The Worth and Worry of Wellness
WPBC
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This Man Wanted

Industry's Enemy

Description

He may be working in your plant.

⋆ ⋆

You will recognize him by his dirty, greasy overalls.

⋆ ⋆

He has committed no crime but he is endangering his own health and life as well as the lives of his fellow workmen.

⋆ ⋆

His greasy overalls are a fire hazard; they are unhealthy . . . unsafe . . . and cause physical fatigue.

⋆ ⋆

Call your local cleaner for healthful suggestions.

There is no reason for anyone in your plant to wear dirty or greasy garments. In your locality there is an Industrial Launderer, classified in the phone book as an Overall Cleaner, who is a reliable member of the "N.I.L.&C.A."
Why Wellness?
Costs of Chronic Disease

$1.8 trillion spent in U.S. for medical costs associated with chronic diseases (i.e. diabetes, heart disease and cancer)

- Diabetes accounts for 11% of U.S. healthcare costs.
- Obesity projected to cost the USA about $344 billion in medical-related expenses by 2018 – 21% of healthcare spending

- Healthcare costs are higher for people with chronic conditions:
  - $2000 for tobacco users
  - $1400 for obese
  - $6600 for diabetics

- Indirect costs to employers – lower productivity, higher disability, increased WC claims – can be 2-3 times the cost of direct medical costs

*Investing in Prevention Improves Productivity and Reduces Employer Costs, Centers for Disease Control and Prevention*
What Is A Wellness Program?

“What program designed to help improve the overall lifestyle, behavior, spirit, effectiveness, environment and financial well-being of the population to which it is being offered.”

Source: Healthiest Employer, LLC
Wellness: Where Are We Today?

Recent ADP study on who is offering wellness:
- 79% large companies (1000+)
- 44% mid-sized (50-999)

MetLife’s Study: 81% of employees stated health and wellness programs would favorably impact their productivity.

Principal Financial Study:
- 62% workers believe workplace wellness activities are successful in improving health, reducing health risks
- 59% say they have more energy to be productive at work as a result of their worksite wellness program
- 45% agree a worksite wellness program would encourage them to stay in their current employment situations.
Wellness: Where Are We Today?

With a wellness program, over four years Safeway’s per-capita healthcare expenses remained flat, and saved $150M
- Rest of American business has seen a 40% increase during this time
- Investing saved dollars into products for customers, creating loyalty

Citibank's health management program reported an estimated savings of $4.50 in medical expenditures per dollar spent on the program

Studies from the California Public Employee Retirement System (CalPERS), Bank of America, and Johnson & Johnson similarly estimated sizable health care savings from wellness efforts.

Harvard Researchers found medical costs fall about $3.27 for every dollar spent on wellness programs, and absentee day costs fall by about $2.73 for every dollar spent.
“While the primary goal is reducing health costs, we’re also seeing other advantages from wellness initiatives, such as higher employer morale, increased productivity and reduced disability.” Michael Wilson, IFEBP CEO.

More and more employers and human resources professionals have come to realize that employee wellness programs are excellent ways to promote positive health care behaviors and create more productive workers and employees,” Donna Rogers, Director of ISC, SHRM.*

Wellness was a “Nice-to-Have” fringe benefit, now it’s a “Must Have” cost containment strategy!
Primary Components of Wellness

- Define what wellness means to your organization
- Develop a mission/vision statement
- Identify high risk areas
  - Health Risk Assessment
  - Complete biometric testing
  - Claims experience
- Provide behavior change support
  - Education/Awareness
  - Coaching Resources: On line, telephonic or face-to-face
  - Creating a healthy culture
- Offer Incentives for healthy behavior
Experts suggest spending $200-$500 PEPY (Dr. Ron Goetzel, Dir. Of Emory Univ. Institute for Health and Productivity Studies, VP of Consulting and Applied Research for Thomson Reuters)

- Investment can be more or less, but this is an average
- If the average medical cost per employee per year (PEPY) is $10,000 (Towers), this represents 2%-5% of employee annual healthcare cost

Most companies show a savings of $3+ for every dollar spent (IFEBP study)

The more you invest, the more you save!
How Do We Find the Money?

Create a wellness fund!

