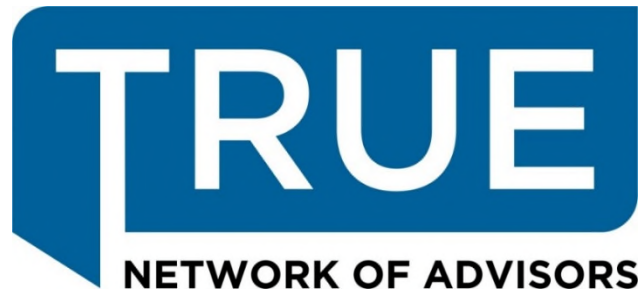


# 2021 Wellness Program Update



Presented By  
Matthew Cannova,  
Maynard, Cooper & Gale, P.C.  
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# AGENDA

- ▼ **Federal Minimum Wage Update**
- ▼ **Outbreak Period Extensions Update**
- ▼ **Vaccine Program FAQs**
- ▼ **Update on EEOC Wellness Program Regulations**
- ▼ **HIPAA Wellness Program Rules Review**

# Federal Minimum Wage Update

- ▼ On February 25, 2021, the Senate parliamentarian issued a decision that defeated the Biden Administration's plan to pass the minimum wage hike as part of the \$1.9 Trillion Stimulus legislation
  - ▼ If Administration wants to pass that bill without any Republican support, they have to use the "reconciliation" process, which can only be used for budgetary matters, and the minimum wage is not one of them
- ▼ In anticipation of roadblocks, House Democrats introduced a separate minimum wage bill in the House that mirrors their phased in minimum wage proposal
  - ▼ Phased in approach would increase the current federal minimum wage from \$7.25/hr to \$9.50/hr in 2021
  - ▼ Skip 2022
  - ▼ Then phase in remaining increases incrementally over 2023, 2024, and 2025

# ***Outbreak Period*** Extensions Update

- ▼ Statutory authority to extend certain deadlines for up to one year
- ▼ DOL issued guidance to clarify and explain (necessary) end to Outbreak Period Extensions
  - ▼ *Individuals and plans with timeframes that are subject to the relief under the Notices will have the applicable periods under the Notices disregarded until the earlier of (a) 1 year from the date they were first eligible for relief, (2) or (b) 60 days after the announced end of the National Emergency (the end of the Outbreak Period). On the applicable date, the timeframes for individuals and plans with periods that were previously disregarded under the Notices will resume. In no case will a disregarded period exceed 1 year.*

# ***Outbreak Period*** Extensions Update

- ▼ **HIPAA Special Enrollment Period**
- ▼ **COBRA**
  - ▼ **COBRA Election Period**
  - ▼ **COBRA Premium Payment Period**
  - ▼ **COBRA Notices from Employees regarding Divorce/Legal Separation, Dependent Child's Eligibility Ceases, and Disability**
- ▼ **Claims Procedures**
  - ▼ **Plan's Benefit Claim Filing Deadline**
  - ▼ **ERISA Adverse Benefit Determination Appeal Deadline**
  - ▼ **ERISA External Review Request Deadline**
  - ▼ **Deadline to Submit Additional Information Related to External Review Request**
- ▼ **Certain Notice and Disclosure Requirements**

# ***Outbreak Period*** Extensions Update

- ▼ 2020 Guidance extended deadlines/timeframes by disregarding the “***Outbreak Period***”
  - ▼ The period from March 1, 2020 until **60 days after** the announced end of the National Emergency period (or a later date announced in subsequent guidance)
  - ▼ Applies retroactively to March 1, 2020
- ▼ ***Examples used April 30, 2020 as the assumed end-date of the National Emergency*** 😂😂😂😂
  - ▼ The assumed April 30 end-date resulted in an Outbreak Period running from March 1, 2020 through June 29, 2020 (the 60th day after the assumed end of the National Emergency)
- ▼ Departments intend to issue additional guidance if there are different Outbreak Periods for different parts of the country

# ***Outbreak Period*** Extensions Update

- ▼ Authority to extend deadlines is capped at one year
- ▼ Two scenarios for end of extensions:
  - ▼ Case-by-case basis
  - ▼ Universal end
  - ▼ In no case will a disregarded period exceed 1 year Authority to extend deadlines is capped at one year
- ▼ Case-by-case basis
  - ▼ DOL takes position that the extensions apply on a case-by-case basis
  - ▼ One-year extension runs from the date the individual's deadline first extended
- ▼ Universal End
  - ▼ If earlier, the extensions end for everyone on date that is 60 days after the announced end of the National Emergency (the end of the Outbreak Period)

