

13TH ANNUAL OHIO

***Employee
Health &
Wellness***
CONFERENCE

Workshop N

Fundamental Practice
**Wellness Programs: Navigating Legal
Landmines and Designing
Legally-Compliant
Employee Communications !**

3:00 p.m. to 4:15 p.m.

Biographical Information

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Linda is of counsel in the Vorys Columbus office and a member of the labor and employment group. Her practice is concentrated in the area of employee benefits. Linda works with employers and multiemployer plans on health and welfare benefit plan issues, including employee communications, compliance with the Patient Protection and Affordable Care Act (ACA), the Employee Retirement Income Security Act (ERISA), the Health Information Technology for Economic and Clinical Health Act (HITECH), the Health Insurance Portability and Accountability Act (HIPAA), and the Consolidated Omnibus Budget Reconciliation Act (COBRA), tax issues, and vendor contracting.

Linda is a Fellow of the American College of Employee Benefits Counsel. She is also a member of the American Bar Association. Linda is the past chair of the Welfare Plan and EEOC Issues Subcommittee of the Tax Section of the ABA. She coordinated the ABA's comments to the IRS on the employer shared responsibility penalties under Code §4980H and has participated in ABA projects to provide comments to the IRS on other ACA regulations.

Linda has spoken on several topics, including ACA, HITECH, COBRA, reporting and disclosure and high deductible health plans/health savings accounts.

Linda received her J.D. with honors from The Ohio State University Michael E. Moritz College of Law and her B.B.A. *magna cum laude* from Kent State University.

Biographical Information

Christine M. Poth, Partner
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Christine is a partner in the Vorys Columbus office and a member of the labor and employment group. Her practice focuses on employee benefits and related tax matters. She has experience in the design, implementation and administration of qualified retirement plans, health and welfare plans, insurance benefits, fringe benefits, deferred compensation, and incentive bonus programs. She has significant experience in working with the Internal Revenue Service (IRS) and Department of Labor (DOL) on compliance issues.

Career highlights include:

- Assisted clients in preparing and updating plan documents for their qualified retirement plans, 403(b) plans and 457(b) plans
- Assisted clients in correcting administrative and operational issues with their qualified retirement plans and 403(b) plans, including preparing voluntary compliance filings with the IRS and DOL
- Assisted clients in implementing best practice procedures for fiduciary oversight of their ERISA employee benefit plans
- Assisted clients with IRS and DOL audits of their qualified retirement plans and group health plans
- Assisted client in transitioning from a traditional retiree group health plan to a health reimbursement arrangement (HRA)
- Assisted and counseled clients on nonqualified deferred compensation arrangements, including compliance with IRC section 409A

Christine has given numerous presentations and trainings to corporations and organizations on current employee benefit topics, such as the Affordable Care Act (ACA), wellness programs, service provider fee disclosure, compliance with the Internal Revenue Code and ERISA, and reporting and disclosure requirements for retirement and health and welfare plans.

Christine is a member of the American Bar Association and the Columbus Bar Association. She is a past chair of the Columbus Bar Association's Employee Benefits Committee.

Christine received her J.D from The Ohio State University Michael E. Moritz College of Law. She received her B.A. *summa cum laude* from the University of Cincinnati, where she was Phi Beta Kappa.

