



**"TRUSTED ADVISOR FOR ALL THINGS HEALTHCARE"**

## Wellness Information Checklist

As of December 27, 2017 the U.S. District Court for the District of Columbia vacated December 20<sup>th</sup> Equal Employment Opportunity Commission (EEOC) rules for employer-sponsored wellness programs.

A federal court recently ruled that effective January 1, 2019, employer-sponsored wellness programs must be truly voluntary - meaning employers may no longer offer employees incentives (or threaten penalties) for participation involving medical exams or inquiries. The case, AARP v. EEOC, could change workplace wellness as we know it.

The EEOC final rules, issued in May 2016, permit employers to offer a financial incentive of up to 30% of the cost of employee-only coverage to workers who participate in workplace wellness programs. The rules are intended to offer employers guidance on how to design their wellness programs to comply with the Americans with Disability Act (ADA) and the Genetic Information Nondiscrimination Act (GINA), which generally prohibit employers from collecting and using information about the health of workers and their families.

HIPAA, as amended by the Affordable Care Act, allows health plans and insurers to offer incentives of up to 30% of the cost of coverage in exchange for an employee's participation in a health-contingent wellness program. Given possible prejudice to AARP members if the original rules stay in place, "and that the balance of the equities weighs in favor of vacatur in 2019, it would constitute manifest injustice to keep the Rules in place beyond 2018," the court said.

### 1. Since these General Information programs are limited, they are generally subject to a few federal requirements

- Be reasonably designed
  - A. Health Insurance Portability and Accountability Act of 1996 (HIPAA) compliance
  - B. Reasonable chance of promoting health or preventing disease
  - C. Not overly burdensome
  - D. Compliant with Americans with Disability Act (ADA) and Genetic Information Nondiscrimination Act (GINA) guidelines
  - E. Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against employees and job applicants on the basis of age with respect to benefits
  - F. Fair Labor Standards Act (FLSA)
    - i. Under the Fair Labor Standards Act (FLSA), nonexempt employees must be compensated at not less than time and one-half of regular pay for time worked over 40 hours in any given workweek.
    - ii. Time need not be compensable if four conditions are met:
      - a. Attendance is outside of the employee's regular work hours
      - b. Attendance is purely voluntary
      - c. The lecture is not directly related to the employee's job
      - d. The employee does not do any productive work during the lecture
- Limit maximum reward
  - A. Incentive is 30% of the total cost of self-only coverage under that plan
  - B. 30% must be calculated using the cost for the least expensive group health plan
- Must be voluntary
  - A. Cannot be denied coverage under any of the group health plans
  - B. Participation may not be subject to any adverse employment action based on non-participation

- Provide a notice
  - A. Program must provide notice
    - i. Written for employee understanding
    - ii. Clearly explains what medical information will be obtained and the purpose for which the medical information will be obtained
    - iii. Identifies who will receive the medical information and how it will be used
    - iv. States the restrictions on disclosures along with the methods that will be used to prevent improper disclosure
  - B. Spouse must be provided with a notice containing specific information
  - C. Under Employment Opportunity Commission (EEOC's) regulations, the wellness program may also include completion of health risk assessments or biometric screenings for children, but the plan may not provide any incentive for completion of the Health Reimbursement Arrangement (HRA) or biometric screening by children including adult and adopted children
- Keep information confidential
- Provide reasonable accommodations
- Tax rules for rewards
  - A. Incentive, cash equivalents rewards are taxable
  - B. Example \$50 gift card will have an additional \$50 of income subject to wage withholding and employment taxes
  - C. Rewards such as t-shirts, mugs qualify as de minimis fringe benefits under Internal Revenue Code Section 132 are not taxable to employees (IRS Publication 15-B Employer's Tax Guide to Fringe Benefits: [irs.gov/publications/p15b/ar02.html](https://irs.gov/publications/p15b/ar02.html))

**2. Since wellness programs limited to participation in certain health related activities with reward for participation are limited, they are generally subject to a few federal requirements**

