

## WELLNESS PROGRAM COMPLIANCE FLOW CHART

### STEP 1: Determine if the wellness program is covered by the ADA.

#### Questions to ask:

- 1) Does the wellness program require a medical exam?
- 2) Does the wellness program ask any disability-related questions?

If yes to *either* question, the program is covered by the ADA wellness program rules.

### STEP 2: If the program is covered by the ADA, continue with ADA Compliance Checklist. If it is not covered by the ADA, skip to Step 3.

#### ADA Compliance Checklist [*effective first day of the plan year that begins on or after 1/1/17*]:

#### 1) Is program voluntary?

- a. Maximum incentive does not exceed 30% of total cost of *employee-only* coverage.
- b. Program is not mandatory, e.g., a condition of employment.
- c. Employees have access to all employer health plans whether or not they participate in the wellness program or successfully complete the wellness program.

#### 2) Does program meet confidentiality requirements?

- a. Notice is distributed to employee before employee provides health information.
  - i. Describes information to be collected, how it will be used, who will receive it, and how it will be kept confidential.
  - ii. Sample notice: <https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm>.
- b. Employer only gets aggregated information. No disclosure of employee names beyond what is necessary to administer a health plan.
- c. Employer does not ask employee to agree to sell, exchange, share, or transfer medical information (except to the extent necessary to carry out the wellness program).
- d. Employer does not ask employee to waive confidentiality protections under ADA as condition of participating in wellness program.

#### 3) Does program have a reasonable design (least likely place to find a compliance problem)?

- a. It promotes health and prevents disease.
- b. It is not overly burdensome.
- c. It is not a subterfuge for violating the ADA or other employment nondiscrimination laws.

### STEP 3: Determine if wellness program is covered by the GINA.

#### Questions to ask:

- 1) Does the program ask for information about an employee's (or the employee's spouse's) family medical history or in any other way inquire about genetic information; this includes information about the "manifestation of a disease or disorder in family members of an individual"?

If yes, the program is covered by the GINA wellness program rules, but see notes below regarding different rules depending upon whether an incentive is offered.

**STEP 4: If the program is covered by the GINA, continue with GINA Compliance Checklist. If it is not covered by the GINA, skip to Step 5.**

**GINA Compliance Checklist [effective first day of the plan year that begins on or after 1/1/17]:**

**1) Is the program voluntary?**

- a. Does the program ask for information about an employee's own genetic information or that of an employee's child?
  - i. If yes, the program cannot have any incentive tied to providing that information.
- b. Does the program ask for information about an employee's spouse's genetic information?
  - i. If yes, the program is acceptable if the incentive does not exceed 30% of total cost of *employee-only* coverage.
- c. The program is not mandatory, e.g., a condition of employment.

**2) Does the program meet confidentiality requirements?**

- a. Participants must sign authorization explaining confidentiality protections.
- b. Is information maintained in a separate medical file and treated as a confidential medical record? No access by anyone making employment decisions about the employee.
- c. Where wellness program is a health plan, disclosure must be limited to HIPAA levels.
- d. Provision of genetic information cannot be a condition of participating in any health benefit.
- e. Employer does not ask employee to agree to sell, exchange, share, or transfer medical information (except to the extent necessary to carry out the wellness program).

**3) Does the program have a reasonable design (least likely place to find a compliance problem)?**

- d. It promotes health and prevents disease.
- e. It is not overly burdensome.
- f. It is not a subterfuge for violating the GINA or other employment nondiscrimination laws.

**STEP 5: Determine whether the program is a group health plan.**

**Questions to Ask:**

- 1) Is it part of an existing group health plan, e.g., an offering that is part of the company's major medical plan?
  - a. If yes, it is a group health plan.
- 2) Does it stand alone but provide or pay for health benefits?
  - a. If yes, it is a group health plan.
- 3) Does it stand alone and not provide health benefits?
  - a. No.

**STEP 6: If the program is a group health plan, continue with HIPAA/ACA Compliance Checklist. If it is not a group health plan, skip to Step 7.**

**HIPAA/ACA Compliance Checklist:**

**Participation-Only Programs:**

- 1) Eligibility is based solely on participation in an employer-sponsored wellness program.
- 2) Permissible so long as they are available to *all similarly situation individuals*.

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## **Health-Contingent Programs:**

- 1) Requires an individual to satisfy a standard related to a health factor to obtain a reward (or requires an individual to undertake more than a similarly-situated individual based on a health factor in order to obtain the same reward).
  - i. Two types:
    1. **Activity-only:** Requires an individual to perform or complete an activity related to a health factor in order to obtain a reward but does not require the individual to attain or maintain a specific health outcome.
    2. **Outcome-based:** requires an individual to attain or maintain a specific health outcome in order to obtain a reward.
- 2) **Does the Program Meet Five Requirements:**
  - i. Gives individuals the opportunity to participate at least once a year.
  - ii. Reward that does not exceed 30% of total cost of employee-only coverage, or family coverage where family members participate. (50% for a smoking cessation program.)
  - iii. Program has a reasonable design:
    1. It has a reasonable chance of improving the health of or preventing disease in participating individuals
    2. It is not overly burdensome
    3. It is not a subterfuge for discriminating based on a health factor
    4. It is not highly suspect in the method chosen to promote health or prevent disease
  - iv. The program has Uniform Availability (must meet general similarly-situated standard)
    1. If **activity-only**: provides a reasonable alternative if:
      - a. It is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard OR
      - b. It is medically inadvisable to attempt to satisfy the otherwise applicable standard
    2. If **outcome-based**: provides a reasonable alternative if:
      - a. Participant does not meet the specific outcome
    3. The program gives notice of availability of reasonable alternative standard, providing that:
      - a. Reasonable alternatives are available
      - b. Recommendations of a physician will be accommodated

## **Regardless of the type of program, meets confidentiality requirements:**

- 1) Employer can only access PHI from plan if employer performs:
  - i. Plan administration OR
  - ii. Amends the plan documents to certify that the employer will not violate rules
- 2) Where employer performs no plan admin, the plan can only disclose to the employer:
  - i. Info stating which individuals are participating in the program and
  - ii. Summary health information if requested for purposes of modifying the plan or obtaining premium bids for coverage under the plan.

## **STEP 7: If the program is not a group health plan**

The program will be in compliance so long as it does not violate general employment discrimination laws.