



ACA, HIPAA AND
FEDERAL HEALTH
BENEFIT MANDATES:

Practical Q&A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, Carolyn Smith, and Dan Taylor provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte and Washington, D.C. law firm. Ashley Gillihan, Carolyn Smith and Dan Taylor are members of the Health Benefits Practice. Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.



Navigating the Winding Highway of Wellness Program Compliance

A GPS for the EEOC's Wellness Program Rules

The road to health plan compliance has never been straight and narrow, but it has become more winding over the years, due in large part to the Affordable Care Act (ACA). The road to compliance just became even more difficult with the issuance of two new final regulations by the Equal Employment Opportunity Commission (EEOC) that implement certain provisions of the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). The final ADA-related regulations ("Final ADA Regulations") and the final GINA-related regulations ("Final GINA Regulations") join the existing wellness regulations previously issued by the tri-agencies—Departments of Labor (DOL), Treasury and Health and Human Services (HHS)—that implement the bona fide wellness program rules of the Health Insurance Portability and Accountability Act (HIPAA), as amended by the ACA and Title I of GINA. This article will serve as part 2 of a GPS for sponsors and administrators of wellness programs to help navigate the road to compliance with the ADA and GINA rules. Part 1 can be found in the November issue of *The Self-Insurer*.

How does the notice requirement in the Final ADA Regulations align with HIPAA's privacy rules?

Many wellness programs that are group health plans or that are offered in connection with group health plans are also subject to HIPAA's privacy rules, which require health plans to furnish a notice to covered individuals that contains information similar to the information required in the ADA notice. Will the HIPAA privacy notice operate to satisfy the notice requirement of Final ADA Regulations? Perhaps, but we recommend employers consider the following before relying on the HIPAA privacy notice to satisfy the ADA notice requirements:

- If the wellness program is made available to all employees without regard to whether the employee participates in the employer's group health plan, then furnishing the group health plan's privacy notice to employees who participate in the wellness program but not the group health plan may cause confusion or cause the employee to ignore the information. The EEOC recommends against sending the ADA notice with a lot of information unrelated to the wellness program.

- HIPAA's privacy rules only require plans to provide the notice after an individual becomes covered and only after there is a change in the notice. Otherwise, plans are merely furnishing covered individuals with reminders every three years of its existence and where to locate it. If the wellness program is made available every year, we recommend that employers provide the ADA notice every year. This may not coincide with the frequency with which the HIPAA notice is furnished.

What are the applicable limitations on inducements?

A wellness program that includes DRIs or requires an ME must be voluntary. While some would argue that a financial inducement does not make a program involuntary¹, the EEOC does not necessarily see it that way. According to the EEOC, if a wellness program that includes DRIs or requires an ME offers inducements (reward or penalty) to participate, the inducement cannot exceed the 30 Percent Limit (i.e., 30 percent of the total cost of self-only coverage for the Benchmark Plan). Any inducement that exceeds the 30 Percent Limit is, according to the EEOC, coercion. The Final ADA Regulations provide rules for calculating the 30 Percent Limit in each of these instances. The chart below summarizes these rules for various common situations.

Healthy employees build strong businesses. What are you doing to strengthen yours?



As featured in the
September 2016
issue of
Self-Insurer

Strengthen your business with In-Sight, the first truly integrated Employee Benefits, Workers' Compensation and Health Management program.

In-Sight puts the administrative and cost control efforts of these programs into the hands of a single, integrated team. Why? Integration allows us to eliminate administrative oversight, prevent duplicate claims and address potential health issues before they become costly problems.

The result? Reduced claims spending and a healthier, more productive workforce.

Call IPMG at (888) 470-9569 to learn how In-Sight can strengthen your business.



