



Keeping Your Wellness Program Legal

John E. Schembari

KutakRock.com

Atlanta | Chicago | Denver | Fayetteville | Irvine | Kansas City | Little Rock | Los Angeles | Minneapolis | Oklahoma City | Omaha | Philadelphia | Richmond | Scottsdale | Spokane | Washington, D.C. | Wichita

Relevant Laws

- ERISA
- HIPAA
- Affordable Care Act (ACA)
- COBRA
- Americans with Disabilities Act (ADA)
- Genetic Information Nondiscrimination Act (GINA)
- Fair Labor Standards Act (FLSA)
- Internal Revenue Code (IRC)
- National Labor Relations Act (NLRA)
- Title VII
- State/Local Laws
 - FMLA, state privacy laws, state/local nondiscrimination laws, workers' compensation, sweepstakes laws

Relevant Laws

	GROUP HEALTH PLANS	NON-GROUP HEALTH PLANS
ERISA	✓*	
HIPAA	✓	
ACA	✓	
COBRA	✓**	
ADA	✓	✓
GINA	✓	✓
FLSA	✓	✓
IRC	✓	✓
NLRA	✓	✓
TITLE VII	✓	✓
State laws	<i>sometimes</i>	✓

*Church and governmental group health plans are exempt from ERISA but subject to state law.