- Add a small amount to employee contributions
- Offer premium differentials for those that participate or meet health criteria vs. those that do not
- Negotiate fund or services with current or future medical carrier
- Charge small fees for employees to participate in programs: yoga, weight management, lunch and learns, etc.
  - Creates “skin in the game”
  - Helps to develop reward for winners
  - Enhances competition
- Apply for Grants from State or Federal Government
How Can We Measure the Success of Our Program?

Choose your Dashboard metrics:
- Participant counts/completion rates
- Satisfaction surveys
- Health risk status – high to low risk
- Modifiable healthcare expenditures

Other
- Claims PEPY year over year
- Self-reported results
- Disability Claims
- Absenteeism rates
- WC claims

Identify whether or not you are achieving expected results and make adjustments to improve the next year.
## Chronic Condition Impact On Health Costs

### Chronic Disease

<table>
<thead>
<tr>
<th>Chronic Disease</th>
<th>Services</th>
<th>% Services</th>
<th>Mbrs</th>
<th>% Mbrs</th>
<th>Plan Paid</th>
<th>% Paid</th>
<th>Avg Paid</th>
<th>Paid/Mbr</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total</strong></td>
<td>21,406</td>
<td>100.00%</td>
<td>1,293</td>
<td>100.00%</td>
<td>$4,583,548.53</td>
<td>100.00%</td>
<td>$214.12</td>
<td>$3,544.89</td>
</tr>
<tr>
<td>Chronic Disease Members</td>
<td>6,003</td>
<td>28.04%</td>
<td>225</td>
<td>17.40%</td>
<td>$1,328,386.79</td>
<td>28.98%</td>
<td>$221.29</td>
<td>$5,903.94</td>
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<tr>
<td>Asthmatics</td>
<td>939</td>
<td>4.39%</td>
<td>38</td>
<td>2.94%</td>
<td>$189,113.90</td>
<td>4.12%</td>
<td>$201.40</td>
<td>$4,976.68</td>
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<tr>
<td>Coronary Heart Disease Patients</td>
<td>641</td>
<td>2.99%</td>
<td>17</td>
<td>1.31%</td>
<td>$160,311.87</td>
<td>3.49%</td>
<td>$250.10</td>
<td>$9,430.11</td>
</tr>
<tr>
<td>Depression-related Disorder</td>
<td>1,297</td>
<td>6.06%</td>
<td>45</td>
<td>3.48%</td>
<td>$483,528.18</td>
<td>10.54%</td>
<td>$372.81</td>
<td>$10,745.07</td>
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<tr>
<td>Diabetics</td>
<td>1,107</td>
<td>5.17%</td>
<td>40</td>
<td>3.09%</td>
<td>$101,509.59</td>
<td>2.21%</td>
<td>$91.70</td>
<td>$2,537.74</td>
</tr>
<tr>
<td>High Blood Pressure Patients</td>
<td>3,367</td>
<td>15.73%</td>
<td>118</td>
<td>9.13%</td>
<td>$611,028.45</td>
<td>13.33%</td>
<td>$181.48</td>
<td>$5,178.21</td>
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<tr>
<td>Obesity Patients</td>
<td>310</td>
<td>1.45%</td>
<td>7</td>
<td>0.54%</td>
<td>$62,148.10</td>
<td>1.35%</td>
<td>$200.48</td>
<td>$8,878.30</td>
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<tr>
<td>Non-Chronic Members</td>
<td>15,403</td>
<td>71.96%</td>
<td>1,068</td>
<td>82.60%</td>
<td>$3,255,161.74</td>
<td>71.01%</td>
<td>$211.33</td>
<td>$3,047.90</td>
</tr>
</tbody>
</table>

**Chronic Disease Services % Services Mbrs % Mbrs Plan Paid % Paid Avg Paid Paid/Mbr**
Wellness Impact on Health Care Costs

Zoe Consulting Inc. Study 2011
Interactive Health Solutions

2010 savings per employee
- IHS Client 1: $1,322
- IHS Client 2: $1,344
Wellness Impact on Productivity

A healthy workforce leads to greater productivity!

