

2013

Designing a Compliant Wellness Program

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Gallagher Benefit Services, Inc.



Table of Contents

Section	Description	Page
1	Introduction	2
2	Determining Wellness Program Type	4
3	Summary of Potentially Applicable Key Laws	7
4	General Education & Participation-only Programs – Not Health Plan-related	8
5	Health Plan-related Participation-only Programs	12
6	Health Plan-related Activity-Based Programs	21
7	Health Plan-related Outcome-Based Programs	33

We share this information with our clients and friends for general informational purposes only. It does not necessarily address all of your specific issues. It should not be construed as, nor is it intended to provide, legal advice. Some of the specific guidance within this Gallagher Benefit Services, Inc. Discussion Guide is based on informal guidance from federal regulators. Therefore, revisions to this guide may be needed at a later date based on updated formal guidance. Questions regarding specific issues and application of these rules to your plans should be addressed by your legal counsel.

SECTION 1 – INTRODUCTION

The rules described in the following pages are those that apply for plan years beginning on or after January 1, 2014. Different rules apply for plan years that begin before January 1, 2014. Although many of the rules described in this Discussion Guide could be voluntarily used before 2014, several, such as the 30% maximum reward (50% for programs designed to reduce tobacco use), are not available until 2014.

Wellness programs come in many different shapes and sizes and may be called something other than a wellness program. These programs may provide very limited benefits such as educational health-related information, or they may be more extensive and involve biometric testing, individualized coaching, or even be part of a disease management program. Knowing what type of program you have is important because which federal laws apply (or don't apply) is largely determined by the type of program. There are four common types of employer-sponsored wellness programs:

1. General educational or participation-only & not health plan-related
2. Participation-only & health plan-related
3. Activity-only & health plan-related
4. Outcome-based & health plan-related

In describing wellness programs, we refer to rewards that many programs provide for employees who participate in the program or achieve certain outcomes. For example, an employee who completes a health risk assessment questionnaire may receive a 5% reduction in required health plan contributions. Other wellness programs use penalties rather than rewards. For example, a wellness program may include a 10% smoker surcharge. Regulators have made it clear in the regulations that the same rules apply to both rewards and penalties. We use the word “reward” in this discussion guide to include both a positive incentive (reward) and a disincentive (penalty or no reward).

Type 1 – General Educational or Participation-only and not Health Plan-Related

General educational or informational programs are designed to provide general health information to employees and sometimes their families. They are voluntary programs that just make information available without requiring the employee to access the information or engage in an activity. These programs are general in nature – they are not individualized and do not provide any medical care.

Participation-only programs that are not health plan-related are designed to promote healthy lifestyle choices among employees and sometimes family members, but they go beyond just providing information. They include some type of health-related activity, but are either purely voluntary with no reward or have a reward that is not tied to a health plan.

The good news for these types of plans is that they are subject to fewer federal employment and benefits laws.

Type 2 – Health Plan-Related Participation-Only Programs

These programs are participation-only since they require participation in a health related activity, but don't tie the reward to the results of participation. They are health plan-related since they are limited to employees enrolled in the employer's health plan. Several federal employment and benefits laws apply to these types of programs with more requirements applicable to programs that involve provision of health care (such as a biometric screening).

Type 3 – Health Plan-Related Activity-Only Programs

These programs are activity-only since they require the individual to complete a specific activity in order to receive the reward. They are health plan-related since they only apply to individuals enrolled in the employer's health plan. Additional federal employment and benefits laws apply to these types of programs.

Type 4 – Health Plan-Related Outcome-Based Programs

These programs base the reward on either the existence of a particular health condition or the results of a test such as a biometric screening and the reward is tied to participation in a health plan. These programs are outcome-based since they require the individual to satisfy a health-related standard in order to receive the reward. They are health plan-related since they only apply to employees enrolled in the employer's health plan. Additional federal employment and benefits laws apply to these types of programs. Rules for these programs – especially under HIPAA and PPACA – are more stringent than for other types of wellness programs.

Determining Wellness Program Type and Rules

In the sections that follow we review the rules as they apply to these common types of wellness programs. Section 2 includes a questionnaire that may help you to determine which type of wellness program you have in place (or are considering implementing). Rules for general educational programs along with participation-only programs that are not related to the employer's health plan are discussed in section 4. Health plan-related programs are discussed in sections 5 through 7 with participation-only programs in section 5, activity-only in section 6, and outcome-based in section 7. Each of these three sections is designed to operate on a stand-alone basis. For example, section 4 describes the rules that apply to an educational program or a participation-only program not related to the employer's health plan, but doesn't include the rules that apply to other types of wellness programs. Section 5 covers the rules for activity-only programs. As a result, an employer with a health plan-related wellness program that is participation-only need only review the rules in section 5.

SECTION 2 DETERMINING WELLNESS PROGRAM TYPE

The questionnaire below is intended to help you determine which type of wellness program (or programs) you have in place or are considering implementing.

#	Question	Yes	No
1	<p>Is your wellness program limited to general information with no reward included?</p> <p>General educational programs give employees (and sometimes family members) information about health related issues such as healthy eating habits or the benefits of regular exercise. These programs do not include a reward for participation. Examples include:</p> <ul style="list-style-type: none"> • Workplace posters with tips on how to avoid catching a cold or getting the flu. • Newsletters with articles on the benefits of healthy eating or general nutritional information. • Lunch-n learn sessions on health related topics. • Healthy food choices in vending machines or cafeterias. 	This is a general educational program – see Section 4	Go to question #2
2	<p>Is your wellness program limited to participation in certain health related activities with no reward for participating?</p> <p>Some wellness programs do more than provide general health-related information. They involve some type of participation by employees (and sometimes family members), but do not include a reward for participating. Examples include:</p> <ul style="list-style-type: none"> • An exercise bicycle or treadmill available to employees at lunch, before work, or after work • A walking program at lunch time that employees can join (or not join) • Free annual flu shot • Individualized health coaching • Individualized exercise plan • Individualized healthy eating plan 	This is a participation-only program not related to a health plan – see Section 4	Go to question #3
3	<p>Is your wellness program limited to participation in certain health related activities with a reward for participating that is not linked to your health plan and is not itself a health plan?</p> <p>Some wellness programs require participation by employees (and sometimes family members) to obtain a reward, but the reward is not related to the employer’s health plan. Examples include:</p> <ul style="list-style-type: none"> • A \$20 gift card for attending a smoking cessation class. • A tee shirt for attending an educational class. 	This is a participation-only program not related to a health plan – see Section 4	Go to question #4

#	Question	Yes	No
	<ul style="list-style-type: none"> • A \$50 gift certificate for completing a health risk questionnaire not limited to employees enrolled in the employer's health plan. • Reimbursement of some of the cost of membership in a health club or gym not restricted to employees eligible for the health plan. 		
4	<p>Does your wellness program provide a reward based on participation in certain health related activities regardless of results with a reward for participating that is tied to your health plan or is itself a health plan?</p> <p>Some wellness programs require employees (and sometimes family members) to participate in order to receive a reward, and the reward is linked to the employer's health plan. The reward is provided just for participating regardless of the results. Examples include:</p> <ul style="list-style-type: none"> • A reduction in the employee's health plan contribution for completing a health risk assessment questionnaire, regardless of the results. • A deductible credit for participating in biometrics such as having blood pressure taken or a cholesterol level checked, regardless of the results • A premium holiday for enrolling in a tobacco cessation program whether or not the individual stops using tobacco • Waiver of copayments for pregnant women who obtain pre-natal care 	This is a participation-only program related to a health plan – see Section 5	Go to question #5
5	<p>Does your wellness program provide a reward based on completion of a specified activity with the reward linked to a health plan?</p> <p>Some wellness programs require employees (and sometimes family members) to complete an activity in order to earn a reward and the reward provided is linked to the health plan. Examples include:</p> <ul style="list-style-type: none"> • A walking program that provides a reduction in the employee's health plan contributions if the employee walks at least 30 minutes every day • A reduction in the employee's health plan contribution based on a specified dietary changes such as reducing salt consumption 	This is a activity-only program related to a health plan – see Section 6	Go to question #6
6	<p>Does your wellness program provide a reward that is based on a health factor such as the results of a biometric test or certain health conditions such as meeting a specific biometric condition and the reward is linked to your health plan?</p> <p>Some wellness programs require employees (and sometimes family members) and offer a reward that is tied</p>	This is an outcome-based program related to a health plan – see Section 7	Go to question #7

#	Question	Yes	No
	<p>to a health plan based on a health factor, such as the results of a biometric test or a health condition such as meeting a specific biometric condition. Examples are:</p> <ul style="list-style-type: none"> • A reduction in the employee's health plan contribution if the employee has a body mass index below 30 • A reduction in the employee's health plan contribution if the employee's total cholesterol count below 200 • An increase in the employee's health plan contribution if the employee uses tobacco products 		
7	If your wellness program does not fit into any of the above categories, a review of the details of the program design will be needed to determine which federal rules may apply.	Individual review of your wellness program needed.	

NOTE: Wellness programs designed to reduce tobacco use are generally outcome-based programs. If the program provides a reward for attending a smoking cessation class regardless of whether the individual does not smoke or stops smoking, it would be participation-only. Otherwise, it is probably outcome-based. Section 7 covers the rules for outcome based wellness programs.

SECTION 3 – SUMMARY OF POTENTIALLY APPLICABLE KEY LAWS

	PPACA	HIPAA Non-discrimination	HIPAA Privacy & Security	ERISA	COBRA	ADEA	ADA	Title VII	FLSA	GINA	Tax Laws	Tax Code Non-discrimination	Cafeteria Plan
General Education & Non-Health Plan and Non-Health Plan-Related Participation-Only (Section 4)						X	If HRA offered	X	X	If HRA offered	X		
Health Plan-Related Participation-Only (Section 5)	X	If provides medical care	X	X	X	X	If HRA offered	X	X	X			
Health Plan-Related Activity Only (Section 6)	X	If provides medical care	X	X	X	X	If HRA offered	X	X	X			
Health Plan-Related Outcomes-Based (Section 7)	X	X	X	X	X	X	X	X	X	X	X	X	X

SECTION 4 – GENERAL EDUCATIONAL & PARTICIPATION-ONLY PROGRAMS THAT ARE NOT HEALTH PLAN-RELATED

General educational programs that are designed to provide general health-related information to employees (and sometimes family members) are considered to be participation-only programs, unrelated to the health plan. They are voluntary and just make health information available. Participation-only programs are designed to promote healthy lifestyles and healthy choices, but not provide individualized health care. Some participation-only programs are purely voluntary with no rewards. Others have a reward for participation, but the reward is not related to the employer's health plan and the wellness program itself is not a health plan.

EDUCATIONAL WELLNESS PROGRAMS

These programs just provide general health information to employees and often family members. They are purely voluntary with no requirement to participate and no reward. Examples of educational and information programs:

- Workplace posters with tips on how to avoid catching a cold or getting the flu
- Newsletters on the benefits of healthy eating or regular exercise
- Lunch-n-learn sessions on health-related topics
- Healthy food choices in vending machines and/or the cafeteria

Since these programs are limited, they are generally subject to few federal requirements.

PARTICIPATION-ONLY PROGRAMS THAT ARE NOT HEALTH PLAN-RELATED

These programs do more than just provide general health-related information. They involve participation on the part of employees, and in some cases family members. They either do not provide a reward or provide a reward that is not related to an employer's health plan and the wellness program itself is not a health plan.