Wellness Programs: Legal Compliance Checkpoints

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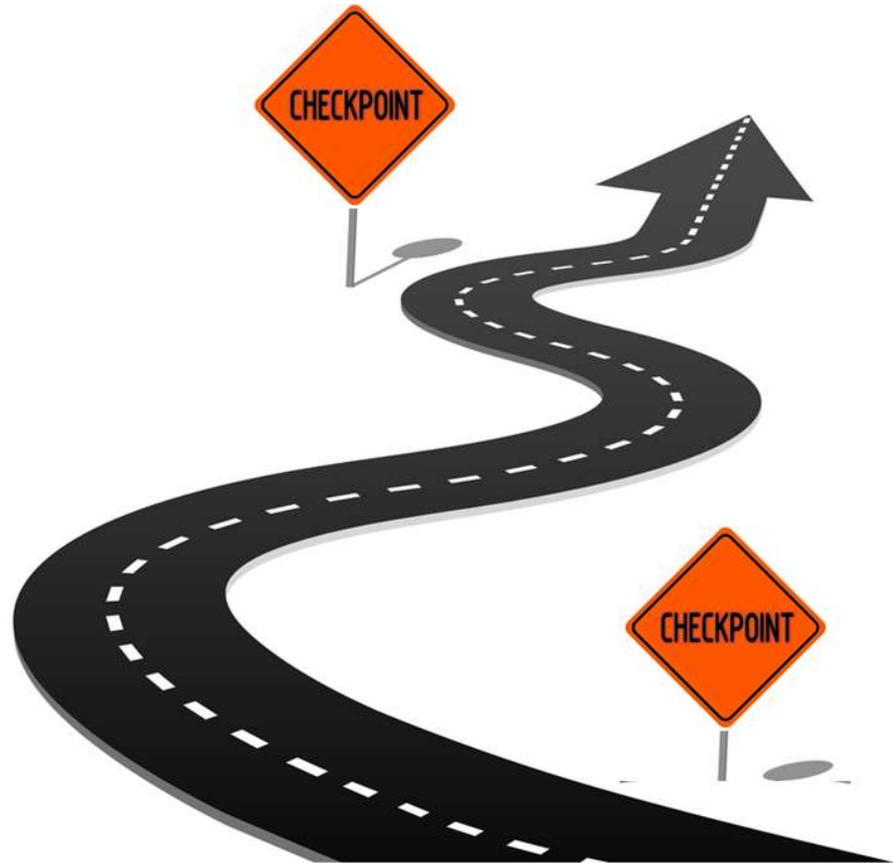
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August 21, 2018

VORYS

Regulation of wellness programs

- ☑ ADA
- ☑ GINA
- ☑ ERISA & IRC
nondiscrimination
rules
- ☑ HIPAA privacy rules
- ☑ General tax rules



Consequence of noncompliance

- Litigation.
 - Participants have the right to bring suit under ERISA, ADA and GINA.
- DOL audits.
 - The DOL is asking about wellness program compliance in group health plan audits.
- Excise taxes.
 - Violations of IRS wellness program rules are supposed to be self-reported to IRS.
 - Potential excise tax equal to \$100/per day violation.

Wellness programs & the ADA

- Why does the Americans with Disabilities Act (ADA) apply to wellness programs?
 - The ADA generally prohibits an employer from requiring medical examinations and making inquiries as to the disabilities of its employees.
 - Subject to three exceptions:
 1. Job-related, necessary medical exams and inquiries.
 - » Not relevant to wellness programs.
 2. Underwriting and plan administration.
 3. Voluntary medical examinations and inquiries.

Wellness programs & the ADA

- EEOC's perspective:
 - Exception for underwriting and plan administration does not apply.
 - A health risk assessment (HRA) or biometric screening is a medical examination or inquiry.
 - An HRA or biometric screening needs to be *voluntary* in order to be permissible.

Wellness programs & GINA

- Why does the Genetic Information Nondiscrimination Act (GINA) apply to wellness programs?
 - Health information about an employee's family member counts as the employee's genetic information.
 - Genetic information includes:
 - The employee's family medical history; and
 - A family member's current illnesses and diseases.

Wellness programs & GINA

- Why does GINA apply to a spouse's participation in a wellness program?
 - A family member's health information counts as the employee's genetic information.
 - An employee's spouse is the employee's family member.
 - A spouse's health information is the employee's genetic information...
 - Even though the employee and spouse are not genetic relations.

Wellness programs & GINA

- What does GINA prohibit?
 - The collection of genetic information:
 1. For underwriting purposes.
 - “Underwriting” is defined broadly to include any incentive (reward or penalty).
 2. Prior to the individual’s enrollment in the associated health plan.