**Workers’ Compensation Claims**

<table>
<thead>
<tr>
<th></th>
<th>2008 -2010</th>
<th>Cost/Claimant</th>
<th>Days/Claimant</th>
</tr>
</thead>
<tbody>
<tr>
<td>IHS Members</td>
<td>986</td>
<td>$10,852</td>
<td>34.5</td>
</tr>
<tr>
<td>Non-IHS Participants</td>
<td>1,907</td>
<td>$12,483</td>
<td>43.7</td>
</tr>
</tbody>
</table>

**Short Term Disability Claims**

<table>
<thead>
<tr>
<th></th>
<th>2009 - 2010</th>
<th>Cost/Claimant</th>
<th>Days/Claimant</th>
</tr>
</thead>
<tbody>
<tr>
<td>IHS Members</td>
<td>462</td>
<td>$5,121</td>
<td>57.7</td>
</tr>
<tr>
<td>Non-IHS Participants</td>
<td>415</td>
<td>$5,232</td>
<td>74.6</td>
</tr>
</tbody>
</table>

- IHS members averaged 9.2 fewer workers’ compensation days
- IHS members had nearly 17 fewer lost workdays from short-term disability

(Source: Zoe Consulting, Inc.)
Chapman Review of Studies

- Included 42 worksite health promotion programs
- Covered 370,558 participants
- Average program length of 3.60 years
- 4.7 program components
- Weighted average results show:
  - 27.8% reduction in Sick Leave
  - 28.7% reduction in Health Costs
  - 33.5% reduction in Disability and WC costs
- For every dollar invested, there was a savings of $5.50 in cost.

Chapman, L.S. Proof Positive: An Analysis of the Cost-Effectiveness of Wellness, 2005
The ROI for wellness programs will always be greater if an organization is self-funded

- You, the employer, are paying the claims vs. the insurance company
- You are impacted directly by reduced health care costs

If you are fully insured, you should:

- Demonstrate your commitment to wellness to the insurance company
- Include carrier in any wellness activities where possible, or make them aware
- Share any results you have with the carrier: participation, changes in high risk, etc.
- Ask for wellness funds to help promote your wellness program for the next year
- Use these in negotiating your renewal premiums
Helpful Cost & ROI Calculators

- The WellSteps ROI calculators
  - [www.wellsteps.com/resources](http://www.wellsteps.com/resources)
    - Health Care Costs
    - Absenteeism Cost:
      - $\text{Absenteeism cost} = 0.2 \times \text{annual health care cost}$
    - Presenteeism Cost:
      - $\text{Presenteeism cost} = 1.8 \times \text{annual health care cost}$

- CDC Obesity Cost Calculator LEAN Works:
  - [www.cdc.gov/leanworks](http://www.cdc.gov/leanworks)
Hard Numbers Are Not Always Necessary to Proclaim Success!

Per ADP study
- Who is Measuring ROI:
  - Only 22% of large
  - 25% of mid-sized
- 60% and 53% respectively declare programs are successful!

Per IFEBP study, “A Closer Look: Wellness ROI:”
- 84% of employers measuring ROI are achieving healthcare savings.

Movement towards VOI vs. ROI
- Value of Investment
- Includes being viewed as employer of choice, caring about employees, deemed one of healthiest companies in the community, etc.
When Will We See an ROI?

- You need to be patient and realistic!
- Most programs take three to five years for broad-based wellness programs focused on entire population
- Targeted value-based programs can see more immediate savings
- Wellness is an investment in your operations just like any other!
What ‘s the Worry?
Laws to Consider

- The Patient Protection and Affordable Care Act of 2010, as modified by the Health Care and Education Reconciliation Act (PPACA)
- Health Insurance Portability and Accountability Act of 1996 (HIPAA) nondiscrimination and wellness rules
- Americans with Disabilities Act (ADA) and the Americans with Disabilities Act Amendments Act (ADAAA)
- Genetic Information Nondiscrimination Act of 2008 (GINA)
- Other nondiscrimination laws:
  - Age Discrimination in Employment Act (ADEA)
  - Title VII of the Civil Rights Act of 1964
- Internal Revenue Code of 1986 (Code)
- HIPAA’s privacy and security rules
- The Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA)
- Employee Retirement Income Security Act of 1974 (ERISA)
- State laws
Federal Laws Have Conflicting Goals

