

What Federal Laws Apply to Wellness Programs Under ERISA Group Health Plans?

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QUESTION: We want to add a wellness program to our ERISA group health plan. What federal laws should we be considering?

ANSWER: Wellness programs take many forms, from informal “lunch and learn” sessions on nutrition or fitness to more comprehensive programs involving biometric tests and disease-management counseling. Programs may offer a wide range of rewards, from T-shirts or gift cards to significant discounts on group health plan premiums. Employers are faced with the tremendous challenge of understanding and complying with the many overlapping laws and continually changing rules that govern the various types of programs. Here is a high-level overview of some of the federal laws that employers with ERISA group health plans should consider before adding a wellness program:

- **HIPAA.** HIPAA’s health status nondiscrimination rules generally prohibit group health plans from varying contributions or benefits based on individual health factors. However, wellness programs may vary benefits (including cost-sharing features) and the amount of premiums or contributions if they comply with HIPAA’s nondiscrimination requirements for wellness programs or the benign discrimination exception. Most wellness programs must also comply with HIPAA’s privacy and security requirements. Among other things, this triggers the need for business associate agreements with vendors.
- **Code.** Employers wishing to implement wellness programs or incentives should consider any compliance implications that may arise under the Code. For example, tax issues can arise when employers provide rewards to employees for participating in wellness or disease-management programs or for meeting certain program goals. Cafeteria plan election change issues can also arise when employees qualify for wellness incentives during the cafeteria plan year.
- **COBRA.** If a wellness program provides health benefits as part of the group health plan, it is subject to COBRA. On the other hand, COBRA does not apply to an employer-sponsored wellness program that provides only general health information (e.g., informational brochures about flu prevention or lunchtime seminars about weight management).
- **ERISA.** Wellness programs that are offered as part of a group health plan or provide medical benefits are subject to ERISA’s requirements (e.g., there must be a plan document). Most employers that offer wellness programs to their employees are not experts in wellness program design and administration and require assistance from service providers. Service providers must be selected in accordance with ERISA’s fiduciary rules (e.g., duties of prudence and loyalty).
- **GINA.** GINA’s requirements must be met if a wellness program requests or requires genetic information from an employee, spouse, or dependent. If the spouse’s past or current health status is

requested related to the manifestation of disease or disorder, specific GINA requirements apply.

- *ADA*. A wellness program that requires disabled individuals to participate to attain benefits equal to those offered to nondisabled individuals might be found to violate the ADA. Also, employee inquiries or medical examinations that are part of a health risk assessment or medical history are considered “disability-related inquiries or medical examinations” that trigger the need for ADA compliance.

The GINA and ADA wellness provisions are in flux, and plan sponsors would welcome additional guidance from the EEOC. In response to court action, the EEOC announced proposed regulations in early 2021 that would significantly change the incentives permitted under the two statutes. However, the proposals were withdrawn pursuant to a regulatory freeze at the beginning of the Biden administration.

The above summary is not an exhaustive description of all wellness program requirements. Also, some of the laws have exceptions (e.g., for certain small employers), which vary by statute. Other issues to consider include how wellness programs interact with state law or other plan designs (e.g., HRAs and HSAs). Each wellness program design requires an individual analysis of applicable law. Employers should rely on the expertise of counsel to navigate this complex and evolving area of the law.

For more information, see EBIA’s Cafeteria Plan manual at Section XVI.M (“Wellness Programs and Cafeteria Plans”), EBIA’s COBRA manual at Section V.C.10 (“Wellness Programs”), EBIA’s Consumer-Driven Healthcare manual at Section VI (“Wellness and Disease-Management Programs”), EBIA’s ERISA Compliance manual at Section VI.J (“Special Issues: Plans Providing Medical Benefits (aka Group Health Plans)”), EBIA’s HIPAA Portability, Privacy & Security manual at Sections XI.I (“Wellness Programs Must Meet Specific Nondiscrimination Requirements”), VI.G (“Wellness Programs”), XXIII.C.9 (“Employee Wellness Programs”), and XV.E (“HIPAA Nondiscrimination Violations”), and EBIA’s Group Health Plan Mandates manual at Section XX.F (“ADA Considerations for Wellness Programs”).

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