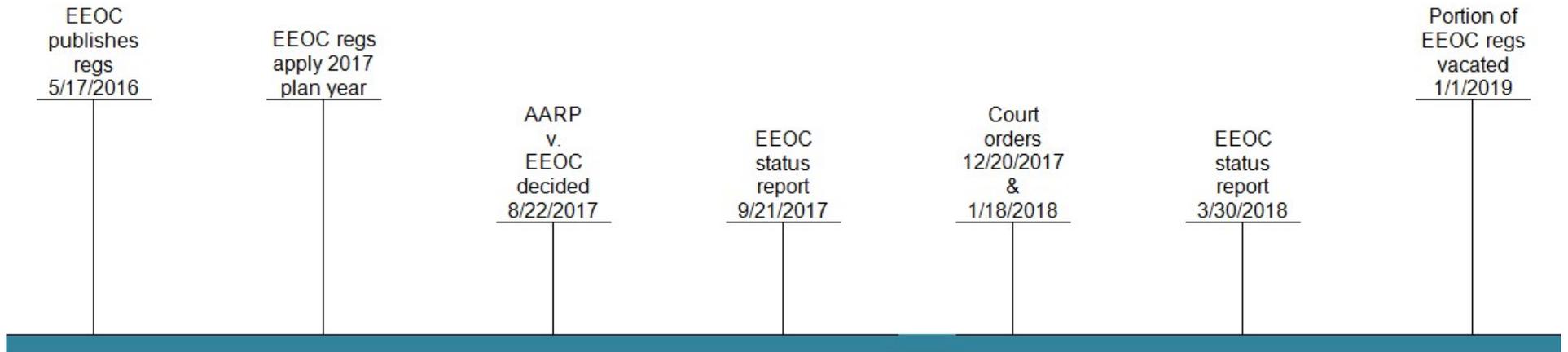
Wellness programs & GINA

- GINA rules of thumb:
 - Health risk assessment (HRA) should not ask for family medical history.
 - HRA should not include open-ended questions that could be answered with family medical history or other genetic information.
 - Or, open-ended questions should include a warning not to respond with genetic information.

Wellness programs & the EEOC

- EEOC published regs 5/15/2016.
 - Applicable to the 2017 plan year.
 - A (mostly) welcome development.
 - Before the regs, there was uncertainty, confusion and litigation regarding the application of the ADA and GINA to wellness programs.
 - Regs list the circumstances under which a wellness program could ask an employee and/or his or her spouse to:
 - complete an HRA,
 - take a biometric screening, or
 - provide information on illnesses and diseases.

Wellness programs & the EEOC



Permissible incentives

- What incentives were permitted by the EEOC regs?

	ADA	GINA
Maximum reward or penalty	<p>Incentives for an employee's participation limited to 30% of the cost of single coverage.</p> <p>Cap applies to any combination of participatory and health-contingent wellness programs plus any other workplace wellness programs which include inquiries as to the employee's health status.</p>	<p>Incentives for a spouse's participation limited to 30% of the cost of single coverage.</p> <p>Cap applies to any combination of participatory and health-contingent wellness programs plus any other workplace wellness programs which include inquiries as to the spouse's health status.</p> <p>If the wellness program is available to both the employee and spouse, each may be offered a separate reward/penalty of up to 30% of the cost of single coverage. The cost of family coverage is not a factor.</p>

Permissible incentives – 30% of what?

- EEOC limits on incentives:
 - If the employer offers only one medical plan option, 30% (or 60%) of the cost of employee-only coverage.
 - If the employer offers multiple medical plan options, 30% (or 60%) of the cost of employee-only coverage under the lowest cost option.

Wellness programs & the EEOC

- AARP v. EEOC, 2017 WL 6542014 (D.D.C. 8/22/2017).
 - AARP filed suit 10/24/2016.
 - Alleged that the permissible incentives under the EEOC regs were so large that a wellness program was in effect involuntary.
 - Court agreed with the AARP.
 - Court found that EEOC acted arbitrarily in construing the term “voluntary” to permit an incentive of up to 30% of the cost of coverage.
 - Court ordered EEOC to reconsider its regulations.

Wellness programs & the EEOC

- AARP v. EEOC (cont'd).
 - EEOC filed a status report on 9/21/2017, saying it expected to publish new regs by 10/2019 which would be effective in 2021.
 - The Court was not satisfied with that timeline.
 - The Court then vacated the challenged portions of the regs effective 1/1/2019.
 - EEOC's filed another status report on 3/30/2018.
 - *[The EEOC] does not currently have plans to issue a Notice of Proposed Rulemaking addressing incentives for participation in employee wellness programs by a particular date certain.*

Wellness programs & the EEOC

- The vacating of the permissible incentives in EEOC regs is not a carte blanche to ignore the ADA and GINA.
 - Incentives in excess of levels that were permitted in the vacated EEOC regs are particularly risky.
- What remains of the EEOC's regs?

Wellness programs & the EEOC

	ADA	GINA
No discrimination	The employer cannot require participation or take adverse employment action against an employee who declines to participate.	The employer cannot require participation or take adverse employment action against an employee whose spouse declines to participate.
Wellness program ≠ gatekeeper	The employer cannot make eligibility for a health benefit package contingent on the employee's participation in a wellness program.	The employer cannot make eligibility for a health benefit package contingent on the spouse's participation in a wellness program.