- Be reasonably designed
  - A. Health Insurance Portability and Accountability Act of 1996 (HIPAA) compliance
  - B. Reasonable chance of promoting health or preventing disease
  - C. Not overly burdensome
  - D. Compliant with Americans with Disability Act (ADA) and Genetic Information Nondiscrimination Act (GINA) guidelines
  - E. Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against employees and job applicants on the basis of age with respect to benefits
  - F. Fair Labor Standards Act (FLSA)
    - i. Under the Fair Labor Standards Act (FLSA), nonexempt employees must be compensated at not less than time and one-half of regular pay for time worked over 40 hours in any given workweek.
    - ii. Time need not be compensable if four conditions are met:
      - a. Attendance is outside of the employee's regular work hours
      - b. Attendance is purely voluntary
      - c. The lecture is not directly related to the employee's job
      - d. The employee does not do any productive work during the lecture
- Limit maximum reward
  - A. Incentive is 30% of the total cost of self-only coverage under that plan
  - B. 30% must be calculated using the cost for the least expensive group health plan
- Must be voluntary
  - A. Cannot be denied coverage under any of the group health plans
  - B. Participation may not be subject to any adverse employment action based on non-participation
- Provide a notice
  - A. Program must provide notice
    - i. Written for employee understanding

- ii. Clearly explains what medical information will be obtained and the purpose for which the medical information will be obtained
  - iii. Identifies who will receive the medical information and how it will be used
  - iv. States the restrictions on disclosures along with the methods that will be used to prevent improper disclosure
- B. Spouse must be provided with a notice containing specific information
- C. Under Employment Opportunity Commission (EEOC's) regulations, the wellness program may also include completion of health risk assessments or biometric screenings for children, but the plan may not provide any incentive for completion of the HRA or biometric screening by children including adult and adopted children
- Keep information confidential
- Provide reasonable accommodations
- Tax rules for rewards
  - A. Incentive, cash equivalents rewards are taxable
  - B. Example \$50 gift card will have an additional \$50 of income subject to wage withholding and employment taxes
  - C. Rewards such as t-shirts, mugs qualify as de minimis fringe benefits under Internal Revenue Code Section 132 are not taxable to employees (IRS Publication 15-B Employer's Tax Guide to Fringe Benefits: [irs.gov/publications/p15b/ar02.html](https://irs.gov/publications/p15b/ar02.html))

### 3. General Educational & Participatory Programs that are not Health Plan Related

- Programs are Voluntary and participatory programs are designed to promote healthy lifestyles and health choices, but not provide individualized care
- Some participatory programs have rewards
- Be reasonably designed
  - A. Health Insurance Portability and Accountability Act of 1996 (HIPAA) compliance
  - B. Reasonable chance of promoting health or preventing disease
  - C. Not overly burdensome
  - D. Compliant with Americans and Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA) guidelines
    - i. Title VII: Employer takes into consideration a p plan participant's race, religion, sex, color or national origin then the program could violate Title VII
  - E. Age In Discrimination in Employment Act (ADEA) prohibits employment discrimination against employees and job applicants on the basis of age with respect to benefits
  - F. Fair Labor Standards Act (FLSA)
    - i. Under the Fair Labor Standards Act (FLSA), nonexempt employees must be compensated at not less than time and one-half of regular pay for time worked over 40 hours in any given workweek.
    - ii. Time need not be compensable if four conditions are met:
      - a. Attendance is outside of the employee's regular work hours
      - b. Attendance is purely voluntary
      - c. The lecture is not directly related to the employee's job
      - d. The employee does not do any productive work during the lecture
- Limit maximum reward
  - A. Incentive is 30% of the total cost of self-only coverage under that plan
  - B. 30% must be calculated using the cost for the least expensive group health plan
- Must be voluntary
  - A. Cannot be denied coverage under any of the group health plans
  - B. Participation may not be subject to any adverse employment action based on non-participation
- Provide a notice
  - A. Program must provide notice

- i. Written for employee understanding
  - ii. Clearly explains what medical information will be obtained and the purpose for which the medical information will be obtained
  - iii. Identifies who will receive the medical information and how it will be used
  - iv. States the restrictions on disclosures along with the methods that will be used to prevent improper disclosure
- B. Spouse must be provided with a notice containing specific information
- C. Under Employment Opportunity Commission (EEOC's) regulations, the wellness program may also include completion of health risk assessments or biometric screenings for children, but the plan may not provide any incentive for completion of the HRA or biometric screening by children including adult and adopted children
- Keep information confidential
- Provide reasonable accommodations
- Tax rules for rewards
  - A. Incentive, cash equivalents rewards are taxable
  - B. Example \$50 gift card will have an additional \$50 of income subject to wage withholding and employment taxes
  - C. Rewards such as t-shirts, mugs qualify as de minimis fringe benefits under Internal Revenue Code Section 132 are not taxable to employees (IRS Publication 15-B Employer's Tax Guide to Fringe Benefits: [irs.gov/publications/p15b/ar02.html](https://irs.gov/publications/p15b/ar02.html))

