the ADA. Employers wanting to offer larger incentives should consider adding a required standard or outcome along with a participatory RAS (that does not itself involve a medical exam or inquiry), thereby transitioning those design into heath-contingent programs under HIPAA and allowing HIPAA incentive limits to apply.

Premium Reduction for Completing a Health Screening or Health Risk Assessment

This example, like the wellness plan design discussed above, is a participatory program that is not subject to HIPAA's nondiscrimination rules. The incentive amount is also not taxable to the employee because it is a reduction in the premium the employee pays for medical coverage. However, any reduction in the premium an employee is required to pay through salary reduction will result in an increase in take-home pay for the employee, which will be subject to payroll and income taxes. Next, under the EEOC's *proposed* rules on incentive limits under the ADA a premium incentive or surcharge is generally not de minimis. E.g., charging an employee $50 per month more for health coverage ($600 per year) for not completing a HRA as part of a participatory wellness program would violate the ADA.

Targeted Disease Management Program with Incentive or Reduced Premium

This is an example of targeted disease management, which can be very effective. Under this design individuals with certain health conditiwd[(c)th

can be a gray area but likely depends on whether a medical exam or inquiry is involved. If additional medical exams or inquiries *are* part of the program, then the EEOC's *proposed* de minimis incentive limits under the ADA would apply, possibly making the program infeasible due to the value of additional services etc. However, if additional medical exams or inquiries are not part of the program (existing data raises a flag under the medical plan), then the ADA's *proposed* limits would not apply. Lastly, GINA precludes dependent child participation (including adult child dependents).

Reduced Premiums for Tobacco-free Status

A common and effective wellness plan design is to offer reduced premiums to employees who are tobacco-free (or have been tobacco-free for a set period of time like the past 6 months). At period od f6-1.5 (l)42mo32r

with respect to timing is that the wellness program and the window in which to complete a reasonable alternative standard close prior to the start of the plan year or within the first few months of the plan year.

Premium Reduction for Completing a Health Screening or Health Risk Assessment AND Achieving a Standard (like cholesterol level or target BMI)

Like the tobacco-free wellness plan design discussed a