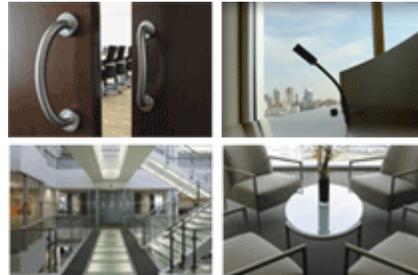




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## Does Your Wellness Program Need a Check-Up?

*Complying With Recent Guidance on Wellness Programs*



by **B. David Joffe**

The Employee Benefits Security Administration (“EBSA”), which is part of the Department of Labor, recently released Field Assistance Bulletin (“FAB”) No. 2008-02 regarding wellness programs. Wellness programs broadly include programs designed to promote health or prevent disease including disease-management, smoking-cessation, and case-management programs. The FAB provides a checklist with examples and tips on the wellness program regulations and related compliance criteria. It supplements regulations issued in December 2006 under the Health Insurance Portability and Accountability Act (“HIPAA”) regarding nondiscrimination based on health factors.

### The Regulations

The HIPAA nondiscrimination regulations generally prohibit a group health plan or group health insurance issuer from denying eligibility for benefits based on a health factor and from charging an individual a higher premium than a similarly situated individual based on a health factor. Health factors broadly include: health status, medical condition (physical and mental), claims experience, receipt of health care, medical history, genetic information, evidence of insurability, and disability. However, the regulations contain an exception that allows plans and issuers to vary benefits (including cost-sharing mechanisms) and premiums or contributions based on whether an individual has met the standards for a wellness program. The regulations apply beginning on the first day of the first plan year beginning on or after July 1, 2007. Therefore, calendar-year plans must comply beginning January 1, 2008.

### The Checklist

In light of questions and comments the EBSA received on the HIPAA nondiscrimination regulations, the EBSA decided to publish a checklist. The checklist contains five questions that are used to determine compliance with the regulations:

1. “Insert the first day of the current plan year: Is the date after July 1, 2007?”
  - The regulations apply for plan year beginning on or after July 1, 2007.
2. “Does the plan have a wellness program (even if it is not labeled as such)?”
  - A wide range of programs may fall within the requirements such as disease management programs, smoking cessation programs, and case management programs.
3. “Is the wellness program part of a group health plan (subject to Part 7 of ERISA)?”

- The requirements only apply if the program is part of a group health plan. If the employer has a separate employment policy (such as one that prohibits smoking), such a policy is not covered by the regulations, though it might raise concerns under other federal and state laws.

4. “Does the program discriminate based on a health factor?”

- Discrimination based on a health factor generally involves providing discounts; rebates; or different copayments, coinsurance, or deductibles based on meeting certain health criteria. For example, a plan may require a cholesterol level under 200 to receive a 20% discount on premiums.

5. “If the program discriminates based on a health factor, is the program saved by the benign discrimination provisions?”

- The regulations do not prohibit discriminating in favor of individuals based on a health factor. For example, a plan could waive deductibles for participants with diabetes if they enroll in disease management educational classes, provided the plan does not require meeting a standard to get the deductible waiver.

### **Wellness Programs**

A wellness program must meet the following five compliance criteria (questions):

1. “Is the amount of the reward offered under the plan limited to 20 percent of the applicable cost of coverage?”

- The 20% amount is tied to employee-only cost; however, if employees and dependents are eligible, it applies to the cost of employee and dependent coverage. Also, the 20% amount applies to all wellness programs combined.

2. “Is the plan reasonably designed to promote health or prevent disease?”

- The program cannot be overly burdensome, be a subterfuge for discrimination, or be highly suspect in the methods chosen.

3. “Are individuals who are eligible to participate given a chance to qualify at least once per year?”

4. “Is the reward available to all similarly situated individuals? Does the program offer a reasonable alternative standard?”

- The alternative must not be unreasonably difficult to satisfy due to a medical condition, and it must not be medically inadvisable for the individual to attempt to satisfy the standard.

5. “Does the plan disclose the availability of a reasonable alternative in all plan materials describing the program?”

- The plan or issuer must disclose the alternative standard “in all plan materials describing the program.” Sample language is provided in the regulations and FAB.

### **Recommendations**

Employers (and issuers) need to review their plans to determine whether they include a wellness component and whether such component complies with the nondiscrimination regulations. The FAB should be helpful to employers and issuers in determining whether they have such programs and whether such programs are

nondiscriminatory.

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If you have any questions about the requirements for wellness programs, please contact one of the [Employee Benefits and Executive Compensation](#) attorneys at Boulton, Cummings, Conners & Berry PLC:

Martha L. Boyd  
615.252.2357  
[mboyd@boultoncummins.com](mailto:mboyd@boultoncummins.com)

Charles M. Cain II  
615.252.2330  
[ccain@boultoncummins.com](mailto:ccain@boultoncummins.com)

Andrew Elbon  
615.252.2378  
[aelbon@boultoncummins.com](mailto:aelbon@boultoncummins.com)

B. David Joffe  
615.252.2368  
[djoffe@boultoncummins.com](mailto:djoffe@boultoncummins.com)

Gordon Earle Nichols  
615.252.2387  
[gnichols@boultoncummins.com](mailto:gnichols@boultoncummins.com)

John M. Scannapieco  
615.252.2352  
[jscannapieco@boultoncummins.com](mailto:jscannapieco@boultoncummins.com)

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**Roundabout Plaza, 1600 Division Street, Suite 700 Nashville, TN 37203**  
**615.244.2582 [www.boultoncummins.com](http://www.boultoncummins.com)**

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