

# Wellness and the Law

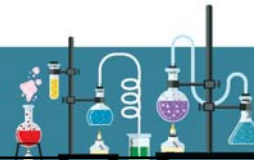
Structuring a Legally Compliant Workplace Wellness Program

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Ice Miller LLP

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## Today's Agenda

- Legal Framework – HIPAA, ADA, and GINA
- Wellness and Tax – When and how to tax rewards
- Case Studies on Common Wellness Program Designs

*Questions are welcome at any time.*

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# Legal Framework

What laws impact and govern the design of your company's wellness program?

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## HIPAA (Health Insurance Portability and Accountability Act)

- Prohibits discrimination against a participant on the basis of the participant's **health status**.
- HIPAA's wellness program rules:
  - **APPLY** to health-contingent wellness programs, including
    - Activity-only programs
    - Outcome-based programs
  - **DO NOT APPLY** to participatory wellness programs

*HIPAA applies only to wellness programs that are **group health plans**.*

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## HIPAA *(cont'd)*

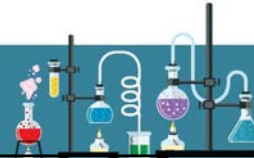
### **SUBJECT** to HIPAA Wellness Program Rules

- ✓ Meeting benchmarks on wellness screening
- ✓ Being a non-tobacco user
- ✓ Meeting weekly step goals
- ✓ Attending fitness classes

### **NOT SUBJECT** to HIPAA Wellness Program Rules

- ✓ Completing an HRA
- ✓ Attending a health seminar
- ✓ Tracking nutrition information
- ✓ Completing an annual physical

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## HIPAA *(cont'd)*

If a wellness program is subject to HIPAA's wellness program rules, it must comply with five standards:

Incentive Limit

Reasonable Design

Available Annually

Reasonable Alternatives

Disclosure Requirement

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## HIPAA *(cont'd)*

Incentive Limit	Aggregate reward for health contingent wellness programs cannot exceed 30% of cost of self-only coverage (EE + ER) or, if enrolled in family coverage, 30% of cost of family coverage (EE + ER). Limit can increase to 50% for non-tobacco use reward.
Available Annually	Individuals eligible for program must have opportunity to qualify for the reward at least once a year.
Reasonable Design	Program must be reasonably designed to promote health or prevent disease.
Reasonable Alternative	Must offer reasonable alternative for obtaining the reward if unreasonably difficult due to a medical condition for activity-only programs, and in all cases for outcome-based programs.
Disclosure Requirement	Must give notice of availability of reasonable alternative standard in all plan materials describing program.

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## ADA (Americans with Disabilities Act)

- Prohibits discrimination against an employee on the basis of the employee's **disability**.
- The ADA's wellness program rules:
  - **APPLY** to programs that
    - Make *disability-related inquiries* and/or
    - Require a *medical examination*
  - **DO NOT APPLY** to all other programs

*The ADA applies to wellness programs regardless of whether they are **group health plans**.*

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## ADA *(cont'd)*

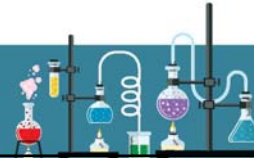
### **SUBJECT** to ADA Wellness Program Rules

- ✓ Participating in a wellness screening
- ✓ Completing an HRA with disability-related questions
- ✓ Testing negative for nicotine
- ✓ Completing an annual physical

### **NOT SUBJECT** to ADA Wellness Program Rules

- ✓ Meeting weekly step goals
- ✓ Attending fitness classes
- ✓ Self-certifying non-tobacco use
- ✓ Participating in weight loss programs

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## ADA *(cont'd)*

If your program is subject to the ADA's wellness program rules, it must comply with five standards:

Incentive Limit

Reasonable Design

Voluntary

(includes Disclosure Requirement)

Reasonable Accommodations

Confidentiality

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## ADA *(cont'd)*

Incentive Limit	Aggregate reward for all ADA-subject programs cannot exceed 30% of cost of self-only coverage (EE + ER).
Voluntary	Employees cannot be required to participate or denied benefits coverage or treated adversely in employment for non-participation. Written notice must be provided to employees each year that describes information to be collected, its purpose, and how it will be kept confidential.
Reasonable Design	Program must be reasonably designed to promote health or prevent disease.
Reasonable Accommodation	Accommodations must be made to enable employees with disabilities to earn whatever incentive is offered.
Confidentiality	Information collected should be provided to employer only in aggregate terms (except to administer plan); compliance with HIPAA Privacy Rule complies with ADA.

