Compliance Obligations for Wellness Plans

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Wellness and disease prevention programs continue to grow in popularity and have become increasingly important under the Affordable Care Act as a way to reduce costs. However, wellness plans always have been, and continue to, be heavily regulated. In fact, regulatory compliance for wellness plans has become even more complicated in recent years. As a result, even an employer genuinely trying to help its employees improve their health and quality of life must assess their wellness plan's compliance obligations under HIPAA, the ADA and GINA, ERISA and COBRA. This paper discusses regulatory compliance, issues to watch for, and provides examples of low risk and recommended wellness designs.

Core Compliance Obligations (HIPAA and the ADA)

Wellness Programs under HIPAA

HIPAA's nondiscrimination provisions generally prohibit group health plans from discriminating against participants with respect to premiums, benefits, or eligibility based on a health factor. Wellness programs, programs designed to promote health or prevent disease, are an exception to this general rule if they meet certain requirements. HIPAA wellness regulations address two types of wellness programs: (1) participatory programs, and (2) health-contingent programs.

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 similarly situated individuals. This requirement allows different options or offerings based on the following distinctions: (1) participant vs. beneficiary, (2) benefit option election, and (3) bona fide employment classification. Examples of bona fide employment classifications include: (1) full-time vs. part-time status, (2) different geographic location, (3) collective bargaining unit, (4) date of hire, (5) length of service, and (6) current employee versus former employee status.

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 inadvisable. Differences also include whether seeking medical verification of the need for the reasonable alternative standard.

<u>Outcome-Based</u>

- Required for anyone who does not meet the initial standard
- No medical verification allowed
- Not required to be medically inadvisable or unreasonably difficult

<u>Activity-Based</u>

- Required ONLY IF activity is medically inadvisable or unreasonably difficult for the individual
- Medical verification is allowed ONLY IF "medical judgment" is required to evaluate the validity of the request

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 week).

Wellness plans should also be structured to avoid an endlessly repeating cycle of required reasonable alternative standards. This cycle happens when the reasonable alternative standard for any health-contingent program is another activity–based or outcomes-based health-contingent program. For example, if a walking program is the reasonable alternative standard provided for a running program, an individual for whom the walking program is unreasonably difficult due to a medical condition or for whom it is medically inadvisable to walk must be provided a second reasonable alternative standard to the walking program. A purely participatory reasonable alternative standard is the best way to avoid the administrative complexities of administering ongoing reasonable alternative standards.

In order to satisfy the requirement to provide a reasonable alternative standard, the same, full reward must be available under a health-contingent wellness program (whether activity-based or outcome-based) to individuals who qualify by satisfying a reasonable alternative standard. Accordingly, while an individual may take some time to request, establish, and satisfy a reasonable alternative standard, the same, full reward must be provided to that individual as is provided to individuals who meet the initial standard for that plan year. This will require payment of any discount or incentive retroactively for the months during which the reasonable alternative standard was being completed.

> Example: If a calendar year plan offers a health-contingent wellness program with a premium discount and an individual who qualifies for a reasonable alternative standard satisfies that alternative on April 1, the plan or issuer must provide the premium discounts for January, February, and March to that individual.

Plans and issuers have flexibility to determine how to provide the portion of the reward corresponding to the period before an alternative was satisfied (e.g., payment for the retroactive period or pro rata over the remainder of the year) as long as the method is reasonable and the individual receives the full amount of the reward. In some circumstances, an individual may not satisfy the reasonable alternative standard until the end of the year. In such cases, the plan can provide a retroactive payment of the reward for that year within a reasonable time after the end of the year, but may not provide pro rata payments over the following year. To avoid paying the retroactive payment by check (as opposed to through an additional pro rata premium discount), employers should be very careful in coordinating the amount of the incentive and the window within which an employee has to achieve a reasonable alternative standard. Payout is likely required on termination of employment.

Lastly, the Regulations provide a model notice for the required notice of the availability of a reasonable alternative standard (excerpted below). That language should be customized to reflect the plan's design and included in any materials describing the program.

> Model Notice: Your health plan is committed to helping you achieve your best health. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at [insert contact information] and we will work with you (and, if you wish, with your doctor) to find a wellness program with the same reward that is right for you in light of your health status.

Wellness Programs under the ADA (and GINA)

Wellness plans that involve a medical exam or inquiry also need to comply with the Americans with Disabilities Act (ADA), and Genetic Information Nondiscrimination Act (GINA). Both the ADA and GINA apply to employers with more than 15 employees (HIPAA does not have an employee threshold).

The ADA generally prohibits employers from obtaining employee medical information through disability-related inquiries or medical examinations except as part of a voluntary employer wellness plan. An example of a disability-related inquiry is an HRA, and an example of a medical examination is a biometric screening, both of which are common components of employer wellness plans. A wellness plan is "voluntary" as long as an employer does not require participation or offer incentives so great that the wellness program can no longer be considered voluntary.