Examples of participation-only programs that do not have a reward:

- An exercise bicycle or treadmill available for employee use during lunch or other work breaks
- A walking program at lunch time that employees are free to join (or not join)
- Individualized health coaching, exercise plan or healthy eating plan

Examples of participation-only programs that provide a reward:

- A T-shirt for attending an educational class or seminar
- A \$25 gift card for attending a smoking cessation class
- A \$50 gift card for completing a health risk assessment questionnaire that is offered to employees regardless of whether or not the employee is eligible for the health plan. It could be open to all employees, all full-time employees, or all employees at a specified location
- Reimbursement of some of the cost of a health club or gym membership regardless of whether or not the employee is eligible for your health plan



- A \$100 gift card for the winner of a “biggest loser” contest

Wellness Programs as Health Plans

Some wellness programs include services that qualify as “medical” care and may need to comply with additional requirements. A wellness program involves “medical care” if the care is individualized and provided by trained professionals. “Medical care” is defined to mean amounts paid for: (a) the diagnosis, cure, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body, (b) amounts paid for transportation primarily for and essential to medical care referred to in (a), and (c) amounts paid for insurance covering medical care referred to in (a) and (b). Because wellness programs are designed to prevent disease, they are often programs that provide individualized medical care. For example, flu shots, health coaching by a nurse, counseling by a therapist, or biometric screening would all be examples of medical care. A program that provides a newsletter with health related articles, a “lunch-n-learn” about diabetes, or a weight loss class without a personalized assessment would be informational rather than individualized medical care. Many employers who sponsor a wellness program that includes individualized medical care will link the wellness program to their health plan (usually major medical plan). For example, the reward might be a reduction in a medical deductible or an increased in a required medical plan contribution.

Other employers have a wellness program that is not tied to a health plan such as a major medical plan. The wellness program provides a reward, but the reward is separate from the employer’s regular health plan. For example, the program offers a \$30 gift card to any full-time employee who completes a Health Risk Assessment including employees not enrolled in or even eligible for the employer’s major medical plan. However, if the wellness program provides medical care, the wellness program itself would be a health plan. Examples of medical care that may be provided by a wellness program are: annual flu shots, biometric testing such as a finger stick for glucose or cholesterol levels, and individualized health coaching by a health care professional. Wellness programs that provide medical care are health plans by themselves and are subject to the rules applicable to health plans – such as the HIPAA and PPACA nondiscrimination requirements. **If your wellness program provides medical care and is participation-only, then the rules outlined in Section 5 would apply. If your wellness program provides medical care and it outcome-based, then the rules outlined in Section 7 would apply.**

NOTE: Wellness programs that provide rewards in the form of a contribution to an account that is related to a health plan such as a health reimbursement arrangement or a health care flexible spending account would be considered health plan-related programs rather than general educational programs. See Sections 5 through 7 for requirements

Following are summaries of federal laws that generally apply to participation-only programs that are not related to an employer’s health plan and are not themselves health plans. Additional rules (described separately below) apply to programs that either include the use of a health risk assessment or provide medical care.

Rules for All Participation-only Programs

Tax Rules for Rewards

Rewards that come in the form of cash (e.g., a cash bonus) or cash-equivalents (e.g., a gift card to a local restaurant) are taxable. If an employer provides a reward in the form of a cash card (e.g., a gift card for a

restaurant or store) or cash, the reward results in taxable income to the employee and will be subject to wage withholding and employment taxes. For example, if an employer provides a \$50 gift card to a restaurant for all employees who complete a health risk assessment, each participating employee will have an additional \$50 of income subject to wage withholding and employment taxes.

Rewards such as certain employee discounts, T-shirts, mugs, and other rewards that qualify as *de minimus* fringe benefits under Internal Revenue Code Section 132 are not taxable to employees. Please note that the *de minimus* standard does not apply to cash rewards. For more information, refer to IRS Publication 15-B Employer's Tax Guide to Fringe Benefits. <http://www.irs.gov/publications/p15b/ar02.html>

Age Discrimination in Employment Act (“ADEA”)

The ADEA prohibits employment discrimination against employees and job applicants on the basis of age with respect to benefits. Protected individuals must be at least 40 years of age. Thus, a wellness program could violate the ADEA if it terminated or decreased wellness rewards, or otherwise discriminated against employees age 40 or older.

Title VII

Title VII relates to the “terms, conditions, or privileges of employment,” which generally include wellness programs. Thus, if an employer takes into consideration a plan participant's race, religion, sex, color, or national origin, then the wellness program could violate Title VII.

Fair Labor Standards Act (“FLSA”)

Under the FLSA, nonexempt employees must be compensated at not less than time and one-half of regular pay for time worked over 40 hours in any given workweek. Thus, if time spent completing a wellness program is considered to be “compensable time,” then the employer may have to pay overtime. For example, if an employer provides health lectures as part of a wellness program, the time spent could be compensable time. However, the time need not be compensable time if four conditions are met: (1) attendance is outside of the employee's regular work hours; (2) attendance is purely voluntary; (3) the lecture is not directly related to the employee's job; and (4) the employee does not do any productive work during the lecture (e.g., answering e-mails).

Two Additional Rules for Programs that Include a Health Risk Assessment

There are two additional rules that may apply to a participation-only wellness program that is not health plan-related, but includes the use of a health risk assessment. A health risk assessment (“HRA”) is a method of determining who might benefit from a wellness (or disease management) program and identifying potential health-related areas of concern for specific individuals. An HRA may be a simple questionnaire, or it may be accompanied by biometric measurements such as blood pressure screening, body mass index calculation, cholesterol screening or testing blood glucose levels. The two additional requirements that may apply to wellness programs that include an HRA are:

Americans with Disabilities Act (“ADA”)

The ADA limits when employers may make medical inquiries or conduct medical examinations. The EEOC released two informal discussion letters in 2009, which indicate that it would be a violation of the ADA for an employer to require an employee to take a health risk assessment (including answering a health-related

questionnaire and/or undergoing biometric testing (e.g., blood pressure screening, blood testing)) in order to obtain coverage under a medical plan or to receive reimbursements from an employer's health reimbursement arrangement. Unfortunately, the EEOC guidance leaves unanswered issues such as whether a purely "voluntary" wellness program would be permissible under the ADA, and what would constitute a "voluntary" wellness program.

In early May 2013, the EEOC held a public meeting at which it received comments from representatives of a number of business, advocacy, and provider groups. Although the EEOC is clearly considering the issues, they have not as yet indicated if/when they will provide additional guidance.

Employers who wish to implement wellness programs that require biometric testing or the completion of a health risk assessment in order to obtain a reward should consult with legal counsel specializing in employment law before implementing such a plan.

Genetic Information Nondiscrimination Act ("GINA")

Employers are prohibited from discriminating against any employee with respect to the compensation, terms, conditions, or privileges of employment on the basis of "genetic information". In general:

- employers are not permitted to request, require or purchase genetic information,
- employers must maintain genetic information as a confidential medical record, and
- strict limits apply to the disclosure of genetic information.

Under GINA, genetic information is broadly defined to include family medical history. Thus, a wellness program that seeks genetic information in the form of family medical history for underwriting purposes violates GINA. Family is broadly defined to include relatives to the fourth degree (e.g., cousins once-removed) and relatives by marriage (e.g., spouses and in-laws).

SECTION 5 –HEALTH PLAN-RELATED PARTICIPATION-ONLY PROGRAMS

Participation-only health plan-related wellness programs are programs in which the reward is based on participating in the wellness program, and the reward is linked to the employer's health plan. The reward is not based on a health factor such as the existence of a specific medical condition or the results of a specific biometric test or completion of a specific activity. Examples of wellness programs that are related to an employer's health plan, but do not require a participant to complete an activity or meet a specific health-related standard, and thus are participation-only, include the following:

- (1) Receiving a premium discount merely for completing a health risk assessment (regardless of the results)
- (2) Receiving a deductible credit merely for participating in biometrics such as having blood pressure taken or a cholesterol level checked (regardless of the results)
- (3) A premium holiday for enrolling in a smoking cessation program regardless of whether the individual stops smoking

Many of these programs include the use of a Health Risk Assessment ("HRA"). A "health risk assessment" is a method of determining who might most benefit from a wellness (or disease management) program and identifying potential health-related areas of concern for specific individuals. A health risk assessment can take the form of a simple questionnaire, and often, a health risk assessment is accompanied by biometric testing (e.g., blood pressure screening, body mass index calculation, cholesterol screening, blood sugar level testing, etc.).

Tip: Some programs with a reward based on an activity that were previously viewed as participation-only programs under HIPAA, may now be activity-only programs. For example, if a wellness program uses a health risk assessment ("HRA") and based on the results of the HRA there is a required follow up – such as phone calls to a health coach based on conditions identified in the HRA – the wellness program is activity-only rather than participation-only program. If the follow-up calls are voluntary (i.e., the reward is given even if the calls are not made), then the program would be participatory.

Generally, the reward must be paid in the year in which it was earned. If the reward is earned mid-year, the employer may prorate the annual reward over the remaining months in the plan year. For example the reward under a calendar year plan is \$20 per month (\$240 per year) and the employee doesn't earn the reward until June. The employer is required to pay the entire \$240 and may pro-rate payment by paying \$40 per month for July through December. If the employee doesn't earn the reward until near the end of the plan year, the employer may pay the reward within a reasonable period after the end of the plan year. In no event may the plan apply the reward to the following plan year.

Wellness programs may be subject to a number of federal and state laws including the Health Insurance Portability and Accountability Act ("HIPAA"), the Patient Protection and Affordable Care Act ("PPACA"), ERISA, COBRA, the Genetic Information Nondiscrimination Act ("GINA"), the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), Title VII of the Civil Rights Act (e.g., gender discrimination), the Fair Labor Standards Act ("FLSA"), the Internal Revenue Code, state tax codes,



state nondiscrimination laws, and federal cafeteria plan rules and regulations. A brief summary of the major requirements under federal laws follows.

HIPAA Nondiscrimination

Participation-only wellness programs must be available to all similarly situated individuals regardless of health status. There is no maximum on the reward (or penalty) for participation-only wellness programs.

HIPAA Privacy and Security

Many wellness programs will be subject to HIPAA's privacy and security rules and regulations. However, these requirements will not apply if the wellness program is linked to a group health plan not subject to HIPAA's privacy and security provisions (e.g., a small self-funded group health plan – one with fewer than 50 eligible individuals, which is administered by the employer that established and maintains the plan). *Note: HIPAA Privacy and Security rules do apply to HIPAA-excepted benefits such as separate dental and vision plans.*

Wellness programs that provide medical care (such as biometric screening) or that are linked to the employer's health plan are subject to the HIPAA privacy and security rules. If the wellness program is linked to the employer's medical plan, the employer may want to simply extend the medical plan's privacy & security policies and procedures to the wellness program. If the wellness program is separate – for example the program is offered to employees who are not eligible for the employer's medical plan – the employer may want to adopt and modify the medical plan's privacy and security procedures for use in the wellness program. For example, an employer providing flu shots or biometric screening to part-time employees who are not eligible for the major medical plan would not need to establish a separate plan with separate documents and procedures for the wellness program. Instead, the employer could include the wellness program in the privacy and security policies and procedures for the major medical plan even though the eligibility for the wellness program and major medical program are not the same. One additional step that should not be forgotten is that of obtaining business associate agreements from wellness vendors.

Patient Protection and Affordable Care Act (“PPACA”)

If a wellness program varies the deductible, co-payments, coinsurance or coverage for any of the services listed in the Summary of Benefits and Coverage (“SBC”), the calculations for that treatment scenario must assume that the individual is participating in the wellness program and additional language must be included in the SBC. For example, if the wellness program has a diabetes component, the SBC instructions provide the following sample language to be included with the coverage examples: *“Note: These numbers assume the patient is participating in our diabetes wellness program. If you have diabetes and do not participate in the wellness program, your costs may be higher. For more information about the diabetes wellness program, please contact [insert].”* As of July 2013, the only treatment scenarios included in the SBC template are pregnancy and diabetes.

The SBC must also include a statement that the health plan does, or does not, provide minimum value.

