

**This Webinar Will Start Momentarily.**  
Thank you for joining us.



# End of the Outbreak Period/ Wellness Programs

June 15, 2023

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*Presented by the Regulatory and  
Legislative Strategy Group*



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# Presentation Agenda



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## End of the Outbreak Period

- Generally
- Joint IRS and DOL rules
- Examples

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## Wellness Programs

- Participatory
- Health Contingent
  - Activity-Only
  - Outcomes-Based

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## Applicable Regulations Related to Incentives

- HIPAA
- ADA
- GINA

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## Other Wellness Program Regulatory Considerations

- COBRA
- Affordable Care Act (ACA) and Affordability
- ERISA
- Tax Considerations

**End of the COVID Outbreak  
Period**





# Generally: End of the Public Health Emergency

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## End of PHE Previously Recorded by the B&B Reg/Leg Team

### Public Health Emergency Ended on May 11, 2023

- This topic was presented on April 20, 2023. For more information on the impact of the end of the Public Health Emergency and COVID coverage within health plans, please listen to our previously recorded webinar presentation at:
  - » <https://www.bbrown.com/insight/recorded-webinar-transparency-update/>
- In summary, as of May 11, 2023, the end of the Public Health Emergency allows plan sponsors to have participants share in the cost of COVID related diagnostic/testing related services (including OTC tests) and OON COVID vaccines.

# Generally: End of the National/Outbreak Period

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## What We Are Covering Today: National Emergency/Outbreak Period

End of the National Emergency (April 10, 2023), and subsequent end of the Outbreak Period (informal government guidance July 10, 2023).

- Certain deadlines associated with health & welfare plans (e.g., deadlines under ERISA, IRS Code, COBRA or HIPAA) will **no longer be tolled/suspended** and the typical deadlines associated with health & welfare plans will once again apply to plan administrators/sponsors and plan participants after the end of the Outbreak Period.
- *We will be providing examples of the effect of the end of the Outbreak Period on annual run-out periods for Health FSAs, HIPAA Special Enrollment events and COBRA election periods/payments later in this presentation.*

# Joint IRS and DOL Rules

RULE ISSUED ON 5/4/20 EXTENDING VARIOUS DEADLINES

## Benefit Plan Deadlines Extended

Certain deadlines associated with health & welfare plans subject to HIPAA, COBRA, ERISA and the IRS Code were tolled during the COVID-19 National Emergency and related Outbreak Period. The tolling period from the date of the applicable relief was the earlier of:

- 1) One (1) year from the date they were first eligible for relief; or
- 2) 60 days after the announced end of the COVID-19 National Emergency (i.e., The Outbreak Period).

The deadlines associated with the following topics are subject to tolling:

- **HIPAA Special Enrollment**
- **COBRA - Participants**
- **COBRA Election Notice distribution by Plan Sponsors**
- **Claims deadlines and various appeal and external review deadlines (All ERISA H&W Plans)**



# Joint IRS and DOL Rules

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END DATE OF THE NATIONAL EMERGENCY-April 10, 2023  
**Outbreak Period Ends on July 10, 2023**

The Outbreak Period ends on July 10, 2023, and all tolled timelines will begin again.

## Examples

1. Claims run-out period under health FSA for PY ending 12/31/22 would begin to run again after 7/10/23
2. COBRA election notice sent to QB on 2/15/23 – 60-day election period would begin to run again after 7/10/23
3. Premium grace period (30 days) for COBRA premium due 3/1/23 would begin to run again after 7/10/23

# Joint IRS and DOL Rule

## Plan Amendments and Notices

### Plan Documents

- Does the expiration of the Outbreak Period trigger the need to amend plan documents or SPDs?
  - It depends on whether documents were amended to specifically reflect the extended time periods as a result of the Joint IRS/DOL Rule

### Notification of the End of the Outbreak Period

- Must employers/plan administrators provide notification of the end of the Outbreak Period?
  - Answer is unclear, however notification is recommended
  - For ERISA plans, **DOL Disaster Relief 2021-01** suggested that plan fiduciaries may have a fiduciary duty to notify individuals if “the end of the relief period for an individual action is exposing a participant or beneficiary to a risk of losing protections, benefits, or rights under the plan”
  - Watch for additional agency guidance



# Example: FSA Annual Run-Out Period

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## FSA Claims/Appeals Period

Employee Y participates in a calendar year health FSA plan from January 1, 2022, through December 31, 2022. The annual run-out period would have run from January 1, 2023, and ended March 31, 2023 (90 days); however, due to the Outbreak Period, Employee Y has 90 days from July 10, 2023 (**October 8, 2023**) to seek reimbursement for expenses incurred during January 1, 2022 – December 31, 2022.