#### 4. Health Plan Related Participatory Programs

- Receiving a premium/contribution discount merely for completing a health risk assessment (regardless of results)
- Receiving a deductible credit merely for participating in biometric screenings (regardless of results)
- Premium/Contribution holiday for enrolling in a smoking cessation program regardless of whether the individual stops smoking
- Employers that provide wellness rewards in the form of "credits" that are assigned to an employee's general purpose health Flexible Spending Account may want to limit the dollar amount to \$500 or less.
  - A. Limiting the maximum dollar amount can help ensure that their health FSAs do not inadvertently lose their status as HIPAA-excepted benefits.
    - i. In order to be an excepted benefit, a general purpose health FSA must have a maximum benefit that is limited to the greater or:
      - a. 2x the employee's salary reduction election or
    - ii. The employee's salary reduction amount plus \$500. Under this rule if the employer assigned \$600 in family wellness credits to an employee's health FSA, and the employee elected a \$0 salary reduction amount the FSA would not be an excepted benefit.
- Mental Health Parity and Addiction Equity
- Patient Protection and Affordable Care Act
  - A. If a wellness program varies the deductible, copayments, coinsurance or coverage for any of the services listed in the Summary of Benefits and Coverage then the calculations for that treatment scenario must assume that the individual is participating in the wellness program and additional language must be included in the SBC.
    - i. Note: These numbers assume the patient is participating in the IEBP diabetes wellness program. If you have diabetes and do not participate, your costs may be higher.
- Tax rules for rewards
  - A. Incentive, cash equivalents rewards are taxable
  - B. Example \$50 gift card will have an additional \$50 of income subject to wage withholding and employment taxes

- C. Rewards such as t-shirts, mugs qualify as de minimis fringe benefits under Internal Revenue Code Section 132 are not taxable to employees (IRS Publication 15-B Employer's Tax Guide to Fringe Benefits: [irs.gov/publications/p15b/ar02.html](https://irs.gov/publications/p15b/ar02.html))
- Be reasonably designed
  - A. Health Insurance Portability and Accountability Act of 1996 (HIPAA) compliance
  - B. Health Insurance Portability and Accountability Act of 1996 (HIPAA) Nondiscrimination
  - C. Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy and Security
  - D. Reasonable chance of promoting health or preventing disease
  - E. Not overly burdensome
  - F. Compliant with Americans and Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA) guidelines
  - G. Age In Discrimination in Employment Act (ADEA) prohibits employment discrimination against employees and job applicants on the basis of age with respect to benefits
  - H. Fair Labor Standards Act (FLSA)
    - i. Under the Fair Labor Standards Act (FLSA), nonexempt employees must be compensated at not less than time and one-half of regular pay for time worked over 40 hours in any given workweek.
    - ii. Time need not be compensable if four conditions are met:
      - a. Attendance is outside of the employee's regular work hours
      - b. Attendance is purely voluntary
      - c. The lecture is not directly related to the employee's job
      - d. The employee does not do any productive work during the lecture
- Limit maximum reward
  - A. Incentive is 30% of the total cost of self-only coverage under that plan
  - B. 30% must be calculated using the cost for the least expensive group health plan
  - C. Must be voluntary
    - i. Cannot be denied coverage under any of the group health plans
    - ii. Participation may not be subject to any adverse employment action based on non-participation
  - D. Provide a notice
    - i. Program must provide notice
      - a. Written for employee understanding
      - b. Clearly explains what medical information will be obtained and the purpose for which the medical information will be obtained
      - c. Identifies who will receive the medical information and how it will be used
      - d. States the restrictions on disclosures along with the methods that will be used to prevent improper disclosure
    - ii. Spouse must be provided with a notice containing specific information
    - iii. Under Equal Employment Opportunity Commission (EEOC's) regulations, the wellness program may also include completion of health risk assessments or biometric screenings for children, but the plan may not provide any incentive for completion of the HRA or biometric screening by children including adult and adopted children
  - E. Keep information confidential
  - F. Provide reasonable accommodations
- COBRA
  - A. Provision of a General Notice
  - B. Provision of an Election Notice
  - C. Provision of a Notice of Unavailability (if applicable)
  - D. Wellness Coverage Information
  - E. Provision of Early Termination Notice (if applicable)

