Wellness Checkup
Wellness Roadmap

- HIPAA Wellness Rules
- ADA
- GINA
- ERISA
- COBRA
- ACA
- HIPAA Privacy
- Tax
Stop #1
HIPAA Wellness Rules
HIPAA Wellness Rules: What is a GHP?

- Apply to group health plans (GHPs) that provide “medical care”
- Broad definition of “medical care”
- Includes amounts paid for “prevention” or “affecting” body
- Look to DOL guidance on EAPs
- Look to IRS guidance on “medical expense” under Code section 213(d)
HIPAA Wellness Rules: Examples

*Where is the line?*

- **Probably Not Subject to HIPAA**
  - Health Newsletter
  - Email Appointment Reminders
  - Weight Watchers Class
  - Fitness Center
  - Subsidy for Healthy Options in Cafeteria
  - Pedometers / FitBit

- **Probably Subject to HIPAA**
  - Comprehensive, Individualized Coaching
  - Disease Management
  - Annual Physical / Biometric Screening
  - Flu Shot?
  - Biometric Screenings?
  - Smoking Cessation?
Quick Refresher: HIPAA Wellness Rules

- HIPAA wellness rules apply if program offers an incentive that is—
  - Based on physical activity
    - Example: Participant receives gift card for exercising
  - Based on attaining a particular outcome related to a health factor
    - Example: Participant receives $100 for attaining low blood pressure
    - Example: Plan charges higher premium for tobacco use
Quick Refresher: HIPAA Wellness Rules

- HIPAA wellness rules do not apply if
  - There is no incentive
  - Incentive is provided merely for participation
    - Example: Participant receives $100 for attending a nutrition class
    - Example: Participant receives health insurance premium credit for undergoing annual physical exam (and not based on results of exam)
  - Benign discrimination in favor of individual with adverse health status
    - Example: Participants with diabetes receive free $100 eye exam
    - But be careful – to be benign discrimination, must treat those with adverse health status better than general population (if extra requirement for those with diabetes, would be subject to HIPAA wellness rules)
HIPAA Wellness Rules: 5 Factors

• Annual qualification
• Reasonable design
• 30% incentive limit (up to 50% for tobacco programs)
• Must provide reasonable alternative if can’t meet standard
• Notice of reasonable alternative (regulations have sample language)

Based on cost of coverage in which individual is enrolled, when combined with other HIPAA wellness program incentives
HIPAA Wellness Rules: Example

Bluebeard Company Health Plan Wellness Program

- **Wellness Program Incentives**
  - $100 if take Health Risk Assessment
  - $100 for Annual Physical
  - $100 if Walk 30 Minutes/Day
  - $100 if Favorable BMI
  - $200 if Tobacco Free
- Annual Premium is $1,000
- 30% Limit is $300
- 50% limit (for tobacco) is $500

- **Not counted:**
  - HRA or Annual Physical (participatory programs, not health-based)

- **Counted:**
  - Walking and BMI programs (health-based) subject to 30% limit
  - Total incentive $200, so ok

- **Counted:**
  - Tobacco Program (health-based) subject to 50% limit (when combined with above)
  - Total incentive $400, so ok
Stop #2
ADA Wellness Rules
Quick Refresher: ADA Wellness Rules

• ADA restricts an employer’s ability to—
  – Make disability-related inquiries
  – Require medical examinations that are not job-related

• Wellness programs that include disability-related inquiries or medical examinations must comply with ADA wellness rules
  – Example: Health risk assessment questionnaires
  – Example: Biometric screenings (blood pressure, cholesterol)
ADA Wellness Rule: 4 Factors

• Reasonable design (including reasonable accommodation if needed)
• Confidentiality requirements similar to HIPAA privacy
• Voluntary / not gatekeeper to be in plan
• Notice requirement about how information is collected and used (EEOC has issued model)
• 30% incentive limit
Real Life Issues: AARP v. EEOC

- ADA says wellness programs must be “voluntary”
- EEOC rules determined that 30% incentive limit is voluntary
- AARP brought suit claiming that EEOC had no basis for 30% limit
- Court agreed and ultimately vacated EEOC rule, effective 1/1/19
- Applies to 30% limit under ADA and GINA rule
**Real Life Issues:**
Post-AARP – What will happen if no rules?