**DCAP** – The tolling of the annual run-out period does not apply to Dependent Care FSAs.

**Does not extend date to incur expenses** – The tolled annual run-out period only applies to health FSA claims incurred during the plan year, and not to claims incurred after the end of the plan year.

# Example: HIPAA Special Enrollment

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## HIPAA Special Enrollment

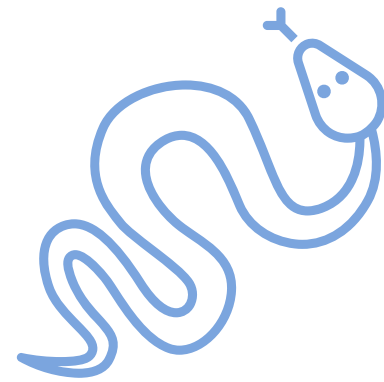
Employee Y is enrolled in group health plan coverage with a calendar year plan. On April 1, 2023, Employee Y gives birth to a child, and thereafter seeks to enroll herself and her child into the group health plan. The birth of a child requires at least a 30-day special enrollment period, and the employer adopts a 30-day special enrollment period for the birth of a child. Employee Y has until 30 days following July 10, 2023 (**August 9, 2023**) to enroll the newborn child into the health plan.

**Only applies to HIPAA Special Enrollment events** – HIPAA Special Enrollment events only include loss of coverage, birth/adoption of a child and marriage.

**Loss of Medicaid or CHIP** – Must provide at least 60 days from the event to enroll in the health plan due to loss of Medicaid or CHIP coverage.

# Example: COBRA Election Period

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## COBRA Election Period

Employee Y participates in a health plan under their employer, and Employee Y is terminated and therefore has a qualifying event for COBRA purposes on April 1, 2023. Employee Y is eligible to elect COBRA coverage under Employer X's plan and is provided a COBRA election notice on May 1, 2023. The deadline for Employee Y to elect COBRA coverage is 60 days following July 10, 2023 (**September 8, 2023**).

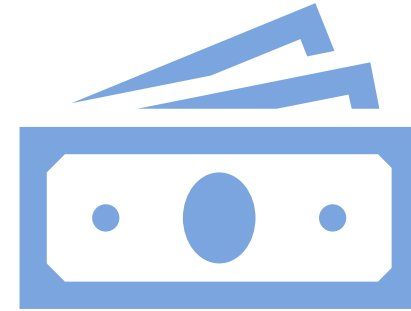
**COBRA qualifying events occurring more than 12 months before end of the outbreak period** – The 60-day election period begins immediately following 12 months after the COBRA qualifying event.

**Election Notice** – The plan administrator/sponsor should ensure that the COBRA election notice is timely and properly delivered to COBRA qualified beneficiaries.



# Example: COBRA Premium Payments

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## COBRA Premium Payments

Employee Y has a qualifying event and receives a COBRA election notice on October 1, 2022. Employee Y elects COBRA continuation coverage on October 15, 2022, retroactive to October 1, 2022. Employee Y has until 45 days following July 10, 2023 (**August 24, 2023**) to make the initial COBRA premium payment. The premium payments should also include premium payments for the months of October 2022 through July 2023.

**Due date for Initial COBRA Premium Payment August 24, 2023** – All COBRA premium payments due (including the initial COBRA Payment and all subsequent payments) would be due by **August 24, 2023**.

**Premium Payments due after the end of the Outbreak Period** – Subsequent payments after the end of the OP would be due on the first day of each month, subject to a 30-day grace period. (August 2023 COBRA premium is due on August 30, 2023)

**Generally: Wellness Programs**



# Generally: Wellness Programs

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## Definition of a Wellness Program

An employer-sponsored program that seeks to improve and promote health and fitness in the workplace. This typically includes premium discounts, but can also include cash rewards, paid gym memberships or other incentives to participate. Some wellness programs focus on assisting employees in diabetes management, promoting active lifestyles, smoking cessation, weight loss or attending a preventive health screening.