Wellness programs & the EEOC

	ADA	GINA
Notice & authorization	<p>The employer must give the employee a notice prior to collecting health information from the employee but...</p> <p>The employer does not need the employee's authorization.</p>	<p>The employer must obtain a spouse's "knowing, voluntary, and written" authorization prior to collecting health information from the spouse.</p> <p>The spouse's authorization cannot be inferred from participation.</p>

Wellness programs & the EEOC

	ADA	GINA
Notice & authorization	<p>Notice must describe:</p> <ol style="list-style-type: none">1. type of information that will be obtained;2. specific purposes for which the information will be used;3. restrictions on disclosure of the information;4. employer representatives or other parties with whom the information will be shared; and5. methods that the employer will use to ensure that information is not improperly disclosed (including compliance with the HIPAA privacy regulations).	<p>Authorization form must describe:</p> <ol style="list-style-type: none">1. type of information that will be obtained;2. general purposes for which the information will be used; and3. restrictions on disclosure of the information.

Wellness programs & the EEOC

	ADA	GINA
Notice & authorization	<p>Notice must be written so that the employee is reasonably likely to understand it.</p> <p>The EEOC published a sample notice.</p>	<p>Authorization form must be written so that the spouse is reasonably likely to understand it.</p> <p>The EEOC has not published a sample authorization form.</p>

Sample ADA notice at

<https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm>

NOTICE REGARDING WELLNESS PROGRAM

[Name of wellness program] is a voluntary wellness program available to all employees. The program is administered according to federal rules permitting employer-sponsored wellness programs that seek to improve employee health or prevent disease, including the Americans with Disabilities Act of 1990, the Genetic Information Nondiscrimination Act of 2008, and the Health Insurance Portability and Accountability Act, as applicable, among others. If you choose to participate in the wellness program you will be asked to complete a voluntary health risk assessment or "HRA" that asks a series of questions about your health-related activities and behaviors and whether you have or had certain medical conditions (e.g., cancer, diabetes, or heart disease). You will also be asked to complete a biometric screening, which will include a blood test for [be specific about the conditions for which blood will be tested.] You are not required to complete the HRA or to participate in the blood test or other medical examinations.

However, employees who choose to participate in the wellness program will receive an incentive of [indicate the incentive] for [specify criteria]. Although you are not required to complete the HRA or participate in the biometric screening, only employees who do so will receive [the incentive].

Additional incentives of up to [indicate the additional incentives] may be available for employees who participate in certain health-related activities [specify activities, if any] or achieve certain health outcomes [specify particular health outcomes to be achieved, if any]. If you are unable to participate in any of the health-related activities or achieve any of the health outcomes required to earn an incentive, you may be entitled to a reasonable accommodation or an alternative standard. You may request a reasonable accommodation or an alternative standard by contacting [name] at [contact information].

The information from your HRA and the results from your biometric screening will be used to provide you with information to help you understand your current health and potential risks, and may also be used to offer you services through the wellness program, such as [indicate services that may be offered]. You also are encouraged to share your results or concerns with your own doctor.

Protections from Disclosure of Medical Information

We are required by law to maintain the privacy and security of your personally identifiable health information. Although the wellness program and [name of employer] may use aggregate information it collects to design a program based on identified health risks in the workplace, [name of wellness program] will never disclose any of your

personal information either publicly or to the employer, except as necessary to respond to a request from you for a reasonable accommodation needed to participate in the wellness program, or as expressly permitted by law. Medical information that personally identifies you that is provided in connection with the wellness program will not be provided to your supervisors or managers and may never be used to make decisions regarding your employment.

Your health information will not be sold, exchanged, transferred, or otherwise disclosed except to the extent permitted by law to carry out specific activities related to the wellness program, and you will not be asked or required to waive the confidentiality of your health information as a condition of participating in the wellness program or receiving an incentive. Anyone who receives your information for purposes of providing you services as part of the wellness program will abide by the same confidentiality requirements. The only individual(s) who will receive your personally identifiable health information is (are) [indicate who will receive information such as "a registered nurse," "a doctor," or "a health coach"] in order to provide you with services under the wellness program.

In addition, all medical information obtained through the wellness program will be maintained separate from your personnel records, information stored electronically will be encrypted, and no information you provide as part of the wellness program will be used in making any employment decision. [Specify any other or additional confidentiality protections if applicable.] Appropriate precautions will be taken to avoid any data breach, and in the event a data breach occurs involving information you provide in connection with the wellness program, we will notify you immediately.

You may not be discriminated against in employment because of the medical information you provide as part of participating in the wellness program, nor may you be subjected to retaliation if you choose not to participate.

If you have questions or concerns regarding this notice, or about protections against discrimination and retaliation, please contact [insert name of appropriate contact] at [contact information].