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## GINA *(Genetic Information Nondiscrimination Act)*

- Prohibits discrimination against an employee on the basis of the employee's **genetic information**.
- GINA's wellness program rules:
  - **APPLY** to programs that ask for the employee's genetic information, which includes:
    - The employee's family medical history and genetic tests
    - The employee's spouse's current medical information
  - **DO NOT APPLY** to all other programs

*GINA applies to wellness programs regardless of whether they are **group health plans**.*

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## GINA *(cont'd)*

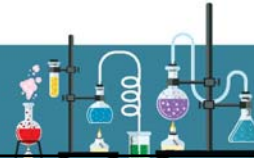
### **SUBJECT** to GINA Wellness Program Rules

- ✓ A spouse participating in a wellness screening
- ✓ A spouse completing an HRA
- ✓ An employee completing an HRA with family medical history questions  
*[not permitted to be tied to incentives]*

### **NOT SUBJECT** to GINA Wellness Program Rules

- ✓ A spouse participating in a walking challenge or attending fitness classes
- ✓ An employee completing an HRA that does not request genetic information

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## GINA *(cont'd)*

If your program is subject to GINA's wellness program rules, it must comply with the following requirements:

Incentive Limit

Reasonable Design

Voluntary

Spousal Authorization

Limits on Participation

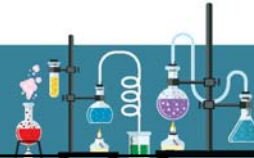
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## GINA *(cont'd)*

<b>Incentive Limit</b>	Aggregate reward for spouse's current medical information cannot exceed 30% of cost of self-only coverage (EE + ER).
<b>Voluntary</b>	Employer cannot deny health coverage to employee and/or family or retaliate against employee based on spouse's refusal to provide current medical information.
<b>Reasonable Design</b>	Program must be reasonably designed to promote health or prevent disease.
<b>Spousal Authorization</b>	Spouse must provide prior knowing, voluntary, and written authorization before providing his or her current medical information.
<b>Limits on Participation</b>	Incentives are not permitted in exchange for the employee's own genetic information, the spouse's own genetic information, or the employee's child's current medical information or genetic information.

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## Wellness and Tax

When and how to tax wellness program rewards and incentives

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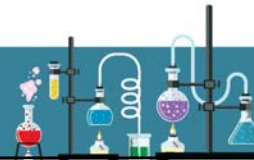




# Taxation of Wellness Incentives

- **GENERAL RULE:**
  - All income is taxable, unless an exception applies.
  - Employers cannot give “gifts” to employees.
  - If the incentive does not otherwise fall within an exception and it can be valued, it generally must be taxed.
- **PRINCIPAL EXCEPTION FOR WELLNESS:**
  - Employer-paid health care is not taxable.

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# Taxation of Wellness Incentives

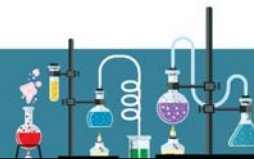
## **EXCLUDED** from Taxable Income

- ✓ Premium discounts
- ✓ Deductible reductions
- ✓ HSA contributions
- ✓ HRA contributions
- ✓ Health FSA contributions
- ✓ No cost health care services (e.g., free flu shots, mammograms)
- ✓ Use of onsite clinic

## **INCLUDED** in Taxable Income

- ✓ Gift cards (any value)
- ✓ Cash incentives
- ✓ Prize drawings
- ✓ PTO or vacation days
- ✓ Movie tickets
- ✓ Gym membership

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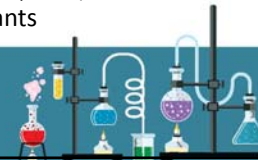
## Taxation of Wellness Incentives

- Is there a *de minimis* exception?
  - **YES**, but it is often misused by employers

“[A]ny property or service the value of which is (after taking into account the frequency with which similar fringes are provided by the employer to the employer’s employees) so small as to make accounting for it unreasonable or administratively impractical.”