# ***Outbreak Period*** Extensions Update

- ▼ **What happens at the end of the extension?**
  - ▼ **On the applicable date, the timeframes for individuals and plans with periods that were previously disregarded under the Notices will resume**
    - ▼ **Deadline/timeline picks back up from there**
    - ▼ **The end of the extension is not the same as the end of the deadline – the applicable timeline still runs from the end of the extension**



# ***Outbreak Period*** Extensions Update

## ▼ Examples:

- ▼ COBRA qualified beneficiary would have been required to make a COBRA election by **March 1, 2020**, but the Outbreak Period Extensions guidance delayed the COBRA election period -- Extension ends on March 2, 2021
- ▼ COBRA qualified beneficiary would have been required to make a COBRA election by **March 1, 2021**, but the Outbreak Period Extensions guidance delayed the COBRA election period -- Extension ends on March 2, 2022
  - ▼ OR earlier Universal Ending date—i.e., 60 days after the end of the Outbreak Period
- ▼ Likewise, if a plan would have been required to furnish a notice or disclosure by March 1, 2020, the relief under the Notices would end with respect to that notice or disclosure on February 28, 2021. The responsible plan fiduciary would be required to ensure that the notice or disclosure was furnished on or before March 1, 2021.
- ▼ In all situations, the delay for actions required or permitted that is provided by the Notices does not exceed 1 year

# ***Outbreak Period*** Extensions Update

## ▼ ***Encouraged Relief***

- ▼ ***The Department of Labor recognizes that affected plan participants and beneficiaries may continue to encounter an array of problems due to the ongoing nature of the COVID-19 pandemic in circumstances under which relief under the Notices is no longer available due to the statutory one-year limit on the Agencies' authority to grant relief. The guiding principle for administering employee benefit plans is to act reasonably, prudently, and in the interest of the workers and their families who rely on their health, retirement, and other employee benefit plans for their physical and economic well-being. This means that plan fiduciaries should make reasonable accommodations to prevent the loss of or undue delay in payment of benefits in such cases and should take steps to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established time frames.***

# ***Outbreak Period*** Extensions Update

## ▼ Fiduciary principles

- ▼ Where the plan administrator or other responsible plan fiduciary knows, or should reasonably know, that 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, the administrator or other fiduciary should consider affirmatively sending a notice regarding the end of the relief period

## ▼ Amend/re-issue notices and disclosures

## ▼ Provide notice of other options for participants who may lose coverage

- ▼ E.g., exchange/marketplace coverage – ***Special*** Special Enrollment Period on Federal Marketplace February 15 and continuing through May 15

# Vaccine Program FAQs

- ▼ **Workplace vaccination mandates generally permissible**
  - ▼ Corporate culture
  - ▼ Consider encouragement (wellness programs)
  - ▼ Communication is important

# EEOC Issues Guidance on Employer Vaccine Requirements

## ▼ EEOC Guidance on Employer Vaccine Requirements

- ▼ On December 16, 2020, EEOC issued updated FAQs on its COVID-19 page regarding employer vaccination requirements

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (see Section K)

- ▼ EEOC acknowledges that employers **may require employees to provide proof of vaccination**
- ▼ **To adequately document the requirement for ADA purposes**, the employer should have a **written policy** that specifies it is a qualification standard for employment that “an individual shall not pose a direct threat to the health or safety of individuals in the workplace.”
- ▼ **Reasonable accommodations** (health factor, pregnancy, religion)

# Vaccine Program FAQs

- ▼ **Vaccine Program as GHP?**
  - ▼ **Depends on structure**
  - ▼ **Who covers the cost?**
  - ▼ **How provided?**

# Vaccine Program FAQs

## ▼ Employees' Objections

- ▼ Individual employee objections about COVID-19 that are personal to the employee's circumstances, health issues, or concerns about PPE should typically be treated like a request for an ADA accommodation
- ▼ Assess, have an interactive discussion, document it, and act reasonably to try and build consensus