## 5. Health Plan Related Activity Only Program

- Activity-only wellness programs are those that base the reward on a health related activity like walking, exercising
- Some programs include the use of a health risk assessment
- Employers that provide wellness rewards in the form of “credits” that are assigned to an employee’s general purpose health Flexible Spending Account may want to limit the dollar amount to \$500 or less.
  - A. Limiting the maximum dollar amount can help ensure that their health FSAs do not inadvertently lose their status as HIPAA-excepted benefits.
    - i. In order to be an excepted benefit, a general purpose health FST must have a maximum benefit that is limited to the greater or:
      - a. 2x the employee’s salary reduction election or
      - ii. The employee’s salary reduction amount plus \$500. Under this rule if the employer assigned \$600 in family wellness credits to an employee’s health FSA, and the employee elected a \$0 salary reduction amount the FSA would not be an excepted benefit.
- Health Insurance Portability and Accountability Act of 1996 (HIPAA) Nondiscrimination
- Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy and Security
- Mental Health Parity and Addiction Equity
- Patient Protection and Affordable Care Act
  - A. If a wellness program varies the deductible, copayments, coinsurance or coverage for any of the services listed in the Summary of Benefits and Coverage then the calculations for that treatment scenario must assume that the individual is participating in the wellness program and additional language must be included in the SBC.
    - i. Note: These numbers assume the patient is participating in the IEBP diabetes wellness program. If you have diabetes and do not participate, your costs may be higher.
- Tax rules for rewards
  - A. Incentive, cash equivalents rewards are taxable
  - B. Example \$50 gift card will have an additional \$50 of income subject to wage withholding and employment taxes
  - C. Rewards such as t-shirts, mugs qualify as de minimis fringe benefits under Internal Revenue Code Section 132 are not taxable to employees (IRS Publication 15-B Employer’s Tax Guide to Fringe Benefits: [irs.gov/publications/p15b/ar02.html](https://irs.gov/publications/p15b/ar02.html))
- Be reasonably designed
  - A. Health Insurance Portability and Accountability Act of 1996 (HIPAA) compliance
  - D. Reasonable chance of promoting health or preventing disease
  - E. Not overly burdensome
  - F. Compliant with Americans with Disability Act (ADA) and Genetic Information Nondiscrimination Act (GINA) guidelines
  - G. Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against employees and job applicants on the basis of age with respect to benefits
  - H. Fair Labor Standards Act (FLSA)
    - i. Under the Fair Labor Standards Act (FLSA), nonexempt employees must be compensated at not less than time and one-half of regular pay for time worked over 40 hours in any given workweek.
    - ii. Time need not be compensable if four conditions are met:
      - a. Attendance is outside of the employee’s regular work hours
      - b. Attendance is purely voluntary
      - c. The lecture is not directly related to the employee’s job
      - d. The employee does not do any productive work during the lecture
- Annual opportunities
- Limit maximum reward
  - A. Incentive is 30% of the total cost of self-only coverage under that plan

- B. 30% must be calculated using the cost for the least expensive group health plan
- C. 50% with the non-tobacco related programs
- Must be voluntary
  - A. Cannot be denied coverage under any of the group health plans/cannot limit plan choice
  - B. Participation may not be subject to any adverse employment action based on non-participation
- Provide a notice
  - A. Program must provide notice
    - i. Written for employee understanding
    - ii. Clearly explains what medical information will be obtained and the purpose for which the medical information will be obtained
    - iii. Identifies who will receive the medical information and how it will be used
    - iv. States the restrictions on disclosures along with the methods that will be used to prevent improper disclosure
  - B. Spouse must be provided with a notice containing specific information
  - C. Under Employment Opportunity Commission (EEOC's) regulations, the wellness program may also include completion of health risk assessments or biometric screenings for children, but the plan may not provide any incentive for completion of the HRA or biometric screening by children including adult and adopted children
- Keep information confidential
- Provide reasonable accommodations
- COBRA
  - A. Provision of a General Notice
  - B. Provision of an Election Notice
  - C. Provision of a Notice of Unavailability (if applicable)
  - D. Wellness Coverage Information
  - E. Provision of Early Termination Notice (if applicable)