### Related to Healthcare

Program focus is on health-based improvement/incentives.

### Does Not Apply to Non-Healthcare Related Coverage

Our focus today, although the topic is important, is not oriented around financial well-being.

### Related to Group Health Plans

We will be addressing incentives/rewards that are either related to a group health plan or are provided as part of a wellness program that is itself considered a group health plan.

# HIPAA: Wellness Program Incentives/Surcharges

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## Reward/Incentive

Providing a “benefit” to employees for participating/satisfying goal.



## Surcharge

A penalty for engaging in certain behaviors/having certain health outcomes.

We will be using the term “rewards/incentives” for the remaining part of the presentation, as the terms “reward” and “surcharge” can be used interchangeably. Rewards can be provided in many forms, but the most common are a reduction to employee premium contributions or employer contributions to an HRA/HSA.

**Generally: Regulations  
Surrounding Wellness  
Programs**





# Generally: Regulations Surrounding Wellness Programs

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## Regulations

### HIPAA

Prohibits discrimination among similarly situated individuals based on the presence or absence of a health factor in relation to eligibility, premiums or contributions. There is an exception for voluntary wellness programs that meet specific standards.

### ADA

Prohibits employers from making disability-related inquiries or requiring medical examinations of their employees. There is an exception for voluntary wellness programs that maintain information according to confidentiality requirements and do not use the information to discriminate against an employee.

### GINA

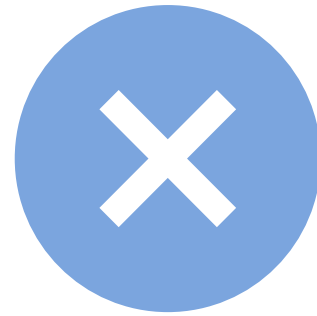
Prohibits employers from using or requesting genetic information of employees and employees' family members for underwriting purposes, or in the determination of employee contributions towards benefits. There is an exception for voluntary wellness programs that meet specific standards.

# HIPAA: Wellness Programs



# HIPAA: Wellness Programs

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## **Not a Group Health Plan –**

Rewards not related to, or a part of, the group health plan.



## **Group Health Plan –**

- ✓ Affects healthcare premiums
- ✓ Is part of the group health plan
- ✓ Is itself a group health plan

It is also important because whether the wellness program is considered a “group health plan” determines if the plan is also subject to ERISA, COBRA and potentially other applicable laws.

# Wellness Program Types Under HIPAA

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## Participatory

- A program that either does not provide an incentive; or
- Provides an incentive but the conditions to obtain the reward are not based on a health factor.



## Health-Contingent

- A program that provides an incentive based on a health factor
- Two kinds of Health-Contingent Programs
  - **Activity-Based** – The reward is contingent on the completion of an activity
  - **Outcomes-Based** – The reward is contingent on a health outcome

# HIPAA: Participatory Wellness Programs





# HIPAA: Participatory Wellness Incentives

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## Participatory Wellness Programs – Definition and Examples

Incentive/Non-incentive only based upon participation in the wellness program, not related to a health factor and program is offered to all similarly situated individuals.

- Examples of Participatory Wellness Programs
  - » Educational Seminars
  - » Gym Membership
  - » Tobacco Cessation Education
  - » Diagnostic Testing (without specific health standards)

# HIPAA: Participatory Wellness Incentives

## Participatory Wellness Programs – Rewards and Incentives

A wellness program that only offers a reward/incentive for employees (and any family members) to participate in the program and does not require any health contingent goals to be met have the following reward/incentive limits:

### No incentive limits

# **HIPAA: Health-Contingent Wellness Programs**



# HIPAA: Health-Contingent Programs



## Activity-Based

- ✓ Exercise/Diet Programs without required outcomes
- ✓ Flu Shots/Immunizations



## Outcomes-Based

- ✓ Exercise/Diet Programs with required outcomes
- ✓ Tobacco free status (employee affidavit or with testing)
- ✓ Diagnostic Testing (with goals)

If rewards are based upon a health factor, HIPAA imposes certain standards on the wellness program for it to remain a “voluntary” and compliant wellness program under the HIPAA rules.