In order to have a voluntary wellness plan, programs must meet the following criteria:

1. An employer may offer **reasonable incentives**
2. Employers may not take adverse action, retaliate against, or coerce employees who choose not to participate,
3. Employers cannot deny benefits eligibility or limit benefits options for employees who don't participate (no gateway designs),

Incentive Limits Under Proposed Rules Continue to Differ from HIPAA Rules

Notably, HIPAA establishes incentive limits for "health-contingent" wellness plans but has no incentive limits for "participatory" wellness plans. However, many participatory programs involve completing a HRA or biometric screening (without a required standard or outcome), bringing them under the purview of the ADA. Historically, many employers implemented wellness programs that involved stacking incentives under both types of programs, resulting in large incentive amounts that were compliant under HIPAA but questionable under the ADA. The EEOC began challenging these designs in 2009 and initiated a series of enforcement actions culminating in 2014 (e.g. *EEOC v. Honeywell*, *EEOC v. Flambeau*, *and EEOC v. Orion Energy*). However, none of these actions or other EEOC guidance provided a definitive answer as to what incentive amount crossed this line.

On May 16, 2016, EEOC issued long awaited regulations that established a complex framework for calculating incentive limits under the ADA that differed significantly from rules under HIPAA. Although the EEOC's incentive limit was generally described as 30% of the cost of coverage, its calculation was often (but not always) based on the lowest cost available plan (not the plan covering the participant as is the case under HIPAA) and spousal incentive limits were based on the individual coverage tier as opposed to the cost of coverage at the employee plus spouse coverage tier (also differing from HIPAA calculations).

The AARP promptly challenged the EEOC's 2016 rules in court and won (*AARP v EEOC*). The court found that EEOC's incentive limits were not adequately supported by a reasoned explanation and ordered the limit vacated effective January 1, 2019. However, on December 19, 2018, the EEOC formally removed the problematic section of its regulations, specifically the section addressing permissible incentive limits for wellness plans involving a medical exam or inquiry. All other portions of the final regulations remained in force.

On January 7, 2021, the EEOC issued a new proposed rule on incentive limits under the ADA for wellness plans that involve a medical exam or inquiry. Under that proposed rule, for HIPAA health-contingent programs HIPAA incentive limits will apply, and for any other wellness program that involves a medical exam or inquiry only a de minimis reward is allowed (e.g. a water bottle or gift card of modest value) in exchange for participation. For example, 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 not be de minimis incentive and would violate the ADA.

The proposed rule specifically exempts any HIPAA health-contingent program that is part of an underlying group health plan from the de minimis standard under an existing ADA underwriting safe-harbor, thereby allowing existing HIPAA incentive limits to apply. The underwriting safe-harbor provides that the ADA does not prohibit or restrict "a person or organization . . . from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law." The EEOC reasons that because health-contingent programs require employees to engage in certain conduct or achieve certain goals they are classifying and/or administering risk specific to the plan. This is a departure from the prior interpretation that the safe harbor was limited

only to situations involving the application of actuarial data or anticipated experience to determine insurability or insurance rates.

The EEOC's proposed rule offers four factors as helpful in determining when a wellness program is part of a group health plan for purposes of the ADA wellness rule: (1) the program is only offered to employees who are enrolled in an employer-sponsored health plan; (2) any incentive offered is tied to cost-sharing or premium reductions (or increases) under the group health plan; 3) the program is offered by a vendor that has contracted with the group health plan or issuer; and (4) the program is a term of coverage under the group health plan. Most HIPAA health-contingent programs should satisfy most of these requirements. The EEOC requested comments on whether different or additional factors would be more useful.

These proposed rules were withdrawn as part if the transition of the Executive branch to the Biden Administration but remain a guidepost as to what the EEOC considers reasonable under the ADA.

Note: These are proposed rules that have been withdrawn and are not currently in force. Employers with participatory wellness programs that include a HRA or biometric screening should consider the logistics of 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.

Importantly, under the ADA, a smoking cessation program that asks employees whether or not they use tobacco does not constitute a disability-related inquiry or medical exam. Thus, any ADA or GINA incentive limits would not apply. However, plans that require a biometric screening or other medical test for the presence of nicotine or tobacco would be subject to the ADA's de minimis incentive limits, upon republication and finalization. Lastly, dependent children (even adult children) cannot participate in wellness plans governed by the ADA/GINA.

Additional Issues for Wellness Plans that Provide Medical Care

A wellness plan that provides medical care potentially has additional compliance considerations. A wellness plan will be considered to provide medical care if it provides biometric screenings (or even flu shots). Note that satisfying these additional compliance obligations generally requires that wellness plans be integrated with the employer's existing group health plan and not offered on a "stand-alone" basis to employees not enrolled in major medical coverage. Alternatively, they could be included in an excepted benefit with an established compliance frame work like an Employee Assistance Program.

