

# Paying People For Being Good

Wellness Reward and Incentive Law

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## Overview

- History/Background – Wellness
- Employers
- Medicare
- Medicaid
- Commercial – Qualified Health Plans
- Providers

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## Employers

1880's to 1940's

Pullman Athletic Associating – Encouraging the proper development of "Proper Middle Class Values"



National Cash Register - Twice-daily exercise breaks employee gym



Hershey – Recreation and Education Facilities



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## History/Background – Wellness

1950's to 1970's

- Post World War 2 Employees Started Paying for Employee Health Insurance
- Gyms - Perk for upper management
- The U.S. Dept. of Labor establishes Occupational Health and Safety Administration to prevent workplace accidents and injuries
- Primary goal - Prevent absences and injuries in the workplace
- Employee Assistance Programs (EAP), which were initially created to help employees with alcohol problems




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## History/Background – Wellness

1980's to 2000

- Programs for Smoking Cessation, Nutrition and Stress Management became common
- Focus on high cost employees.
- Employee bans re: Smoking
- Insurance Companies – Rise of Managed Care = Disease Management Programs




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## History/Background – Wellness

2000 to Today

- Corporate wellness, once regarded by the C-Suite as "fluffy," is now respected
- Employee Wellness Programs become very common – 79% of Companies Offer(2014)
- Wellness Industry is worth 40 billion (2014)
- Growing Interest in Rewards/Incentives - Managed Care Organizations Particularly Government Programs (Pay for Performance) Disease Management and Preventative Care



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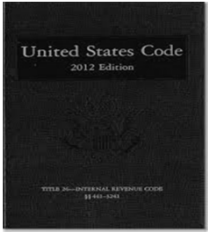
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**Employers**

- HIPAA/ Affordable Care Act
- ADA
- GINA
- Tax, ERISA, privacy



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**Employers**

**HIPAA (Non-Discrimination) as Amended By the Affordable Care Act**

**General Rule:** Group health plans cannot discriminate against individuals with respect to eligibility, benefits or premiums based on health status-related factors (health status, medical condition, medical history)

**Exception:**

- 2006 DOL regulations exempted wellness programs
- 2010 Affordable Care Act expands exception
- 2014 Rules implementing Affordable Care Act are issued

**Enforced by:** CMS Office of Civil Rights (OCR)

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**Employers**

**HIPAA (Non-Discrimination) as Amended By the Affordable Care Act**

**1. Participatory Wellness Programs**

- Examples: gym membership, diagnostic testing, attend a health fair, participate in a smoking cessation program
- Does not base any part of the reward on the outcome
- Very little regulation
- Must be available to all "similarly situated individuals regardless of health status"- (e.g. could not limit the program/rewards to only healthy individuals)

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**Employers**

**HIPAA (Non-Discrimination) as Amended By the Affordable Care Act**

2. Health Contingent Wellness Programs

- Require an individual to satisfy a standard related to a health factor to obtain a reward
- *Activity-Only Wellness Program* - Must perform or complete an activity (e.g. walking, diet, or exercise program).
- *Outcome-based Wellness Programs* - Must achieve a specific health outcome (e.g. not smoking, receiving certain results on a biometric)

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**Employers**

**HIPAA (Non-Discrimination) as Amended By the Affordable Care Act**

2. Health Contingent Wellness Programs, cont.

- Frequency of opportunities to qualify - At least once a year
- Size of Reward - 30% of health plan's premiums and 50% for premiums for smoking.
- Reasonable Design
- Reasonable chance to improve
  - Not overly burdensome
  - Not a subterfuge to discriminate based on health factor
  - Not highly suspect in the method used
- Uniform Availability = Reasonable Alternative Standard
  - May waive
  - May require a different alternative standard in subsequent years
  - Retroactive payment of reward upon satisfaction of a reasonable alternative standard

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**Employers**

**HIPAA (Privacy)**

**Applicability:** - Group Health Plans ("Covered Entity")

**General Rule** - If an employer is not performing plan administration on behalf of the group health plan then aggregate data. It must be de-identified.

**Exception** - If performing plan administration employer must build a "wall" and limit employee PHI to only those administering the wellness program.

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**Employers**

**American's With Disability Act (ADA)**

**General Rule:** Employers may not require employees to undergo medical examinations unless they are "job related and consistent with business necessity."

**Exceptions:**

- Voluntary exams as part of an employee health program if:
  - Participation is voluntary
  - Information is maintained according to ADA's confidentiality requirements
  - Information is not used to discriminate against an employee

**Enforced by:** Equal Employment Opportunity Commission (EEOC)

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**Employers**

**American's With Disability Act (ADA), cont.**

**Voluntariness:**

- *US v. Honeywell* - Does the substantial size of insurance penalty render participation voluntary even if in compliance with the ACA?