Wellness programs & the EEOC

	ADA	GINA
Confidentiality	The employer can't access an employee's individually identifiable health information that was collected in connection with the wellness program except as necessary to administer the wellness program and related group health benefits.	The employer can't access a spouse's individually identifiable health information that was collected in connection with the wellness program except as necessary to administer the wellness program and related group health benefits.
No waiver of rights	The employer can't offer an inducement to the employee to agree to a disclosure or sale of the employee's health information.	The employer can't offer an inducement to the employee or spouse to agree to a disclosure or sale of the spouse's health information.

Wellness programs & the EEOC

	ADA	GINA
Reasonable design	The employer must actually use collected information for health promotion or disease prevention.	Same as ADA.

Wellness programs, ERISA & IRC

- Why do ERISA and the Internal Revenue Code (IRC) apply to wellness programs?
 - ERISA and the IRC prohibit a health plan from discriminating on the basis of health status.
 - Requirements under ERISA and the IRC are the same but the remedies are different.
 - ERISA gives participants the right to sue.
 - IRC imposes an excise tax.

Health plan status

- A health plan is any plan or program
 - maintained (or contributed to) by an employer...
 - for the purpose of providing medical care to employees and/or their dependents. ERISA §3(1).
 - Medical care is “the diagnosis, cure, mitigation, treatment, or *prevention of disease*.” ERISA §733.

Wellness programs, ERISA & IRC

- Is there a health plan?
 - Does your wellness program:
 - Provide or pay for medical care?
 - Share data with your health plan claims administrator or insurer?
 - Impact employees' health plan contributions or cost sharing?
- Not everything called a wellness program is regulated as a health plan.
 - On-site exercise class, fitness room, or walk-at-lunchtime program.