# HIPAA: Health-Contingent Wellness Program Rules

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## Rules

- Reasonably Designed

- » Must be reasonably designed to promote health or prevent disease
- » Has a reasonable chance at improving health/preventing disease
- » Not overly burdensome
- » Is not a disguised effort at discriminating against employees based upon a health factor
- » The methods chosen to promote health/prevent disease are not highly suspect

- Uniform Availability

- » The full reward (100% of the reward) must be available to similarly situated participants (applies to both participatory and health-contingent wellness programs) regardless of date of completion

- Frequency of Reward

- » Eligible individuals must be able to qualify for the reward at least once per year



# HIPAA: Health-Contingent Wellness Programs

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## Health-Contingent Wellness Programs – Reasonable Alternative Standard

Reasonable Alternative Standard (RAS) – Must be offered to those that are unable to satisfy the conditions of the Health-Contingent Wellness Program, and different than the ADA requirement of “reasonable accommodation” based upon disability.

- Activity-Only Wellness Programs
  - » Must be provided to any individual where:
    - It is unreasonably difficult due to a medical condition to participate in the activity; or
    - It is medically inadvisable to attempt to participate in the activity.
  - » Health plan may seek verification of medical condition (e.g., doctor’s statement)
- Outcomes-Based Wellness Programs
  - » Must be offered to all individuals, and cannot take into consideration medical condition
    - Health plan cannot request verification (e.g., Cannot request doctor’s statement)

# ERISA: Wellness Programs

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## ERISA

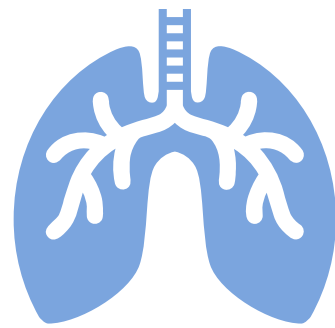
- If the health plan is subject to ERISA and the wellness plan is considered a group health plan under ERISA, the wellness program is subject to ERISA



## Health-Contingent Wellness Programs

- Information about the availability of a RAS is required in all plan materials that describe the terms of the health-contingent wellness program
  - Notice must include contact information for obtaining the RAS
  - Recommendations of an individual's personal physician will be accommodated
- Notice of RAS is not required if plan materials limit information to mentioning a wellness program, in general, is available (and no other description of wellness program terms)

# HIPAA: Health-Contingent Wellness Incentives



## Non-Tobacco Related Incentive

Up to **30%** of the total premium cost of coverage for the “benefit package” available to those eligible for the wellness program.



## Tobacco-Related Incentive

Up to a total of **50%** (all incentives combined) of the total premium cost of coverage for the “benefit package” available to those eligible.

Reward thresholds are based upon who is eligible to receive the wellness reward (employee, or employee and family members) and upon the “total amount of employer and employee contributions towards the cost of coverage for the benefit package under which the employee is (or the employee/spouse/dependents are) receiving coverage.” **Caution:** Integrated HRA.

# **ADA and GINA: Wellness Incentives and Lawsuits**



# ADA and GINA: Wellness Incentive Limits



## *Incentive Regulations Vacated*

Court found that EEOC wellness regulation rules could be “coercive” under the ADA/GINA rules. EEOC has not yet adopted final rules for a “voluntary” wellness program.



## *Class Action*

Class action lawsuit against an employer that imposed a \$25 per week (\$1,300 per year) penalty for employees who did not participate in wellness program. Significant settlement (excess of \$1M for employees).

**Current Rules:** Plan Sponsors with wellness programs should consider offering “de minimis” rewards/incentives for those activities/programs that may implicate the ADA or GINA and could then offer a separate health-contingent wellness incentive for a separate activity/program within the wellness program that is solely subject to the HIPAA rules (that does not implicate the ADA/GINA). However, the sum of these “de minimis” incentives when added together with all other rewards under the wellness program, may only be a maximum of 30% (or 50% or less for tobacco-related incentives) of the cost associated with the benefit package option under the HIPAA wellness program rules.

# ADA: Wellness Programs





# ADA: Wellness Programs

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## Subject to the ADA

Wellness program that includes a disability inquiry or medical examination.

**Disability Inquiry** – Question(s) that are likely to elicit information about a disability.

**Medical Examination** – A procedure/test that seeks information about an individual's physical/mental impairment/health.