Some encourage wellness programs and other measures to promote healthy lifestyles and improve employee health.
- PPACA
- HIPAA’s wellness rules (an exception to HIPAA’s nondiscrimination rules)

Others prevent discrimination based on health status, disability, or other protected classes.
- HIPAA’s nondiscrimination rules
- ADA
- GINA
- ADEA
- Title VII
What Laws Apply Depend Upon
Group Health Plan Status

A wellness program that is a group health plan or is part of a
group health plan is subject to the following laws:

- ERISA
- PPACA
- HIPAA
- ADA
- GINA – Title I
- ADEA and Title VII
- Internal Revenue Code
- COBRA
- State laws (not clear)

A wellness program that is **not** a group health plan nor is part of a
group health plan is subject to the following laws:

- ADA
- GINA – Title II
- ADEA and Title VII
- Internal Revenue Code
- State laws
**ERISA Welfare Plan Criteria** - A wellness program will be considered an ERISA welfare plan if it is a plan, fund, or program that is established or maintained by an employer for the purpose of providing medical care or benefits to participants and their beneficiaries.

- Medical care includes care for diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any structure or function of the body.

  - Medical care includes benefits that are diagnostic or preventative in nature.
  - Scope or frequency of the plan benefits is irrelevant.
  - Offering additional lifestyle and educational components doesn’t alter status.

- Does the wellness program provide medical care?
  - Biometric screenings, physical examinations, flu shots, disease management counseling likely considered medical care.
  - Weight loss programs not tied to health plan premiums and educational programs are unlikely to be considered medical care.
ERISA Welfare Plan Requirements - If the wellness program is a separate, stand-alone ERISA plan, it will have to comply with various requirements –

- Plan document and summary plan description.
- Form 5500 filings.
- ERISA’s fiduciary standards.
- New requirements under PPACA (e.g., claims and appeals requirements, SBC requirements).
HIPAA Nondiscrimination & Wellness Rules – Issued by IRS, DOL and HHS in 2006.

- **General Nondiscrimination Rule** - HIPAA prohibits group health plans from discriminating based on a health factor with respect to eligibility to participate in the plan, premiums and cost-sharing mechanisms (e.g., co-insurance, co-pays, and deductibles).
  - “Health factors” include health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, and disability.

- **Exception for Wellness Programs** - Premium discounts, rebates, or modification to cost-sharing are permitted in return for adhering to certain programs that promote health or prevent disease.
PPACA codified HIPAA’s wellness rules effective for plan years beginning on or after January 1, 2014.

- No changes to the existing rules other than to increase the amount of the reward.
- Applied to non-grandfathered plans.

Proposed regulations issued by IRS, DOL and HHS in November 2012.

- Applies to all plans (i.e., grandfathered and non-grandfathered plans).
- 2006 regulations continue to apply until proposed regulations are finalized.
Two Types of Wellness Programs

- **Participatory Wellness Programs** - Wellness programs that either do not require an individual to meet a standard related to a health factor in order to obtain a reward or do not offer a reward at all.

- **Health-Contingent Wellness Programs** - Wellness programs that require an individual to satisfy a standard related to a health factor in order to obtain a reward.
HIPAA and PPACA Wellness Rules (cont'd)

Participatory Wellness Programs

- **Requirements** – The program must be made available to all similarly-situated individuals.

- **Examples**
  - Fitness center reimbursement program.
  - A diagnostic testing program (e.g., cholesterol screening) that provides a reward for participation and not on any outcome.
  - A program that waives co-payments or deductibles for prenatal or well-baby visits.
  - A program that reimburses employees for the cost of smoking cessation programs without regard to whether the employee quits smoking.
  - A program that provides a reward to employees for attending a free health education seminar.
Health-Contingent Wellness Programs

Five Requirements

1) Individuals must be given an opportunity to qualify for the reward at least once a year.
2) The amount of the reward must be limited.
3) Reasonable alternative standards to earn the reward must be made available to certain individuals.
4) The program must be reasonably designed to promote health or prevent disease.
5) Reasonable alternatives must be disclosed in plan materials.