HIPAA Privacy and Security Rules

A wellness plan that provides medical care is considered self-funded if the employer pays for the cost of the program. This would generally be the case where the employer engages a third party vendor to manage the program (facilitate biometric screening and/or flu shots). It is not the case where an insurance carrier offers these services or a program in connection with an insured major medical plan. There are obviously many regulatory safeguards on the privacy and permitted uses of wellness plan

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 to comply with HIPAA Privacy and Security rules except possibly secure Business Associate Agreements with any wellness vendors. This is because these employers will already have a HIPAA infrastructure in place. Employers offering only insured benefits may want to consider the administrative time and cost involved in implementing a HIPAA Infrastructure before introducing wellness plan that provides medical care on a self-funded basis.

COBRA Considerations

A wellness plan that provides medical care will be subject to COBRA. How COBRA applies to wellness plans depends on the medical care provided and how any incentives are structured. Qualified Beneficiaries (QBs) that elect COBRA for a wellness plan should have access to the underlying medical care offered (e.g. biometric screening or flu shots). However, in most cases they do not earn incentives that reduce their portion of the premium for major medical coverage. These incentives generally do not reduce the "cost of coverage" but instead adjust cost sharing between the employer and employee and the COBRA premium combines the cost to employer and employee. Although uncommon, if an insurance carrier actually reduces the premium for wellness participants, a QB that earns that incentive should have a reduced COBRA premium reduced.

If the wellness plan incentive is funding for an account based plan that is also subject to COBRA (most typically a Health Reimbursement Arrangement), a QB that elects COBRA for the wellness plan and the Health Reimbursement Arrangement should be able to earn those wellness Health Reimbursement Arrangement incentive funds. Because Health Reimbursement Arrangements must be integrated with major medical coverage, the QB would also need to elect COBRA for the major medical plan. Note, however, that QBs are not entitled to Health Savings Account (HSA) funds even if tied to a wellness plan. This is because HSAs are not subject to COBRA (or ERISA). Health-Flexible Spending Account (H-FSA) wellness incentive funding is less common and H-FSAs are also subject to a limited COBRA obligation (COBRA is only offered for underspent accounts).

ERISA

A wellness plan that provides medical care is also subject to ERISA and ERISA reporting and disclosure requirements. This means that the wellness plan should be included in an employer/plan sponsor's wrap Summary Plan Description (SPD) or have a separate SPD. The wellness plan would also need to be included in an employer's 5500 filing for its bundled ERISA plan. Because there is no way to indicate the inclusion of the wellness plan in a 5500 filing, including the wellness plan in the corresponding wrap SPD will be adequate to indicate its inclusion. If the employer/plan sponsor does not wrap its ERISA plan(s) then in theory a separate 5500 filing is required (and additional SAR distributed to wellness plan participants).

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 must be asked to pay more than 9.5% (not shown as indexed) of adjusted gross household income for employee only coverage.

Wellness incentives that can reduce the premium an employee pays will not generally be considered in determining affordability. The only exception is for "tobacco free" incentives offered as part of a health-contingent Outcomes-Based Program.

> Example: The cost to an employee for employee only, base plan coverage is $150/month. If employees are tobacco free it is $100/month. The $100/month rate determines affordability for all employees, even those that are not tobacco free.

Taxation of Incentives

The general rule is that everything of value provided by an employer to an employee is taxable unless an Internal Revenue Code (IRC) exclusion applies. Wellness plan incentives take a variety of forms and the form of the incentive determines whether it is taxable.

Wellness plan incentive amounts placed in a tax-favored account based plan like a Health Flexible Spending Account (limits apply), Health Reimbursement Arrangement, or Health Savings Account are not taxable because they have a separate tax exclusion (IRC § 105/106).

A reduction in the premium the employee pays for medical coverage is a common wellness plan incentive. This type of incentive is not necessarily "taxable" but will result in an increase in take-home pay for the employee as a result of paying less in premiums. That additional take home pay will be subject to standard payroll and income taxes (employee premiums are paid on a tax favored basis under IRC § 125).

Gift certificates or other cash equivalent items provided by the employer are never excludable from income, are generally not de minimis benefits and are always taxable (a low value vendor specific card could be deemed de minimis but no large amount or cards of general applicability). De minimis benefits are generally items so small accounting is unreasonable /impractical (IRC § 132). De minimis benefits include but are not limited to the following:

> Controlled, occasional employee use of photocopier, occasional snacks, coffee, doughnuts, etc., Occasional tickets for entertainment events, holiday gifts, flowers, fruit, books, etc., provided under special circumstances.

