

**Q&A from Assurex Global Webinar  
"The Future of Wellness Plans After the AARP v.  
EEOC Decision"**

**November 16, 2017**

Question	Answer
How is the incentive limit impacted if the spouse is involved in the wellness program?	<p>Under HIPAA wellness rules, if the wellness incentive is only available to employees, the incentive must be based off the total cost of employee-only (single) coverage. However, if the incentive is also available to spouses and/or children, the incentive may be based off the cost of coverage for the tier in which the individuals are enrolled (e.g. family coverage).</p> <p>Under the EEOC wellness rules, if the wellness incentive is only available to employees, the incentive is based off the total cost of employee-only (single) coverage. If the incentive is also available to spouses, the incentive is still based off the total cost of employee-only coverage, but may be doubled (2 X 30% of employee-only coverage).</p>
If one of the options for the incentives for doing a blood screening is getting money in their HSA account, does that count as affecting the health plan?	In general, an HSA is not considered a group health plan and is not subject to HIPAA nondiscrimination rules, so offering an HSA contribution as the incentive would not require HIPAA wellness rules to be followed.
If premium discount is applied for participation in HRA and Biometric Screening. Individual results are not used to determine premiums would ADA apply?	Yes, EEOC wellness rules would need to be followed. <u>Any time the wellness program involves disability-related questions (e.g. HRA) or medical examinations (e.g. biometric screening), the EEOC wellness rules apply</u> , regardless of whether the program is participatory or health-contingent (e.g. based on a particular outcome).
In the example in which the Employer needs to provide an alternative health path to running or walking for an Employee with plantars fasciitis, could a self-funded plan utilize their TPA's Health Coach to directly interface with this particular Employee?	Yes, that would be one way to handle responding to a request for a reasonable alternative and determining what reasonable alternative standard may be appropriate.
Is the waiving of a copay for voluntary participation in an employee clinic considered an incentive?	This would likely be subject to HIPAA because it affects the group health plan. However, as described, it seems to be participatory, and therefore would only require that it be available to all similarly situated individuals. Depending upon what is involved to participate in the "employee clinic", EEOC rules (ADA/GINA) may also need to be considered...such rules apply any time a wellness incentive is tied to a requirement involving disability-related questions or medical examinations.
When there is testing for tobacco does the may then drop to 30% instead of 50%?	The incentive cap is reduced to 30% under the EEOC rules (ADA) if medical testing is used to determine tobacco use. If an employer requires only an affidavit or certification regarding tobacco use (without any medical testing), the EEOC rules do not apply and only the HIPAA rules need to be considered.
Why the spouse under something genetic	Information about an employee's family health history (including spouses and children) falls within the definition of genetic information, which is generally protected and allowed to be requested by employers only under very narrow circumstances, and specifically prohibits any incentives tied to obtaining such information. However, for purposes of wellness programs, the EEOC carved out an exception and allows an incentive tied to the spouse providing information about current or past health status.

<p>You may have said it.. but the 50% for tobacco related programs - is it the single coverage cost only or can it be 50% of family cost?</p>	<p>A tobacco-related incentive, assuming it affects the group health (e.g. reduction in employee contribution for medical coverage), is subject to HIPAA incentive limits.</p> <ul style="list-style-type: none"> <li>- If only the employee may indicate status as a tobacco or non-tobacco user, the 50% incentive limit applies to the total cost of employee-only (single) coverage.</li> <li>- If the spouse and/or children may also indicate status as a tobacco or non-tobacco user for an additional incentive, the 50% incentive limit applies to the total cost of coverage for the tier in which the employee, spouse and/or children are enrolled.</li> </ul>
<p>It sounds like in designing a wellness program - based on biometrics and health risk assessment and tied to an outcome - utilizing the EEOC guidance on incentive limit and always providing a Reasonable Alternative Standard should keep you within compliance for all regs?</p>	<p>While that will often be the case, we always warn employers to consider incentives under both the EEOC and HIPAA incentive limits to ensure compliance with both. Depending upon how the wellness program is structured, especially if the incentives are available to spouses as well as employees, the 30% calculation is performed a bit differently under each set of rules.</p>
<p>Can participatory enrollment in an employee health clinic (with a small health premium discount incentive) be offered only to employees enrolled in the health plan and not to those who waived coverage?</p>	<p>It is possible to offer a wellness program and associated incentives only to those who enroll the employer's group health plan. The wellness program does not have to be offered more broadly (e.g. to all employees, or all full-time employees) unless there is a desire to do so.</p>
<p>Is it up to the employer to choose whether their tobacco surcharge will be an activity-only (participate in cessation course) or outcome-based (negative cotinine test) as defined under the HIPAA nondiscrimination rules?</p>	<p>No. A tobacco-related surcharge on the medical plan will always be considered health-contingent under HIPAA wellness rules.</p>
<p>Are you able to touch on affordability as it relates to tobacco surcharge/incentive?</p>	<p>If the wellness incentive affects the amount the employee contributes for coverage (i.e. the premium), for purposes of calculating affordability under §4980H rules and determining what amount should be entered on Line 15 of Form 1095-C, generally the employee contribution is based off the non-wellness rate (the higher employee contribution rate); however, when the incentive is tobacco-related, the employee contribution is based off the non-tobacco rate.</p>
<p>Does "total cost" mean both employee and employer premiums combined?</p>	<p>Yes, total cost = COBRA premium (minus the 2%); or said differently, the combination of both the employer and employee cost.</p>

<p>Are there any rules for an employer that has employees who sign a tobacco affidavit as a “smoker in a cessation program, or Non-tobacco user” but they are still smoking and the ER is aware of this?</p>	<p>Determining exactly how to handle those who misrepresent their status as a non-tobacco user requires both a clear policy as well as consideration of general employment law (HR) requirements (e.g. some states have laws prohibiting employers from considering employee actions outside of work). Some employers simply use an employee attestation/affidavit certifying tobacco use or not, while others have taken it a step further and require medical testing. If the employer is using an affidavit (taking the employee’s word) versus performing some medical testing to confirm use, there are some decisions to be made as to how much the employer wants to actively police whether employees were truthful or not on the affidavit. A few things to consider for the affidavit:</p> <ul style="list-style-type: none"> <li>- The affidavit should be clear as to whether the employee is indicating tobacco use currently, for the previous 12 months, that it will not be used for the next 12 months, or all three.</li> <li>- It is important to communicate the repercussions of falsification...for example, surcharge (retrospectively/prospectively) and/or termination of coverage (retrospectively/prospectively).</li> </ul> <p>Whatever is ultimately decided, it would be advisable to have the affidavit reviewed by legal counsel to ensure that it correctly communicates the employer’s intentions and also allows the employer to enforce such intentions.</p>
<p>If you go outside of the health plan and offer gift cards to non-smokers do you have to offer a reasonable alternative to the smokers to earn the gift card? I think that you do - am I correct?</p>	<p>If the wellness incentive does not affect the group health plan (e.g. gift cards, cash), it is not subject to HIPAA wellness rules, and therefore would not have to offer a reasonable alternative standard. If the wellness program does not involve disability-related questions or a medical examination, it's not subject to EEOC wellness rules either.</p>
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