IPMG.COM/CHANGE-THE-GAME

Situation	Benchmark Plan
<p><i>Employer maintains only one group health plan option.</i></p> <p><i>This situation is a combination of the categories described in 1630.14(d)(2)(i) and (ii)</i></p> <p>This situation includes programs that are limited to employees who enroll in the group health plan or that are made available to employees without regard to whether they enroll in the health plan.</p>	<p>30% of the total cost of self-only coverage under the one health plan option offered to employees.</p>
<p><i>The employer maintains multiple group health plan options and limits the inducement to those employees who enroll in a specific health plan option. For example, the employer offers a PPO and HDHP but limits the inducement to those who enroll in the HDHP.</i></p> <p><i>Although this situation is not clearly described in one of the categories in 1630.14(d)(2), a close examination of the rules and the manner in which EEOC interprets the term “plan” indicates this situation falls within the category described in 1630.14(d)(2)(i)</i></p> <p>This situation includes programs that are made available to all employees without regard to whether they enroll in the health plan but that limit the inducements to employees who enroll in a specific health plan option.</p>	<p>30% of the total cost of self-only coverage for the specified option in which the employees must enroll to receive the inducement.</p>
<p><i>Employer maintains multiple group health plan options but does not limit the inducement to those who enroll in a specific health plan option.</i></p> <p>This situation includes a program that is made available to all employees but limits the inducement to those who enroll in any of the health plan options. It also includes a program that is limited to those who enroll in any of the health plan options and provides the inducement to any such employee</p>	<p>30% of the total cost of self-only coverage for the lowest-cost group health plan option maintained by the employer <i>without regard to the option in which the employee actually enrolls</i></p>
<p><i>Employer maintains multiple group health plan options but offers a different wellness program with each option and limits the inducement for each program to those who enroll in the plan.</i></p> <p>For example, the employer maintains a PPO and HDHP. Those that enroll in the PPO are eligible for a premium reduction if they complete a health risk assessment. Employees who enroll in the HDHP are eligible for a premium reduction if they complete a biometric screening. The program is not available to employees who do not participate in the program.</p>	<p>Although not specifically addressed in the Final ADA Regulations, we believe it is a reasonable interpretation of the Final ADA Regulations to conclude that the Benchmark Plan in this situation is the plan in which the employee is enrolled since the wellness program is different for each health plan option</p>
<p>Employer does not offer any group health plan options.</p>	<p>0% of the total cost of self-only coverage for the second-lowest-cost silver plan for a 40-year-old nonsmoker in the state or federal health care exchange in the state of the employer’s principal place of business</p>

LISTEN - UNDERSTAND - LEVERAGE - SOLVE

A CONTRACT IS A LEGAL DOCUMENT.



A TRUE PARTNERSHIP IS SO MUCH MORE.

Whether addressing ACA changes, high dollar claims or unique types of medical risk, PartnerRe Health's experience and innovation are focused on helping our clients. We listen to your goals and challenges, leveraging our deep resources to deliver customized Medical Reinsurance and Employer Stop Loss solutions.

Find out what you can expect from a true partner at partnerre.com/health

Underwritten by PartnerRe America Insurance Company
Executive Office: 450 Sansome St., San Francisco, CA 94111
Form HAD0815 04/2016

PartnerRe



NOTE: In light of guidance issued by EEOC in an information letter addressed to Alston & Bird LLP dated August 21, 2016, it is clear that the EEOC interprets the reference to “plan” in the rules to mean health plan option.

The Final ADA Regulations do not prescribe a method for calculating the “total cost” of self-only coverage. Presumably, employers may follow the rules for calculating the applicable premium under COBRA; however, the regulations do not foreclose the use of alternative methods²

The Final ADA Regulations also clarify that the 30 Percent Limit applies to any financial or in-kind incentives, such as DRI or MEs. Thus, the 30 Percent Limit might apply to an inducement in the form of a gift card or other non-cash item, such as an iPad or gym membership.

Practice Pointer: If an employer offers a minimum essential coverage (MEC) only plan that provides only ACA mandated preventive care (a so-called “skinny plan”) as one of its options, the total cost of the self-only coverage for the MEC will be the Benchmark Plan in most cases. This may have an adverse impact on the wellness program due to the relatively low cost of an MEC plan.

What if the participant can obtain the full inducement without the DRIs or MEs?