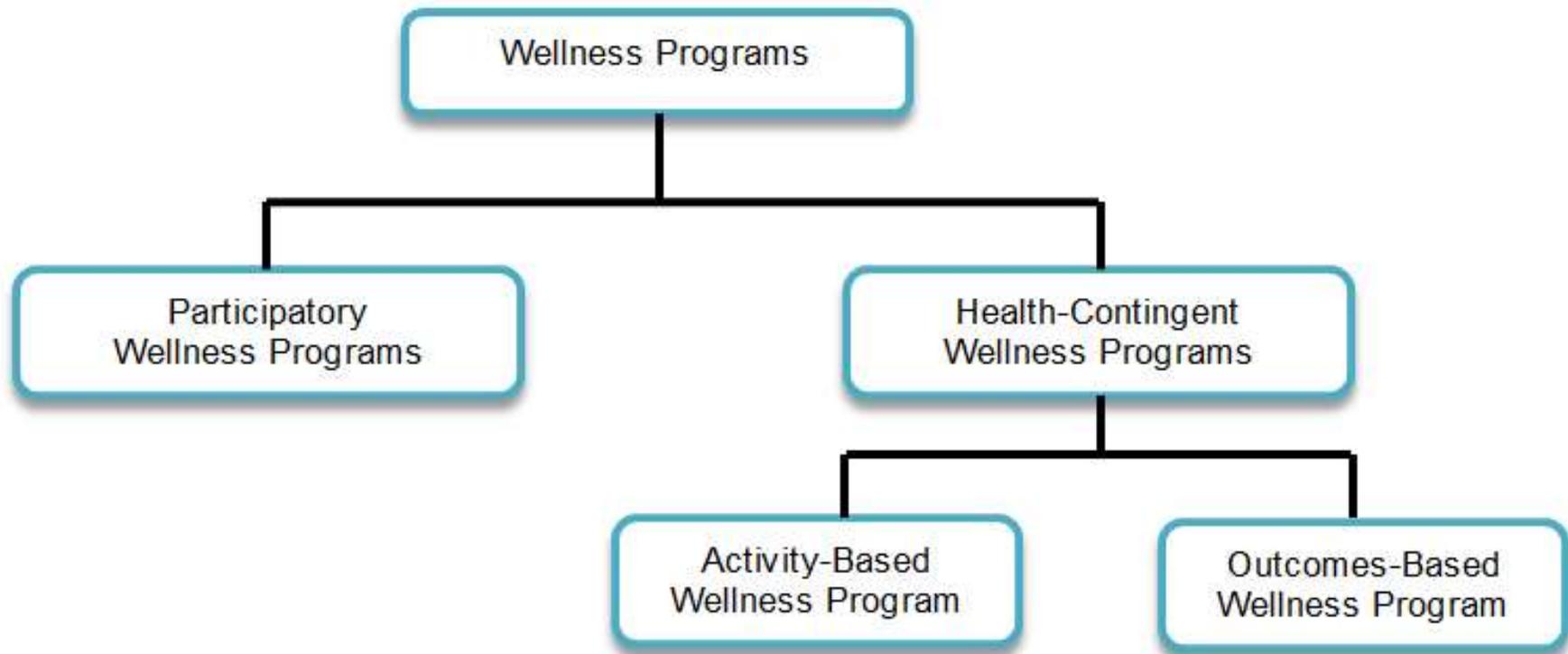
Health plan status

- What is discrimination on the basis of health status?
 - Discrimination = any difference in eligibility, contributions, or coverage based on health status.
 - Exceptions:
 - Discrimination that favors participants with adverse health conditions.
 - Wellness programs that meet DOL and IRS standards.

Wellness programs, ERISA & IRC

- Discrimination in favor of participant with an adverse health condition.
 - Example: Disabled adult child remains eligible for your health plan after attaining age 26.
 - Not permitted: Extra payments to employee with an adverse health condition (or a family member with an adverse health condition) in exchange for waiving your health plan.

Two types of wellness programs



Participatory wellness programs

- A wellness program is classified as participatory if:
 - No reward for participation.
 - Example: The plan offers a health risk assessment (HRA). No reward for completing the HRA (no penalty for failing to complete the HRA).
 - Reward for participation, but the conditions for obtaining the reward are not based on an individual satisfying a standard that is related to a health factor.
 - Example: Employee gets a reward for completing the HRA, with no further action required.

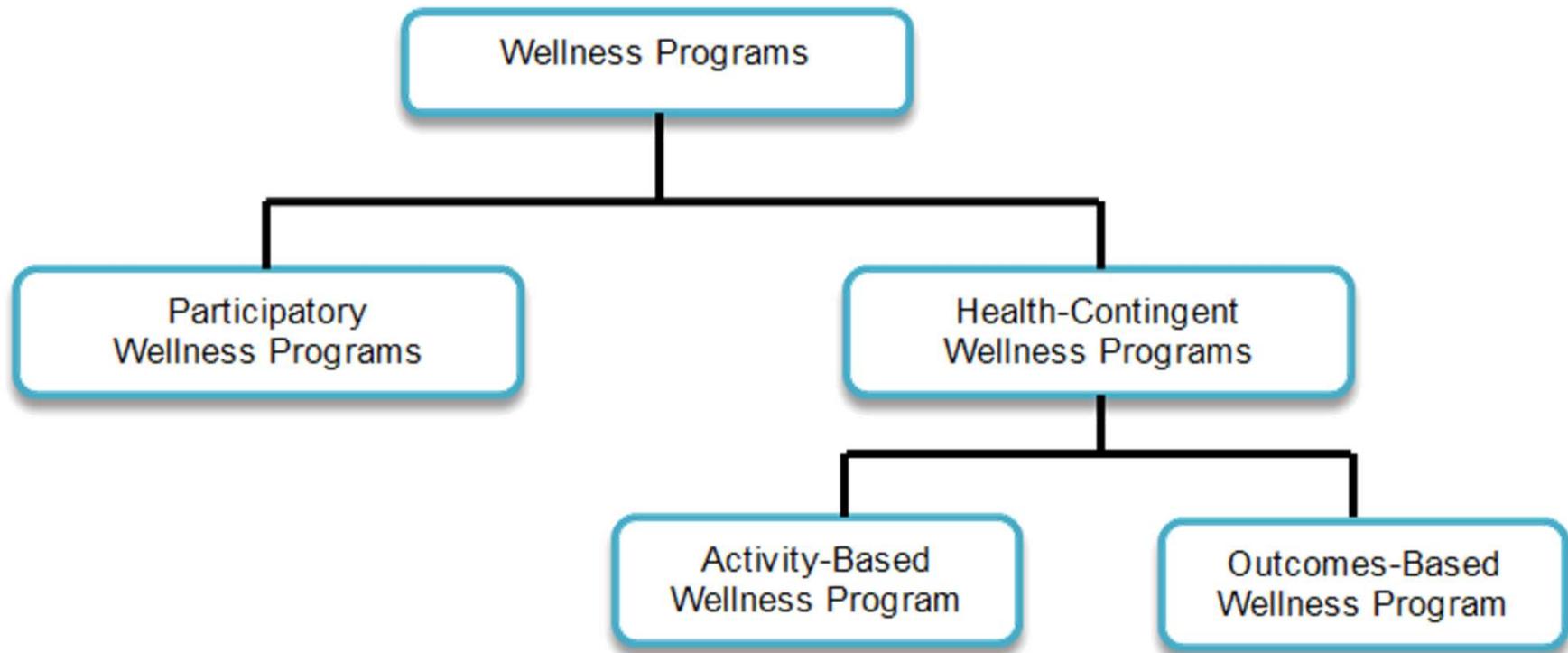
Participatory wellness programs

- Examples of rewards/penalties:
 - Reduced employee contributions or avoidance of an employee contribution surcharge.
 - Change in cost-sharing (e.g., lower deductible, copays or coinsurance).
 - Additional or enhanced benefits.