Under PPACA's employer shared responsibility requirement, a large employer (generally requiring more than 50 full-time or full-time and full-time equivalent employees) who does not offer minimum essential coverage to at least 95% of its full-time employees or a large employer that offers coverage that is either not “affordable” or does not provide “minimum value” may be required to pay a penalty. PPACA regulations issued in 2013

specify how minimum value and affordability may be calculated for employers sponsoring wellness programs that are tied to their health plans.

IRS proposed regulations state that a medical plan's share of the costs ("minimum value," which is generally defined as an actuarial value of 60%) must be determined without regard to reduced cost-sharing available under a wellness program (with an exception for tobacco reduction programs described below). For example, if a wellness program had a \$1,000 deductible with a \$200 reduction for completion of a health risk assessment ("HRA"), the medical program may not use an \$800 deductible when calculating minimum value – it must use the full \$1,000.

A medical plan's affordability must be determined assuming that each employee fails to satisfy the requirements of the wellness program (except for a tobacco-free program). For example, if a health plan with a \$1,000 premium contribution reduces the contribution by \$200 for completion of a health risk assessment ("HRA"); the medical program may not use a \$,800 premium contribution when calculating affordability– it must use the full \$1,000.

Employers may, however, determine minimum value and affordability by taking into account certain rewards for wellness programs that are designed to reduce tobacco use. When determining minimum value, the employer may include the value of changes such as a reduction in a deductible assuming that all individuals will qualify for the reward due to being tobacco-free. For example, if the deductible is \$1,500 but will be reduced by \$300 for any individual who either does not use tobacco or attends a smoking cessation class, the employer may use \$1,200 in determining minimum value. Similarly, premium rewards (or penalties) may be taken into account in determining affordability by assuming that all individuals will qualify for the reward if the reward is based upon tobacco use status. If the annual required contribution is \$2,000 and individuals who either don't smoke or who attend a smoking cessation class receive a \$300 reduction in their contribution, the employer may use \$1,700 as the required contribution for the plan.

NOTE: On July 2, the Treasury Department announced that it would delay implementation of a new coverage reporting requirement and the employer shared responsibility requirement until 2015. As a result, employers will not be required to determine affordability until 2015. While there will be no need to determine minimum value for the purpose of the employer shared responsibility requirement, guidance issued to date has not indicated that there will be a delay in the requirement to disclose minimum value in the Summary of Benefits and Coverage for 2014.

The June 3, 2013, wellness regulations included a special transition rule for 2014 available for employers that had a compliant wellness program in place on May 3, 2013. However, since the announcement of the delay in the employer shared responsibility requirement until 2015, the regulators have not yet indicated if any transition rule for wellness programs will be available for 2015.

New Quality of Care Reporting

Under regulations not yet issued as of June 2013, non-grandfathered group health plans will be required to submit an annual report to both the Secretary of HHS and enrollees regarding quality of care measurements. These quality of care measurements include information about benefits and reimbursement plan components that implement wellness and health promotion activities. Activities may include things such as personalized

wellness and prevention services provided by, coordinated by, or maintained by: (1) a health care provider, (2) a wellness and prevention plan manager, or (3) a health, wellness, or prevention services organization that conducts health risk assessments or offers individual intervention efforts (e.g., phone or web-based assistance).

The personalized wellness and prevention services could include health risk assessments or ongoing face-to-face, telephonic, or web-based intervention efforts for each of the program's participants, and may include the following wellness and prevention efforts:

- (1) Smoking cessation;
- (2) Weight management;
- (3) Stress management;
- (4) Physical fitness;
- (5) Nutrition;
- (6) Heart disease prevention;
- (7) Healthy lifestyle support; or
- (8) Diabetes prevention

The due date for providing a report to the Secretary of HHS has not yet been specified, but presumably, a deadline will be provided when HHS issues implementing regulations. Plans must provide the report to enrollees during each open enrollment period after the effective date specified in the regulations. Providers, prevention plan managers, and wellness organizations may be required to gather the necessary information and provide a report to the plan so that the plan may, in turn, provide a report to enrollees and HHS.

Tax Rules for Rewards

If the wellness program otherwise meets applicable nondiscrimination requirements, a reward in the form of a lower employee premium or an employer-provided contribution to an HRA, HSA, or FSA does not result in taxable income to employees and is not subject to wage withholding or employment taxes. For example, if an employer contributes \$150 to the HRA of each employee who undergoes a cholesterol screening, the \$150 contribution does not result in additional income for each participating employee.

NOTE: Discrimination or comparability issues may arise under other laws such as the Internal Revenue Code for rewards in the form of increased benefits under a medical plan such as an additional contribution to an HRA. Consult your benefits advisor for additional information regarding employer contributions to HRAs, HSAs, and FSAs. In addition, the Internal Revenue Code sections which prohibit discrimination in favor of highly compensated and key employees will apply.

Likewise, rewards that take the form of reduced premiums, co-payments, or deductibles would not be taxable under Section 105 and 106 of the Internal Revenue Code. *(Note: the reward may be taxable under certain situations such as where cash or a cash equivalent reward is paid for an individual who is not the employee's federally recognized spouse or tax dependent.)*

Rewards that come in the form of cash (e.g., a cash bonus) or cash-equivalents (e.g., a gift card to a local restaurant) are taxable and will be subject to wage withholding and employment taxes. For example, if an employer provides a \$50 gift card to a restaurant for all employees who complete a health risk assessment, each participating employee will have an additional \$50 of income subject to wage withholding and employment taxes.

Rewards such as certain employee discounts, T-shirts, mugs, and other rewards that qualify as *de minimus* fringe benefits under Internal Revenue Code Section 132 are not taxable to employees. Please note that the *de minimus* standard does not apply to cash rewards. For more information, refer to IRS Publication 15-B Employer's Tax Guide to Fringe Benefits. <http://www.irs.gov/publications/p15b/ar02.html>

Other noncash rewards could be taxable such as discounts on products or merchandise (e.g., weights, MP3 players, etc.) Employers should consult with their tax advisors with any questions about the taxation of rewards.

Other Federal Laws

Some of the federal laws such as the prohibition against discrimination based on age will apply to all types of programs. Others will apply to some, but not all, wellness programs. For example, the Genetic Information Nondiscrimination Act ("GINA") rules will apply to most wellness programs that use health risk assessments, but would not apply to a program that only provides a reward for attending a smoking cessation class.

Cafeteria Plans

Under the Section 125 cafeteria plan regulations, if the decrease in premium is "insignificant," an employer may structure its cafeteria plan to automatically change a newly qualifying employee's salary reduction to reflect the reduced premium. If the decrease in premium is "significant," an employee may elect to have his or her salary reduction prospectively changed to reflect the decreased premium. The Section 125 regulations would also permit mid-year changes when an employee loses a wellness reward and thus must pay a higher monthly premium (e.g., an employee starts smoking). For more information on the impact of cost changes on permissible salary reduction changes, refer to Treasury Regulation Section 1.125-4(f)(2). Unfortunately, the existing cafeteria plan regulations were issued before the wellness program regulations were finalized. As a result, it is unclear how any retroactive rewards would be treated under the cafeteria plan. Hopefully, the IRS will provide updated guidance before the new wellness rules become effective in 2014.

Americans with Disabilities Act ("ADA")

The ADA limits when employers may make medical inquiries or conduct medical examinations. The EEOC released two informal discussion letters in 2009, which indicate that it would be a violation of the ADA for an employer to require an employee to take a health risk assessment (including answering a health-related questionnaire and/or undergoing biometric testing (e.g., blood pressure screening, blood testing)) in order to obtain coverage under a medical plan or to receive reimbursements from an employer's health reimbursement arrangement. Unfortunately, the EEOC guidance leaves unanswered issues such as whether a purely "voluntary" wellness program would be permissible under the ADA, and what would constitute a "voluntary" wellness program.

In early 2011, a Florida federal district court found that a wellness program which provided a \$20 per pay period reduction in employee premiums for employees who completed a health risk assessment and biometric testing (without regard to the results of either the HRA or the tests) fell within the *bona fide* health plan exception for voluntary programs under the ADA. In August 2012, the 11th Circuit Court of Appeals affirmed the federal district court's decision in favor of the employer.

In early May 2013, the EEOC held a public meeting at which it received comments from representatives of a number of business, advocacy, and provider groups. Although the EEOC is clearly considering the issues, they have not as yet indicated if/when they will provide additional guidance.

Employers who wish to implement wellness programs that require biometric testing or the completion of a health risk assessment in order to obtain a reward (such as a lower monthly premium) or avoid a penalty (such as having to pay a higher premium for failure to complete an HRA or biometric screening) under a wellness program should consult with legal counsel specializing in employment law before implementing such a plan.

Genetic Information Nondiscrimination Act (“GINA”)

Employers are prohibited from discriminating against any employee with respect to the compensation, terms, conditions, or privileges of employment on the basis of “genetic information”. In general:

- employers are not permitted to request, require or purchase genetic information,
- employers must maintain genetic information as a confidential medical record, and
- strict limits apply to the disclosure of genetic information.

Under GINA, genetic information is broadly defined to include family medical history. Thus, a wellness program that seeks genetic information in the form of family medical history for underwriting purposes violates GINA. Family is broadly defined to include relatives to the fourth degree (e.g., cousins once-removed) and relatives by marriage (e.g. spouse and in-laws).

A wellness program may not seek genetic information such as family history prior to or in conjunction with enrollment, and it may not reward employees for completion of a health risk assessment that includes family history questions whether before or after enrollment.

The Genetic Information Nondiscrimination Act (“GINA”) prohibits the collection of genetic information for underwriting purposes. Under the GINA regulations, a health plan that provides a premium reduction for employees who complete a health risk assessment **after** enrollment, which includes questions about employee family history, violates GINA – even if the health risk assessment is provided after enrollment – because completion of the health risk assessment results in a reduction of premium and is therefore considered to be for purposes of underwriting.

A health plan that includes completion of a health risk assessment may still violate GINA even if there is no premium reduction for completing the assessment (or penalty for not completing it) if the assessment requests genetic information such as family medical history **if the assessment is obtained before coverage begins**. For example, an employer with a calendar year plan conducts annual enrollment for the upcoming year during November. On December 5, after all elections have been made, the employer sends a health risk questionnaire that requests genetic information with instructions that the assessment must be completed and returned by December 31. The employer has violated the GINA requirements by collecting the information before the January 1 coverage effective date.

ERISA

If a private employer (for-profit or not-for-profit) is involved, an exception under ERISA does not otherwise apply, and the program provides individualized “medical care,” then the program is likely an ERISA plan. The program involves “medical care” if the care is individualized and provided by trained professionals. For example, flu shots, health coaching by a nurse, counseling by a therapist, or biometric screening would all be example of medical care if provided through an employer. However, if a program only offers general education,

it is not “medical care.” For example, a newsletter with health condition articles, a “lunch-n-learn” about diabetes, and a weight loss class without a personalized assessment are all example of general education.

If a wellness program is an “employee welfare benefit plan” under ERISA, it will have to satisfy ERISA's applicable compliance requirements, including the following:

- (1) there must be a plan document;
- (2) plan terms must be followed and strict fiduciary standards adhered to;
- (3) SPDs (SMMs, and SMRs) must be provided to plan participants;
- (4) Form 5500 must be filed annually (subject to certain exceptions); and
- (5) claims procedures must be established and followed.

In some cases an employer offers a wellness program that is participation-only with either no reward or a reward that is not tied to the employer’s major medical plan, but the wellness program itself is a health plan subject to ERISA because it provides medical care (e.g., annual flu shots or biometric screening). If the eligibility for the wellness program and major medical plan are different – for example, full-time employees are eligible for major medical but both full-time and part-time employees are eligible for the wellness program – the employer may, but is not required, to create a separate ERISA plan just for the wellness program. Even though the eligibility is different, the employer can include the wellness program as part of the ERISA plan that includes major medical. The ERISA plan would need to be amended to reflect both the wellness benefits and the difference in eligibility. In addition, financial information on the wellness program must also be included on the employer’s Form 5500 filing.