**Church plans are exempt from COBRA.

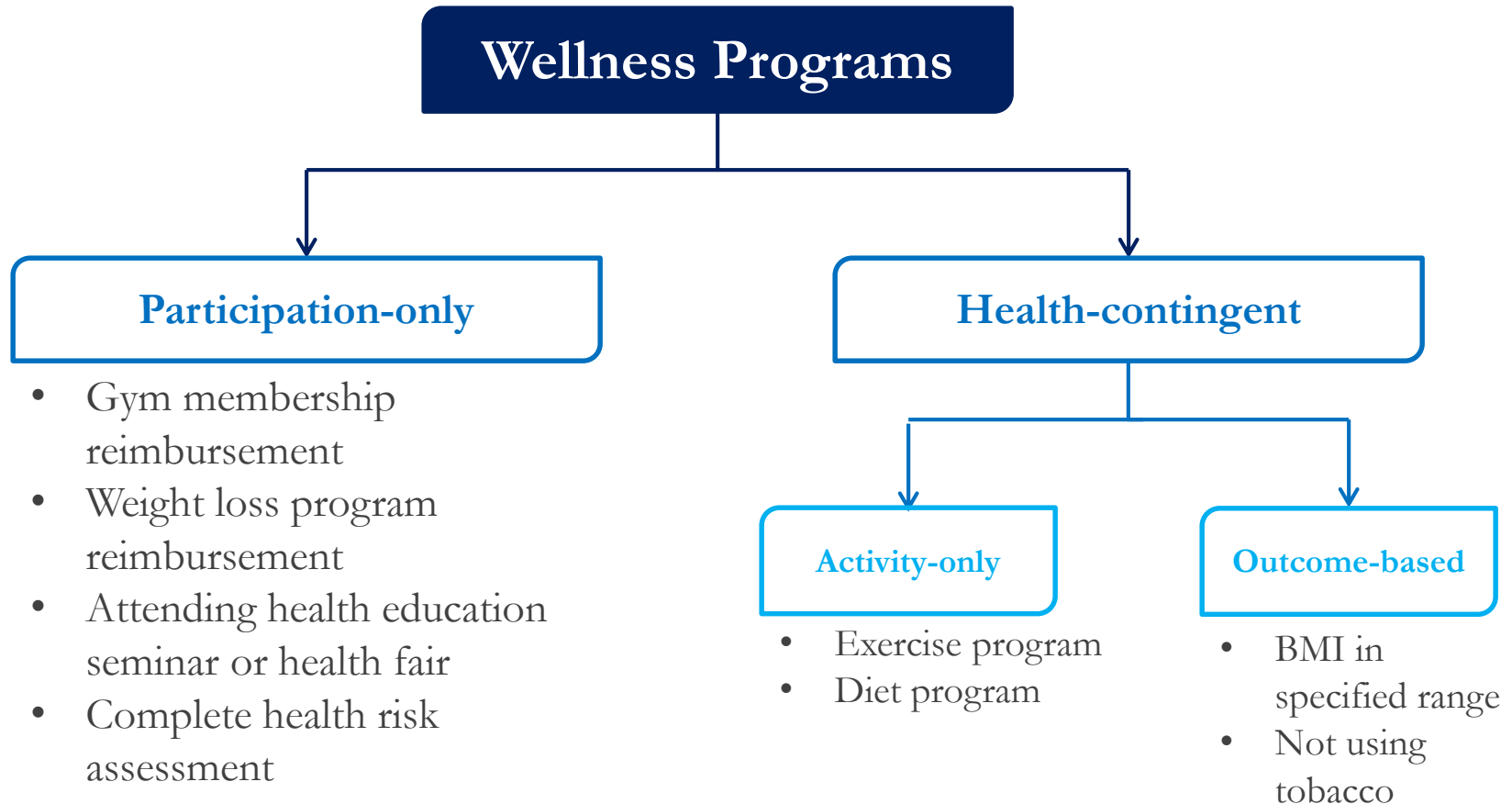
Today's Focus

- Begin with the assumption that wellness program is a group health plan under ERISA
 - HIPAA
 - ACA
 - COBRA
 - ADA
 - GINA

Wellness Programs & HIPAA

- Two parts to HIPAA
 - Portability rules (nondiscrimination)
 - Administrative simplification (privacy & security)
- Nondiscrimination
 - Ban on discriminating among similarly situated individuals based on health status, unless meet certain requirements
 - Requirements vary depending on whether the wellness program is participation-only or health-contingent

Wellness Programs & HIPAA



Wellness Programs & HIPAA

- Participation-only program
 - Must be available to similarly situated individuals
 - Examples:
 - reimbursement for health club membership
 - reward for attending monthly health education seminar
 - incentive to participate in health fair or testing (regardless of outcome)
 - reward for completing a health risk assessment (without any further action required by the employee with regard to issues identified in the assessment)

Wellness Programs & HIPAA

- Health-contingent program
 - Must meet five criteria under 2006 Regulations
 - Total reward cannot exceed 20% of the total cost of employee-only coverage under the plan
 - Reasonably designed to promote health
 - Opportunity to qualify at least once per year
 - Available to similarly situated individuals and offer a reasonable alternative standard (RAS)
 - Plan discloses availability of a RAS
 - 2013 Regulations changed rules slightly

Wellness Programs & HIPAA

- Health-contingent program
 - 2013 Regulations added subcategories
 - Activity-only wellness program
 - Examples: walking, diet and exercise programs
 - Outcome-based wellness program
 - Examples: not using tobacco; attaining specified results on biometric tests

Wellness Programs & HIPAA

- Health-contingent program
 - 2013 Regulations and ACA changed five criteria
 - Frequency of reward
 - No changes; must still offer at least once per year
 - Size of the reward
 - Now capped at 30% (or 50% if tobacco program)
 - Reasonably designed to promote health
 - Cannot be overly burdensome;
 - Subterfuge for discriminating based on health factor; or
 - Highly suspect in the method chosen to promote health or prevent disease
 - Disclosure of RAS in plan materials
 - Statement must include contact information
 - State that recommendations of personal physician will be accommodated

Wellness Programs & HIPAA

- Health-contingent program
 - 2013 Regulations and ACA changed five criteria (continued)
 - Uniform availability and RAS
 - Full reward must still be available to all similarly situated individuals
 - » **Activity-only:** reward will be “available” if program allows RAS to those for whom it is unreasonably difficult/medically inadvisable to meet the standard
 - » **Outcome-based:** must allow RAS regardless

Wellness Programs & HIPAA

- Health-contingent program
 - 2013 Regulations and ACA changed five criteria (continued)
 - Uniform availability and RAS (continued)
 - If RAS is activity-only wellness program or outcome-based program...
 - » **Activity-only**: must meet activity-only & outcome-based requirements
 - » **Outcome-based**: must meet activity-only requirements; additional outcome-based requirements for the RAS
 - Personal physician verification
 - » **Activity-only**: if reasonable, can seek verification
 - » **Outcome-based**: never reasonable