# ADA: Wellness Programs

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## ADA: Wellness Program Must Be Voluntary

Elements of a voluntary wellness program:

- Employees cannot be required to participate
- Employers cannot take any adverse employment action/retaliate against, interfere with, coerce, intimidate or threaten employees
- Employers must provide to employees a prescribed notice provided by the EEOC:
  - » <https://www.eeoc.gov/regulations/sample-notice-employer-sponsored-wellness-programs>
  - » Employees must receive notice prior to providing health information, and within enough time to properly decide whether they want to participate in the wellness program

# ADA: Wellness Programs

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## ADA: Wellness Program

Additional requirements for wellness programs under the ADA:

- Reasonably Designed – Must be designed to promote health or prevent disease
- Reward/Incentive – **Unclear at this time (de minimis standard)**
- Reasonable Accommodation – Although the EEOC has not adopted a requirement for a RAS, a reasonable accommodation must be provided to all employees with a disability so that they are offered the same benefits and privileges provided to employees without a disability
- Gatekeeping Prohibited – Cannot require participation as condition for eligibility under the group health plan

# ADA: Wellness Programs

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## Examples of ADA Wellness Programs

The following examinations/inquiries are examples of wellness programs that could implicate application of the ADA rules:

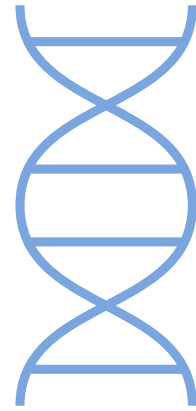
- Health Risk Assessment (HRA)
- Blood pressure screening
- Testing for tobacco as part of a tobacco cessation program
- Range-of-motion tests for muscle strength and motor function
- Medical exams measuring heart rate or blood pressure
- Asking an employee whether they have (or ever had) a disability, how they became disabled or the severity of an employee's disability
- Asking for information related to an employee's disability

# **GINA: Wellness Programs**



# GINA: Wellness Programs

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## Subject to GINA

If a group health plan or employer requests information that is related to an employee's (or family member's) medical history or genetic information.

**Title I** – Group health plans are prohibited from collecting genetic information (e.g., family medical history) for underwriting purposes.

**Title II** – Genetic information or medical information can be requested, so long as it is “voluntary”.

# GINA: What Is Genetic Information?

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## Genetic Information:

- Information about the individual's genetic tests;
- The genetic tests of the individual's family member/spouse;
- The manifestation of disease or disorder in the individual's family member/spouse; and
- The individual's/spouse's request for genetic research, counseling and education.

## Genetic Test

- A test involving analysis of human DNA, RNA, chromosomes or metabolites that detect genotypes, mutations and chromosomal changes





# GINA: Wellness Programs

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## Examples of GINA Wellness Programs

### Examples:

- Analysis of human DNA, RNA, chromosomes; or
- Metabolites that detect genotypes, mutations and chromosomal changes
- Requests for individual's family medical history or spouse's medical history

### Not Considered GINA Information:

- Body mass index
- Blood pressure
- Cholesterol
- Age
- Sex
- Tobacco use



# GINA: Wellness Programs

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## GINA: Wellness Programs

Wellness programs require separate analysis under both GINA Title I and GINA Title II.

- GINA Title I Wellness Programs – Applies to GHPs or wellness programs that are part of a GHP
  - » “Underwriting purposes” includes eligibility for the plan and determination of/contribution towards premium
    - **Caution:** Health Risk Assessments that contain requests for family medical history or genetic information
      - Employees should not complete the HRA prior to (or in connection with) enrollment in the health plan
      - No HRA-based incentives, or tie incentives to an HRA that does not request info related to GINA

# GINA: Wellness Programs

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## GINA: Wellness Programs

- GINA Title II Wellness Programs – Only apply if the wellness program is not a GHP or is not part of a GHP
  - » Wellness program can request medical/GINA information, so long as it is “voluntary”
    - Reasonably Designed – Must be designed to promote health or prevent disease, and not highly suspect
    - Not Overly Burdensome
    - Non-Discriminatory - Is not a disguised effort to discriminate against employees for employment purposes based on GINA information
    - Authorization – Employer receives prior knowing/voluntary authorization
    - Non-Disclosure to Employer – The GINA information is not shared with anyone in the workplace, including those that make employment decisions (aggregate reporting is acceptable)
    - Reward/Incentive – **Amount of incentive/reward is unclear at this time (de minimis standard)**
      - If HRA that includes GINA questions, must provide language reasonably likely to be understood by individuals prior to taking the HRA that the reward/incentive is being presented to individuals regardless of whether they complete GINA questions
      - An employer may offer reward/incentive for genetic information of employee/spouse, but not of an employee’s child
      - Gatekeeping Prohibited – Cannot require participation as condition for eligibility under the GHP