- The IRS does not provide a dollar threshold for what constitutes *de minimis*
- **THINK**: complimentary fruit in the company kitchen, **not** \$20 Starbucks gift card drawings for wellness participants

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## Taxation of Wellness Incentives

- **COMPLIANCE CONSIDERATIONS**
  - For non-cash taxable incentives, impute amount as income and withhold taxes from other income earned
  - Make sure all taxable incentives are coded properly for payroll purposes
  - Employers can “gross up” a taxable reward so that employees receive additional money to cover the tax, but that amount is also taxable, so ensure that the gross-up calculation takes that into account
  - Review vendor agreements with wellness providers that directly pay incentives to determine tax and reporting obligations

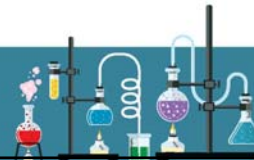
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# Case Studies

Legal considerations for common workplace wellness program designs

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## Program #1

## Let's Get Physical!

- **REQUIREMENTS**

- Complete an annual physical with personal physician or onsite clinic provider
- Complete an online health risk assessment that includes questions about health status and current or past medical conditions

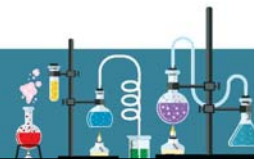
- **ELIGIBILITY**

- All employees of the Company (no spouses)

- **INCENTIVE**

- Employees enrolled in the Company's health plan receive a \$10/pay premium reduction
- Employees not enrolled in the Company's health plan receive a \$50 gift card

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## Program #1

## Let's Get Physical!

- **BREAKDOWN – What type of program is this?**

Participatory wellness program	NOT subject to HIPAA
The physical is a medical examination and the HRA includes disability-related inquiries	<b>SUBJECT to ADA</b>
The program is not offered to spouses and does not collect genetic information	NOT subject to GINA

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## Program #1

## Let's Get Physical!

- **COMPLIANCE CONSIDERATIONS**

<b>ADA Incentive Limit</b>	Confirm the incentive is within 30% of the cost of applicable single coverage option – the limit may be different for health enrollees than other employees.
<b>ADA Voluntary</b>	Provide ADA wellness disclosure annually prior to beginning of program year.
<b>ADA Confidentiality</b>	Ensure confidentiality, consider using third party vendor so employer only receives aggregate information.
<b>Taxation</b>	Premium discount is not taxable; \$50 gift card is taxable to non-health plan enrollees.

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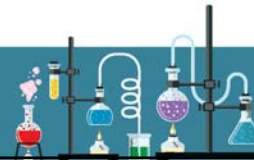
## Program #2

# Step Up for Fitness!

### • REQUIREMENTS

- Earn **1,000 points** in the year by choosing among the following activities:
  - Meet quarterly step goals – 100 points per quarter, up to 400 points
  - Participate in a weight loss class – 400 points
  - Attend 12 group fitness classes at a gym – 300 points
  - Participate in a community running or cycling event – 300 points each, capped at 600 points
  - Attend monthly brown bag lunches on fitness and nutrition topics – 100 per month, capped at 600 points

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## Program #2

# Step Up for Fitness!

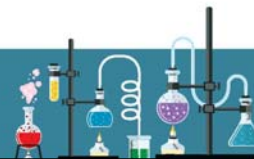
### • ELIGIBILITY

- All employees of the Company (regardless of health plan enrollment) and enrolled spouses of employees who are enrolled in the Company's health plan

