**Age Discrimination in Employment Act (ADEA)**

A wellness program cannot discriminate by terminating or decreasing rewards for employees 40 or older.

**Americans with Disabilities Act (ADA)**

A wellness program can’t discriminate against a differently-abled employee so an alternative method of reward (incentive OR penalty) achievement should be planned. The ADA also governs wellness programs with an HRA (disability-related questions such as depression) OR biometric screening by including these requirements:

1) Be reasonably designed to promote health/prevent disease, not be too hard, not be a smokescreen to enable discrimination, and the methods should make sense. Collecting data with no results or follow-up is not reasonably designed.

2) Limit the max rewardto 30% of the cost of employee-only coverage in the least expensive plan available OR in the absence of a health plan, 30% of self-only coverage for a 40-year-old non- smoker in the second lowest cost Silver plan from the local marketplace. There is one exception; if smoking status is verified by an affidavit only (no biometric tests), then the limit is 50%. Otherwise the limit is 30%.

3) Don’t require, deny coverage, or base adverse employment action on participation status.

4) Provide clear written notice that explains what data will be collected, how it will be used, with whom it will be shared, and how it will be kept both confidential and secure. A sample notice is provided [here](https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm).

5) Don’t share data with those who can make employment decisions (e.g. supervisors or managers). Don’t require participants to disclosure of personal data (e.g. sale, sharing, transfer, etc) to receive an incentive.

6) Provide reasonable accommodation for employees to access the wellness program.

**COBRA**

If a wellness program provides a benefit such as a reduced deductible (e.g. for HRA completion) to *all* employees, this benefit must be covered in COBRA. However, reduced *premiums* are exempt from this rule. Here are the most significant COBRA requirements: 1) participant and spouse must receive a *general* notice when coverage under COBRA begins and an *election* notice (wellness program and medical notice can be combined) that explains rights and obligations; 2) Those who will *not* receive COBRA coverage must be notified;  3) the COBRA coverage period for the wellness program should be the same for the medical COBRA coverage period; and  4) an early termination notice must be provided if applicable. Note: If applicable, wellness programs should be included in written COBRA policies.

**ERISA**

Wellness programs that only provide general education (newsletters, classes, etc) are exempt. Programs that provide individualized “medical care” (biometric testing or flu shots) or coaching/counseling by a trained professional are subject to the following requirements: 1) include and follow all plan terms including financial standards; 2) provide summary plan documents to participants; and 3) file [Form 5500](https://www.irs.gov/retirement-plans/form-5500-corner) annually. NOTE: These services should be provided by a Broker or Employer. If eligibility for the wellness program and major medical plan are different (e.g. FTEs are eligible for medical but FTEs *and* PTEs are eligible for the wellness program), the employer *may* create a separate ERISA plan just for the wellness program.

**Fair Labor Standards Act (FLSA)**

If participation in a wellness program is “compensable time,” then an employer has to pay time and a half for hours over 40 in a workweek. These conditions will prevent a wellness program from being considered compensable: 1) voluntary attendance; 2) outside regular work hours; 3) activity not directly related to the employee’s job; and 4) the employee does no productive work during the activity (e.g., answering e-mails).

**Flexible Spending Accounts (FSA)**

If employees can earn “credits” that an employer deposits into an FSA, the max amount should be $500 or less to ensure that FSAs don’t lose their HIPAA-excepted benefit status. An alternative would be to credit reward amounts to an FSA that is limited to dental and vision expenses.

**Genetic Information Nondiscrimination Act (GINA)**

Employers can’t ask for or buy genetic information; if they already have it, the information must be part of a confidential medical record; and it can’t be used for underwriting. When a reward (incentive or penalty) is offered for wellness program participation, an HRA with family history questions may *not* be used. Family is defined [here](https://www.eeoc.gov/laws/types/genetic.cfm). If a spouse (but *not* children) can qualify for a reward based on biometric testing *or* HRA completion (with genetic information or not), the reward is subject to the ADA rules above *plus* the spouse must receive notice that the information will be provided to trained professionals if required for health reasons and that information will not shared with the employer.

**HIPAA Nondiscrimination**

A wellness program that includes “medical care”, or health assessments (disability-related inquiries such as depression) must be available to all similarly situated employees regardless of health status. It is illegal to restrict benefit options to only wellness program participants *or* to those who meet a health factor based standard (e.g. not smoking). However, it is legal to charge more for benefit options.

**HIPAA Privacy and Security**

These rules don’t apply to self-insured companies that run a health plan with 50 or fewer eligible employees *or* to dental/vision plans. Otherwise, a wellness program that provides “medical care” (see ERISA section above) OR that is linked to a health plan (do wellness activity to earn a benefit) must follow [HIPAA Privacy and Security rules](https://www.hhs.gov/hipaa/for-professionals/security/laws-regulations/). The HIPAA Privacy and Security rules used for a medical plan can cover a wellness program. A Business Associate Agreement should be executed with all wellness vendors.

**Mental Health Parity and Addiction Equity Act (MHPAEA)**

This act legislates parity between medical and mental benefits. Health plans can’t have higher or separate deductibles or co-pays for mental health/substance use disorder treatments, nicotine addiction included. Wellness programs that pay for “stop smoking” drugs are subject to this rule but clearer definitions are forthcoming. Employers that limit smoking cessation drugs or counseling should consult with their legal counsel.

**New Quality of Care Reporting**

Group health plans must report yearly to the HHS *and* enrollees (during open enrollment) regarding wellness/prevention services delivered including HRA’s completed; face-to-face, telephonic, or web-based intervention efforts; and participation in smoking cessation, weight or stress management, heart disease or diabetes prevention, and other healthy lifestyle programs. A good vendor should facilitate this.

**Patient Protection and Affordable Care Act (PPACA)**

If a wellness program varies a benefit for *any* service listed in the Summary of Benefits and Coverage, then the calculations must assume wellness participation and it must be explained e.g.,*“These numbers assume the employee is participating in our diabetes program. If you have diabetes and do not participate in the wellness program, your costs may be higher…”* Effective April 2017, three things must be included in the SBC: pregnancy diabetes, and simple fractures. PPACA includes [Employer Shared Responsibility](https://www.irs.gov/affordable-care-act/employers/employer-shared-responsibility-provisions) which mandates a penalty for not adequately insuring employees based on several criteria. The IRS has issued final regulations to help companies determine the [penalty and medical plan affordability](https://www.irs.gov/affordable-care-act/individuals-and-families/aca-individual-shared-responsibility-provision-calculating-the-payment).

***Section 125 Cafeteria Plans***

Depending on the size of a premium change, either an employer or an employee can make changes to the cafeteria plan.

**Tax Rules for Rewards**

A wellness program that meets nondiscrimination requirements is likely *not* liable for employment taxes on reduced premiums, co-pays, or deductibles; or employer contributions to an HRA, HSA, or FSA. Cash rewards (e.g. a bonus, gift cards, or product discounts) given from the employer to the employee *are* subject to employment taxes. Small rewards (T-shirts, mugs, etc) qualify as *de minimis* fringe benefits and are not taxable. See the IRS [guidelines](http://www.irs.gov/publications/p15b/ar02.html) on fringe benefits. NOTE: Our opinion is that incentives provided by the vendor to the employee are *not* subject to employment taxes if they come directly out of vendor operating costs. Tax lawyers should be consulted for additional advice.

**Title VII**

A wellness program cannot discriminate based on employee race, religion, sex, color, or national original.