

**ADA PROPOSED RULES**

Under the ADA Proposed Rules, a wellness program that includes disability-related inquiries or medical examinations must meet five requirements, as summarized in the following chart:

<b>ADA Proposed Requirements for a Wellness Program that includes Disability-Related Inquiries or Medical Examinations</b>	
<b>1. Reasonably Designed</b>	A wellness program must be reasonably designed to promote health or prevent disease and not be over burdensome or a subterfuge for violating the ADA (this is similar to the HIPAA Wellness Rules standard). An example given in the regulations of an over burdensome program is requiring costly medical exams.
<b>2. Voluntary</b>	To be voluntary, the employer must not: (i) require employees to participate, (ii) deny coverage under its group health plans or particular benefit packages for non-participation, or limit the extent of such coverage; or (iii) take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees to coerce an employee to participate or threaten to discipline an employee for not participating.
<b>3. Maximum Incentive that may be offered</b>	Total incentives may be offered up to a maximum of 30% of the total cost (employer + employee) of <u>employee-only coverage</u> , whether in the form of reward or penalty. This 30% limit is related to the “voluntary” requirement because it addresses the EEOC’s concern that too high of an incentive would amount to economic coercion rendering participation involuntary.
<b>4. Notice and confidentiality requirements to ensure participation is truly voluntary.</b>	The employer must provide a notice that clearly explains: (i) what medical information will be obtained, (ii) who will receive the information; (iii) how the information will be used; (iv) the restrictions on its disclosure; and (v) the methods the employer will employ to prevent improper disclosure of the medical information.  The proposed rule allows disclosure of medical information obtained by a wellness program only in aggregate form, except as needed to administer the health plan.
<b>5. Must not discriminate against Employees with Disabilities</b>	The Employer must provide reasonable accommodations to employees with disabilities (applies regardless of whether the wellness program includes disability related inquiries or medical examinations).

Note that the incentive limits and notice requirements listed above apply only to programs that are part of, or provided by, a group health plan or a health insurer offering group health insurance in connection with a group health plan.

## HIPAA AND ADA REQUIREMENTS COMPARED

The ADA Proposed Rules follow the general framework of the HIPAA Wellness Rules. The HIPAA Wellness Rules separate wellness programs into “participatory” programs and “health contingent” programs, and the HIPAA wellness requirements follow from that distinction. Whether the ADA Proposed Rules would apply to a particular participatory or health contingent program depends on whether the program includes disability-related inquiries or medical examinations. Based on these distinctions, an employer can determine whether a wellness program would have to satisfy only the existing HIPAA Wellness Rules, or also the ADA rules.

**1. Participatory wellness programs.** Participatory programs reward participation in an activity or survey, without regard to satisfying a standard related to a health factor. Examples of participatory programs include providing a reward for taking a series of biometric tests or for taking a health risk assessment regardless of outcome or a weight loss program that does not require reaching any set goals.

(a) Participatory programs are permissible under the HIPAA Wellness Rules, without further conditions, provided they are made available to all similarly-situated individuals, regardless of health status. There is no limit on the incentive for participation.

(b) A participatory program would not be subject to the ADA Proposed Rules so long as it does not include disability-related inquiries or medical examinations. An example of such a program would be attending nutrition classes or other general education programs. Otherwise, if the program includes any disability-related inquiries or medical examinations, it would be subject to the five ADA requirements listed in the chart above. In addition, any wellness program would be required to provide reasonable accommodation, absent undue hardship, to enable an employee with a disability to earn the financial incentives offered.

**2. Health contingent wellness programs.** These programs require individuals to satisfy a standard related to a health factor in order to obtain a reward, or require an individual to undertake more than a similarly-situated individual because of a health factor to obtain the same reward. These can be activity-only programs, requiring individuals to complete an activity such as participation in exercise programs, or outcome-based programs, requiring individuals to attain or maintain a specific health outcome. Requiring an individual to quit smoking, lose weight, or attend health coaching for an identified risk are examples of outcome-based programs.