Examples
- A premium surcharge based on tobacco use.
- A program that provides a reward based on attaining certain results under a biometric screening.
Health-Contingent Wellness Programs

- **Requirement #1: Annual Qualification** – Individuals must be given the opportunity to qualify for the reward at least once per year.

- **Proposed Regulations** - No changes in the proposed regulations.
Health-Contingent Wellness Programs

- **Requirement #2: Reward Limited** – The reward, when combined with any other health-contingent wellness program reward, must not exceed 20% of the cost of employee-only health coverage. If dependents may participate in the wellness program, the combined reward may not exceed 20% of the cost of coverage in which the employee and dependents are enrolled.

- **Proposed Regulations**
  - Increase the reward for non-tobacco-related wellness programs to 30%.
  - Increase the reward to 50% for programs designed to prevent or reduce tobacco use (consistent with tobacco use rating provisions that will apply to insurers in 2014).
    - If exclusively a tobacco prevention program, can provide 50% reward.
    - If offer a health-contingent program that includes tobacco prevention, can provide total reward of 50%, but non-tobacco portion limited to 30%.
  - Proposed changes apply to non-grandfathered and grandfathered plans.
  - Comments requested regarding whether rewards should be prorated if some, but not all family members qualify.
Health-Contingent Wellness Programs

Requirement #3: Reasonable Alternative Standards
- A reasonable alternative standard (or waiver of the standard) must be provided to:
  o Individuals for whom it is unreasonably difficult to meet the standard due to a medical condition.
  o Individuals for whom it is medically inadvisable to attempt to satisfy the standard.
- Alternative standard does not need to be established in advance.

Proposed Regulations
- Must provide support to enrollees to comply with reasonable alternatives.
  o Make available and pay for the cost of educational programs.
  o Pay membership or participation fees for diet programs (but not food).
  o Accommodate the recommendations of an individual’s physician with regard to medical appropriateness if the program requires compliance with the plan’s physician.
- The plan may seek physician verification that a health factor makes it unreasonably difficult or medically inadvisable for the individual to attempt to satisfy the standard only if reasonable under the circumstances.
Health-Contingent Wellness Programs

- **Requirement #4: Reasonable Design**
  - Must be reasonably designed to promote health or prevent disease;
  - Must not be overly burdensome;
  - Must not be a subterfuge for discrimination; and
  - Must not be highly suspect in the method chosen to promote health and prevent disease.

- **Proposed Regulation**
  - To the extent a plan’s initial standard for obtaining a reward is based on the results of a measurement, test, or screening relating to a health factor (e.g., biometric exam or health risk assessment), the plan must make an alternative available to any individual who does not meet the standard.
    - This expands Requirement #3 – (1) to require that a reasonable alternative be offered to all individuals who do not meet the standard; and (2) to possibly require that the alternative be developed in advance as a matter of plan design.
  - Comments requested regarding whether evidence- or practice-based standards are needed.
Health-Contingent Wellness Programs

- **Requirement # 5: Notice of Availability of Reasonable Alternatives** - The program must provide notice that an alternative standard (or waiver) is available in all plan materials describing the wellness program.

- **Proposed Regulations**
  - If plan materials merely mention that a wellness program is available, without describing its terms, disclosure of the alternative standard or waiver is not required. (For example, disclosure is not required in summary of benefits and coverage (SBC))
  - The proposed regulations provide new sample language to satisfy required disclosures.
Two ADA Rules that Impact Wellness Programs

- **Prohibition Against Discrimination** - Employers may not discriminate against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.
  - ADAAA clarified and broadened the definition of “disability.”

- **Limits on Medical Exams and Disability-Related Inquiries** - The ADA limits an employer’s ability to make disability-related inquiries and to require medical examinations.
  - Class action lawsuits have been filed alleging that certain wellness programs violate this ADA requirement.
Prohibition Against Discrimination

- Health plans must generally provide equal benefits for employees with disabilities and to other employees.
  - Disability-based distinctions violate the ADA unless the employer can show that it is a bona fide plan and that the disability-based distinctions are based on sound actuarial principles or related to actual or reasonably anticipated experience. Unclear how this exception can be applied to wellness components.
- Cautious employers should design their wellness programs to provide reasonable accommodations for those with disabilities.
Disability-Related Inquiries and Medical Examinations