## 6. Health Plan Related Outcome Based Programs

- Outcome based wellness program are those that based the reward on a health factor such as the results of a biometric test or health condition such as diabetes.
- Most outcome based wellness programs include the use of a health risk assessment
- Employers that provide wellness rewards in the form of "credits" that are assigned to an employee's general purpose health Flexible Spending Account may want to limit the dollar amount to \$500 or less.
  - A. Limiting the maximum dollar amount can help ensure that their health FSAs do not inadvertently lose their status as HIPAA-excepted benefits.
    - i. In order to be an excepted benefit, a general purpose health FST must have a maximum benefit that is limited to the greater or:
      - a. 2x the employee's salary reduction election or
    - ii. The employee's salary reduction amount plus \$500. Under this rule if the employer assigned \$600 in family wellness credits to an employee's health FSA, and the employee elected a \$0 salary reduction amount the FSA would not be an excepted benefit.
- Mental Health Parity and Addiction Equity
- Quality of Care Reporting Requirement
- Be Voluntary
  - A. Employees may not be required to participate
  - B. Employees may not be denied coverage under any of the group health plans or particular benefit packages within a group health plan based on non-participation
  - C. Employees may not be subject to any adverse employment action based on non-participation (e.g., termination of employment)

- Patient Protection and Affordable Care Act
  - A. If a wellness program varies the deductible, copayments, coinsurance or coverage for any of the services listed in the Summary of Benefits and Coverage then the calculations for that treatment scenario must assume that the individual is participating in the wellness program and additional language must be included in the SBC.
    - i. Note: These numbers assume the patient is participating in the IEBP diabetes wellness program. If you have diabetes and do not participate, your costs may be higher.
- Tax rules for rewards
  - A. Incentive, cash equivalents rewards are taxable
  - B. Example \$50 gift card will have an additional \$50 of income subject to wage withholding and employment taxes
  - C. Rewards such as t-shirts, mugs qualify as de minimis fringe benefits under Internal Revenue Code Section 132 are not taxable to employees (IRS Publication 15-B Employer's Tax Guide to Fringe Benefits: [irs.gov/publications/p15b/ar02.html](https://irs.gov/publications/p15b/ar02.html))
- Be reasonably designed
  - A. HIPAA compliance
  - B. HIPAA Nondiscrimination
  - C. HIPAA Privacy and Security
  - D. Reasonable chance of promoting health or preventing disease
  - E. Not overly burdensome
  - F. Compliant with Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA) guidelines
  - G. Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against employees and job applicants on the basis of age with respect to benefits
  - H. Fair Labor Standards Act (FLSA)
    - i. Under the Fair Labor Standards Act (FLSA), nonexempt employees must be compensated at not less than time and one-half of regular pay for time worked over 40 hours in any given workweek.
    - ii. Time need not be compensable if four conditions are met:
      - a. Attendance is outside of the employee's regular work hours
      - b. Attendance is purely voluntary
      - c. The lecture is not directly related to the employee's job
      - d. The employee does not do any productive work during the lecture
- Annual opportunities

**7. Reasonable Alternative Standard The program must be available to all similarly situated individuals and must be given a reasonable alternative standard**

- Limit maximum reward
  - A. Incentive is 30% of the total cost of self-only coverage under that plan
  - B. 30% must be calculated using the cost for the least expensive group health plan
  - C. 50% with the non-tobacco related programs
- Must be voluntary
  - A. Cannot be denied coverage under any of the group health plans/cannot limit plan choice
  - B. Participation may not be subject to any adverse employment action based on non-participation
- Provide a notice
  - A. Program must provide notice
    - i. Written for employee understanding
    - ii. Clearly explains what medical information will be obtained and the purpose for which the medical information will be obtained
    - iii. Identifies who will receive the medical information and how it will be used

- iv. States the restrictions on disclosures along with the methods that will be used to prevent improper disclosure
- B. Spouse must be provided with a notice containing specific information
- C. Under Employment Opportunity Commission (EEOC's) regulations, the wellness program may also include completion of health risk assessments or biometric screenings for children, but the plan may not provide any incentive for completion of the HRA or biometric screening by children including adult and adopted children
- Keep information confidential
- Provide reasonable accommodations
- COBRA
  - A. Provision of a General Notice
  - B. Provision of an Election Notice
  - C. Provision of a Notice of Unavailability (if applicable)
  - D. Wellness Coverage Information
  - E. Provision of Early Termination Notice (if applicable)

**8. Wellness program does not fit into any of the above categories, a review of the details of the program design will be needed to determine which federal rules may apply.**

- A. Note: Wellness programs designed to reduce tobacco use are generally outcome-based programs
- B. If the program provides a reward for attending a smoking cessation class regardless of whether the individual does not smoke or stops smoking, it would be participatory. Otherwise, it is probably outcome-based.
- C. If your wellness program does not fit into any of the above categories, a review of the details of the program design will be need to determine which federal rules may apply.