Wellness Programs & HIPAA

- Reasonable alternative standards
 - If RAS is completion of educational program, the plan must make the program available or assist the employee in finding a program
 - Cannot require employee to pay for program either
 - Time commitment must be reasonable
 - If the RAS is a diet, plan isn't required to pay for food, but must pay any participation fee
 - RAS must accommodate physician's recommendations, if any

Wellness Programs & HIPAA

- Tobacco surcharges
 - May increase to reward to 50%
 - ADA may apply and limit surcharge to 30% however
 - Employer may also want to test incentives separately
 - Example: Employer sponsors a GHP. Annual premium for employee-only coverage is \$6,000 (employees pay \$1,500). Wellness program is health-contingent with focus on exercise, blood sugar, weight, cholesterol. The reward for compliance is an annual premium rebate of \$600. Plan also imposes \$2,000 premium surcharge for those who used tobacco in last 12 months and who are not enrolled in plan's smoking-cessation program.

Wellness Programs & HIPAA

- Privacy and Security Rule
 - Plan document requirements
 - Policies in place
 - Business Associate Agreement

Wellness Programs & the ACA

- Wellness program must be structured to comply with or be exempt from ACA mandates
 - Guaranteed availability
 - Nondiscrimination based on health status
 - Coverage for clinical trials
 - Expanded claims and appeals procedures
 - Provide Summary of Benefits and Coverage

Wellness Programs & the ACA

- Paths to ACA compliance
 - Medical plan integration
 - Restricting participation to retirees
 - Restricting benefits to excepted benefits
 - Employee Assistance Program (EAP) integration is no longer an option
- ACA expanded HIPAA's wellness program incentives

Wellness Programs & COBRA

- COBRA notices
 - Initial notice
 - Election notice
- Determining COBRA premiums
- Other considerations
 - On-site immunizations or biometric screenings may require qualified beneficiary to return to the workplace

Wellness Programs & GINA

- Cannot discriminate based on genetic info
 - This includes family medical history
- Different rules depending on whether health risk assessment is part of a group health plan (GHP) or offered independently
 - If a GHP and in connection with enrollment, must be voluntary and not request/collect genetic information
 - If a GHP, can request genetic information if assessment is after enrollment, participation is voluntary and no reward is offered for completion
 - If not a GHP, rules are more complex

Wellness Programs & the ADA

- *Honeywell International*
- EEOC Final Regulations (2016)
 - Designed to promote health/prevent disease
 - Participation must be **voluntary**
 - notice requirements
 - Incentives cannot exceed 30% limit
 - Reasonable accommodation obligations
 - Information must be maintained according to ADA confidentiality requirements
- *Flambeau*

The Future of Wellness Programs

- *AARP v. EEOC* (2017)
 - Case involving final regulations under ADA & GINA
 - Is a 30% incentive/penalty truly “voluntary”?
 - Court said no; held that 30% limit was arbitrary
 - Vacated the ADA and GINA regulations effective January 1, 2019
 - Until then, the incentive/penalty levels remain in effect

Tying It All Together

- If not a group health plan
 - ADA and GINA apply
- If a group health plan
 - ERISA
 - HIPAA
 - ACA
 - COBRA
 - ADA and GINA apply

Simple Steps

- If an employer wants to offer a wellness program without involving complex legal issues, consider:
 - Improving benefits for annual checkups under medical plan
 - Offering a stand-alone program that pays for gym dues
 - Hosting a monthly lunch and learn (with healthy foods) for employees
 - Sponsoring a health fair where no medical screenings are done
 - Adding a nurse call-line
 - Awarding t-shirts or other prizes to employees who walk a certain number of miles
 - Providing additional vacation days (or higher pay) to employees who do not smoke

Questions?

John E. Schembari

Kutak Rock LLP

1650 Farnam Street

Omaha, NE 68102

john.schembari@kutakrock.com