- **Disability-Related Inquiries** – Questions that are likely to elicit information about a disability.
  - Examples of disability-related questions:
    - What prescription drugs are you taking?
    - What is your weight?
    - What is your blood pressure and cholesterol?
  - Examples of non-disability-related questions:
    - How often do you exercise?
    - How many hours of sleep do you get each night?
    - How often do you eat at fast food restaurants?
- Most health risk assessments make disability-related inquiries.
Disability-Related Inquiries and Medical Examinations

- **Medical Examinations** – Procedures or tests that seek information about an individual’s physical or mental impairments or health.
  - **Factors to Consider** -
    - Whether the test is administered or interpreted by a health care professional.
    - Whether the test is designed to reveal an impairment or physical or mental health.
    - Whether the test is invasive.
    - Whether the test measures an employee’s performance of a task.
    - Whether the test is normally given in a medical setting or whether medical equipment is used.
  - **Examples of medical examinations** - Blood, urine, and breath analyses to detect disease, blood pressure screening and cholesterol testing.
  - **Biometric screenings and blood and saliva tests for tobacco use are likely medical examinations.**
Disability-Related Inquiries and Medical Examinations are Generally Prohibited

- **Job-Related Exception** - If job-related and consistent with business necessity.
- **Voluntary Wellness Program Exception** - If it is part of a wellness program that meets the following requirements:
  - Participation in the program is voluntary - The employer neither requires participation, nor penalizes those who do not participate.
  - Information obtained is kept confidential and separate from personnel records.
  - Information obtained is not used to discriminate against an employee.
- **Exception for Bona Fide Plans**
Voluntary Wellness Programs

- Mandatory health risk assessments fail to satisfy the requirement that a medical examination or inquiry must be voluntary.

- The EEOC has not taken a position regarding whether financial incentives to participate in wellness programs violate the “voluntary” requirement.
  - Informal discussion letter indicating that a wellness reward limited to 20% of the cost of coverage was permissible under the ADA was rescinded by the EEOC.
  - Compare to the EEOC’s position regarding GINA’s voluntary wellness program exception. The EEOC has taken the position that financial incentives are generally not permitted under GINA.

- Hiring a third party who will not share health information with the employer to administer the health risk assessment or wellness program will not otherwise resolve the “voluntary” requirement.
Exception for Bona Fide Plans

- Purpose of the exception is to permit the development and administration of benefit plans in accordance with accepted principles of risk assessment, allowing for disability-based distinctions in benefits.

- **Seff v. Broward County** (11th Circuit 2012) –
  - Insured plan imposed a penalty on employees who refused to complete a health risk assessment and biometric screening. Employees filed a class action lawsuit in the U.S. District Court for the Southern District of Florida.
  - Neither the district court, nor the court of appeals addressed the voluntary wellness program exception and instead held that the wellness program was permissible under the exception for bona fide plans because the wellness program was based on underwriting risks, classifying risks, or administering such risks.

- The EEOC has informally stated that it disagrees with the Seff decision.
**Genetic Information Nondiscrimination Act of 2008**

**General Rule** - GINA prohibits genetic discrimination in two areas – employment and health insurance.

- **Title I** prohibits group health plans and health insurance issuers from –
  - Discriminating on the basis of genetic information with respect to eligibility, premiums, and contributions.
  - Collecting genetic information before or in connection with enrollment or for underwriting purposes.

- **Title II** prohibits employers from –
  - Discriminating on the basis of genetic information in employment decisions.
  - Requesting, requiring, or purchasing genetic information.
Genetic Information
Nondiscrimination Act of 2008 (cont'd)

Definitions

- **Genetic information** - Broadly defined to include information about the genetic tests of an employee and the employee’s family members, as well as the manifestation of a disease or disorder in the employee’s family (i.e., the employee’s family medical history).

- **Genetic test** - Generally defined as the analysis of an individual’s DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes.

