August 18, 2016

Wellness Plan Regulations Update

Presented by Benefit Comply

Wellness Plan Regulations Update

- Welcome! We will begin at 3 p.m. Eastern
- There will be no sound until we begin the webinar. When we begin, you can listen to the audio portion through your computer speakers or by calling into the phone conference number provided in your confirmation email.
- You will be able to submit questions during the webinar by using the “Questions” box located on your webinar control panel.
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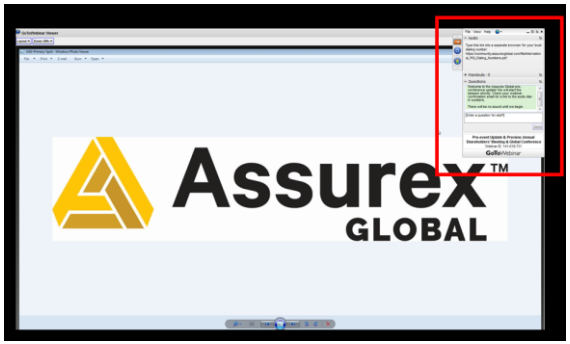

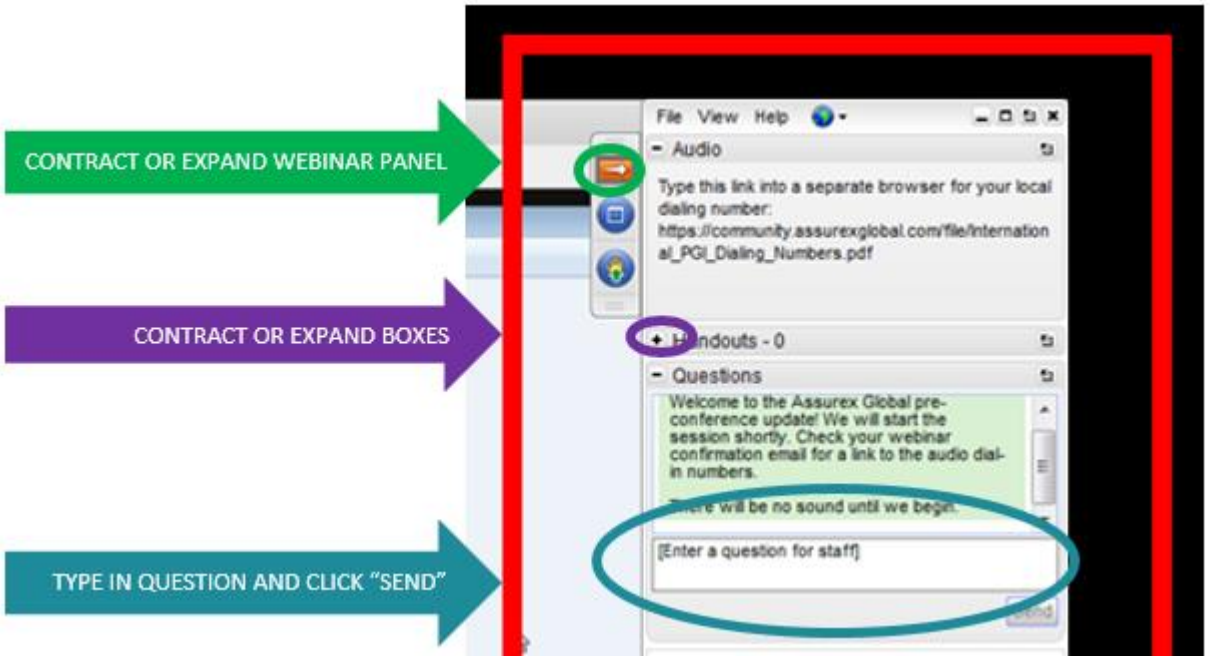

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- The Rowley Agency
- Starkweather & Shepley Insurance Brokerage
- Woodruff-Sawyer & Co.
- Wortham Insurance & Risk Management

Agenda

- HIPAA
- ADA
- GINA
- Comparison of various requirements
  - Examples
- Other applicable laws

WELLNESS PROGRAMS

- The term "wellness program" refers to programs and activities typically offered in association with employer-provided health plans as a means to help employees improve health and reduce health care costs

HIPAA

HIPAA

- HIPAA non-discrimination rules prohibit discrimination in health plans based on health status
  - Group health plans that base health plan eligibility, cost of coverage, or benefit levels (i.e., amount of co-pay, deductible, etc.) on an individual's health factors are "discriminatory"
  - Exception for wellness programs that meet certain requirements
- HIPAA wellness rules apply only when the incentive affects the group health plan (e.g. reduced premiums or cost-sharing)
  - HIPAA rules do not apply to wellness incentives that simply provide cash, gifts, etc., which do not impact the group health plan
- Two types of programs under HIPAA wellness rules
  - Participatory wellness programs and health-contingent wellness programs
  - Different requirements apply depending upon the type of program