IRS has ruled previously in a particular case that items with a value exceeding $100 could not be considered de minimis but this is not a regulatory threshold for de minimis benefits.

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 complex menu-based wellness plan designs will generally require additional compliance review and consideration.

Conflicting Incentive Limits

Employers that offer sophisticated wellness plans with both participatory and health-contingent options, and/or multiple incentive levels, should take special note of the intersection of HIPAA and ADA incentive rules. HIPAA does not place incentive limits on participatory plans. However, under the ADA and the EEOC's *proposed* rules, incentives for any participatory wellness program with a medical exam or inquiry must be de minimis. Employers should consider adding a required standard or outcome to these participatory programs 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.

Low Risk and Recommended Wellness Designs

Below is a discussion of some common wellness program designs including recommendations for certain low-risk designs that can be implemented with minimal compliance obligations. Employers that have been engaged in wellness for a long time and understand the compliance challenges associated with more complex designs may want programs that go beyond our low risk recommendations.

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 condition are identified and offered incentives including cash payments, reduced premiums, reduced cost sharing, or additional benefits like health coaching. As long as participation is completely voluntary, this design will be considered benign discrimination. It is permissible under HIPAA to treat such individuals more favorably than other plan participants. This design is not otherwise subject to HIPAA's nondiscrimination rules. Whether it is subject to the ADA

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

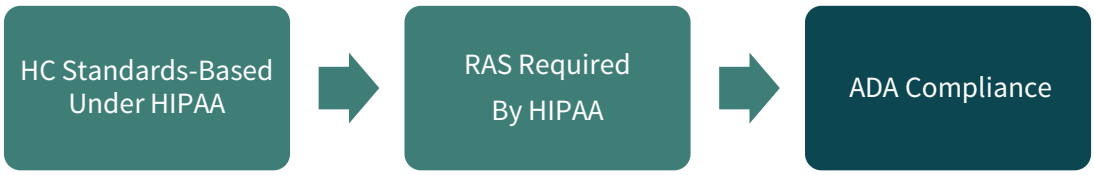
A common and effective wellness plan design is to offer reduced premiums to employees who are tobacco-free (or have been tobacco-free for a set period of time like the past 6 months). A tobacco-free incentive is technically a health-contingent standards-based wellness program that is subject to HIPAA's nondiscrimination rules. There are five requirements for any health-contingent program under HIPAA. (1) Eligible individuals must have an opportunity to qualify once per year. (2) The reward must not exceed 30% of the cost of coverage *or 50% of the cost of coverage for tobacco cessation programs*. (3) The reward must be available to all similarly situated individuals. (4) The program must be reasonably designed to promote health or prevent disease and cannot be overly burdensome. (5) A reasonable alternative standard or waiver of the standard must be available for anyone who does not initially qualify. The plan must disclose in all materials a description of the program, the availability of a reasonable alternative standard or waiver of the standard. HHS has provided a Model Notice. No medical verification of the need for a reasonable alternative standard is allowed under these circumstances or for any health-contingent outcomes-based program. If the only inquiry is whether a participant is tobacco free the ADA and GINA do not apply as long as there are *no other medical inquiries or exams* (no Cotinine testing, etc.). The EEOC's *proposed* de minimis incentive limits effective preclude cotinine testing in connection with a tobacco cessation program. Note that some states protect any lawful off-duty conduct which would include smoking. These laws are generally preempted by ERISA.

As noted above, a reasonable alternative standard is required with this design. The recommendation is for a participation-only reasonable alternative standard such as completion of an educational program regarding tobacco use or cessation. If the reasonable alternative standard requires completion of an activity — such as taking steps towards quitting smoking or any other activity that would qualify as an activity-based health-contingent wellness program in its own right — an additional reasonable alternative standard must be offered with respect to the alternative. A participatory alternative avoids a cycle of ongoing reasonable alternative standards.

Timing can also be important with any wellness design that requires a reasonable alternative standard. This is because once someone completes a reasonable alternative standard; they are entitled to the full value of the reward as if they had initially met the standard. In sum, the reward becomes retroactively due as opposed to only being prospectively payable. The recommendation

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 above, this is a health-contingent outcomes-based program that is subject to HIPAA's nondiscrimination rules. The considerations discussed above regarding HIPAA will apply, including recommendations regarding the type and timing of the required reasonable alternative standard and the required disclosure regarding the availability of a reasonable alternative standard or waiver of the standard. HHS has provided a Model Notice. Under HIPAA, the amount of the premium discount must remain at or below 30% of the total cost of coverage. This is as opposed to the higher 50% standard that can apply for tobacco-free programs. Under the ADA and the EEOC's *proposed* rules in incentive limits, HIPAA's health-contingent incentive limits would apply.

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