PPACA added more special requirements, including enhanced internal claims and appeals requirements and external review procedures applicable to non-grandfathered plans. In the preamble to the amended PPACA appeals regulations issued on June 24, 2011, the Departments of Health and Human Services, Labor, and Treasury included examples of situations in which a claim would involve “medical judgment” and therefore be subject to the federal external review process for an adverse benefit determination. Included among those examples is a determination based on whether a participant would be entitled to a reasonable alternative standard under an employer-sponsored wellness program.

Thus, non-grandfathered plans denying a request for a reasonable alternative standard (or a waiver of an otherwise applicable standard) to obtain a reward related to a standard-based wellness program should be ready to follow the PPACA appeals procedures, including the requirement to make available an external review by an Independent Review Organization.

COBRA

A health plan that is subject to COBRA is linked with a wellness program, must include some of the wellness program provisions as part of COBRA coverage offered by the health plan. In general, if the wellness program provides a reward in the form of a different benefit such as a reduced deductible, it must be offered to COBRA qualified beneficiaries. For example, if the wellness program provides a \$100 reduction in the annual deductible for any individual who completes a health risk assessment question, regardless of the results, qualified beneficiaries must be given the same opportunity. Rewards in the form of reduced premiums do not need to be offered to COBRA qualified beneficiaries.

Health plans must comply with any applicable COBRA requirements. The most significant obligations are listed below:

- (1) **Provision of a General Notice:** Each participant and his or her spouse must receive a General Notice when coverage under the program first begins;
- (2) **Provision of an Election Notice:** Each Qualified Beneficiary must receive an Election Notice with a notice of the Qualified Beneficiary's rights and obligations for a specific qualifying event (e.g., termination of a covered employee's employment or reduction of a covered employee's hours of employment, etc.) The Election Notice for the wellness program may be combined with the Election Notice for the employer's major medical plan(s);
- (3) **Provision of a Notice of Unavailability (if applicable):** Certain individuals who expect to receive COBRA continuation coverage but are not entitled to such coverage must be provided with a Notice of Unavailability;
- (4) **Coverage:** if a Qualified Beneficiary elects COBRA continuation coverage under the wellness program, he or she generally may receive such coverage for a basic coverage period which is the same period of time as any other COBRA continuation period (e.g., 18 months for certain qualifying events, 36 months for other qualifying events). The Qualified Beneficiary would be entitled to any incentives available to active employees and would also be permitted to elect any other group health coverage offered to other employees during open enrollment; and
- (5) **Provision of an Early Termination Notice (if applicable):** If COBRA continuation terminates before the end of the maximum coverage period, the Qualified Beneficiary must be provided with a Notice of Termination.

Employers should review their existing plan materials and COBRA policies and procedures to ensure that applicable wellness programs are included in any written COBRA policies and procedures.

Age Discrimination in Employment Act ("ADEA")

The ADEA prohibits employment discrimination against employees and job applicants on the basis of age with respect to benefits. Protected individuals must be at least 40 years of age. Thus, a wellness program could violate the ADEA if it terminated or decreased wellness rewards, or otherwise discriminated against employees age 40 or older.

Title VII

Title VII relates to the "terms, conditions, or privileges of employment," which generally include wellness programs. Thus, if an employer takes into consideration a plan participant's race, religion, sex, color, or national origin, then the wellness program could violate Title VII.

Fair Labor Standards Act ("FLSA")

Under the FLSA, nonexempt employees must be compensated at not less than time and one-half of regular pay for time worked over 40 hours in any given workweek. Thus, if time spent completing a wellness program is considered to be "compensable time," then the employer may have to pay overtime. For example, if an employer provides health lectures as part of a wellness program, the time spent could be compensable time. However, the time need not be compensable time if four conditions are met: (1) attendance is outside of the employee's

regular work hours; (2) attendance is purely voluntary; (3) the lecture is not directly related to the employee's job; and (4) the employee does not do any productive work during the lecture (e.g., answering e-mails).

SECTION 6 – HEALTH PLAN-RELATED ACTIVITY-ONLY PROGRAMS

Activity-only wellness programs are those that base the reward on a health-related activity. For example, a wellness program that requires an individual to walk 30 minutes every day to receive the reward would be an activity-only program. If, on the other hand, the program only requires an individual to keep a record of the amount of time she spends exercising each week with the reward based solely on recording the information (even if the individual records that she spent no time exercising), it would probably be viewed as a participation-only program. Which category applies must be determined based on all of the facts and circumstances. The rules for activity-only programs are contained in this section. The rules for participation-only programs that are health plan-related are contained in Section 5.

Some programs include the use of a Health Risk Assessment (“HRA”) A health risk assessment is a method of determining who might most benefit from a wellness (or disease management) program and identify potential health-related areas of concern for specific individuals. A health risk assessment can take the form of a simple questionnaire, and often, a health risk assessment is accompanied by biometric testing (e.g., blood pressure screening, body mass index calculation, cholesterol screening, blood sugar level testing, etc.).

Tip: Some programs with a reward based on an activity that were previously viewed as participation-only programs under HIPAA, may now be activity-only programs. For example, if a wellness program uses a health risk assessment (“HRA”) and based on the results of the HRA there is a required follow up – such as phone calls to a health coach based on conditions identified in the HRA – the wellness program is activity-only rather than participation-only. If the follow calls are voluntary (i.e., the reward is given even if the calls are not made), the program would be participation-only.

Wellness programs may be subject to a number of federal and state laws including the Health Insurance Portability and Accountability Act (“HIPAA”), the Patient Protection and Affordable Care Act (“PPACA”), ERISA, COBRA, the Genetic Information Nondiscrimination Act (“GINA”), the Americans with Disabilities Act (“ADA”), the Age Discrimination in Employment Act (“ADEA”), Title VII of the Civil Rights Act (e.g., gender discrimination), the Fair Labor Standards Act (“FLSA”), the Internal Revenue Code, state tax codes, state nondiscrimination laws, and federal cafeteria plan rules and regulations. A brief summary of the major requirements under federal laws follows.

HIPAA Nondiscrimination

Wellness programs that offer a reward related to a health plan that condition receipt of the reward upon completing a certain health-related activity such as an exercise or diet program are subject to the HIPAA nondiscrimination rules. The HIPAA nondiscrimination rules provide that group health plans may not discriminate in health coverage among individuals on the basis of a “health factor,” in terms of eligibility, benefits or costs. There are eight “health factors” that may not be used to discriminate against individuals in providing health coverage: (1) health status; (2) medical condition (physical or mental illness); (3) claims experience; (4) receipt of health care; (5) medical history; (6) genetic information; (7) disability; and (8) evidence of insurability. Wellness programs that are related to the employer’s health plan and provide a reward dependent upon an individual meeting a “specific health-related standard” such as completion of a specific activity differentiate in terms of benefits or costs based upon health status. Wellness programs that comply

with HIPAA's nondiscrimination requirements are an exception to this requirement, they are permitted to vary benefits and/or costs by a limited amount. Wellness programs are permitted to discriminate in favor of employees who have a health condition – called benign discrimination. For example, a wellness plan could include free glucose testing or test strips for diabetics.

Wellness programs that are, or that are a part of, HIPAA-exempt health plans are not subject to HIPAA's nondiscrimination rules. For example, a wellness reward provided under a stand-alone vision plan (such as a lower co-payment for participants who have annual vision checkups) is not subject to HIPAA's portability rules.

There are five general rules that apply to all health plan-related activity-only wellness programs:

1. **Maximum Reward**

The total plan-based reward for all of the employer's wellness programs that require satisfaction of an activity-only standard must not exceed 30% of the cost of employee-only coverage under the employer's health plan. If dependents (including spouses or dependent children) may participate in the wellness program, the reward must not exceed 30% of the cost of coverage for the applicable level of coverage. If there is more than one activity-only program or if there is an outcome-based program in addition to the activity-only program, the maximum reward (or penalty) for all such wellness programs combined may not exceed 30%.

Although an employer may use a reward up to 50% for a wellness program that is designed to reduce tobacco use, if other wellness programs or benefits are included, the maximum available for all wellness programs combined is 50% with the non-tobacco related programs are limited to 30%. For example, an employer could not use 50% for a tobacco reduction program plus 30% for an activity-only program for a total of 80%.

Generally, the reward must be paid in the year in which it was earned. If the reward is earned mid-year – for example because an employee satisfies a reasonable alternative standard mid-year, the employer may make a retroactive payment to cover the months before the standard or reasonable alternative standard was met. Alternatively, the program may prorate the annual reward over the remaining months in the plan year. For example if the reward under a calendar year plan is \$20 per month and the standard is met on July 1, the plan may prorate the monthly amount and pay \$40 per month for July through December. If the standard is not satisfied until near the end of the plan year, the employer may pay the reward within a reasonable period after the end of the plan year. In no event may the plan apply the reward to the following plan year.

Rewards under wellness programs are typically in the form of changes in contributions or benefits such as a reduction in required health contributions or an increase in a deductible. Some employers have wanted to condition eligibility for a particular health plan option on smoker/nonsmoker status or another health factor. For example, smokers would be eligible for a core option while nonsmokers would be eligible for a core option and would also be able to buy up to an enhanced option. Based on previous informal discussions with Department of Labor representatives, the DOL may view the HIPAA prohibition on discrimination in benefits and eligibility as extending to benefit options within a health plan. As a result it may not be permissible to base option eligibility

on health factors such as smoker/nonsmoker status. The same rule applies to activity-only wellness programs.

It is permissible to design a wellness program that favors those with health conditions (benign discrimination). For example, an employer may structure a wellness program that includes a reduced contribution for employees who complete a walking program and automatically provide the reward for individuals who are unable to walk for a medical reason (e.g., an employee recovering from surgery).

2. **Reasonable Design**

The program must be reasonably designed to promote health or prevent disease. Programs are reasonably designed to promote health and prevent disease if they (1) provide a reasonable chance to improve health or prevent disease; (2) are not overly burdensome; (3) are not a subterfuge for discrimination based on health; and (4) are not “highly suspect” in the method chosen to promote health or prevent disease.

3. **Annual Opportunity**

The program must allow eligible individuals at least one opportunity per year to qualify for the reward. Some programs determine eligibility for the reward shortly before the beginning of a new medical plan year (e.g., a plan that reduces the monthly premium for the next year for those individuals who certify at annual enrollment that they have been tobacco-free for six months).

An individual who does not satisfy the initial standard must be given a reasonable alternative standard. It may take some time for individuals who do not meet the initial standard for the year to request, establish, and satisfy a reasonable alternative standard. As a result, wellness programs that determine eligibility for the reward prior to or at the beginning of a plan year may still have individuals qualifying during the plan year.

4. **Reasonable Alternative Standard**

The program reward must be available to all similarly situated individuals and must include a reasonable alternative standard for individuals who do not satisfy the standard. In order to be reasonable, the alternative standard must satisfy the following rules (as applicable):

1. If the alternative standard is completion of an educational program, the plan must make the educational program available or help the individual find the program and pay the cost of the program. It cannot require the individual to find or pay for the program.
2. If the alternative standard is a diet program, the plan must pay for any membership or participation fee. The plan is not required to pay the cost of food.
3. The time commitment required must be reasonable. The regulations state that requiring attendance nightly at a one-hour class would not be reasonable.
4. If the individual’s personal physician states that a plan standard (and if applicable the recommendations of the plan’s medical professional) is not medically appropriate for that individual, the plan must provide a different reasonable alternative standard that accommodates the personal physician’s recommendations.

The alternative standard may itself be a participation-only, activity-only, or outcomes-based standard. If the alternative standard is activity-only, it must follow the rules for activity-only standards. If the alternative is outcome-based, it must follow those rules. If it is participation-only, those rules must be followed.