HIPAA

- Participatory wellness programs
  - Reward not based on an individual satisfying a standard that is related to a health factor
  - No limit on incentives or rewards
  - Only requirement is that the program must be offered to “all similarly situated individuals”
  - Examples include:
    - a diagnostic testing program that provides a reduced copayment for participation and does not base any part of the reward on outcomes
    - a program that provides a medical premium reduction to employees for attending a monthly, no-cost health education seminar

HIPAA

- Health-contingent wellness programs
  - Requires an individual to satisfy a standard related to a health factor to obtain a reward
  - Two types of health-contingent wellness programs
    1) Activity-only
       - Individual is required to perform or complete an activity related to a health factor in order to obtain a reward (e.g. walking, diet, or exercise programs), but is not required to attain or maintain a specific health outcome (e.g., walk 2 miles in 30 minutes, lose 15 lbs., complete 20 push-ups)
    2) Outcome-based
       - Individual must attain or maintain a specific health outcome (such as not smoking or attaining certain results on biometric screenings) in order to obtain a reward

HIPAA

- 5 requirements for health-contingent wellness programs
  1. Must be given annual opportunity to qualify for the reward
  2. Maximum reward cannot exceed 30% of the total cost of coverage, or 50% for tobacco-related programs
     - Rewards are generally limited to 30% (or 50%) of the cost of employee-only coverage, but if dependents may participate in the wellness program, the reward must not exceed 30% (or 50%) of the total cost of the coverage in which an employee and any dependents are enrolled
     - Combined incentive for a program that includes both tobacco and non-tobacco related rewards may not exceed 50% (with total non-tobacco related reward components limited to 30%)
  3. Reasonably designed to promote health or prevent disease. Must not be overly burdensome or a subterfuge for violating discrimination laws
  4. Reward must be available to all similarly situated individuals and individuals who qualify by satisfying a reasonable alternative
  5. Must disclose the availability of a reasonable alternative standard in all plan materials describing the terms of the wellness program
     - Model notice available

HIPAA

- More on Reasonable Alternative Standards (RAS)
  - Plans not required to establish an RAS in advance of a request
  - RAS can be the same for a class of individuals or set on an individual basis
  - Cannot refuse RAS merely because person failed last year; must continue to offer a RAS, whether the same or new
  - If RAS is completing an educational program, must make program available and pay for cost
  - Instead of offering an RAS, may always waive an otherwise applicable standard and provide reward for an entire class of individuals or on an individual-by-individual basis for those not meeting the contingency
  - Differences in requirements for RAS for activity-only and outcome-based wellness programs

The Americans with Disabilities Act (ADA)

ADA

- The Americans with Disabilities Act (ADA) generally restricts employers from making disability-related inquiries or requiring medical examinations of employees unless they are job-related or consistent with business necessity
  - Exception for wellness programs that are considered “voluntary”
  - Examples:
    - A health risk assessment (HRA) that includes disability-related questions (e.g., “Are you currently taking any medications?”)
    - Biometric screening programs are considered medical examinations
    - Tobacco-related programs that require medical testing to determine tobacco use
- In addition, any wellness program must provide a “reasonable accommodation”, as appropriate, to enable any disabled individual to earn incentives

ADA

- EEOC final rules issued in May 2016
  - Apply to any wellness program requiring disability-related inquiries and/or medical examinations
  - Generally effective for plan years beginning on or after January 1, 2017

- Court case decisions
  - No ADA violation because wellness program was within “bona fide benefit plan” safe harbor
  - EEOC final rules expressly disagreed with the court case decisions
  - For wellness programs subject to the ADA, there is still some question as to whether there is potentially a safe harbor available; however, the conservative approach for now is to design wellness programs that comply with the final EEOC regulations and any other applicable nondiscrimination rules

ADA

- EEOC Requirements:
  - Must be Voluntary: Employees choosing not to participate cannot be denied employer group health plan coverage or be subjected to any adverse employment action, coercion, or intimidation
  - Reasonable Design: Must be reasonably designed to promote health or prevent disease. Must not be overly burdensome or a subterfuge for violating discrimination laws
  - Required Notice: Must provide employees with a notice that includes a description of the medical information collected, who will have access to it, and how it will be used and kept confidential – *new model notice available on EEOC's website*
  - Confidentiality: Information collected may generally be provided only in aggregate form that is unlikely to disclose the identity of specific individuals except as necessary to administer the plan. Information must be collected on separate forms, maintained in separate files, and treated as a confidential medical record
  - Reasonable Accommodation: A reasonable accommodation is required if a disability or medical condition prevents an employee from participating or earning an incentive
  - Other: Employees may not be required to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information (except as permitted to carry out activities related to the wellness program), or to waive confidentiality protections available under the ADA as a condition for participating or receiving an incentive

