

Health Promotion Program Legal Updates

Webinar Q&A: January 20, 2021

The following questions were submitted during WELCOA's *Health Promotion Program Legal Updates* webinar session that aired on **January 20, 2021**. To help further educate yourself in legal compliance with your wellness program, please review this list of attendee inquiries and the responses provided by presenter and health law attorney, Barbara Zabawa.

****Please note: The responses provided below do NOT constitute legal advice and should not be used as such. Readers should retain legal counsel to obtain definitive answers. The responses below are for educational purposes only.**

- 1. So participatory programs that collect health information will not be able to offer monetary incentives of any value?**
Under the proposed rules, participatory programs could offer de minimis incentives.
- 2. What is health information defined as?**
Under the ADA, it is “medical examinations” or “disability-related inquiries.”
- 3. What does a group health plan mean? Is it programming through your health plan/carrier?**
Group health plan typically means a plan sponsored by an employer, whether it is offered through an insurance company or is self-insured by the employer.
- 4. If a participatory program that is not a group health plan program collects data from an online wellness assessment, do they need to only offer a de minimis incentive?**
According to the proposed rules, yes.
- 5. Any chance we can get an EEOC member on these presentations? I have a LOT of things to ask them.**
We can try.
- 6. How about combination programs that have different levels of participation. For example, Level 1 complete health assessment, labs, and PCP visit to earn a \$700 incentive premium discount. Based on Level 2, they can earn additional financial incentives based on their Level 1 biometric results. Employees can earn additional financial incentive. Level 3 is participatory, recording healthy habits throughout the year, employee could earn additional financial incentive.**
If the program collects health information and is participatory, under the proposed rules, the incentive can only be de minimis.
- 7. It sounds like the best way to move forward is to make it optimal to provide health information and provide other opportunities to earn the incentive that would not require giving health information. Is that accurate?**
That is a judgment call you should discuss with your lawyer.
- 8. Does group health plan mean it can only be offered to those on the medical plan or those eligible to be on the medical plan? i.e. should benefit eligible opt-outs not be receiving an incentive for their participation in a health contingent program?**
Those on the medical plan would be subject to the group health plan requirements. Those not on the health plan would be subject to the de minimis requirements under the proposed rule.



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- 9. So spouses enrolled on the medical plan can no longer be incentivized for their participation in a health-contingent program?**
Under the proposed rules, spouses could be incentivized for de minimis benefits. The 2016 rule allowing up to 30% incentive was deleted on 1/1/19.
- 10. When talking about programs that collect health information, what if the employer doesn't collect health data but the vendor whose program is being use does? Example: vendor who encourages participants to sync fitness tracking devices to the program.**
Doesn't matter. The ADA/GINA incentive rules still apply.
- 11. So even though HIPAA allows spouses to be included in earning the incentive, spouses can only earn de minimis, even if they are part of the health-contingent GHP program?**
Correct, according to the proposed rules.
- 12. If the employer fits the qualifications for the 30%/50% incentives, it's no longer de minimis so does the notice still need to be sent out?**
The notice is still required under current law and applies no matter the incentive. Under the proposed rules, the notice requirement would disappear regardless of the incentive.
- 13. Is the ADA notice required if not a de minimis incentive?**
See response to #12.
- 14. Our program is a participatory, group health plan program...BUT by not participating in the HRA/Biometric Screening they lose out on a \$90 per month credit applied to their premium. How is the proposal law interpreting this amount of money? At your session in WELCOA this amount has been my biggest concern.**
De minimis is "defined" as a water bottle or gift card of modest value as examples. That is what the EEOC wants you to use to gauge whether \$90/month is de minimis.
- 15. What else could be considered an activity-based health contingent program? It seems a lot of programs will want to go this route if they are interested in stronger incentives but not in an outcomes-based program...can a biometric screening or other similar "activity" be considered as an "activity-based" health contingent program, or is it really limited to walking-type programs?**
Activity based wellness programs are defined by the HIPAA/ACA rules as a wellness program that requires an individual to perform or complete an activity related to a health factor in order to obtain a reward but does not require the individual to attain or maintain a specific health outcome. See 78 Fed. Reg. at 33182 (June 3, 2013).
- 16. Would a company only be able to provide "de-minimis" incentive during year one of a health contingent program? This year one is for gathering data. Year two would compare this data and provide incentive based on improvement/maintenance.**
The proposed rule does not address incentives in different years.
- 17. Under these new rules, if wellness program (Biometrics and HRA) is offered on a voluntary basis to all employees whether or not they are enrolled in the group health plan, are there limits on their incentives?**
Yes, it would be de minimis if participatory, and subject to HIPAA/ACA incentive rules if health contingent and as part of a group health plan.



