

# WELLNESS COMPLIANCE

## 8 Questions To Ask

In designing and implementing a wellness plan, employers must navigate a complex web of intersecting laws and regulations. Employers must be aware of the requirements of the Health Insurance Portability Act (HIPAA), the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), as well as the regulations applied to wellness programs promulgated by the Equal Employment Opportunity Commission (EEOC). In evaluating this complicated landscape, employers should ask themselves the following questions:



### 1. IS MY WELLNESS PLAN OFFERED AS PART OF A GROUP HEALTH PLAN?

A wellness program that provides medical care must comply with group health plan legal requirements under ERISA, the Affordable Care Act, and COBRA, among other applicable legal and regulatory frameworks.



### 2. DO I OFFER A PREMIUM DISCOUNT OR OTHER REWARD IN CONNECTION WITH MY WELLNESS PROGRAM?

If a reward is offered, the maximum reward must be no more than 30% of the total cost (including employer and employee contributions) of the lowest-cost self-only plan.



### 3. DO I CONSIDER TOBACCO USE AS PART OF MY WELLNESS PLAN?

For tobacco-related programs in which employees self-report the use of tobacco, the reward can be up to 50% of the cost of the lowest-cost self-only plan. If the plan requires a medical test for nicotine use, however the incentive is limited by the EEOC's rules to only 30% of the total cost.



### 4. IS MY WELLNESS PLAN PARTICIPATORY OR HEALTH-CONTINGENT?

Participatory programs, such as gym reimbursement, voluntary diagnostic programs, and educational seminars, are subject to fewer regulatory hurdles than health-contingent plans that offer rewards for satisfying a health-related standard. For health-contingent plans which offer a reward, the ACA requires employers to offer a "reasonable alternative" to any individual who fails to meet the requirements for the reward.



### 5. IF MY WELLNESS PLAN IS HEALTH-CONTINGENT, IS IT "ACTIVITY ONLY" OR "OUTCOME BASED"?

Activity only plans simply require an employee to perform an activity (such as a walking, diet, or exercise plan) to receive a reward. Wellness plans that are tied to particular health outcomes (for example, programs in which an employee receives an incentive for achieving a goal cholesterol count) are subject to both HIPAA and EEOC wellness plan rules. For activity only plans, employees for whom participation is medically inadvisable must either have the activity requirement waived or be given a reasonable alternative activity to earn the reward. For outcome-based plans, employees who fail to meet the health standard must be offered an alternative such as working with a health coach or completing an educational program to earn the reward.



### 6. AM I COMPLYING WITH THE AMERICANS WITH DISABILITIES ACT?

The general prohibition on making disability-related inquiries and requiring medical examinations after employment unless those inquiries are consistent with business necessity does not apply in the case of voluntary wellness programs. Employers should structure their wellness plans to ensure that employees with disabilities have equal access to the program's benefits and are not required to complete additional requirements to obtain equal benefits under the wellness program. Medical information obtained as part of a wellness program must be kept confidential and may only be disclosed to the employer in an aggregate form that is not reasonably likely to disclose the identity of specific employees.



### 7. AM I COLLECTING GENETIC INFORMATION?

Under the Genetic Information Nondiscrimination Act, employers can offer incentives for a spouse or employee to answer questions about current or past health status, but may not ask questions about a child's genetic make-up or predisposition to disease.



### 8. DOES MY WELLNESS PLAN HAVE ANY OTHER POTENTIAL FOR DISCRIMINATORY IMPACT?

Other laws to consider include the Age Discrimination in Employment Act (ADEA) and Title VII, as well as applicable state nondiscrimination statutes – wellness plans can have a disproportionate impact on older workers, or may impact workers based on other protected categories, including sex, race, national origin, or gender. Plans should be structured to avoid these negative impacts.