# Other Rules for Wellness Programs



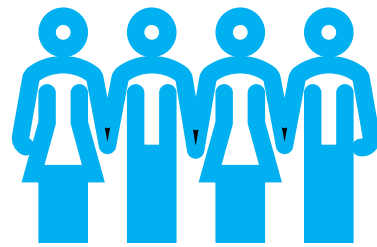
# Wellness Programs: Family Member Incentives

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## Incentive for One Person

- Incentives may be provided separately for each member participating in the wellness program (e.g., one reward for employee participation in the wellness program, and a separate reward provided for a spouse's participation in the wellness program)



## One or More Incentives Requiring Multiple Persons to Complete Wellness Program to Receive Reward

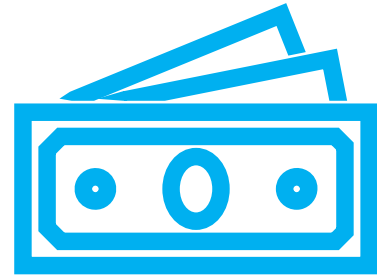
- A program that may only provide rewards/incentives if the employee **and** a family member complete a wellness activity/program, but no reward if only one person completes the activity or program, could be problematic
- Issues
  - **Reasonably Designed** – Would it be reasonably designed to promote health/prevent disease if the reward is contingent upon completion by an employee's family member(s)?
  - **Discrimination Based on Family Status** – Different treatment based upon family status?

# Other Regulations: ACA and Coverage Affordability



# ACA: Affordability of the Coverage

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## ACA: Coverage Affordability and Penalties

- If a plan is not considered “affordable” to a FT employee, the employer could be subject to penalties for failure to offer an affordable plan to an employee that purchases coverage in the Marketplace/Exchange and receives a premium tax credit

## Wellness Program Incentives and Coverage Affordability Under the ACA



- A wellness program offering premium contribution incentives should ensure that the plan would be considered affordable under the ACA
- Incentives
  - **Non-Tobacco Related Premium Incentives** – An employer must calculate the affordability of the plan based upon all employees failing to receive the premium incentive under the wellness program (i.e., all employees are responsible for the premium contribution penalty)
  - **Tobacco-Related Premium Incentives** – An employer may calculate the affordability of the plan based upon all employees successfully completing the wellness program and receiving the premium incentive under the wellness program (i.e., no premium penalty under the wellness program)

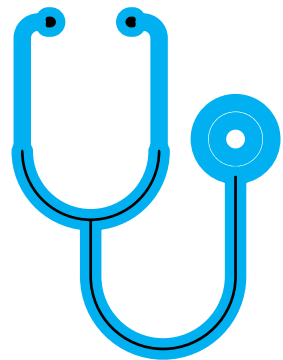


# Other Regulations: Applicable IRS Code Regulations



# IRS: Taxability of Wellness Incentives

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## IRS: If Rewards/Incentives Are Used Towards Healthcare

- If a plan contributes to an HSA, HRA or FSA or reimburses any healthcare-related out-of-pocket expenses, most likely these amounts can be provided to the participant without imputing income to the employee/participant



## Wellness Program Incentives that Are in the Form of Cash/Items

- A wellness program that offers cash or “cash-equivalent” rewards/incentives would be taxable to the employee/participant
  - There is no “de minimis” exception to cash rewards/incentives (e.g., \$5 gift card must be imputed as income to the employee)
- Items
  - **De minimis Items** – “de minimis” prize items are not taxable to participants (t-shirt that has a value of \$10 or less)
  - **Non-de minimis Items** – An employer must impute income to the employee for any items that are not considered “de minimis” to the employee (e.g., iPad)



# Summary

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Be familiar with the upcoming deadlines associated with the end of the Outbreak Period.

Review your wellness program for potential HIPAA, ADA and GINA violations.

# HRCI and SHRM Credits

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This Program, **ID No. 627220**, has been approved for 1.00 HR (General) recertification credit hours toward aPHR™, aPHRi™, PHR®, PHRca®, SPHR®, GPHR®, PHRi™ and SPHRi™ recertification through HR Certification Institute® (HRCI®).



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