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18. **As an employer we currently offer employees up to \$500 in HSA or FSA funds annually based on their level of participation in an activity-based wellness platform, Virgin Pulse, who does offer (but does not require) participants of the program the option of completing an HRA for which no additional incentive is awarded. Being self-insured and seemingly not part of a group health plan, would this participatory wellness program design be allowed under the recently proposed EEOC rules?**

Self-insured health plans are a type of group health plan and would be subject to the HIPAA/ACA wellness incentive rules and if they were health contingent, would be permitted to have an incentive of up to 30% of the total cost of coverage under the ADA.

19. **If a wellness program asks employees to go to their physician for a physical/screening but the employer does not collect the health information, is the maximum incentive they can earn only de minimis? Or does this not qualify because the employer doesn't collect the medical information?**

Who collects the information is not of any import if the information is collected as part of an employee wellness program. What is important is whether it is a participatory program and whether it is part of a group health plan. If participatory, the proposed rules indicate the incentive would be de minimis. If health contingent and part of a group health plan, the HIPAA/ACA incentive limits would apply.

20. **If a wellness program is not related to the group health plan and does not require completion of an HRA or biometric screening, but instead assigns point values to a variety of activities (that may include an HRA or screening) along with other activities (IE: steps, reading health articles, etc.) that the employees can choose to complete, what incentive rules apply? Di Minimus?**

I suspect more guidance is needed on that specific question, but I imagine the EEOC might say de minimis still applies if health information collection is part of the program.

21. **Does the 30% incentive limit continue to apply under the new rules to BOTH types of health contingent program (activity based AND outcome based)?**

Yes.

22. **What would be the dollar amount on a de minimus gift card?**

See response to #14.

23. **Would these rules apply to activity based programs that do not collect health information through biometrics/HRA?**

No.

24. **Can you offer Cash at the de minimus value?**

I believe yes.

25. **If a program has a screening program and also a points-based portion such as completing different activities to earn points for the incentive, can part of the incentive be monetary and part be tied to HSA or health insurance plan.**

For these proposed rules, I don't think it matters. It's the value of the reward that matters, not what the reward looks like.

26. **As the law stands now though, employers can run their programs with the old rules until this becomes approved?**

Yes.



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- 27. Can you please provide some additional clarity on what constitutes participatory vs. outcomes-based. You mentioned a walking program could be considered outcomes-based, but that would seem to be participatory.**

I suggest taking this course to get some foundation on wellness incentive law: <https://www.welcoa.org/training/certification-schedule/#2019-q2>.

- 28. Can a spouse on the health plan be required to participate in a screening/HRA in order for the employee to receive an incentive?**

Be careful with using the word “required.” GINA allows genetic information collection if it is “voluntary.” The employer can tie an incentive to spousal participation as long as the incentive meets the GINA rules. The proposed rules allow for “de minimis” incentive.

- 29. If employees take an HRA but there is no outcomes-based component- can they only be incentivized with de minimis incentives?**

Correct.