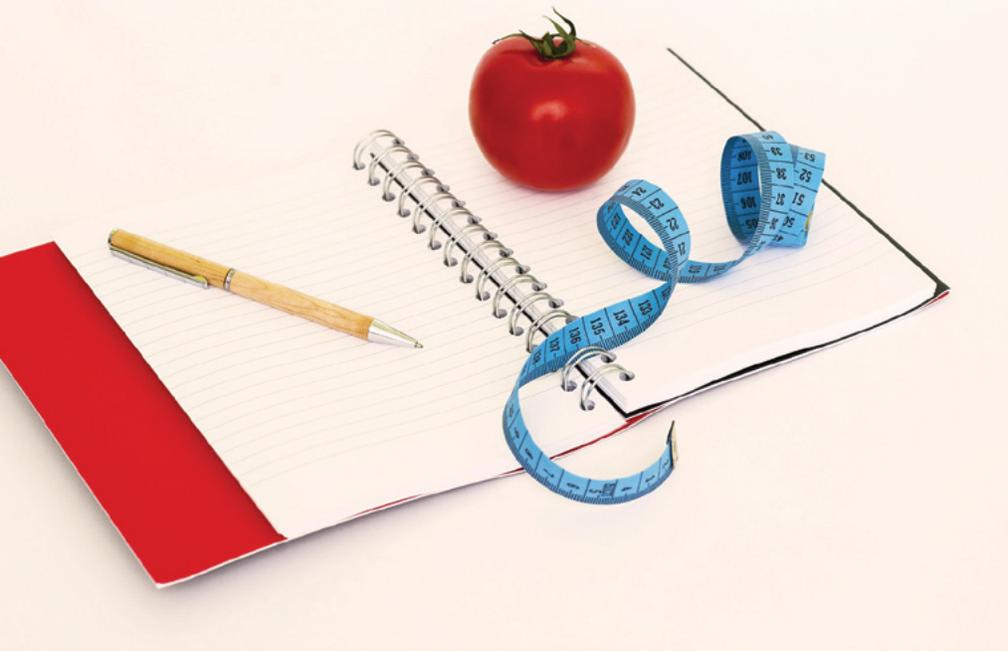
How do the inducement rules apply when the employee health program includes DRIs or MEs but participants can obtain the full inducement offered without responding to the DRIs or completing the MEs? Consider the following illustration:

ABC Company provides employees with a \$300 per month premium reduction if they complete any two of the following five action items:

- They record their physical activity during the week
- They record the food that they have eaten during the week
- They take a stress relief class
- They take a class on healthy eating
- They complete a health risk assessment

In the above list, only the health risk assessment is a DRI. Moreover, the \$300 per month premium reduction exceeds the 30 Percent Limit.

In the above example, the wellness program includes a DRI—the health risk assessment—but the participants in the program can obtain the full inducement—the \$300 per month premium reduction—without completing the health risk assessment. Does this program violate the Final ADA Regulations merely because the program includes a DRI, even though the participants can obtain the inducement without completing the health risk assessment? EEOC officials indicate that the inducement offered by the wellness program would not be subject to the 30 Percent Limit (or the notice requirement) to the



extent that the inducement was available to participants without regard to the DRI or ME. Thus, even though a program might include DRIs and/or MEs, the 30 Percent Limit will not apply if the employees or participants do not have to respond to the DRIs or take the MEs to obtain the full inducement.

Likewise, if a program includes various components with different inducements that can be satisfied separately, only the inducements related to DRIs or require MEs must comply with the 30 Percent Limit. Consider the following illustration:

ABC Company maintains a wellness program that has three components, each of which has a corresponding inducement:

- Complete a health risk assessment in exchange for a \$100 premium reduction
- Complete a biometric screening in exchange for a \$50 premium reduction
- Participate in an educational session on nutrition in exchange for a \$50 premium reduction

In this situation, the 30 Percent Limit applies to the combined inducements for the health risk assessment and the biometric screening, but not to the inducement for the educational session because it does not contain any DRIs or MEs.

Practice Pointer: *Is it permissible to offer the wellness program to all employees but limit the inducement to those who enroll in the employer's health plan? According to informal conversations with EEOC officials, it is permissible; however, the employer must follow the rules described above to determine the 30 Percent Limit.*

When is a program reasonably designed to promote health and prevent disease?

An employee health program, including DRIs and MEs offered as part of the employee health program, must be reasonably designed to promote health and prevent disease, even those that do not include disability-related inquiries or medical exams. According to the Final ADA Regulations, the program must have a reasonable chance of improving health or preventing disease, must not be overly burdensome or time consuming, and must not be a subterfuge for violating the ADA or any other federal law.

Examples of programs that do not satisfy this standard include:

- A program that requires a significant amount of time to obtain a reward.
- A program that imposes unreasonably intrusive procedures.
- A program that imposes significant costs related to medical examinations.



- A program that exists mainly to shift costs to targeted employees.
- A program that exists simply to collect information for the employer to estimate future health care costs.

In addition, wellness programs that collect medical information through a measurement, screening or test without follow-up information or advice designed to improve health would not be reasonably designed to promote health or prevent disease unless the collected information is actually used to design a wellness program that addresses at least a subset of the conditions identified through the program.



What are the applicable confidentiality requirements?