In addition, if an individual is unable to meet an activity-only standard because it would be unreasonably difficult or inadvisable for medical reasons, the wellness program must provide the individual with a reasonable alternative standard as a way to earn the reward. The plan sponsor may require a physician's note confirming that satisfying the standard would be either medically inadvisable or unreasonably difficult for a medical reason. If the individual's physician states that a plan's standard is not medically appropriate, the plan must provide a reasonable alternative standard that accommodates the recommendation of the individual's physician.

The employer does not need to have a reasonable alternative developed in advance. The reasonable alternative can be designed once a request for one has been received. The reasonable alternative may be generic or it may be individualized. Waiving the standard (and paying the reward) is always a reasonable alternative.

5. Required Disclosure

The program must disclose (in all materials describing the terms of the program, including annual enrollment materials) the availability of a reasonable alternative standard – or the possibility of a waiver of the underlying standard, if applicable.

A program need only disclose that a reasonable alternative standard (or waiver of the standard) is available in all materials describing the wellness program. For example, if information about a wellness program is included in open enrollment materials, the statement about the availability of a reasonable alternative standard must be included in those materials. Materials that include reference to a premium discount would be required to disclose the existence of an alternative standard. In addition, the program must disclose that a reasonable alternative standard is available in any notice informing the individual that he/she did not satisfy the activity-only standard. The Department of Labor provided new sample language in June 2013:

“Your health plan is committed to helping you achieve your best health. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at [insert contact information] and we will work with you (and if you wish with your doctor) to find a wellness program with the same reward that is right for you in light of your health status.”

The June 2013 regulations also included the following additional sample language in the examples:

“Fitness Is Easy! Start Walking! Your health plan cares about your health. If you are considered overweight because you have a BMI of over 26, our Start Walking program will help you lose weight and feel better. We will help you enroll. (If your doctor says that walking isn't right for you, that's okay, too. We will work with you [and, if you wish, your own doctor] to develop a wellness program that is.)”

HIPAA Privacy and Security

Many wellness programs will be subject to HIPAA's privacy and security rules and regulations. However, these requirements will not apply if the wellness program is, or is part of, a group health plan not subject to HIPAA's privacy and security provisions (e.g., a small self-funded group health plan – one with fewer than 50 eligible individuals – which is administered by the employer that established and maintains the plan). *Note: HIPAA Privacy and Security rules do apply to HIPAA-excepted benefits such as separate dental and vision plans.*

Wellness programs that provide medical care (such as biometric screening) or that are linked to the employer's health plan are subject to the HIPAA privacy and security rules. If the wellness program is linked to the employer's medical plan, the employer may want to simply extend the medical plan's privacy & security policies and procedures to the wellness program. If the wellness program is separate – for example the program is offered to employees who are not eligible for the employer's medical plan – the employer may want to adopt and modify the medical plan's privacy and security procedures for use in the wellness program. For example, an employer providing flu shots or biometric screening to part-time employees who are not eligible for the major medical plan would not need to establish a separate plan with separate documents and procedures for the wellness program. Instead, the employer could include the wellness program in the privacy and security policies and procedures for the major medical plan even though the eligibility for the wellness program and major medical program are not the same. One additional step that should not be forgotten is that of obtaining business associate agreements from wellness vendors.

Patient Protection and Affordable Care Act (“PPACA”)

If a wellness program varies the deductible, co-payments, coinsurance or coverage for any of the service listed in the Summary of Benefits and Coverage (“SBC”), the calculations for that treatment scenario must assume that the individual is participating in the wellness program and additional language must be included in the SBC. For example, if the wellness program has a diabetes component, the SBC instructions provide the following sample language to be included with the coverage examples: *“Note: These numbers assume the patient is participating in our diabetes wellness program. If you have diabetes and do not participate in the wellness program, your costs may be higher. For more information about the diabetes wellness program, please contact [insert].”* As of July 2013, the only treatment scenarios included in the SBC template are pregnancy and diabetes.

The SBC must also include a statement that the health plan does, or does not, provide minimum value.

Under PPACA's employer shared responsibility requirement a large employer (generally defined as more than 50 full-time or full-time and full-time equivalent employees) that does not offer minimum essential coverage to at least 95% of its full-time employees or a large employer that offers coverage that is either not “affordable” or does not provide “minimum value” may be required to pay a penalty. PPACA regulations issued in 2013 specify how minimum value and affordability may be calculated for employers sponsoring wellness programs that are tied to their health plans.

IRS proposed regulations state that a medical plan's share of the costs (“minimum value” which is generally defined as an actuarial value of 60%) must be determined without regard to reduced cost-sharing available under a wellness program (with an exception for tobacco reduction programs described below). For example, if a wellness program has a \$1,000 deductible with a \$200 reduction for completion of a health-related activity, the medical program may not use an \$800 deductible when calculating minimum value – it must use the full \$1,000.

A medical plan's affordability must be determined assuming that each employee fails to satisfy the requirements of the wellness program. Regulations include an example where an employer with a \$1,000 required contribution reduces the contribution by \$200 for completion of a health-related activity. This employer may not use an \$800 required contribution when calculating affordability– it must use the full \$1,000.

Employers may, however, determine minimum value and affordability by taking into account certain rewards for wellness programs that are designed to reduce tobacco use. When determining minimum value the employer may include the value of differences such as a reduction in a deductible assuming that all individuals will qualify for the reward. For example, if the deductible is \$1,500 but will be reduced by \$300 for any individual who either does not use tobacco or attends a smoking cessation class, the employer may use a \$1,200 deductible in determining minimum value. Similarly, premium rewards (or penalties) may be taken into account in determining affordability by assuming that all individuals will qualify for the reward. If the annual required contribution is \$2,000 and individuals who either don't smoke or who attend a smoking cessation class receive a \$300 reduction in their contribution, the employer may use \$1,700 as the required contribution for the plan.

NOTE: On July 2, the Treasury Department announced that it would delay implementation of a new coverage reporting requirement and the employer shared responsibility requirement until 2015. As a result, employers will not be required to determine affordability until 2015. While there will be no need to determine minimum value for the purpose of the employer shared responsibility requirement, guidance issued to date has not indicated that there will be a delay in the requirement to disclose minimum value in the Summary of Benefits and coverage for 2014.

The June 3, 2013 wellness regulations included a special transition rule for 2014 available for employers that had a compliant wellness program in place on May 3, 2013. However, since the announcement of the delay in the employer shared responsibility requirement until 2015, the regulators have not yet indicated if a transition rule will be available for 2015.

Under regulations not yet issued as of June 2013, non-grandfathered group health plans will be required to submit an annual report to both the Secretary of HHS and enrollees regarding "quality of care" measurements. These quality of care measurements include information about benefits and reimbursement plan components that implement wellness and health promotion activities. Activities may include things such as personalized wellness and prevention services provided by, coordinated by, or maintained by: (1) a health care provider, (2) a wellness and prevention plan manager, or (3) a health, wellness or prevention services organization that conducts health risk assessments or offers individual intervention efforts (e.g., phone or web-based).

New Quality of Care Reporting Requirement

The personalized wellness and prevention services could include health risk assessments or ongoing face-to-face, telephonic or web-based intervention efforts for each of the program's participants, and may include the following wellness and prevention efforts:

- (1) Smoking cessation;
- (2) Weight management;
- (3) Stress management;
- (4) Physical fitness;

- (5) Nutrition;
- (6) Heart disease prevention;
- (7) Healthy lifestyle support; or
- (8) Diabetes prevention

The due date for providing a report to the Secretary of HHS has not yet been specified, but presumably, a deadline will be provided when HHS issues implementing regulations. Plans must provide the report to enrollees during each open enrollment period after the effective date specified in the regulations. Providers, prevention plan managers, and wellness organizations may be required to gather the necessary information and provide a report to the plan so that the plan may, in turn, provide a report to enrollees and HHS.

Tax Rules for Rewards

If the wellness program otherwise meets applicable nondiscrimination requirements, a reward in the form of a lower employee premium or an employer-provided contribution to an HRA, HSA, or FSA does not result in taxable income to employees and is not subject to wage withholding or employment taxes. For example, if an employer contributes \$150 to the HRA of each employee who undergoes a cholesterol screening, the \$150 contribution does not result in additional income for each participating employee. (Note: the reward may be taxable under certain situations where a cash or cash equivalent reward is paid for an individual who is not the employee's federally recognized spouse or tax dependent.)

NOTE: Discrimination or comparability issues may arise under other laws such as the Internal Revenue Code for rewards in the form of increased benefits under a medical plan such as an additional contribution to an HRA. Consult your benefits advisor for additional information regarding employer contributions to HRAs, HSAs, and FSAs. In addition, the Internal Revenue Code sections which prohibit discrimination in favor of highly compensated and key employees will also apply.

Likewise, rewards that take the form of reduced premiums, co-payments or deductibles would not be taxable under Section 105 and 106 of the Internal Revenue Code. (Note: the reward may be taxable under certain situations where a cash or cash equivalent reward is paid for an individual who is not the employee's federally recognized spouse or tax dependent.)

Rewards that come in the form of cash (e.g., a cash bonus) or cash-equivalent (e.g., a gift card to a local restaurant) are taxable and will be subject to wage withholding and employment taxes. For example, if an employer provides a \$50 gift card to a restaurant for all employees who complete a health risk assessment, each participating employee will have an additional \$50 of income subject to wage withholding and employment taxes.

Rewards such as certain employee discounts, T-shirts, mugs, and other rewards that qualify as *de minimus* fringe benefits under Internal Revenue Code Section 132 are not taxable to employees. Please note that the *de minimus* standard does not apply to cash rewards. For more information, refer to IRS Publication 15-B "Employer's Tax Guide to Fringe Benefits." <http://www.irs.gov/publications/p15b/ar02.html>

Other noncash rewards could be taxable such as discounts on products or merchandise (e.g., weights, MP3 players, etc.). Employers should consult with their tax advisors with any questions about the taxation of rewards.

Other Federal Laws

Some federal laws such as the prohibition against discrimination based on age will apply to all types of programs. Others will apply to some, but not all, wellness programs. For example, the Genetic Information Nondiscrimination Act (“GINA”) rules will apply to most wellness programs that use health risk assessments, but would not apply to a program that only provides a reward for attending a smoking cessation class. Following is a brief summary of the major federal laws that may apply to activity-only wellness programs.

Cafeteria Plans

Under the Section 125 cafeteria plan regulations, if a decrease in the employee’s required contribution is “insignificant,” an employer may structure its cafeteria plan to automatically change a newly qualifying employee’s salary reduction to reflect the reduced required contribution. If the decrease in required contribution is “significant,” an employee may elect to have his or her salary reduction prospectively changed to reflect the decreased contribution. The Section 125 regulations would also permit mid-year changes when an employee loses a wellness reward and thus must pay a higher monthly contribution (e.g., an employee starts smoking). For more information on the impact of cost changes on permissible salary reduction changes, refer to Treasury Regulation Section 1.125-4(f)(2). Unfortunately, the existing cafeteria plan regulations were issued before the wellness program regulations were finalized. As a result, it is unclear how any retroactive rewards would be treated under the cafeteria plan. Hopefully, the IRS will provide updated guidance before the new wellness rules become effective in 2014.

Americans with Disabilities Act (“ADA”)

There are two areas of concern under the ADA with regard to wellness programs. First, the ADA prohibits employers from discriminating against individuals with disabilities. For example, a program that provides a reward for walking thirty minutes three times per week may discriminate against individuals who have a disability that affects their ability to walk. This may violate the ADA even if the program is designed so that it complies with the HIPAA nondiscrimination requirements.

Second, the ADA limits when employers may make medical inquiries or conduct medical examinations. The EEOC released two informal discussion letters in 2009, which indicate that it would be a violation of the ADA for an employer to require an employee to take a health risk assessment (including answering a health-related questionnaire and/or undergoing biometric testing (e.g., blood pressure screening, blood testing)) in order to obtain coverage under a medical plan or to receive reimbursements from an employer’s health reimbursement arrangement. Unfortunately, the EEOC guidance leaves unanswered issues such as whether a purely “voluntary” wellness program would be permissible under the ADA, and what would constitute a “voluntary” wellness program.