- 30. Just to clarify, if a wellness program currently offers de minimus incentives (i.e. water bottle, lunch bag, etc. under \$25 value) then it should be fine to continue offering these to employees in a participatory program (not outcomes based) going forward - whether or not it is directly connected to a group health plan. If the proposed rules are approved going forward, then the 30-50% incentive for employees in a participatory or outcomes-based, group health-plan related wellness program may apply ... but a de minimus incentive for spouses/children would also possibly apply. Is this correct?**

The HIPAA/ACA incentive limit would not apply to participatory programs, even if through a group health plan wellness program. De minimis would apply to participatory programs, and to spouses and children in all circumstances where health information is collected by the employee wellness program.

- 31. Is the 30-50% incentive only taken off of single coverage vs. family coverage because spouse/family cannot be included?**

It's the coverage in which the employee is enrolled if family members are also eligible to participate.

- 32. Are points that are earned to be eligible for a premium discount considered de minimus?**

It depends. See response to #14.

- 33. I have a couple questions in relation to a program connected to a group health plan (merely as an interpretation of the proposed rules, while knowing this very well may change/etc.) 1.) Would the de minimis rules still apply if a program would offer the ability/option to complete a biometric screening as part of the program voluntarily, but not specifically require it? (For example, offering it in addition to wide range of other non-health contingent options, and letting the employee choose a number to complete.) 2.) On the EEOC's website, the definition for health-contingent wellness programs is copied below; I read this as it could be a program that collects health information (biometric screenings, etc.) but it wouldn't necessarily require a person to meet certain outcomes, correct? (glucose, cholesterol, etc.)**

1) See response to #20; 2) a program that collects health information and rewards someone for just participating in the health information collection activity is a participatory program, not a health contingent program.

(ii) Health-contingent wellness program. A health-contingent wellness program is a program that requires an individual to satisfy a standard related to a health factor to obtain a reward (or requires an individual to undertake more than a similarly situated individual based on a health factor in order to obtain the same reward). A health-contingent wellness program may be an activity-only wellness program or an outcome-based wellness program.



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34. What I'm gathering is that employees must be enrolled in the group health plan in order to be offered a "non de minimis" incentive such as a large cash bonus?

I think that is correct.

35. Do you suspect that a "gift card of modest value" would be further defined and given a max dollar amount in the final rule?

Perhaps, especially if the comments resoundingly demanded it.

36. Is there any difference in incentive between self-funded and fully insured groups?

No.

37. How would this fall when it comes to incentives aspect change if the wellness program is not tied to the medical plan of a company? It is voluntary but cost money to be in per week, but are able to get money refunded end of the wellness program year by meeting challenges and events that take place through the year, made by the wellness program?

If no employee health information is collected, the ADA and GINA rules would not apply as to those employees.

38. If outcomes based does an alternative still have to be provided?

Yes, if it's a group health plan wellness program, it is subject to the HIPAA/ACA rules which require as one of the five requirements the offer of a reasonable alternative standard.

39. If a program is offered only to employees on the insurance plan, but does not require reaching health metrics, but does offer credit for being tobacco free, does it need a reasonable alternative for the tobacco-free credit?

That's a health contingent, outcomes-based program, so a reasonable alternative standard would need to be offered.

40. Do steps taken in a walking program count as collecting health info?

I do not believe the EEOC considers that a disability-related inquiry subject to the ADA, but that doesn't mean someone could argue that it is a disability-related inquiry subject to the ADA rules. I think that would be a good question for notice and comment of these proposed rules.

41. Would groups still be able to put in a surcharge for the incentives as they can currently? If tied to health plan and contingent.

The proposed rules limit incentives to the HIPAA/ACA incentives if a health plan and health contingent program. I would need more information about what is meant by surcharge.

42. If Insurance carriers offer an online HRA with the opportunity to earn an above de minimus reward, who is responsible for changing this model (sponsor or carrier?)

That would depend on the contractual obligations.

43. Will adding COVID-19 Vaccine to participatory incentive-earning program change it to a health contingent due to the questionnaire pre-injection?

Perhaps. The proposed rules do not address tying incentives to receiving a vaccine.



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