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 December 20, 2017, the D.C. District Court issued an order to vacate the EEOC's final rules related to incentive limits under ADA and GINA, effective January 1, 2019. 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.

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

Together, all the way.®

Cigna®

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).

* 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.

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.

The incentive limits under the EEOC's rules were challenged by the American Association of Retired Persons (AARP) as being too high and potentially coercive. The D.C. District Court found the limits to be insufficiently justified, and issued an order to vacate the rules on January 1, 2019 if clarification or new rules were not issued. The EEOC has formally removed incentive limits from ADA and GINA, but has not provided insight on an anticipated date for new rules. ADA and GINA incentive limits are no longer effective as of January 1, 2019. It is important to note that the remaining sections of the ADA and GINA rules remain in effect.

Americans with Disabilities Act

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
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** The 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 a 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. Employers must also distribute notices describing the handling of medical information, and procedures for safeguarding information privacy to all wellness program participants.	**Key difference** The 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.	**Key difference** The ACA does not address award limitations for nonparticipation in voluntary programs.

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

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 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.

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 health care provider 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.

Privacy

MCKIBBEN CONSTRUCTION — Example 3

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.