In early 2011, a Florida federal district court found that a wellness program which provided a \$20 per pay period reduction in employee premiums for employees who completed a health risk assessment and biometric testing (without regard to the results of either the HRA or the tests) fell within the *bona fide* health plan exception for voluntary programs under the ADA. In August 2012, the 11th Circuit Court of Appeals affirmed the federal district court’s decision in favor of the employer.

In early May 2013, the EEOC held a public meeting at which it received comments from representatives of a number of business, advocacy, and provider groups. Although the EEOC is clearly considering the issues, they have not as yet indicated if/when they will provide additional guidance.

Employers who wish to implement wellness programs that require biometric testing or the completion of a health risk assessment in order to obtain a reward (such as a lower monthly premium) or avoid a penalty (such as having to pay a higher premium for failure to complete an HRA or biometric screening) under a wellness program should consult with legal counsel specializing in employment law before implementing such a plan.

Genetic Information Nondiscrimination Act (“GINA”)

Employers are prohibited from discriminating against any employee with respect to the compensation, terms, conditions, or privileges of employment on the basis of “genetic information”. In general:

- employers are not permitted to request, require or purchase genetic information,
- employers must maintain genetic information as a confidential medical record, and
- strict limits apply to the disclosure of genetic information.

Under GINA, genetic information is broadly defined to include family medical history. Thus, a wellness program that seeks genetic information in the form of family medical history for underwriting purposes violates GINA. Family is broadly defined to include relatives to the fourth degree (e.g., cousins once-removed) and relatives by marriage (e.g. spouse and in-laws).

A wellness program may not seek genetic information such as family history prior to or in conjunction with enrollment, and it may not reward employees for completion of a health risk assessment that includes family history questions whether before or after enrollment.

The Genetic Information Nondiscrimination Act (“GINA”) prohibits the collection of genetic information for underwriting purposes. Under the GINA regulations, a health plan that provides a premium reduction for employees who complete a health risk assessment **after** enrollment, which includes questions about employee family history, violates GINA – even if the health risk assessment is provided after enrollment – because completion of the health risk assessment results in a reduction of premium and is therefore considered to be for purposes of underwriting.

A health plan that includes completion of a health risk assessment may still violate GINA even if there is no premium reduction for completing the assessment (or penalty for not completing it) if the assessment requests genetic information such as family medical history **if the assessment is obtained before coverage begins**. For example, an employer with a calendar year plan conducts annual enrollment for the upcoming year during November. On December 5, after all elections have been made, the employer sends a health risk questionnaire that requests genetic information with instructions that the assessment must be completed and returned by December 31. The employer has violated the GINA requirements by collecting the information before the January 1 coverage effective date.

A health risk assessment that does not ask about family medical history or otherwise obtain genetic information as defined by GINA will not result in a violation of GINA as it does not appear to be asking about genetic information. But this may result in a violation of the Americans with Disabilities Act if it is required as a condition of employment or enrollment in the plan.

ERISA

If a private employer (for-profit or not-for-profit) is involved, an exception under ERISA does not otherwise apply, and the program provides individualized “medical care,” then the program is likely an ERISA plan. The program involves “medical care” if the care is individualized and provided by trained professionals. For example, flu shots, health coaching by a nurse, counseling by a therapist, or biometric screening would all be example of medical care if provided through an employer. However, if a program only offers general education, it is not “medical care.” For example, a newsletter with health condition articles, a “lunch-n-learn” about diabetes, and a weight loss class without a personalized assessment are all example of general education.

If a wellness program is an “employee welfare benefit plan” under ERISA, it will have to satisfy ERISA's applicable compliance requirements, including the following:

- (1) there must be a plan document;
- (2) plan terms must be followed and strict fiduciary standards adhered to;
- (3) SPDs (SMMs and SMRs) must be provided to plan participants;
- (4) Form 5500 must be filed annually (subject to certain exceptions); and
- (5) claims procedures must be established and followed.

Wellness programs that constitute group health plans must also meet certain special requirements: (a) additional requirements under the DOL claims procedure regulations; (b) additional SPD disclosures; and (c) special timing rules for SMMs.

PPACA added more special requirements, including enhanced internal claims and appeals requirements and external review procedures applicable to non-grandfathered plans. In the preamble to the amended PPACA appeals regulations issued on June 24, 2011, the Departments of Health and Human Services, Labor, and Treasury included examples of situations in which a claim would involve “medical judgment” and therefore be subject to the federal external review process for an adverse benefit determination. Included among those examples is a determination based on whether a participant would be entitled to a reasonable alternative standard under an employer-sponsored wellness program.

Thus, non-grandfathered plans denying a request for a reasonable alternative standard (or a waiver of an otherwise applicable standard) to obtain a reward related to a standard-based wellness program should be ready to follow the PPACA appeals procedures, including the requirement to make available an external review by an Independent Review Organization.

COBRA

A health plan that is subject to COBRA is linked with a wellness program, must include some of the wellness program provisions as part of COBRA coverage offered by the health plan. In general, if the wellness program provides a reward in the form of a different benefit such as a reduced deductible, it must be offered to COBRA qualified beneficiaries. For example, if the wellness program provides a \$100 reduction in the annual deductible for any individual who completes a health risk assessment question, regardless of the results, qualified beneficiaries must be given the same opportunity. Rewards in the form of reduced premiums do not need to be offered to COBRA qualified beneficiaries.

Health plans must comply with any applicable COBRA requirements. The most significant obligations are listed below:

- (1) **Provision of a General Notice:** Each participant and his or her spouse must receive a General Notice when coverage under the program first begins;
- (2) **Provision of an Election Notice:** Each Qualified Beneficiary must receive an Election notice with a notice of the Qualified Beneficiary's rights and obligations for a specific qualifying event (e.g., termination of a covered employee's employment or reduction of a covered employee's hours of employment, etc.) The Election Notice for the wellness program may be combined with the Election Notice for the employer's major medical plan(s);
- (3) **Provision of a Notice of Unavailability (if applicable):** Certain individuals who expect to receive COBRA continuation coverage but are not entitled to such coverage must be provided with a Notice of Unavailability;
- (4) **Coverage:** if a Qualified Beneficiary elects COBRA continuation coverage under the wellness program, he or she generally may receive such coverage for a basic coverage period which is the same period of time as any other COBRA continuation period (e.g., 18 months for certain qualifying events, 36 months for other qualifying events). The Qualified Beneficiary would be entitled to any incentives available to active employees and would also be permitted to elect any other group health coverage offered to other employees during open enrollment; and
- (5) **Provision of an Early Termination Notice (if applicable):** If COBRA continuation terminates before the end of the maximum coverage period, the Qualified Beneficiary must be provided with a Notice of Termination.

Employers should review their existing plan materials and COBRA policies and procedures to ensure that applicable wellness programs are included in any written COBRA policies and procedures.

Age Discrimination in Employment Act ("ADEA")

The ADEA prohibits employment discrimination against employees and job applicants on the basis of age with respect to benefits. Protected individuals must be at least 40 years of age. Thus, a wellness program could violate the ADEA if it terminated or decreased wellness rewards, or otherwise discriminated against employees age 40 or older.

Title VII

Title VII relates to the "terms, conditions, or privileges of employment," which generally include wellness programs. Thus, if an employer takes into consideration a plan participant's race, religion, sex, color, or national original, then the program could violate Title VII.

Fair Labor Standards Act ("FLSA")

Under the FLSA, nonexempt employees must be compensated at not less than time and one-half of regular pay for time worked over 40 hours in any given workweek. Thus, if time spent completing a wellness program is considered to be "compensable time," then the employer may have to pay overtime. For example, if an employer provides health lectures as part of a wellness program, the time spent could be compensable time. However, the time need not be compensable time if four conditions are met: (1) attendance is outside of the employee's

regular work hours; (2) attendance is purely voluntary; (3) the lecture is not directly related to the employee's job; and (4) the employee does not do any productive work during the lecture (e.g., answering e-mails).

SECTION 7 –HEALTH PLAN-RELATED OUTCOME-BASED PROGRAMS

Outcome-based wellness programs are those that base the reward on a health factor such as the results of a biometric test or a health condition such as diabetes. Examples of outcome-based plans include programs that condition a reward on having a cholesterol count under 200 or a Body Mass Index (“BMI”) less than 30.

Rewards such as smoker/nonsmoker rewards or penalties are outcome-based if the reward is only earned if the individual does not use tobacco or quits using tobacco.

Many outcome-based wellness programs include the use of a Health Risk Assessment (“HRA”). A health risk assessment is a method of determining who might most benefit from a wellness (or disease management) program and identify potential health-related areas of concern for specific individuals. A health risk assessment can take the form of a simple questionnaire, and often, a health risk assessment is accompanied by biometric testing (e.g., blood pressure screening, body mass index calculation, cholesterol screening, blood sugar level testing, etc.).

Wellness programs may be subject to a number of federal and state laws including the Health Insurance Portability and Accountability Act (“HIPAA”), the Patient Protection and Affordable Care Act (“PPACA”), ERISA, COBRA, the Genetic Information Nondiscrimination Act (“GINA”), the Americans with Disabilities Act (“ADA”), the Age Discrimination in Employment Act (“ADEA”), Title VII of the Civil Rights Act (e.g., gender discrimination), the Fair Labor Standards Act (“FLSA”), the Internal Revenue Code, state tax codes, state nondiscrimination laws, and federal cafeteria plan rules and regulations. A brief summary of the major requirements under federal laws follows.

HIPAA Nondiscrimination

Wellness programs that offer a reward related to a health plan and those that condition receipt of the reward upon a health factor such as a cholesterol count under 200 are subject to the HIPAA nondiscrimination rules. The HIPAA nondiscrimination rules provide that group health plans may not discriminate in health coverage among individuals on the basis of a “health factor,” in terms of eligibility, benefits or costs. There are eight “health factors” that may not be used to discriminate against individuals in providing health coverage: (1) health status; (2) medical condition (physical or mental illness); (3) claims experience; (4) receipt of health care; (5) medical history; (6) genetic information; (7) disability; and (8) evidence of insurability. Wellness programs that are related to the employer’s health plan and provide a reward dependent upon an individual meeting a “specific health-related standard” differentiate in terms of benefits or costs based upon health status. Wellness programs that comply with HIPAA’s nondiscrimination requirements are an exception to this requirement, they are permitted to vary benefits and/or costs by a limited amount. Wellness programs are permitted to discriminate in favor of employees who have a health condition – called benign discrimination. For example, a wellness plan could include free glucose testing or test strips for diabetics.

Wellness programs that are, or that are a part of, HIPAA-exempt health plans are not subject to HIPAA’s nondiscrimination rules. For example, a wellness reward provided under a stand-alone vision plan (such as a lower co-payment for participants who have annual vision checkups) is not subject to HIPAA’s nondiscrimination rules.



There are five general rules that apply to all health plan-related outcome-based wellness programs:

1. Maximum Reward

The total plan-based reward for all of the employer's wellness programs that require satisfaction of an outcome-based standard must not exceed 30% of the cost of employee-only coverage under the employer's health plan. If dependents (including spouses or dependent children) may participate in the wellness program, the reward must not exceed 30% of the cost of coverage for the applicable level of coverage. If there is more than one outcome-based program or if there is an activity-only program in addition to the outcome-based program, the maximum reward (or penalty) for all such wellness programs combined may not exceed 30%.

An employer may use a reward up to 50% for a wellness program that is designed to reduce tobacco use. If the employer's only wellness program is a tobacco reduction program, the entire 50% is available for the program. If other wellness programs or benefits are included, the maximum available for all wellness programs combined is 50% with the non-tobacco related programs are limited to 30%. For example, an employer could not use 50% for a tobacco reduction program plus 30% for a non-tobacco program with a total of 80%.