ADA

- EEOC Requirements (continued):
  - Incentive Limits: Maximum reward (or penalty) cannot exceed 30% of the total cost of employee-only coverage
    - Applies regardless of whether the incentive affects the group health plan
    - Applies regardless of whether the wellness program is participatory, health-contingent, or a combination of the two
    - Program requiring medical testing to determine tobacco use limits incentives to 30% instead of the 50%
    - Total cost of coverage includes both employee and employer contributions

Plan Design	Incentive Limit
Reward available only to those enrolled in the plan	30% of the cost under the plan in which the individual enrolls
Single plan offered, but reward available regardless of whether individual enrolls	30% of the cost under that plan
Multiple plans offered, but reward available regardless of whether individual enrolls	30% of the lowest cost plan
Employer does not offer a group health plan	30% of the second lowest cost Silver Plan through a public exchange

Genetic Information Nondiscrimination Act (GINA)

GINA

- The Genetic Information Nondiscrimination Act (GINA) prohibits an employer from requesting, requiring or purchasing employee “genetic information”
  - Exception for health or genetic services offered as part of a voluntary wellness program if certain requirements are met

- “Genetic information” includes information about:
  - A person’s genetic tests or the genetic tests of the person’s family members
  - A person’s request for or receipt of genetic services (e.g., genetic research, counseling on a genetic condition, genetic education)
  - The manifestation of a disease or disorder in the individual's family member (i.e., family medical history or “health status”)

GINA

- When genetic information is involved:
  - Employers may ask, but cannot require an employee to disclose genetic information
    - Employee must give prior, knowing, voluntary, and written authorization after getting description of the type of genetic information, its use, and restrictions on its disclosure (e.g., restricted to health professional use, not for employment decisions)
    - Questions eliciting genetic information must not be made prior to or in connection with individual's health plan enrollment
    - Providing incentives to obtain genetic information is generally prohibited
      - Incentives for completing HRA that include questions about genetic information are permitted, but instructions must identify questions on genetic information and must make clear that the incentive is available regardless of responding to those questions

GINA

- EEOC final rules issued in May 2016
  - Confirmed an individual's "family medical history" is genetic information of that individual
    - Current or past health data about the employee, which is often collected as part of a health risk assessment (HRA), is not "genetic information"
    - Current or past health status of a spouse or child is the employee's "genetic information" because it is the employee's family history
  - No information – health status or genetic – may be requested of the employee's children (biological or non-biological)
  - GINA does allow an employer to offer incentives when requesting information about a spouse's current and past health status (manifestation of a disease or disorder)

GINA

- EEOC Requirements:
  - Must be Voluntary: Spouses choosing not to participate cannot be denied employer group health plan coverage and information collected must not be used for any employment decision in regard to the employee
  - Reasonable Design: Must be reasonably designed to promote health or prevent disease. Must not be overly burdensome or a subterfuge for violating discrimination laws
  - Required Notice and Written Consent: Must obtain written consent from the spouse for the collection of health information after disclosing what will be collected, how it will be used, and how the information will be protected
  - Confidentiality: Information collected may generally be provided only in aggregate form that is unlikely to disclose the identity of specific individuals except as necessary to administer the plan. Information must be collected on separate forms, maintained in separate files, and treated as a confidential medical record
  - Reasonable Alternative: Must waive the requirement or provide an alternative if a disability or medical condition prevents a spouse from participating or earning an incentive
  - Other: Spouses may not be required to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information (except as permitted to carry out activities related to the wellness program), or to waive confidentiality protections available under GINA as a condition for participating or receiving an incentive

GINA

- EEOC Requirements (continued):
  - Incentive Limits: Maximum reward (or penalty) cannot exceed 30% of the total cost of employee-only coverage
    - Applies regardless of whether the incentive affects the group health plan
    - Applies regardless of whether the wellness program is participatory, health-contingent, or a combination of the two
    - Total cost of coverage includes both employee and employer contributions
    - If both the employee and spouse qualify for the incentive, the maximum incentive limits is 2 X 30% of the total cost of employee-only coverage

Plan Design	Incentive Limit
Reward available only to those enrolled in the plan	30% of the cost under the plan in which the individual enrolls
Single plan offered, but reward available regardless of whether individual enrolls	30% of the cost under that plan
Multiple plans offered, but reward available regardless of whether individual enrolls	30% of the lowest cost plan
Employer does not offer a group health plan	30% of the second lowest cost Silver Plan through a public exchange

Comparison of Requirements

Which Rules Apply?