Under the ADA's confidentiality provisions, employer-sponsored wellness programs may not:

- Disclose identifiable medical information to the employer except as necessary for the employer to administer the health plan.
- Require employees to waive confidentiality protections or agree to the sale or exchange of medical information as a condition of participating in the program.

Read literally, employers who sponsor wellness programs that are not limited to health plan participants arguably will not be able to obtain any identifiable medical information obtained through the wellness program. Such employers will be limited to information regarding participation (did the employee participate or not). Likewise, employers who sponsor wellness programs that are limited to health plan participants will not be able to receive any identifiable medical information obtained through the wellness program unless the information is necessary to administer the health plan.

The ADA's confidentiality requirements are similar to HIPAA's privacy requirements; however, there is a key difference between the two. HIPAA's rules only apply to health plans, while wellness programs subject to the ADA might not qualify as a health plan subject to HIPAA. For example, if a wellness program provides an inducement to employees who log physical activity each week, the wellness program is likely not a health plan subject to HIPAA but it would be a wellness program subject to the ADA's confidentiality requirements.

Under what circumstances would an employer be required to make a reasonable accommodation for a wellness program?

If an employee is unable to participate in the wellness program due to a disability, the employer must provide an alternative in accordance with the ADA's rules. For example, if the employer provides a reward for employees who walk or exercise a specified amount of time each week, the employer would be obligated to provide a reasonable alternative to an employee who is unable to satisfy the requirements due to a disability.



HELP YOUR CLIENTS

WAKE UP

TO A TRUE PARTNER
IN STOP-LOSS.

The benefits of smart coverage, when it matters most. Sun Life is #1 in stop-loss for a reason:* our unparalleled expertise and innovative benefits and services help protect self-funded employers. Our new benchmarking tools arm you with customized data in an appealing, client-ready format. Coupled with our cost-containment products, you can tailor the perfect solution for each client. Put our expertise to work—call your Sun Life rep today.

Life's brighter under the sun



sunlife.com/wakeup

*#1 independent direct writer stop-loss carrier based on the 2013 year-end Sun Life Stop-Loss premium of \$915.2M and our analysis of marketshare data from various third parties. Group stop-loss insurance policies are underwritten by Sun Life Assurance Company of Canada (Wellesley Hills, MA) in all states, except New York, under Policy Form Series 07-SL. In New York, group stop-loss insurance policies are underwritten by Sun Life and Health Insurance Company (U.S.) (Windsor, CT) under Policy Form Series 07-NYSL REV 7-12. Product offerings may not be available in all states and may vary depending on state laws and regulations. © 2015 Sun Life Assurance Company of Canada, Wellesley Hills, MA 02481. All rights reserved. Sun Life Financial and the globe symbol are registered trademarks of Sun Life Assurance Company of Canada.

PRODUCER USE ONLY.

BRAD-5073

SLPC 26354 01/15 (exp. 01/17)



Does the ADA's bona fide employee benefit plan exception apply?

Despite two recent court decisions indicating that it does, the EEOC does not agree.³ The Final ADA Regulations make clear, in no uncertain terms, that the EEOC does not believe that the bona fide employee benefit plan exception to the ADA's requirements applies in the context of employee health programs. A recent court decision seems to support this position.⁴

The Road to Compliance—the Final GINA Regulations

Which wellness programs are subject to the Final GINA Regulations?

A wellness program is generally subject to the Final GINA Regulations if the wellness program is maintained by a private or state or local governmental employer with 15 or more employees for each working day in at

least 20 calendar weeks in the current or preceding calendar year (similar to Title I of the ADA).

In what ways do the Final GINA Regulations regulate wellness programs?

The 2010 GINA regulations set the stage by indicating that employers who offer health or genetic services, including a wellness program, are not in violation of GINA if the employer obtains an individual's genetic information to the extent the following requirements are satisfied:

- The individual voluntarily provides the information. Information is not considered to be voluntarily provided if a penalty is imposed on individuals who choose not to provide such information.
- The individual provides prior, written authorization.

- The individual's identifiable genetic information collected through the program is used solely for purposes of the program and none of the information collected is disclosed to the employer except in aggregate, de-identified form.

The Final GINA Regulations were primarily issued to address a discrete issue—the extent to which inducements can be offered in exchange for information regarding the manifestation of disease or disorder (i.e., current or past medical history) of an employee's family members. The Final GINA Regulations make the following clarifications:

- An inducement may be provided to the employee only in exchange for information regarding a spouse's manifestation of disease, and then only to the extent the spouse provides the authorization required by the 2010 GINA regulations. No inducement may be offered in exchange for a spouse's genetic information (other than medical history) or the genetic information and/or medical history of a child.