*Two Sides to Every Story*

**One view (pro-health plan)**
- Go back to ADA statute, which says wellness program must be “voluntary”
- No express limit on incentive amounts
- So *any incentive is permissible*, as long as program is not mandatory
- Maybe even bring back ADA safe harbor for employer health plans so ADA n/a at all

**Another view (pro-AARP)**
- Go back to ADA statute, which says wellness programs must be “voluntary”
- Not “voluntary” if incentive is too great
- If no 30% “safe harbor” then *no incentive allowed at all* - under ADA or GINA

Remember HIPAA limits still remain
Stop #3
Genetic Information Nondiscrimination Act (GINA)
GINA: Two Parts

Title I

• Enforced by DOL, IRS, HHS (for health plans)

• Health plan cannot offer any type of incentive (even a t-shirt) for completion of a Health Risk Assessment (HRA) that asks family history

• Health plan cannot collect genetic information prior to or in connection with enrollment
GINA: Two Parts

**Title II**

- Enforced by EEOC (for employers)
- Similar prohibition on asking family history questions
- New rules issued 5/17/16 related to asking questions of spouse / dependent child
- If ask spouse/child questions about OWN condition, considered “family history” of employee, so triggers GINA
GINA EEOC Wellness Rules

- Under new rules, cannot have Health Risk Assessment (HRA) incentive for child
- Under new rules, ok to have spousal Health Risk Assessment (HRA) incentive as long as:
  - Voluntary and reasonably designed to promote health or prevent disease
  - Written authorization from spouse
  - 30% incentive limit (similar to ADA calculation method)
A few more stops before we’re done . . .
COBRA

• If employer is involved, also may have COBRA obligation for wellness program
• If wellness program is part of underlying health plan, COBRA election should include wellness program
• If wellness program is stand-alone, may need to offer COBRA separately
• If insured, also may have state “COBRA” laws
Affordable Care Act

• Certain ACA mandates apply to a GHP
• For example - OOP max limit, annual/lifetime limit rules, and preventive care requirements

If wellness program is part of underlying GHP

Should already meet ACA requirements
Affordable Care Act

But if wellness program is stand-alone:

• Need to find exception, such as fitting under HIPAA excepted benefit category

• **TREND:** Try to fit under exception for EAPs
  - Only works if no “significant” medical benefits, employer pay all, and not tied to another plan
  - May fit under EAP exception if wellness program only provides limited counseling, but probably not if offers full-blown disease management
HIPAA Privacy

• May need privacy procedures to safeguard information
• May need business associate contract with wellness program vendors
• May need authorization to disclose PHI (for example, to employer to pay incentive)
• Also watch out for rules related to marketing if wellness program is promoting a product or service
Quick Refresher: Taxation of Wellness Rewards (IRS CCA 201622031)

• Cash wellness rewards are always taxable
  • No de minimis exception; includes gift cards

• Gym fees and other non-excludable wellness rewards are taxable
  • Payment of employee’s gym membership fees is a non-excludable benefit that must be included in income and subject to employment taxes
  • Contrast with a de minimis reward (e.g., T-shirt)

• No “double-dipping”
  • IRS has advised on various schemes promoted as wellness programs
    • Salary reductions taken pre-tax as “wellness program premiums,” and returned to the employee as a purportedly nontaxable “premium reimbursement” or “reward” under wellness program (e.g., for completing a health risk assessment)
  • IRS confirmed the return of pretax amounts to the employee (even if called a wellness program reward) is taxable income
Key Takeaways

• What rules does your wellness program trigger?
• Work through each checklist to ensure compliance.
• We will ALL be watching for new EEOC rules / guidance.
Wellness Scenario: Fitness Challenge—What Rules Apply?

• Fact pattern:
  • Our company is considering implementing a Fitness Challenge that would involve providing wearable activity-tracking devices to employees who choose to participate.
  • We may also add coaching for employees with certain risk factors
  • We haven’t decided whether to offer an incentive, but, if we do, we’re considering a drawing for a “grand prize” of a gift card from ABC Sporting Goods

• What compliance issues do we need to consider? (next slide)
Wellness Scenario #2: Fitness Challenge—What Rules Apply?

• Compliance considerations include—
  • Is the wellness program a GHP, or part of a GHP?
    • GHP rules include HIPAA (wellness rules and privacy/security rules) and COBRA
  • Do the ADA wellness rules apply?
  • Who will administer the program, and what agreements will be in place with that entity?
  • What are the federal income tax consequences—with respect to providing the tracking devices and the grand prize? (next slide)
  • If we design our wellness program as a group health plan, could it be an ACA excepted benefit?
Questions?