- Does the wellness program incentive affect the group health plan (e.g. reduced premiums or cost-sharing)?
  - If Yes, then HIPAA rules apply
- Does the wellness program involve medical testing or disability-related questions?
  - If Yes, then ADA rules apply
- Does the wellness program ask about the manifestation of a disease or disorder of the spouse?
  - If Yes, then GINA rules apply

REQUIREMENTS	HIPAA #		ADA *	GINA *
	Participatory Programs	Health-Contingent Programs		
Information privacy	X	X	X	X
Voluntary participation			X	X
Frequency to qualify		X		
Incentives		X	X	X
Reasonable design		X	X	X
Uniform availability	X	X		
Reasonable alternative		X	X	
Notice		X	X	X

- Applies only if part of a group health plan

* - ADA and GINA rules apply to both participatory and health-contingent programs

Example 1 - Tobacco Surcharge

- Considered a health-contingent program under HIPAA (conditioned on status as smoker or non-smoker)
- Subject to ADA rules if medical testing is used to determine tobacco use
  - If the program simply asks individuals whether they use tobacco or not (e.g. attestation/certification), then ADA will not apply
- Not subject to GINA rules

Example 1 - Tobacco Surcharge

- Under HIPAA rules, the following would apply:
  - Information privacy
  - Annual opportunity to qualify
  - 50% incentive limit
  - Reasonably designed and uniformly available
  - Reasonable alternative available (e.g. smoking cessation classes/counseling or supplies) and notice of such alternative

Example 1 - Tobacco Surcharge

- **IF MEDICAL TESTING IS INVOLVED**, under ADA rules, the following would also apply:
  - Information privacy
  - Participation must be voluntary
  - 30% incentive limit
  - Reasonably designed
  - Reasonable accommodation available if a disability or medical condition prevents an employee from participating or earning an incentive
  - Confidentiality notice required

Example 2 - Participatory Health Risk Assessment (HRA) or Biometric Screening

- Considered a participatory program under HIPAA if the reward is not contingent upon any specific answers or results
- ADA rules apply because the HRA typically involves disability-related inquiries and the biometric screening is considered medical testing
- GINA rules generally apply if the spouse is asked to participate in the HRA or biometric screening

Example 2 - Participatory Health Risk Assessment (HRA) or Biometric Screening

- Under HIPAA, as a participatory program, the only requirement is that the reward be available to all similarly situated individuals

- Under ADA rules, the following would apply:
  - Information privacy
  - Participation must be voluntary
  - 30% incentive limit (calculated off the employee-only cost of coverage)
  - Reasonably designed
  - Reasonable accommodation available if a disability or medical condition prevents an employee from participating or earning an incentive
  - Confidentiality notice required

Example 2 - Participatory Health Risk Assessment (HRA) or Biometric Screening

- If the spouse is asked to participate, under GINA rules, the following would also apply:
  - Information privacy
  - Participation must be voluntary
  - 30% incentive limit (calculated off the employee-only cost of coverage)
    - If both employee and spouse earn the incentive, the maximum incentive limit is 2 X 30% of the employee-only cost of coverage
  - Reasonably designed
  - Must obtain written consent from the spouse for the collection of health information after disclosing what will be collected, how it will be used, and how the information will be protected
  - Must waive the requirement or provide an alternative if a disability or medical condition prevents a spouse from participating or earning an incentive

Other Applicable Laws

Other Applicable Laws

- ERISA and COBRA
  - If the wellness program itself is considered a group health plan (e.g. biometric screening provides “medical care”), then ERISA and COBRA will generally apply
  - **ERISA** requires a formal written plan document and that SPDs are distributed to participants. Generally, the easiest way of meeting this requirement is through the preparation of a WRAP document
  - **COBRA**:
    - If the wellness program is integrated with the medical plan and offered only to those participating in the medical plan, then it may simply be bundled with the medical when offering COBRA (restrict offering COBRA for the wellness program to only those who elect COBRA for the medical plan)
    - If employees may participate regardless of whether they actually enroll in the medical plan, there is a COBRA obligation to offer the wellness program as separate continuation option
      - Not much cost risk, but perhaps an administrative hassle and requires a determination of the applicable premium amount

Other Applicable Laws

- HIPAA privacy and security
  - Apply if the wellness plan is using or disclosing protected health information (PHI)
  - If the information the wellness plan uses or discloses is de-identified, it is not subject to HIPAA privacy and security rules

- Tax laws
  - Employers should generally consider any incentive provided as taxable income unless it is specifically addressed as tax-free or it is considered “de minimis”
    - Applicable to things such as gym reimbursements, gift cards or prizes
    - No specific dollar amount is considered “de minimis”, and since the definition is so strict, generally all incentives or gifts will need to be treated as taxable

- Other nondiscrimination laws, including employment discrimination laws

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