(a) Under the HIPAA Wellness Rules, health contingent wellness programs must meet the following five conditions: all individuals are given the opportunity to qualify for the reward at least once per year; the total incentive reward cannot exceed 30% of the total cost of coverage (50% for tobacco prevention or reduction); the program is reasonably designed; the full reward is available to all similarly-situated individuals; and plans must disclose the availability of a reasonable alternative reward.

(b) Under the ADA Proposed Rules, any health contingent wellness program that includes disability-related inquiries or medical examinations would be subject to the five ADA requirements.

**THE MAXIMUM ALLOWABLE INCENTIVE**

The HIPAA Wellness Rules raised the total incentive (reward or penalty) for all wellness programs with respect to a plan to 30% of the total cost of coverage under the plan, and up to 50% to the extent the additional percentage is in connection with a program designed to prevent or reduce tobacco use. Generally, the incentive is based on the total cost of employee-only coverage, but if another dependent participates in the wellness program, the reward is limited to the applicable percentage of the total cost of coverage in which the employee and dependent are enrolled.

The ADA Proposed Rules would also limit incentives to a maximum of 30% of the total cost of employee-only coverage, but with no reference to dependent coverage. In addition, the ADA Proposed Rules may limit incentives for tobacco cessation to 30% if individuals are required to respond to disability-based inquiries or undergo medical examinations. For example, if a participant must undergo a test to see if they have been using tobacco, the ADA Proposed Rules would be implicated and any incentive (or penalty) would be limited to 30%. In contrast, a smoking cessation program that merely asks employees whether they use tobacco would not be subject to the ADA Proposed Rules and the 50% incentive limit would apply.

The following chart provides a comparison of HIPAA and ADA requirements for offering incentives as part of a wellness program.

<b>Comparison of Requirements in Offering Incentives as part of a Wellness Program</b>		
	<b>Health-Contingent Programs (HIPAA)</b>	<b>All Wellness Programs (including participatory) that include disability-related inquiries or medical examinations (ADA)</b>
<b>Reasonably Designed Program to promote health and prevent disease; not overly burdensome; not a subterfuge for discrimination.</b>	Required	Required
<b>Maximum incentives</b>	<ul style="list-style-type: none"> <li>• 30% of total cost of coverage; or</li> <li>• 50% to the extent the additional percentage is related to tobacco prevention or reduction</li> </ul>	30% of total cost of <u>employee-only</u> coverage

<b>Comparison of Requirements in Offering Incentives as part of a Wellness Program</b>		
	<b>Health-Contingent Programs (HIPAA)</b>	<b>All Wellness Programs (including participatory) that include disability-related inquiries or medical examinations (ADA)</b>
<b>Notice and Disclosure</b>	Plans must disclose the availability of a reasonable standard for the reward in all plan materials and in any disclosure to an individual that he or she did not satisfy an outcome-based standard.	The employer must provide a notice that clearly explains: (i) what medical information will be obtained, (ii) who will receive the information; (iii) how the information will be used; (iv) the restrictions on its disclosure; and (v) the methods the employer will employ to prevent improper disclosure of the medical information.
<b>Opportunity</b>	All eligible individuals are given the opportunity to qualify for the reward at least once per year.	
<b>Similarly-situated individuals/non-discrimination</b>	The full reward must be available to all similarly-situated individuals. A reasonable alternative standard (or waiver of the otherwise applicable standard) must be made available. The specifics of this requirement depend on whether the program is activity-only or outcome based.	Programs must not discriminate against employees with disabilities. This means the employer must provide reasonable accommodations to enable employees with disabilities to fully participate and earn any reward or avoid any penalty offered. This is similar to the reasonable alternative standard of the HIPAA requirements.
<b>Voluntary Requirement</b>		To be voluntary, the employer must not: (i) require employees to participate, (ii) deny coverage under its group health plans or particular benefit packages for non-participation, or limit the extent of such coverage; or (iii) take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees to coerce an employee to participate or threaten to discipline an employee for not participating.