**New Regulations (Finalized This Spring)**

- Goal - Reconcile the ADA with the ACA
- Involuntary >30%
- Aligns ADA confidentiality rules with HIPAA

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**Employers**

**Genetic Information Non Discrimination Act (GINA)**

**General Rule:** Health plan can't obtain genetic information about an employee

Genetic information includes information about (i) such individual's genetic tests, (ii) the genetic tests of family members of such individual, and (iii) the manifestation of a disease or disorder in family members of such individual

**Exception:** May provide incentives for spouse to provide information about his/ her current or past health status. *Poore v. Peterbilt of Bristol; Honeywell*

**Enforced by:** EEOC

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<p><b><u>Employers</u></b></p> <p><b>Other Laws</b></p> <p>ERISA - Wellness programs could cause a wellness plan to become a Group Health Plan subject to ERISA</p> <p><b>State Laws –</b></p> <ul style="list-style-type: none"> <li>• As long as they don't interfere with federal rules. No preemption by the ACA.</li> <li>• Likely means states can be more protective of members.</li> </ul> <p><b>COBRA Continuation of Coverage</b> - Continuation of wellness program after termination?</p> <p><b>Fair Labor Standards Act "FLSA"</b> - Paid for time completing Health Risk Assessment...etc?</p> <p><b>IRS</b> - What inducements/incentives are taxable?</p>	
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<p><b><u>Medicare</u></b></p> <p><b>Applicability:</b> - Only Allowed for Part C (MA Plans).</p> <p><b>General Requirements:</b></p> <ul style="list-style-type: none"> <li>• Not a benefit - should not list in Plan Benefit Package. Include cost in bid as a non-benefit expense (administrative cost)</li> <li>• Can include in marketing material - But, must be provided to all current and prospective enrollees and in conjunction with plan benefits.</li> <li>• Note: Enrollment information, etc. is not considered marketing material –</li> </ul> <p><b>Participation:</b></p> <ul style="list-style-type: none"> <li>• Must not discriminate based on race, gender, chronic disease, institutionalization, frailty, health status or history of compliance</li> <li>• But - can use programs that target enrollees with specific diseases/chronic conditions</li> <li>• Alternative methods for earning &amp; claiming rewards must be allowed (e.g. paper vs. internet and alternative exercise)</li> </ul>	
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<p><b><u>Medicare</u></b></p> <p><b>Rewards and Incentives associated with the RI Program <u>Must</u>:</b></p> <ul style="list-style-type: none"> <li>• Be focused on improving health, preventing illness, or efficient use of healthcare resources.</li> <li>• Have a value that may be expected to affect enrollee behavior, but not exceed the value of the health related service or the activity itself. (Future guidance possible)</li> </ul> <p><b>Rewards and Incentives Associated with the RI Program <u>Must Not</u>:</b></p> <ul style="list-style-type: none"> <li>• Be offered in the form of cash or other monetary rebates, charities or based on probability</li> <li>• Cost sharing reduction viewed as monetary rebates</li> <li>• Gift cards and coupons are ok as long as they cannot be converted to cash.</li> <li>• Be used to target potential enrollees</li> <li>• Be awarded based on health outcomes - e.g.lose 10 lbs</li> </ul>	
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## Medicaid

### General requirements

- No federal rules.
- However, Preamble to the proposed Medicaid "mega" rule mentions *"nothing in them is intended as a barrier to the operation programs that promote wellness"*.
- Final Medicaid Rule – Speaks to possible future rulemaking pending outcome MIPCD grants
- Many States have reference in MCO contracts and a few have issued guidance memos.

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## Health Insurance Marketplace

### HIPAA (Non-Discrimination) as Amended By the Affordable Care Act

Applicability: - Individual Market

### Participatory Wellness Programs –

- Does not base any part of the reward on the outcome. (e.g. gym membership or diagnostic testing)
- Must be available to all "similarly situated individuals regardless of health status".
- Can you target "sick members"? Yes – Per email from CCIOO

Health Contingent Wellness Programs - Not Allowed

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## Providers

### Offering Gifts and Inducements To Beneficiaries

- Applicability - Prohibits a person from offering remuneration that will likely influence a beneficiary's selection of a particular provider/supplies/practitioner of a Medicare/Medicaid payable item
- Ok - If \$10 individually and no more than \$50 in the aggregate per year
- Preventive Care Exception:
  - Items and services that are covered by Medicare/Medicaid AND are either prenatal/postnatal well-baby services or are services describe in the Guide to Clinical Preventative Services
  - May not be in the form of cash or cash equivalents
  - May not be disproportionate to the value of the preventative care provided

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### Providers – ACO Waivers

**Provides a waiver of the beneficiary inducement rules:**

- Advance the goals of preventive care, adherence to treatment, drug, or follow-up care regimes, or a management of a chronic disease or condition
- There is a reasonable connection between the incentives and medical care No cash or cash equivalents

**Allowable examples according to CMS:**

- Provision of a blood pressure cuff for a hypertensive patient participating in an ACO's chronic disease management program
- Local transportation to a medical appointment or to pick up prescriptions (as long as not just giving the beneficiary cash for the transportation)

**Nonallowable examples according to CMS:**

- Items such as beauty products & theatre tickets
- Gifts to induce beneficiaries to receive services from providers affiliated with the ACO

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