- **Family members** - Broadly defined to include dependents, including spouses, and fourth degree relatives of the employee or the employee’s dependents.
Title I – Group Health Plan Prohibitions

- Premiums or contribution amounts for an employer or a group of similarly situated individuals cannot be based on genetic information.
- Plans and issuers may not request or require that an individual undergo a genetic test, subject to exceptions for health care professionals, to determine payment of a claim, and for research.
- Plans and issuers may not collect genetic information (including family medical history) prior to or in connection with enrollment or for underwriting purposes.
  - “Underwriting” includes reducing deductibles or other cost-sharing mechanisms, or providing premium discounts, rebates, or payments in kind in return for completing a health risk assessment or participating in a wellness program.
Genetic Information
Nondiscrimination Act of 2008 (cont'd)

**Title I - Administering Health Risk Assessments**

- **Employee-only HRA participation**
  - Eliminate questions that request genetic information.
  - Eliminate questions that are open-ended and might solicit genetic information, unless a statement is included instructing the individual not to provide genetic information.
  - If want to solicit family medical history: (1) do not provide HRA prior to or in connection with enrollment; and (2) do not provide a reward or bifurcate HRA and only provide reward for the portion that does not collect genetic information.

- **Spouse and dependent participation**
  - Unclear if permissible. The Title I regulations do not address whether a health risk assessment completed by a spouse is considered family medical history of the employee.
  - If offer to spouses and/or dependents consider: (1) not providing HRA prior to or in connection with enrollment; and (2) eliminating rewards.
Title II – Employment Prohibitions

- **Genetic discrimination prohibited** - Employers may not discriminate on the basis of genetic information.

- **Acquisition of genetic information prohibited** - Employers may not request, require, or purchase genetic information, subject to certain exceptions, including voluntary wellness programs, provided certain requirements are met.

- **Confidentiality protections** - Genetic information obtained must kept confidential and separate from personnel records.
Title II - Voluntary Wellness Program Requirements:

- The employee provides the information voluntarily. This requirement is not met if the employee is required to provide the genetic information, is penalized for not providing it, or offered a financial inducement to provide it.
  - Unclear if EEOC believes that providing an incentive to an employee for a spouse who completes a health risk assessment violates GINA.
- The employee provides knowing, voluntary, and written authorization.
- Only the employee (or the employee’s family member if the family member is receiving genetic services) and the health care professional or board certified genetic counselor providing the services may receive individually identifiable genetic information.
- The results of the genetic services may only be disclosed to the employer in the aggregate.
Other Nondiscrimination Laws to Consider

**Age Discrimination in Employment Act** - Subject to certain exceptions, benefits provided to employees age 40 and older must be at least equal to the benefits provided to employees who are under age 40.
- Employers may want to consider whether their wellness program standards have a disparate impact on older employees.

**Title VII** - Coverage under a group health plan must be provided without regard to race, color, religion, sex, or national origin.
- Employers may want to consider whether their wellness program standards have a disparate impact on a protected class.
**General Taxation Rule** - Amounts paid to employees, either as cash compensation or in the form of benefits, are treated as taxable income, unless an exemption is available under the Code.

**Possible Exclusions for Wellness Programs**
- **Non-taxable health benefits**
- **De minimis fringe benefits** - The property or service must be provided infrequently and the value of the property or service provided must be so minimal that accounting for it would be unreasonable or administratively impractical.
Examples

- Cash and cash equivalents are always taxable.
- Reductions to health plan premiums or other cost sharing mechanisms (e.g., deductibles, co-pays) under a major medical plan are not taxable.
- Contributions to health flexible spending accounts (Health FSAs), health reimbursement arrangements (HRAs), and health savings accounts (HSAs) are not taxable.
- Reimbursements of health club dues are generally taxable.
- Gym bags, water bottles, and t-shirts likely not taxable as a de minimis fringe benefit.
**Nondiscrimination Rules** – The Code’s nondiscrimination rules generally prohibit discrimination in favor of highly compensated employees and key employees with respect to eligibility and benefits under certain plans. Employer contributions to Health FSAs, HRAs and HSAs may impact nondiscrimination testing.

