WELLNESS PROGRAMS AND INCENTIVES

INFORMED ON REFORM

Employers have been using wellness programs to promote better health among employees and help control health care costs for a number of years. The Affordable Care Act (ACA) wellness regulations were finalized in 2013 and became effective for 2014 plan years.

ACA rules are just one set of regulations that impact workplace wellness programs. There are also federal regulations by the Equal Employment Opportunity Commission (EEOC) under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) governing wellness programs that were finalized in May 2016. On 12/20/2017, the D.C. District Court issued an order to vacate the EEOC's final rules under ADA and GINA, effective 1/1/2019. The Court further ordered the EEOC to release new proposed rules, which are expected to be published before 8/31/2018. See "Other Wellness Program Rules and Regulations" for more information. Complying with one set of rules and regulations does not necessarily ensure compliance with all the others. See the chart on page five for more information about the other regulations.

The goal of the ACA regulations is to ensure that wellness programs are designed to improve health and prevent disease and not to limit benefits for employees who have health conditions. The ACA regulations apply only to those wellness programs that are, or are part of, group health plans. The following is an overview of the key features of the ACA regulations.

Program categories

Under the ACA regulations, wellness programs are divided into these categories.

Participatory	**Health-contingent** Health factors could impact rewards	
	Activity-only	**Outcome-based**
Participate and receive a reward	Earn a reward for completing an activity	Earn a reward for achieving specific health outcomes
Examples: › Health assessment › Fitness center discount	Examples: › Walking program › Coaching program	Examples: › Tobacco-free › BMI < 30

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Reasonable alternatives

For health-contingent programs, the ACA requires employers to offer a reasonable alternative to any individual who fails to meet the requirements for a reward. Every employee must be given the opportunity to earn the full reward regardless of their personal health status. For example:

- **Activity-only** – A doctor may verify that it is medically inadvisable for an employee to participate in an activity due to an illness, pregnancy or recent surgery. The employer may waive the activity requirement or offer the employee a reasonable alternative activity to earn the full reward.
- **Outcome-based** – An employee who fails to meet the required health standard must be offered an alternative such as working with a health coach.

Maximum rewards

The maximum reward for a health-contingent wellness program under the ACA cannot exceed:

- **30%** of the total cost of medical coverage, including both employee and employer contributions.
- **50%** of the cost of coverage for tobacco-related programs.

Under the ACA, cost of coverage is calculated using the coverage in which the employee is enrolled (e.g., individual or family coverage).

Reward timing

Employees must have the opportunity to qualify for a reward at least once per year.

Other wellness program rules and regulations

The ACA rules are just one set of federal regulations that impact employer wellness programs. Prior regulations under the ADA and the GINA have also provided guidance for employers offering wellness programs. In May 2016, the EEOC, which enforces the ADA and GINA, issued final regulations on wellness programs in an effort to provide additional guidance on the prohibition of discrimination based on health status. Employers should consider these regulations when designing their programs.

On Dec. 20, 2017, the D.C. District Court issued an order – in the matter of AARP vs. EEOC – to vacate the EEOC's final rules on wellness under the ADA and GINA specific to the limits on incentive rewards. This order is not effective until Jan. 1, 2019. The Court further ordered the EEOC to release new proposed rules, which are expected to be published before Aug. 31, 2018.

Americans with Disabilities Act (ADA)

The ADA prohibits employers from asking an employee to provide health information or requiring an employee to submit to a medical exam. There are exceptions to this rule outlined in the final regulations, which allow employers to ask disability-related questions and conduct medical exams for voluntary wellness programs that promote health or wellness. Key differences between the ACA and the final ADA regulations include:

ADA	ACA
Maximum incentives: Limits incentives to a combined 30% of the total contribution (employer and employee) toward a self-only coverage medical policy (up to 50% for programs with self-reported tobacco use), regardless of whether the program is health-contingent or participatory. (See "Incentive Calculation" section on next page.)	**Key difference** ACA allows incentives up to 30% of the cost of family coverage if family and spouses can participate; ACA limits for tobacco cessation are for health-contingent programs only
Reasonable accommodations: Reasonable accommodations must be provided if an employee is unable to complete part or all of a wellness program for disability-related reasons. A reasonable alternative offered under the ACA may be considered a form of a reasonable accommodation under the ADA.	**Key difference** ACA does not specify reasonable accommodations for wellness programs; however, reasonable alternatives are required for health-contingent programs. (A reasonable alternative under the ACA may be considered a form of reasonable accommodation under the ADA.)
Information protection: Employers may only receive information from wellness programs in aggregate; any individually identifiable information received is considered PHI. Employer must also distribute notices describing the handling of medical information, and procedures for safeguarding information privacy to all wellness program participants	**Key difference** ACA does not address privacy
Voluntary participation: Employers may not require participation in a wellness program, nor may they deny access to coverage for nonparticipation. A wellness program is considered voluntary if the amount of an incentive offered for participation – alone or in combination with incentives offered for health-contingent wellness programs – does not exceed the 30% incentive maximum.	**Key difference** ACA does not address award limitations for nonparticipation in voluntary programs

Incentive calculations

Under the ADA regulations, there are four ways for an employer to calculate the incentive limit depending on how employers offer participation:

IN THIS SITUATION:	CALCULATE TO THIS PLAN:
Enrollment in the plan is a condition for participation in the wellness program	The group health plan in which the employee is enrolled
The employer offers a single health plan, but enrollment is not a condition for participation	The group health plan offered by the employer
The employer offers multiple health plans, but enrollment is not a condition for participation	The lowest cost self-only coverage under a major medical plan offered by the employer
The employer offers no group health coverage	The second lowest cost Silver Plan available on the Exchange for a 40-year-old non-smoker in the employer's primary place of business

ADA safe harbor not applicable

The statutory text of the ADA provides a safe harbor that allows medical inquiries and examinations to be conducted in connection with a "bona fide benefit plan." This statutory language has been interpreted to include employer-sponsored wellness programs within that safe harbor, and the courts have agreed*. The final ADA regulations clearly state that the "bona fide benefit plan" safe harbor does not apply to rewards and penalties offered in connection with an employer's wellness program that includes disability-related inquiries or medical examinations, and go on to state that the EEOC does not agree with the outcome of the cases on this issue.

* *EEOC v. Flambeau, Inc.*, (No. 14-cv-638-bbc (December 31, 2015) and *Seff v. Broward County*, 778 F. Supp.2d 1370 (S. D. Fla. 2011) both ruled in favor of the employer.

Genetic Information Nondiscrimination Act (GINA)

Federal regulations implementing GINA were first published in October 2009. The regulations generally explained that GINA restricts employers from requesting, requiring or purchasing genetic information from employees unless an exception applies. Under these rules, there is an exception that allows employers to offer financial incentives as part of a wellness program that solicits genetic information from the employee, so long as it is made clear that disclosing this information is voluntary. Additional regulations issued in May 2016 further clarify these rules by providing an exception under which employers can offer financial incentives connected to a spouse's completion of a health risk assessment that asks about the spouse's health (but not genetic) information.

There are key differences between the final GINA regulations and the ACA:

- Limit use of genetic health information collected through a wellness program.
- Regulate sharing of health information collected from spouses.
- Prohibit health and genetic information collection from employees' children.
- Prohibit the sale of genetic information provided through a wellness program to other vendors.

In combination, it is clear that compliance with one set of regulations does not necessarily ensure compliance with all the others. Employers should review their wellness programs and incentives against all regulations, and consult with legal counsel if their current wellness programs don't align with the final ADA and/or GINA regulations.

High-level overview of key differences

	ACA	ADA	GINA
Incentive* limit for programs that do not include tobacco cessation	30%	30%	30%
Incentive* limit for programs that include tobacco cessation	50%	50% Applies only with self-reported tobacco use; clinical tests for tobacco can't exceed 30%	Not applicable
Based on what total cost (Employer and employee share)	Self-only coverage Can increase to 30% of the family coverage cost if spouses and dependents can participate	Self-only coverage	Self-only coverage Can increase to two times 30% of self-only coverage if an employee's spouse provides personal health information as part of an HRA
Included in max limit	Health-contingent program incentives	› Health-contingent program incentives › Participatory program Incentives	Not specified
Frequency of incentive	Health-contingent program: Must provide chance to qualify at least once per year Participatory program: No requirement	No requirement	No requirement

* All incentives offered through a wellness program should be reviewed for tax purposes. Incentives are generally subject to tax unless (1) given as a premium credit, (2) deposited into an FSA/HSA/HRA, or (3) are prizes of nominal value (e.g., pens or t-shirts). Cash or gift card incentives are always taxable.

HOW THE RULES WORK TOGETHER

These examples highlight some of the differences between the rules and suggest ways to help ensure compliance with all regulations.

Reasonable alternatives

EVERGREEN COMPANY — **Example 1**

SITUATION

Employees receive a wellness incentive for completing an online health assessment and participating in biometric screenings.

ISSUE

These activities are considered participatory under ACA, and no reasonable alternative must be offered.

Since assessments and screenings collect health information, ADA rules require a reasonable alternative

CONSIDERATION

Evergreen Company could offer a reasonable alternative such as seeing a doctor for a preventive care visit.

Voluntary participation

ORCHID SALON & SPA — Example 2

SITUATION

Two medical plans:
Lower and higher deductibles.

Wellness program requires employees to participate in biometric screenings to enroll in lower deductible plan.

ISSUE

Inconsistent with ADA regulations that program must be voluntary and access to health plans cannot rely on participation.

CONSIDERATION

Orchid could change their wellness program rules to allow all eligible employees to enroll in either medical plan.

Incentives

FINCH ADVERTISING — Example 3

SITUATION

Wellness program provides 30% incentive for health-contingent programs plus a separate reward for completing a health assessment.

ISSUE

Under final ADA rules, the 30% maximum incentive applies to all rewards, including those for participatory programs.

CONSIDERATION

Finch could review its program so total wellness incentives do not exceed 30% of the total cost of medical coverage, including both employee and employer contributions.

Privacy

MCKIBBEN CONSTRUCTION — Example 4

SITUATION

Employee health information collected through wellness program is currently protected by HIPAA.

ISSUE

Under the final ADA rules, if a wellness program collects health information or requires a health exam, employers must provide employees with a notice describing what medical information will be collected, who will have access to it, how it will be used, and how it will be kept confidential.

CONSIDERATION

McKibben should consider providing a notice to employees that satisfies the requirements.