



# 7 Tips to Tackle Wellness Program Compliance

After a federal court ruled that effective Jan. 1, 2019, workplace wellness programs must be fully voluntary (without monetary incentives or penalties), employers were left with more questions than answers. We huddled up a panel of experts to offer up expertise for employers on how to move forward.

## Threading the needle: Wellness program elements – okay or not okay?

**1** **Not asking medical questions means taking away Health Risk Assessments, correct? Or, are health questionnaires/screenings still okay, if they aren't pushed with incentive dollars or penalties?**

Employers still can include health risk assessments or biometric screenings in their wellness programs – but participation in these programs must be voluntary, meaning that they cannot be mandated or financially coerced.

Until the Equal Employment Opportunity Commission (EEOC) provides additional guidance that clarifies the allowable incentives permitted, employers cannot be certain that any incentive will comply with the voluntary requirements. Because of this, most employers with such screenings/assessments will either add alternative means by which an employee can earn an incentive, or remove the financial incentives altogether.

**2** **How are “medical exams or queries” defined?**

The statute says the requirement of a medical exam, not the medical exam itself, would trigger the voluntariness concern. Nonetheless, it is up in the air right now. This will have to be determined in the rules or by the courts.

Are such programs still disallowed even if the employer does not see either of the results?

The answer is straightforward: Yes. And honestly, if you give someone a \$50 gift card for participating, I seriously doubt anyone is going to mind – no matter what the final rules say, if indeed they are published by January 1 (or at all). There are many “voluntary” activities where the sponsor gives the volunteer a little gift at the end.

## Crunching the calendar

**3** Does the ruling apply on a plan-year or calendar-year basis? For example, if a wellness plan year is July 1, 2018 through June 30, 2019, how will the Jan. 1, 2019 effective date affect that fiscal-year plan?

It would be considered an open question. It appears that if, for example, employers change the monthly contribution starting in 2018 based on participating vs. not participating in a wellness screen in 2018, they may have to change it back starting in January to no differential. This would be a question for in-house counsel, who may recommend that, to be on the safe side, all differentials end on Dec. 31.

On the other hand, employers whose FY stretches through June 2019, but all clinical wellness activities (like screening) and all incentives/penalties take place in 2018, are likely okay.

**4** Wouldn't the 2013 tri-agency rules under the Affordable Care Act still be in effect if the EEOC rules are vacated?

Yes. The 2013 rules are still in effect, but employers should be cautioned that while those rules permit an incentive attached to voluntary wellness plans, the prior guidance does not provide a definition of "voluntary," unlike the recently vacated rules. Without a common understanding of what is considered voluntary by the agencies, employer programs that offer incentives for participation in a biometric screening or medical exam are potentially at risk of noncompliance.



## No money, more problems? Points, penalties, premiums, oh my!

**5** Low incentives could still be regarded as coercive. How low is non-coercive? What are best practices for wellness program design based on intrinsic motivation?

In order for incentives to be effective, they need to be meaningful to the individual. So, the amount of the incentive is less important than the type of incentive. A paid day off from work may be more influential to one employee than a contribution to someone's health savings account. Giving employees choice may be more influential.

**6** What if biometric screenings are not mandatory and only allow employees to earn points (not financial incentives) for participating in it?

It depends what the points are used for. In the absence of rules, points used for extra PTO, for example, would be treated differently by a court than points exchanged for something of direct monetary value. Once again, an educated guess in what's already a gray area.

**7** Are tobacco-use premium discounts/surcharges affected by this change? If so, how can we make tobacco-cessation programs something "for" employees rather than "to" employees?

Premium surcharges for people who use tobacco were first used in calculating life insurance rates. As long as employers rely upon an employee's response as to whether they use tobacco, the surcharge should not be affected.

The best ways to make certain a tobacco-cessation program is being done for employees is two-fold:

1. Make the program voluntary.
2. Let employees choose from a menu of approaches that have been shown by research to work.

Keep in mind that according to most estimates, it takes 8-12 quit attempts before stopping permanently.



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