

# EEOC Ruling on Wellness Plans

## WELLNESS PROGRAMS & NON-DISCRIMINATION

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# Wellness Programs and the EEOC

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## Agenda

- Background/HIPAA Nondiscrimination Rules
- EEOC Advisory/Case Studies
- Q&A/Follow Up

# Wellness and EEOC

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- Honeywell defeats efforts to block wellness program
- EEOC has lost only case tried to conclusion
- Will the EEOC staff rethink position with recent loss? Apparently not!
- EBSA rules and Congressional intent expressed in PPACA contradict their concerns
- New guidance from the EEOC – could make compliance difficult



# TYPES OF WELLNESS PROGRAMS

|   | Participation   | Activity-Only  | Outcomes-Based  |
|---|---|--|---|
| Program Examples                            | <ul style="list-style-type: none"> <li>• Health Assessment Completion</li> <li>• Biometric Screening Completion</li> <li>• Attend Lunch and Learn</li> <li>• Enroll and complete health coaching program</li> <li>• Enroll and complete disease management program</li> <li>• Complete annual exam</li> </ul> | <ul style="list-style-type: none"> <li>• Complete physical activity program</li> <li>• Complete nutrition program</li> <li>• Complete weight management program</li> <li>• Complete tobacco cessation program</li> </ul> | <ul style="list-style-type: none"> <li>• Non-tobacco user</li> <li>• Improve biometric screening measures (BMI, cholesterol, blood pressure, glucose etc.)</li> <li>• Improve health assessment scores</li> </ul> |
| Amount of reward/penalty allowed            | Unlimited   | 30% of total cost of coverage; 50% if program addresses tobacco use  | 30% of total cost of coverage; 50% if program addresses tobacco use   |
| Qualification requirements                  | Anytime   | At least once per year   | At least once per year  |
| Reasonable Alternative Required*?           |   |  |   |
|   | No  | Yes- In advance or upon request  | Yes- In advance or upon request   |
| Can require physician verification?         | N/A   | Yes  | No  |
| Must accommodate physician recommendations? | N/A   | Yes  | Yes   |

# HIPAA NONDISCRIMINATION

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PROHIBITS DENIAL OF ELIGIBILITY FOR BENEFITS (OR PREMIUM DIFFERENTIAL) BECAUSE OF ANY HEALTH FACTOR



# HIPAA NONDISCRIMINATION GROUP RULES

## NONDISCRIMINATION BASICS

**Can a group health plan require an individual to pass a physical examination in order to be eligible to enroll in the plan?**

**No.** A group health plan may not require an individual to pass a physical exam for enrollment.



**Can a plan require an individual to complete a health care questionnaire in order to enroll?**

**Yes, but** the information may not be used to deny, restrict, or delay benefits, or to determine individual premiums.



**Can a plan charge individuals with histories of high claims more than *similarly situated* individuals?**

**No.** Group health plans cannot charge an individual more than other *similarly situated* individuals based on a health factor.



**Can an insurer charge different premiums within a similarly situated group based on individual health status?**

**No.** Issuers may not charge an employer separate rates that vary for different individuals, based on a health factor.

# HIPAA NONDISCRIMINATION

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## DEFINING SIMILARLY SITUATED EMPLOYEES

Distinctions amongst employees prohibited if based on certain factors:

- Health factor-based
- Inconsistent with employer's usual business practices
- Wage or income based

Distinctions amongst employees must be based on bona-fide employment-based classifications:

- Part-time versus full-time employees
- Employees working in different geographic locations
- Employees with different dates of hire
- Employees with different lengths of service
- Employees versus beneficiaries

Allowable distinctions amongst employees include:

- Different eligibility provisions
- Different benefit restrictions
- Different costs

# HIPAA'S WELLNESS EXCEPTIONS

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## General Rule:

- Group health plans generally prohibited from charging similarly situated individuals different premiums or contributions or imposing different deductible, copayment or other cost sharing requirements based on a health factor.

## Wellness Exception:

- If none of the conditions for obtaining a reward under a wellness program are based on an individual satisfying a standard related to a health factor, or if no reward is offered, the program complies with the nondiscrimination requirements.

Fitness center memberships & fee reimbursements

Rewards for diagnostic testing (activity only)

Waiver of copays and deductibles for preventive care

Free or reduced-cost enrollment in tobacco cessation programs

Rewards for attending educational seminars



# HIPAA'S WELLNESS EXCEPTIONS

Requirements for wellness programs that base rewards on health factor-related standards



# HIPAA'S WELLNESS EXCEPTIONS

## TOBACCO RELATED PREMIUM DIFFERENTIALS

The plan is offering a reward based on an individual's ability to stop smoking.