Participatory wellness programs

- Participatory wellness program must be made available to all similarly situated individuals (without regard to health status).
- If you have rewards/penalties:
 - The DOL and IRS regs do not cap financial incentives for participation in a participatory wellness program.
 - But, the EEOC cap was supposed to have applied to participatory wellness programs.

Health-contingent wellness programs



Health-contingent wellness programs

- Two types of health-contingent wellness programs.
 - Activity-only wellness program.
 - Where some individuals may have difficulty participating in the activity due to a health factor.
 - Example: A reward for completing a diet and/or exercise program.
 - Outcomes-based wellness program.
 - Where the reward is based on individuals satisfying a standard that is related to a health factor.
 - Examples:
 - A reward for normal body mass index (BMI).
 - A premium surcharge based on tobacco use.

Health-contingent wellness programs

- Five requirements for health-contingent wellness programs:
 1. Opportunity to qualify.
 2. Size of the reward/penalty.
 3. Reasonable design.
 4. Uniform availability.
 5. Notice of alternative standard.

Health-contingent wellness programs

- Check to be sure you meet all five requirements.
 - DOL audits of health plans include checking wellness program compliance.
 - If a wellness program does not comply, the DOL can require the employer to provide the reward (or waive the penalty) for all participants who did not otherwise qualify.
 - The DOL can also refer a plan to the IRS for assessment of penalties under Code §4980D (\$100 per day per violation during a period of noncompliance).

1. *Opportunity to qualify*

- The wellness program must give eligible individuals an opportunity to qualify for the reward at least once per year.
 - Typically coordinated with open enrollment.
 - What about new hires and newly-eligible individuals?

2. *Size of the reward*

- The reward/penalty cannot exceed:
 - 30% of the cost of coverage; plus
 - An additional 20% (for a total of 50%) of the cost of coverage for not using tobacco.
- Applied to the cost of single coverage.
 - If the spouse may participate in the wellness program, apply the percentage to the cost of coverage in which the employee and family members are enrolled.
- Remember that an employee is entitled to the reward (or to avoid a penalty) if he or she meets an alternative standard.

2. *Size of the reward – example*

- Employee-only coverage premium (total cost) is \$500 per month.
 - Employer pays 60% of the cost (\$300); and
 - Employee pays 40% of the cost (\$200).

2. Size of the reward – example

- 30% of \$500 cost = \$150.
 - Can vary the employee contribution by as much as \$150 per month.
 - Reward.
 - Employees who meet the standard pay \$50; and
Employees who do not meet the standard pay \$200.
 - Penalty.
 - Employees who meet the standard pay \$200; and
Employees who do not meet the standard pay \$350.
 - One or the other – ***NOT BOTH.***

2. Size of the reward – example

- Adding a tobacco surcharge:
 - 50% of \$500 cost = \$250, minus other health-contingent wellness program rewards/penalties.
 - \$250 is the maximum variation between the lowest rate and the highest rate tied to a health-contingent wellness program with a tobacco use component.
 - If the other rewards/penalties are \$150, then the tobacco reward/penalty cannot exceed \$100.

2. Size of the reward – example

- What about the ADA and GINA?
 - Employee’s tobacco use.
 - Rewards/penalties would not have counted against the ADA 30% cap **unless** you were testing the employee for tobacco use.
 - Spouse’s tobacco use.
 - Rewards/penalties would not have counted against the GINA 30% cap **even if** you were testing the spouse for tobacco use.
- *Remember DOL/IRS 50% limit applies in all cases.*

2. Size of the reward – example

- Adding a tobacco surcharge (cont'd):
 - Apply the lower of the (a) DOL/IRS limit or the (b) EEOC ADA limit.
 - If the employee *is not* tested for tobacco use:
 - 50% of \$500 (\$250).
 - If the employee *is* tested for tobacco use.
 - 30% of \$500 (\$150).
 - Remember to take into account all rewards/penalties in applying the limits.