Generally, the reward must be paid in the year in which it was earned. If the reward is earned mid-year – for example because an employee satisfies a reasonable alternative standard mid-year, the employer may make a retroactive payment to cover the months before the standard or reasonable alternative standard was met. Alternatively, the program may prorate the annual reward over the remaining months in the plan year. For example if the reward under a calendar year plan is \$20 per month and the standard is met on July 1, the plan may prorate the monthly amount and pay \$40 per month for July through December. If the standard is not satisfied until near the end of the plan year, the employer may pay the reward within a reasonable period after the end of the plan year. In no event may the plan apply the reward to the following plan year.

Rewards under wellness programs are typically in the form of changes in contributions or benefits such as a reduction in required health contributions or an increase in a deductible. Some employers have wanted to condition eligibility for a particular health plan option on smoker/nonsmoker status or another health factor. For example, smokers would be eligible for a core option while nonsmokers would be eligible for a core option and would also be able to buy up to an enhanced option. Based on previous informal discussions with Department of Labor representatives, the DOL may view the HIPAA prohibition on discrimination in benefits and eligibility as extending to benefit options within a health plan. As a result it may not be permissible to base option eligibility on health factors such as smoker/nonsmoker status.

It is permissible to design a wellness program that favors those with health conditions (benign discrimination). For example, an employer may structure a wellness program that tests cholesterol levels and provides free dietary counseling to individuals with total cholesterol about a specified value such as 200 but does not provide any other type of reward (i.e., there is no reward for having total cholesterol below the target number.)

2. Reasonable Design

The program must be reasonably designed to promote health or prevent disease. Programs are reasonably designed to promote health and prevent disease if they (1) provide a reasonable chance to improve health or prevent disease; (2) are not overly burdensome; (3) are not a subterfuge for discrimination based on health; and (4) are not “highly suspect” in the method chosen to promote health or prevent disease.

3. Annual Opportunity

The program must allow eligible individuals at least one opportunity per year to qualify for the reward. Some programs determine eligibility for the reward shortly before the beginning of a new medical plan year (e.g., a plan that reduces the monthly premium for the next year for those individuals who certify at annual enrollment that they have been tobacco-free for six months).

An individual who does not satisfy the initial standard must be given a reasonable alternative standard. It may take some time to request, establish and satisfy a reasonable alternative standard to individuals who do not meet the initial standard for the year. As a result wellness programs that determine eligibility for the reward prior to or at the beginning of a plan year may still have individuals qualifying during the plan year.

4. Reasonable Alternative Standard

The program reward must be available to all similarly situated individuals and must include a reasonable alternative standard for individuals who do not satisfy the standard. In order to be reasonable, the alternative standard must satisfy the following rules (as applicable):

1. If the alternative standard is completion of an educational program, the plan must make the educational program available or help the individual find the program and pay the cost of the program. It can't require the individual to find or pay for the program.
2. If the alternative standard is a diet program, the plan must pay for any membership or participation fee. The plan is not required to pay the cost of food.
3. The time commitment required must be reasonable. The regulations state that requiring attendance nightly at a one-hour class would not be reasonable.

The reasonable alternative standard cannot be the same standard as the initial standard without additional time to satisfy the standard. For example, if the standard is a BMI under 30, the reasonable alternative standard cannot be to achieve a BMI under 31 on the same day. The alternative could be a small amount or percentage reduction over a realistic period of time.

If an individual is unable to meet an outcome-based standard, the wellness program must provide the individual with a reasonable alternative standard as a way to earn the reward. The plan sponsor may not require a physician's note confirming that satisfying the standard would be either medically inadvisable or unreasonable difficult for a medical reason. In addition, the individual must be given the opportunity to comply with the recommendation of his/her own physician as a second reasonable alternative standard. The individual may make a request to involve his/her personal physician at any time during the year and the physician may modify his/her recommendations at any time based on medical appropriateness.

The alternative standard may itself be a participation-only, activity-only or outcome-based standard. If the alternative standard is activity-only, it must follow the rules for activity-only standards. If the alternative is outcome-based, it must follow those rules. If it is participation-only, those rules must be followed.

The employer does not need to have a reasonable alternative developed in advance. The reasonable alternative can be designed once a request for one has been received. The reasonable alternative may be generic or it may be individualized. Waiving the standard (and paying the reward) is always a reasonable alternative.

5. Required Disclosure

The program must disclose (in all materials describing the terms of the program, including annual enrollment materials) the availability of a reasonable alternative standard – or the possibility of a waiver of the underlying standard, if applicable. Materials describing the reasonable alternative standard must include a statement that the individual’s person physician’s recommendations will be accommodated by the program

A program need only disclose that a reasonable alternative standard (or waiver of the standard) is available in all materials describing the wellness program. For example, if information about a wellness program is included in open enrollment materials, the statement about the availability of a reasonable alternative standard must be included in those materials. Materials that include reference to a premium discount would be required to disclose the existence of an alternative standard. In addition, the program must disclose that a reasonable alternative standard is available in any notice informing the individual that he/she did not satisfy the activity-only standard. The Department of Labor provided new sample language in June 2013:

“Your health plan is committed to helping you achieve your best health. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at [insert contact information] and we will work with you (and if you wish with your doctor) to find a wellness program with the same reward that is right for you in light of your health status.”

The June 2013 regulations also included the following additional sample language in the examples:

“Your health plan wants to help you take charge of your health. Rewards are available to all employees who participate in our Cholesterol Awareness Wellness Program. If your total cholesterol count is under 200, you will receive the reward. If not, you will still have an opportunity to qualify for the reward. We will work with you and your doctor to find a Health Smart program that is right for you“

HIPAA Privacy and Security

Many wellness programs will be subject to HIPAA's privacy and security rules and regulations. However, these requirements will not apply if the wellness program is, or is part of, a group health plan not subject to HIPAA's privacy and security provisions (e.g., a small self-funded group health plan – one with fewer than 50 eligible

individuals – which is administered by the employer that established and maintains the plan). *Note: HIPAA Privacy and Security rules do apply to HIPAA-excepted benefits such as separate dental and vision plans.*

Wellness programs that provide medical care (such as biometric screening) or that are linked to the employer's health plan are subject to the HIPAA privacy and security rules. If the wellness program is linked to the employer's medical plan, the employer may want to simply extend the medical plan's privacy & security policies and procedures to the wellness program. If the wellness program is separate – for example the program is offered to employees who are not eligible for the employer's medical plan – the employer may want to adopt and modify the medical plan's privacy and security procedures for use in the wellness program. For example, an employer providing flu shots or biometric screening to part-time employees who are not eligible for the major medical plan would not need to establish a separate plan with separate documents and procedures for the wellness program. Instead, the employer could include the wellness program in the privacy and security policies and procedures for the major medical plan even though the eligibility for the wellness program and major medical program are not the same. One additional step that should not be forgotten is that of obtaining business associate agreements from wellness vendors.

Patient Protection and Affordable Care Act (“PPACA”)

If a wellness program varies the deductible, co-payments, coinsurance or coverage for any of the service listed in the Summary of Benefits and Coverage (“SBC”), the calculations for that treatment scenario must assume that the individual is participating in the wellness program and additional language must be included in the SBC. For example, if the wellness program has a diabetes component, the SBC instructions provide the following sample language to be included with the coverage examples: *“Note: These numbers assume the patient is participating in our diabetes wellness program. If you have diabetes and do not participate in the wellness program, your costs may be higher. For more information about the diabetes wellness program, please contact [insert].”* As of June 2013, the only treatment scenarios included in the SBC template are pregnancy and diabetes.

The SBC must also include a statement that the health plan does, or does not, provide minimum value.

Under PPACA's employer shared responsibility requirement a large employer (generally defined as more than 50 full-time or full-time and full-time equivalent employees) that does not offer minimum essential coverage to at least 95% of its full-time employees or a large employer that offers coverage that is either not “affordable” or does not provide “minimum value” may be required to pay a penalty. PPACA regulations issued in 2013 specify how minimum value and affordability may be calculated for employers sponsoring wellness programs that are tied to their health plans.

IRS proposed regulations state that a medical plan's share of the costs (“minimum value” which is generally defined as an actuarial value of 60%) must be determined without regard to reduced cost-sharing available under a wellness program (with an exception for tobacco reduction programs described below). For example, if a wellness program has a \$4,000 deductible with a \$200 reduction for completion of a health-related activity, the medical program may not use a \$3,800 deductible when calculating minimum value – it must use the full \$4,000.

A medical plan's affordability must be determined assuming that each employee fails to satisfy the requirements of the wellness program. Regulations include an example where an employer with a \$4,000 required

contribution reduces the contribution by \$200 for completion of a health-related activity. This employer may not use a \$3,800 required contribution when calculating affordability– it must use the full \$4,000.

Employers may, however, determine minimum value and affordability by taking into account certain rewards for wellness programs that are designed to reduce tobacco use. When determining minimum value the employer may include the value of differences such as a reduction in a deductible assuming that all individuals will qualify for the reward. For example, if the deductible is \$1,500 but will be reduced by \$300 for any individual who either does not use tobacco or attends a smoking cessation class, the employer may use a \$1,200 deductible in determining minimum value. Similarly, premium rewards (or penalties) may be taken into account in determining affordability by assuming that all individuals will qualify for the reward. If the annual required contribution is \$2,000 and individuals who either don't smoke or who attend a smoking cessation class receive a \$300 reduction in their contribution, the employer may use \$1,700 as the required contribution for the plan.

NOTE: On July 2, the Treasury Department announced that it would delay implementation of a new coverage reporting requirement and the employer shared responsibility requirement until 2015. As a result, employers will not be required to determine affordability until 2015. While there will be no need to determine minimum value for the purpose of the employer shared responsibility requirement, guidance issued to date has not indicated that there will be a delay in the requirement to disclose minimum value in the Summary of Benefits and coverage for 2014.

The June 3, 2013 wellness regulations included a special transition rule for 2014 available for employers that had a compliant wellness program in place on May 3, 2013. However, since they announcement of the delay in the employer shared responsibility requirement until 2015, the regulators have not yet indicated if any transition rule will be available for 2015.

Under regulations not issued as of June 2013, non-grandfathered group health plans will be required to submit an annual report to both the Secretary of HHS and enrollees regarding “quality of care” measurements. These quality of care measurements include information about benefits and reimbursement plan components that implement wellness and health promotion activities. Activities may include things such as personalized wellness and prevention services provided by, coordinated by, or maintained by: (1) a health care provider, (2) a wellness and prevention plan manager, or (3) a health, wellness or prevention services organization that conducts health risk assessments or offers individual intervention efforts (e.g., phone or web-based).

New Quality of Care Reporting Requirement

The personalized wellness and prevention services could include health risk assessments or ongoing face-to-face, telephonic or web-based intervention efforts for each of the program's participants, and may include the following wellness and prevention efforts:

- (1) Smoking cessation;
- (2) Weight management;
- (3) Stress management;
- (4) Physical fitness;
- (5) Nutrition;
- (6) Heart disease prevention;

- (7) Healthy lifestyle support; or
- (8) Diabetes prevention

The due date for providing a report to the Secretary of HHS has not yet been specified, but presumably, a deadline will be provided when HHS issues implementing regulations. Plans must provide the report to enrollees during each open enrollment period after the effective date specified in the regulations. Providers, prevention plan managers, and wellness organizations may be required to gather the necessary information and provide a report to the plan so that the plan may, in turn, provide a report to enrollees and HHS.

Tax Rules for Rewards

If the wellness program otherwise meets applicable nondiscrimination requirements, a reward in the form of a lower employee premium or an employer-provided contribution to an HRA, HSA, or FSA does not result in taxable income to employees and is not subject to wage withholding or employment taxes. For example, if an employer contributes \$150 to the HRA of each employee who undergoes a cholesterol screening, the \$150 contribution does not result in additional income for each participating employee. (Note: the reward may be taxable under certain situations where a cash or cash equivalent reward is paid for an individual who is not the employee's federally recognized spouse or tax dependent.)