- **Health FSAs** – Nondiscrimination tests under Code Sections 105(h) and 125 apply to Health FSAs.
- **HRAs** – Nondiscrimination tests under Code Section 105(h) apply to HRAs.
- **HSAs** – Comparability rules apply to HSAs offered outside of a cafeteria plan and nondiscrimination testing under Code Section 125 applies to HSAs offered under a cafeteria plan.
  - Employer contributions to an HSA outside of a cafeteria plan for an employee’s participation in a wellness program likely fails to satisfy the comparability requirements.
Cafeteria Plan Mid-Year Election Change Rules

- An employee may be able to change his/her contributions for group health plan coverage mid-year as a result of participating in a wellness program if the change in cost is considered significant.
- Employers may be able to automatically adjust employee contributions for group health plan coverage as a result of employee participation in a wellness program if the change in cost is insignificant.
- No mid-year changes to employee contributions to Health FSAs permitted.
Other Considerations

- **HSA Eligibility Rules** - An individual will not fail to be eligible to contribute to an HSA solely because the individual is covered under a disease management program or wellness program if the program does not provide significant benefits in the nature of medical care or treatment. Screening and other preventive care services are disregarded.

- **Health FSA HIPAA Considerations** - Employer contributions to Health FSAs may cause the Health FSA to become subject to HIPAA’s portability requirements. To be excluded from HIPAA’s portability requirements –
  - Major medical coverage must be made available to the same class of employees eligible for the Health FSA; and
  - The maximum benefit payable under the Health FSA to any participant cannot exceed two times the employee's salary reduction election under the Health FSA for the year (or, if greater, the amount of the employee's salary reduction election for the Health FSA for the year, plus $500).
**HIPAA’s Privacy and Security Rules**

**General HIPAA Privacy and Security Rules**

- A group plan that provides or pays the cost of medical care is subject to HIPAA’s Privacy and Security Rules.
  - Exception: Self-funded, employer-administered group health plans that have fewer than 50 eligible employees are excluded.
- If an employer sponsors a fully-insured group health plan and does not receive protected health information (PHI), the obligation to comply with most of HIPAA’s Privacy and Security Rules falls on the insurance carrier.
- If an employer receives PHI from its fully-insured group health plan or if the employer sponsors a self-funded group health plan, the employer will have to comply with HIPAA’s Privacy and Security Rules.
Applying HIPAA’s Privacy and Security Rules to a Wellness Program

- If a wellness program is not considered a group health plan, HIPAA’s Privacy and Security Rules do not apply.
- If the wellness program is part of a group health plan
  - If the plan and the wellness program are both fully-insured, the insurance carrier is responsible for most HIPAA compliance.
  - If the plan and the wellness program are self-funded, the plan’s HIPAA policies and procedures should incorporate the wellness program.
  - If the plan is fully-insured, but the wellness program is self-funded, arguably the employer becomes responsible for HIPAA compliance for both the fully-insured plan and the self-funded wellness program.
- If the wellness program is a stand-alone, self-funded group health plan, the employer is responsible for the program’s HIPAA compliance.
**General Rule** - COBRA applies to group health plans. A plan is a “group health plan” if it provides “medical care” as defined in Code Section 213(d).

- Medical care generally includes the diagnosis, cure, mitigation, treatment, or prevention of disease.
- Medical care does not include anything that is merely beneficial to the general health of an individual.

**Application of COBRA to Wellness Programs**

- Wellness programs that are part of a group health plan should be offered to COBRA qualified beneficiaries.
- Stand-alone wellness programs that provide physical exams / screenings may be subject to COBRA.
- Lunchtime educational programs and reimbursement of gym memberships would not be subject to COBRA.
Adding or changing a wellness component of a grandfathered plan could cause the plan to lose grandfathered status if the employer’s contribution percentage is reduced by more than 5% below the contribution rate on March 23, 2010.

Stand-alone wellness programs that are group health plans are subject to most PPACA mandates.
State Laws

- **Lifestyle Laws** – Prohibit discrimination based on any lawful activity by an employee off the premises and during non-working hours.

- **Lawful Product Laws** – Prohibit discrimination based on an employee’s use of lawful products (e.g., tobacco).

- **ERISA preemption?**
Circular 230 Disclaimer

To ensure compliance with Treasury Regulations governing written tax advice, please be advised that any tax advice included in this communication, including any attachments, is not intended, and cannot be used, for the purpose of: (i) avoiding any federal tax penalty; or (ii) promoting, marketing, or recommending any transaction or matter to another person.
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