Medical evidence suggests that smoking may be related to a health factor:

*The Diagnostic and Statistical Manual of Mental Disorders* states the position that nicotine addiction is a medical condition

Surgeon General's report notes that scientists in the field of drug addiction agree that nicotine, a substance common to all forms of tobacco, is a powerfully addictive drug

For a group health plan to maintain a premium differential between smokers and nonsmokers and not be considered discriminatory, the plan's nonsmoking program would need to meet the 5 requirements for health factor contingent wellness programs:

The premium differential is not more than 30% of the total cost of employee-only coverage

The program is reasonably designed to promote health and prevent disease

Eligible individuals are provided at least one annual opportunity to qualify for the discount

The program accommodates individuals for whom it is unreasonably difficult to quit using tobacco by providing an RAS

Plan materials describing the terms of the premium differential describe the availability of an RAS

# Wellness Programs and the EEOC

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## Background

- ❑ Regulatory Agencies and Laws Supporting Wellness Programs
  - ❑ Department of Labor (Employee Benefits Security Administration)
  - ❑ Department of the Treasury
  - ❑ Department of Health & Human Services
  - ❑ PPACA
    - ❑ Specifically Increased Financial Incentives
  - ❑ 11<sup>th</sup> Circuit Court of Appeals
    - ❑ ADA Safe Harbor for “Bona Fide Benefit Plans” Extends to Wellness Programs
- ❑ Competing View Challenging Wellness Programs
  - ❑ Equal Employment Opportunity Commission (EEOC)
    - ❑ Requirements to Complete Health Questionnaire/Screening to Participate or Obtain Financial Incentives Violate the ADA Prohibition on Involuntary Medical Inquires



# Wellness Programs and the EEOC

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## EEOC Proposed Wellness Rules

- ❑ The ADA limits the circumstances in which employers may ask employees about their health or require them to undergo medical examinations, but it **allows such inquiries and exams if they are: (1) voluntary and (2) part of an employee health program.**
- ❑ For a program that includes disability-related inquiries or medical examinations to be voluntary it must:
  - ❑ Not **require** employees to participate
  - ❑ Not **deny coverage** under any of its group health plans or particular benefits packages within a group health plan for non-participation, or limit the extent of benefits for employees who do not participate
  - ❑ Not take any adverse employment action or retaliate against, interfere with, **coerce**, intimidate, or threaten employees
- ❑ If the wellness program is part of a group health plan, **the employer must provide employees with a notice** that describes what medical information will be collected, with whom it will be shared, how it will be used, and how it will be kept confidential.



section two

# **CASE STUDIES**

# Client Practice Example #1

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**January 2014**

- Client announces Tobacco Cessation (TC) Program
- Announces 2015 tobacco surcharge (\$50.00/month)

**October 2014**

- During open enrollment, employees are directed to complete tobacco declaration

**December 2014**

- Tobacco users must complete cessation program on or before 12/31 or face 2015 premium differential

**January 2015**

- Annual employee contribution is set at \$2,000
- Total annual employee contribution for tobacco user is set at \$2,600

## Solution – Example #1

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- ✓ Employer offered a reasonable alternative standard.

However, the participant must earn the credit for the differential effective for the same plan year in which the RAS is satisfied

## Client Practice Example #2

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**July 2014**

- Employer announces wellness incentives for the 2015 plan year of \$500.00 for biometric screening and \$500.00 for health assessment

**November 2014**

- Employer's open enrollment for the 2015 plan year ends & certifications of biometric screening and health assessments are due to plan administrator

**January 2015**

- Effective 01/01, participants who failed to submit biometrics and health assessments by November of 2014 are denied enrollment for the 2015 plan year

**January 2015**

- Effective 01/01, participants who submitted biometrics and health assessments by November of 2014 receive \$1,000 premium differential for the 2015 plan year



## **Solution – Example #2**

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**This is a potential ADA violation!**

**A medical exam can only be administered if is job related and a business necessity.**

**Health assessments and biometric screenings are considered medical exams.**

# Client Practice Example #3

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**October 2014**

- Employee enrolls in the employer sponsored PPO option group health plan & voluntarily submits an affirmative tobacco affidavit declaring he is a tobacco user

**January 2015**

- Effective 01/01, employee pays a 20% premium differential for PPO participation based on the affirmative tobacco declaration

**April 2015**

- Employee satisfies the plan's RAS by completing a tobacco cessation program

**June 2015**

- After a co-worker reports seeing the employee smoking on a lunch break, the plan administrator notifies the employee to report to the company's on-site clinic for a cotinine test

**July 2015**

- Having failed the cotinine test, the employee is charged-back for the difference of the refunded premium differential & subsequently dropped from the plan

## Solution – Example #3

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The employer did not provide advance notice of the testing policy in plan materials!

Employer's administration of the random testing policy is discriminatory because enforcement is not random!

The employer has co-mingled its ERISA fiduciary duties as a plan sponsor with its HIPAA privacy obligations as a plan sponsor and employer.

The employer has improperly withheld wages (theft) by reclaiming the refunded premium differential.



# **QUESTIONS & ANSWERS**