NOTE: Discrimination or comparability issues may arise under other laws such as the Internal Revenue Code for rewards in the form of increased benefits under a medical plan such as an additional contribution to an HRA. Consult your benefits advisor for additional information regarding employer contributions to HRAs, HSAs, and FSAs. In addition, the Internal Revenue Code sections which prohibit discrimination in favor of highly compensated and key employees will also apply.

Likewise, rewards that take the form of reduced premiums, co-payments or deductibles would not be taxable under Section 105 and 106 of the Internal Revenue Code. (Note: the reward may be taxable under certain situations where a cash or cash equivalent reward is paid for an individual who is not the employee's federally recognized spouse or tax dependent.)

Rewards that come in the form of cash (e.g., a cash bonus) or cash-equivalent (e.g., a gift card to a local restaurant) are taxable and will be subject to wage withholding and employment taxes. For example, if an employer provides a \$50 gift card to a restaurant for all employees who complete a health risk assessment, each participating employee will have an additional \$50 of income subject to wage withholding and employment taxes.

Rewards such as certain employee discounts, T-shirts, mugs, and other rewards that qualify as *de minimus* fringe benefits under Internal Revenue Code Section 132 are not taxable to employees. Please note that the *de minimus* standard does not apply to cash rewards. For more information, refer to IRS Publication 15-B "Employer's Tax Guide to Fringe Benefits." <http://www.irs.gov/publications/p15b/ar02.html>

Other noncash rewards could be taxable such as discounts on products or merchandise (e.g., weights, MP3 players, etc.). Employers should consult with their tax advisors with any questions about the taxation of rewards.

Other Federal Laws

Some federal laws such as the prohibition against discrimination based on age will apply to all types of programs. Others will apply to some but not all wellness programs. For example, the Genetic Information Nondiscrimination Act (“GINA”) rules will apply to most wellness programs that use health risk assessments, but would not apply to a program that provides a reward for attending a smoking cessation class. Following is a brief summary of the major federal laws that may apply to outcome-based wellness programs.

Cafeteria Plans

Under the Section 125 cafeteria plan regulations, if a decrease in the employee’s required contribution is “insignificant,” an employer may structure its cafeteria plan to automatically change a newly qualifying employee’s salary reduction to reflect the reduced required contribution. If the decrease in required contribution is “significant,” an employee may elect to have his or her salary reduction prospectively changed to reflect the decreased contribution. The Section 125 regulations would also permit mid-year changes when an employee loses a wellness reward and thus must pay a higher monthly contribution (e.g., an employee starts smoking). For more information on the impact of cost changes on permissible salary reduction changes, refer to Treasury Regulation Section 1.125-4(f)(2). Unfortunately, the existing cafeteria plan regulations were issued before the wellness program regulations were finalized. As a result, it is unclear how any retroactive rewards would be treated under the cafeteria plan. Hopefully, the IRS will provide updated guidance before the new wellness rules become effective in 2014.

Americans with Disabilities Act (“ADA”)

There are two areas of concern under the ADA with regard to wellness programs. First, the ADA prohibits employers from discriminating against individuals with disabilities. For example, a program that provides a reward based on a health condition may discriminate against individuals who have a disability. This may violate the ADA even if the program is designed so that it complies with the HIPAA nondiscrimination requirements.

Second, the ADA limits when employers may make medical inquiries or conduct medical examinations. The EEOC released two informal discussion letters in 2009, which indicate that it would be a violation of the ADA for an employer to require an employee to take a health risk assessment (including answering a health-related questionnaire and/or undergoing biometric testing (e.g., blood pressure screening, blood testing)) in order to obtain coverage under a medical plan or to receive reimbursements from an employer’s health reimbursement arrangement. Unfortunately, the EEOC guidance leaves unanswered issues such as whether a purely “voluntary” wellness program would be permissible under the ADA, and what would constitute a “voluntary” wellness program.

In early 2011, a Florida federal district court found that a wellness program which provided a \$20 per pay period reduction in employee premiums for employees who completed a health risk assessment and biometric testing (without regard to the results of either the HRA or the tests) fell within the *bona fide* health plan exception for voluntary programs under the ADA. In August 2012, the 11th Circuit Court of Appeals affirmed the federal district court’s decision in favor of the employer. However, in this particular case the program was participation-only, not outcome-based. The reward did not depend on the results of either the HRA or tests. The courts may take a different view of a program where the reward is based on the results.

In early May 2013, the EEOC held a public meeting at which it received comments from representatives of a number of business, advocacy, and provider groups. Although the EEOC is clearly considering the issues, they have not as yet indicated if/when they will provide additional guidance.

Employers who wish to implement wellness programs that require biometric testing or the completion of a health risk assessment in order to obtain a reward (such as a lower monthly premium) or avoid a penalty (such as having to pay a higher premium for failure to complete an HRA or biometric screening) under a wellness program should consult with legal counsel specializing in employment law before implementing such a plan.

Genetic Information Nondiscrimination Act (“GINA”)

Employers are prohibited from discriminating against any employee with respect to the compensation, terms, conditions, or privileges of employment on the basis of “genetic information”. In general:

- employers are not permitted to request, require or purchase genetic information,
- employers must maintain genetic information as a confidential medical record, and
- strict limits apply to the disclosure of genetic information.

Under GINA, genetic information is broadly defined to include family medical history. Thus, a wellness program that seeks genetic information in the form of family medical history for underwriting purposes violates GINA. Family is broadly defined to include relatives to the fourth degree (e.g., cousins once-removed) and relatives by marriage (e.g. spouse and in-laws).

A wellness program may not seek genetic information such as family history prior to or in conjunction with enrollment, and it may not reward employees for completion of a health risk assessment that includes family history questions whether before or after enrollment.

The Genetic Information Nondiscrimination Act (“GINA”) prohibits the collection of genetic information for underwriting purposes. Under the GINA regulations, a health plan that provides a premium reduction for employees who complete a health risk assessment **after** enrollment, which includes questions about employee family history, violates GINA – even if the health risk assessment is provided after enrollment – because completion of the health risk assessment results in a reduction of premium and is therefore considered to be for purposes of underwriting.

A health plan that includes completion of a health risk assessment may still violate GINA even if there is no premium reduction for completing the assessment (or penalty for not completing it) if the assessment requests genetic information such as family medical history **if the assessment is obtained before coverage begins**. For example, an employer with a calendar year plan conducts annual enrollment for the upcoming year during November. On December 5, after all elections have been made, the employer sends a health risk questionnaire that requests genetic information with instructions that the assessment must be completed and returned by December 31. The employer has violated the GINA requirements by collecting the information before the January 1 coverage effective date.

A health risk assessment that does not ask about family medical history or otherwise obtain genetic information as defined by GINA will not result in a violation of GINA as it does not appear to be asking about genetic information. But this may result in a violation of the Americans with Disabilities Act if it is required as a condition of employment or enrollment in the plan.

ERISA

If a private employer (for-profit or not-for-profit) is involved, an exception under ERISA does not otherwise apply, and the program provides individualized “medical care,” then the program is likely an ERISA plan. The program involves “medical care” if the care is individualized and provided by trained professionals. For example, flu shots, health coaching by a nurse, counseling by a therapist, or biometric screening would all be example of medical care if provided through an employer. However, if a program only offers general education, it is not “medical care.” For example, a newsletter with health condition articles, a “lunch-n-learn” about diabetes, and a weight loss class without a personalized assessment are all example of general education.

If a wellness program is an “employee welfare benefit plan” under ERISA, it will have to satisfy ERISA's applicable compliance requirements, including the following:

- (1) there must be a plan document;
- (2) plan terms must be followed and strict fiduciary standards adhered to;
- (3) SPDs (SMMs and SMRs) must be provided to plan participants;
- (4) Form 5500 must be filed annually (subject to certain exceptions); and
- (5) claims procedures must be established and followed.

Wellness programs that constitute group health plans must also meet certain special requirements: (a) additional requirements under the DOL claims procedure regulations; (b) additional SPD disclosures; and (c) special timing rules for SMMs.

PPACA added more special requirements, including enhanced internal claims and appeals requirements and external review procedures applicable to non-grandfathered plans. In the preamble to the amended PPACA appeals regulations issued on June 24, 2011, the Departments of Health and Human Services, Labor, and Treasury included examples of situations in which a claim would involve “medical judgment” and therefore be subject to the federal external review process for an adverse benefit determination. Included among those examples is a determination based on whether a participant would be entitled to a reasonable alternative standard under an employer-sponsored wellness program.

Thus, non-grandfathered plans denying a request for a reasonable alternative standard (or a waiver of an otherwise applicable standard) to obtain a reward related to a standard-based wellness program should be ready to follow the PPACA appeals procedures, including the requirement to make available an external review by an Independent Review Organization.

COBRA

A health plan that is subject to COBRA is linked with a wellness program, must include some of the wellness program provisions as part of COBRA coverage offered by the health plan. In general, if the wellness program provides a reward in the form of a different benefit such as a reduced deductible, it must be offered to COBRA qualified beneficiaries. For example, if the wellness program provides a \$100 reduction in the annual deductible for any individual who completes a health risk assessment question, regardless of the results, qualified beneficiaries must be given the same opportunity. Rewards in the form of reduced premiums do not need to be offered to COBRA qualified beneficiaries.

Health plans must comply with any applicable COBRA requirements. The most significant obligations are listed below:

- (1) **Provision of a General Notice:** Each participant and his or her spouse must receive a General Notice when coverage under the program first begins;
- (2) **Provision of an Election Notice:** Each Qualified Beneficiary must receive an Election Notice with a notice of the Qualified Beneficiary's rights and obligations for a specific qualifying event (e.g., termination of a covered employee's employment or reduction of a covered employee's hours of employment, etc.) The Election Notice for the wellness program may be combined with the Election Notice for the employer's major medical plan(s);
- (3) **Provision of a Notice of Unavailability (if applicable):** Certain individuals who expect to receive COBRA continuation coverage but are not entitled to such coverage must be provided with a Notice of Unavailability;
- (4) **Coverage:** if a Qualified Beneficiary elects COBRA continuation coverage under the wellness program, he or she generally may receive such coverage for a basic coverage period which is the same period of time as any other COBRA continuation period (e.g., 18 months for certain qualifying events, 36 months for other qualifying events). The Qualified Beneficiary would be entitled to any incentives available to active employees and would also be permitted to elect any other group health coverage offered to other employees during open enrollment; and
- (5) **Provision of an Early Termination Notice (if applicable):** If COBRA continuation terminates before the end of the maximum coverage period, the Qualified Beneficiary must be provided with a Notice of Termination.

Employers should review their existing plan materials and COBRA policies and procedures to ensure that applicable wellness programs are included in any written COBRA policies and procedures.

Age Discrimination in Employment Act ("ADEA")

The ADEA prohibits employment discrimination against employees and job applicants on the basis of age with respect to benefits. Protected individuals must be at least 40 years of age. Thus, a wellness program could violate the ADEA if it terminated or decreased wellness rewards, or otherwise discriminated against employees age 40 or older.

Title VII

Title VII relates to the "terms, conditions, or privileges of employment," which generally include wellness programs. Thus, if an employer takes into consideration a plan participant's race, religion, sex, color, or national origin, then the program could violate Title VII.

Fair Labor Standards Act ("FLSA")

Under the FLSA, nonexempt employees must be compensated at not less than time and one-half of regular pay for time worked over 40 hours in any given workweek. Thus, if time spent completing a wellness program is considered to be "compensable time," then the employer may have to pay overtime. For example, if an employer provides health lectures as part of a wellness program, the time spent could be compensable time. However, the time need not be compensable time if four conditions are met: (1) attendance is outside of the employee's

regular work hours; (2) attendance is purely voluntary; (3) the lecture is not directly related to the employee's job; and (4) the employee does not do any productive work during the lecture (e.g., answering e-mails).