Wellness program rewards & affordability

- Impact on employer pay or play penalties:
 - If your company is an applicable large employer and your health coverage is not “affordable,” you may incur a Code §4980H(b) unaffordable/inadequate coverage penalty.
 - The 2018 penalty is \$290 per month (\$3,480 per year) for each full-time employee who received federal premium assistance to buy health insurance in the Marketplace.

Wellness program rewards & affordability

- To determine “affordability:”
 - Divide a numerator by a denominator:
 - Numerator: the employee contribution for single health coverage.
 - Use the employee contribution rate applicable to employees who decline participation in any wellness programs (other than those related to tobacco use).
 - Denominator: one of three proxies for household income.
 - A result that does not exceed 9.56% (in 2018) is deemed to be “affordable” for purposes of the unaffordable / inadequate coverage penalty.

3. Reasonable design

A health-contingent wellness program must be “reasonably designed”	
Activity-Only Wellness Programs	Outcomes-Based Wellness Programs
<ul style="list-style-type: none"> • Must be reasonably designed to promote health or prevent disease. • Must not be overly burdensome. • Must not be a subterfuge for discriminating based on a health factor. 	<ul style="list-style-type: none"> • In addition to the above, the program must offer a reasonable alternative standard to qualify for the reward to <u>every</u> individual who does not meet the initial standard. <ul style="list-style-type: none"> – If the reward is based on the results of a measurement, test, or screening related to a health factor, you must – in all cases – make “<i>a different, reasonable means of qualifying for the reward</i>” available to ALL individuals who do not meet the standard. – Everybody wins?

4. Uniform availability

A health-contingent wellness program must be “uniformly available”	
Activity-Only Wellness Programs	Outcomes-Based Wellness Programs
<ul style="list-style-type: none"> You must offer a reasonable alternative standard (or waiver of the otherwise-applicable standard) for any individual for whom the activity would be: <ul style="list-style-type: none"> Medically inadvisable; or Unreasonable due to a medical condition. 	<ul style="list-style-type: none"> The reasonable alternative standard (or waiver of the otherwise-applicable standard) must be offered to <u>every</u> individual who does not meet the initial standard.
<ul style="list-style-type: none"> You can require verification from the individual's physician. <ul style="list-style-type: none"> The plan must provide a reasonable alternative standard that accommodates the recommendations of the individual's physician. 	<ul style="list-style-type: none"> You <u>cannot</u> require any sort of verification from the individual's physician.
<ul style="list-style-type: none"> If the alternative is an education program, the Plan must arrange and pay for the program. The time commitment must be reasonable. 	

5. Notice of alternative standard

A health-contingent wellness program must provide notice of availability of reasonable alternative standard	
Activity-Only Wellness Programs	Outcomes-Based Wellness Programs
<ul style="list-style-type: none"> All materials describing the terms of the wellness program must disclose the availability of a reasonable alternative standard (and, if applicable, the possibility of waiver of the otherwise applicable standard). Include: <ul style="list-style-type: none"> Contact information for obtaining a reasonable alternative standard; and A statement that recommendations of an individual's doctor will be accommodated. If materials merely mention that a program is available, without describing its terms, the disclosure is not required. 	
<ul style="list-style-type: none"> N/A. 	<ul style="list-style-type: none"> Also include the disclosure in any notice that an individual did not satisfy an outcomes-based standard.

5. Notice of alternative standard

- Old government sample notice:
 - *“If it is unreasonably difficult due to a medical condition for you to achieve the standards for the reward under this program, or if it is medically inadvisable for you to attempt to achieve the standards for the reward under this program, call us at [insert telephone number] and we will work with you to develop another way to qualify for the reward.”*

5. Notice of alternative standard

- New (friendlier) government sample notice:
 - *“Your health plan is committed to helping you achieve your best health. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at [insert contact information] and we will work with you (and, if you wish, with your doctor) to find a wellness program with the same reward that is right for you in light of your health status.”*

Other legal issues

- What else?
 - Like all health plan information, individually identifiable health information collected in connection with a wellness program is subject to the HIPAA privacy rules.
 - Cash rewards for participation in a wellness program are taxable.
 - Gift card counts as cash.
 - Reportable on Form W-2.

Good health costs more in the long run

- *The healthier you are, the more money you need to save for health care in retirement.*
 - How much money should you have on hand at age 65 to cover medical expenses for the balance of your life?
 - Male with Type 2 diabetes: \$88,300 (life expectancy 78).
 - Male smoker: \$114,900 (life expectancy 81).
 - Healthy male: \$143,800 (life expectancy 87).
- WSJ (2/10/2016).