### • INCENTIVE

- Employees not enrolled in the health plan are reimbursed for the cost of their personal gym membership up to \$75 per month
- Employees enrolled in the health plan receive a \$1,000 HSA contribution
- Spouses earn the employee an additional \$1,000 HSA contribution

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## Program #2

# Step Up for Fitness!

- **BREAKDOWN – What type of program is this?**

Health-contingent wellness program that is <i>activity-only</i>	<b>Subject to HIPAA, if a group health plan</b>
The program does not include a medical examination or disability-related inquiries	NOT subject to the ADA
The program is offered to spouses, but the incentives are not in exchange for the spouse's medical information	NOT subject to GINA

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## Program #2

# Step Up for Fitness!

- **COMPLIANCE CONSIDERATIONS**

<b>Group health plan analysis</b>	This program is not designed to rise to the level of a group health plan, so it would not be subject to HIPAA.
<b>Affordable Care Act mandates</b>	Employers often <i>expand</i> programs like this, so that they grow into a HIPAA-subject program over time. While the program can be designed to comply with HIPAA, it would violate the ACA; consider limiting to health plan enrollees at that point.
<b>Taxation</b>	Gym reimbursements are taxable to the employee; HSA contributions are not taxable.
<b>HSAs</b>	Ensure that HSA employer contributions are never higher than HSA limits in effect for tier of coverage.

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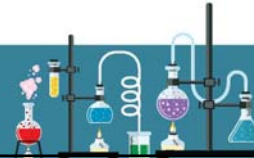
## Program #3

# Dial Down Those Digits!

- **REQUIREMENTS**

- **Complete** an annual biometric screening with personal physician or onsite clinic provider
- **Achieve** the Company benchmark or improve over last year's results in the following categories:
  - BMI (body mass index) measurement
  - Blood pressure
  - Cholesterol
  - Glucose
  - Non-tobacco user (self-certification)

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## Program #3

# Dial Down Those Digits!

- **ELIGIBILITY**

- Employees and spouses who are enrolled in the Company's health plan

- **INCENTIVE**

- Employees earn 8 PTO hours for completing the screening
- Employees earn a monthly premium reduction from \$20 - \$100 based on the results of their screening (\$20 per metric)
- Spouses earn the employee an additional premium reduction from \$20 - \$100 based on the results of their screening (\$20 per metric)

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## Program #3

# Dial Down Those Digits!

- **BREAKDOWN – What type of program is this?**

Health-contingent wellness program that is <i>outcome-based</i>	<b>Subject to HIPAA, if a group health plan</b>
The biometric screening is a medical examination	<b>Subject to the ADA</b>
The program offers an incentive in exchange for the spouse's medical information	<b>Subject to GINA</b>

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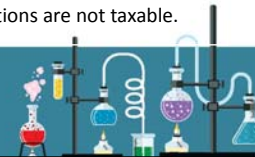
## Program #3

# Dial Down Those Digits!

- **COMPLIANCE CONSIDERATIONS**

<b>HIPAA, ADA, GINA Incentive Limits</b>	Confirm the incentive is within 30% of the cost of applicable coverage option (measured differently under each law). An increase to 50% is permitted with respect to non-tobacco certifications.
<b>ADA Voluntary</b>	Provide ADA wellness disclosure annually prior to beginning of program year.
<b>GINA Spousal Authorization</b>	Obtain consent from participating spouses <u>before</u> they complete the screening.
<b>HIPAA Disclosure</b>	Provide HIPAA disclosure on reasonable alternatives for all participants who do not achieve the standard to receive the reward.
<b>Taxation</b>	PTO hours earned as an incentive are taxable when used, in the same manner as regular PTO hours; premium reductions are not taxable.