Windsor Strategy Partners
Actuaries. Always Thinking.

ACTUARIAL EXPERTS

Strategic Consultants Building Solid Relationships For Your Continued Success

Visit us at www.wspactuaries.com and learn more today.



Practice Pointer: *The regulations make no distinctions between adult or minor children and natural and adopted children. Moreover, the 2010 GINA regulations define “genetic information” to include the genetic information of a fetus carried by an employee or family member of an employee.*

- The request for such information must be made as part of a health risk assessment. The Final GINA Regulations clarify that this may be through a questionnaire, medical exam or both.

- In accordance with the 2010 GINA regulations, the information collected may only be used for the program, and no information may be provided to the employer except in aggregate, de-identifiable form.

Practice Pointer: *Unlike the Final ADA Regulations, the Final GINA Regulations, in conjunction with the 2010 GINA regulations, do not appear to allow disclosure of identifiable information to the employer to administer the health plan. It is unclear if this is an intentional limitation or an oversight. Such a limitation could have a significant impact on plans that use health risk assessments and screenings.*

The wellness program must be reasonably designed to promote health. This is essentially the same standard espoused by the EEOC in the Final ADA Regulations.

- The employer may not exclude a spouse from participating in a health plan, restrict access to health plan options or otherwise retaliate against the employee or the spouse who chooses not to participate from participation in or restrict access to health coverage.

- If the employee and spouse are offered the opportunity to participate in the program, the inducement to each may not exceed 30 percent of the total cost of self-only coverage (30 Percent Limit) under the applicable group health plan (Benchmark Plan). Much like the Final ADA Regulations, the Final GINA Regulations provide specific rules for identifying the Benchmark Plan, which vary depending on whether the employer offers group health plan coverage or not. These rules are identical to the rules prescribed in the Final ADA Regulations for identifying the applicable Benchmark Plan.

Practice Pointer: *If the total cost of employee-only coverage for the Benchmark Plan is \$3,000, then the total inducement offered for information regarding the spouse’s manifestation of disease would be \$900.*

- The employer may not condition participation in the wellness program or provide any inducement to the employee or spouse in exchange for an agreement permitting the sale, exchange or disclosure of genetic information.

Practice Pointer: *The Final GINA Regulations clarify that tobacco usage is not considered “medical history” for purposes of GINA.*

Arriving at Your Destination

Charting a course for compliance with the Final ADA and GINA Regulations is no small challenge, especially when you consider that the tri-agencies also have issued wellness program rules under both HIPAA and Title I of GINA. Part II will explore those rules and how they coordinate with the EEOC’s ADA and Title II GINA Rules. In the meantime, employers who sponsor wellness programs should input the following coordinates:

- Carefully review your wellness programs to determine whether it includes DRIs or MEs.
- Include an ADA-compliant notice in your wellness program materials and ensure that program participants receive that notice before they provide any information.
- If you offer inducements in connection with responses to DRIs or completion of MEs, ensure that all inducements related to DRIs and MEs (even if offered under different programs maintained by the same employer) do not exceed the 30 Percent Limit.
- If you provide inducements in exchange for information regarding a spouse’s manifestation of disease or disorder, be sure that the spouse provides a prior, written authorization for such information and that the information is kept confidential in accordance with the Final GINA Regulations. ■

References

[1] EEOC v. Orion Energy Sys. Inc., 2016 WL 5107019 (E.D.Wis. 2016) (court held that a program shifting the entire cost of coverage to an employee was voluntary because “even a strong incentive is still no more than an incentive; it is not compulsion.”)

[2] For example, the proposed regulations issued by the IRS on the “Cadillac tax” under Code Section 4980I have identified possible alternative methods for calculating the total cost of health coverage for purposes of the Cadillac tax, and those methods, once finalized, might be a sufficient basis for calculating the total cost under these rules.

[3] Seff v. Broward County, 691 F.3d 1221 (11th 2012); EEOC v. Flambeau, 2015 U.S. Dist. LEXIS 173482 (W.D.Wis. Dec. 30, 2015).

[4] EEOC v. Orion Energy Sys., Inc., 2016 WL 5107019 (E.D.Wis. 2016). However, as noted above, the court disagreed with the EEOC’s determination of what is voluntary.