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## Program #4

## No Butts Allowed!

- **REQUIREMENTS**

- Demonstrate your tobacco-free status by testing negative for nicotine use (cheek swab) **OR**
- Complete a tobacco cessation course

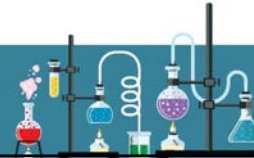
- **ELIGIBILITY**

- All employees of the Company (no spouses)

- **INCENTIVE**

- Employees enrolled in the Company's health plan receive a \$500 reduction to their annual deductible
- Employees not enrolled in the Company's health plan receive a cash incentive of \$150

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## Program #4

## No Butts Allowed!

- **BREAKDOWN – What type of program is this?**

Health-contingent wellness program that is *outcome-based*

**Subject to HIPAA, if a group health plan**

The cheek swab is a medical examination

**Subject to the ADA**

Spouses are not eligible to participate and the program does not collect genetic information

Not subject to GINA

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## Program #4

## No Butts Allowed!

### • COMPLIANCE CONSIDERATIONS

#### HIPAA Reasonable Alternative

The Company must make the tobacco cessation course available (or assist employees with finding one) and must pay for the cost of the course.

#### ADA Voluntary

Provide ADA wellness disclosure annually prior to beginning of program year.

#### HIPAA Reasonable Alternative

Employees cannot be required to quit smoking following completion of the course, but they can be required to complete the course each year to qualify for the incentive as long as they remain a tobacco user.

#### ADA Incentive Limit and HSAs

The deductible reduction cannot exceed 30% of the cost of single coverage, and may not reduce the deductible below the statutory minimum deductible for high deductible health plans.

#### Taxation

The cash incentive for employees not enrolled in the Company's health plan is taxable compensation, subject to regular withholding.

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## Program #5

## Living Well

### • REQUIREMENTS

- Make use of the Company's online clinic and wellness provider at least 3 times per quarter for any of the following services:
  - Preventive care (annual well visits, flu shots, etc.)
  - Routine care for minor illnesses and injuries
  - One-on-one health coaching sessions to achieve personal wellness goals
  - Disease management program
  - Weight management program
  - Group fitness classes
  - Group yoga/mindfulness sessions
  - Cooking and nutrition courses

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## Program #5

## Living Well

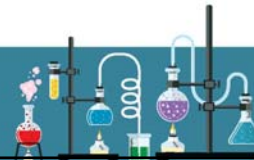
- **ELIGIBILITY**

- Employees, spouses, and dependent children ages 18-25 who are enrolled in the Company's health plan

- **INCENTIVE**

- Employees who log 3 visits per quarter at the onsite clinic – for any service offered at the clinic – will maintain a “Living Well” premium discount applied to premiums for the following quarter
- Eligible family members who log 3 visits per quarter can earn the employee an additional premium discount based on tier of coverage

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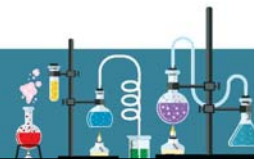
## Program #5

## Living Well

- **BREAKDOWN – What type of program is this?**

Health-contingent wellness program that is <i>activity-only</i>	<b>Subject to HIPAA, if a group health plan</b>
The program includes medical examinations	<b>Subject to the ADA</b>
The program may offer an incentive in exchange for the spouse's medical information	<b>Subject to GINA</b>

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## Program #5

## Living Well

### • COMPLIANCE CONSIDERATIONS

<b>HIPAA, ADA, GINA Incentive Limits</b>	Confirm the premium reduction is within 30% of the cost of applicable coverage option (measured differently under each law).
<b>ADA Voluntary</b>	Provide ADA wellness disclosure annually prior to beginning of program year.
<b>GINA Spousal Authorization</b>	Obtain consent from participating spouses at <u>first clinic visit</u> each year.
<b>HIPAA Reasonable Alternatives</b>	Reasonable alternatives are built-in to the design based on the range of services offered at the clinic.
<b>HSAs</b>	Many employers offer onsite clinic services at no cost or below fair market value cost to encourage their employees to use the clinic – but remember that HSA participants must pay fair market value for non-preventive medical services until the statutory HSA deductible is met to remain HSA eligible.

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Questions and Discussion  
Thank you!

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