# Vaccine Program FAQs

- ▼ **Disparagement vs. Protected Conduct**
- ▼ **Employee objections that are about the broader applicability of the employer's safety/COVID-19 concerns (whether they are in favor of greater safety protocols or fewer), should be treated as something more risky**
- ▼ **Potentially implicate Section 7 of the National Labor Relations Act's protected concerted activity rules, where an employee's complaint for the "mutual aid or protection" of himself and at least one other employee is entitled to protection from retaliation**
  - ▼ **Ultimately, when employees act "in concert" about an issue of concern with their employment, it is among the most serious risks an employer faces, because it doesn't take much more for them to turn to a union for help**
- ▼ **Take the complaints seriously, work to build consensus, seek expert assistance if you need it**



# EEOC *Proposed* Wellness Rules

- ▼ In early January 2021, the EEOC (finally) issued new proposed wellness regulations
  - ▼ But...in accordance with the Memorandum for the Heads of Executive Departments and Agencies, issued by Chief of Staff Ronald A. Klain, the proposed regulations have been withdrawn for review by the Biden administration
  - ▼ **WITHDRAWN**
- ▼ Background –
  - ▼ ADA and GINA
  - ▼ Do wellness incentive cause a wellness program to be *involuntary*?
  - ▼ Court required EEOC to revise regulations regarding incentives
- ▼ 2021 Proposed Regulations
  - ▼ Wellness incentives must satisfy *De Minimis Standard*
  - ▼ New ADA *Safe Harbor* for Health-Contingent Programs in Group Health Plans

# EEOC *Proposed* Wellness Rules

## ▼ New ADA “Safe Harbor” for Health-Contingent Programs in Group Health Plans

- ▼ Program is designed based on risks and not as a subterfuge to evade the purposes of the ADA’s equal employment provisions
- ▼ Program is a health contingent program that is **integrated** into (or independently qualifies as) a group health plan that is subject to the HIPAA Wellness Rules
  - ▼ Implicit acceptance of integration for **non-account-based plans**?
- ▼ Program satisfies the HIPAA Wellness Rules, including rules for the value of the incentive (30% of the cost of coverage, or 50% for programs designed to reduce tobacco use)

## ▼ Safe Harbor does NOT apply to GINA

- ▼ De Minimis Standard applies whenever incentive conditioned on an employee providing family medical or other genetic information

# EEOC *Proposed* Wellness Rules

- ▼ New ADA “Safe Harbor” for Health-Contingent Programs in Group Health Plans
  - ▼ Implicit acceptance of integration for **non-account-based plans**?
    - ▼ Whether incentive is limited to employees enrolled in the plan, whether the incentive is tied to cost sharing or premiums under the plan, whether the program’s vendor has a contract with the plan, and whether the plan includes the welfare program as a term of coverage

# HIPAA/ACA Nondiscrimination Rules

- ▼ HIPAA generally prohibits group health plans from discriminating against participants and beneficiaries as to eligibility, benefits, or premiums based on a health factor
- ▼ Wellness program rules provide exceptions to the HIPAA nondiscrimination requirements
- ▼ Participatory vs. Health-Contingent (Standards-Based Wellness Programs)

# HIPAA/ACA Nondiscrimination Rules

- ▼ **Participatory Wellness Programs**
  - ▼ **Either does not provide a reward for participation, or offers a reward, but does not condition the reward on an individual satisfying a standard that is related to a health factor**
  - ▼ **Participatory wellness programs are permitted under HIPAA nondiscrimination rules as long as they are available to all similarly situated individuals regardless of health status**
- ▼ **Health-Contingent Wellness Programs**
  - ▼ **Requires that an individual “satisfy a standard related to a health factor to obtain a reward.”**
  - ▼ **Reward = Obtaining a reward or avoiding a penalty**

# HIPAA/ACA Nondiscrimination Rules

- ▼ **Five Requirements for Health-Contingent Wellness Programs:**
  1. Frequency of Opportunity to Qualify
  2. Maximum Reward
  3. Reasonable Design
  4. Uniform Availability
  5. Notice Requirement

- ▼ 2013 Regulations also divided health-contingent wellness programs into **two subcategories subject to different requirements:**
  1. Activity-Only
  2. Outcome-Based

# Health-Contingent Wellness Programs

## ▼ Two Categories of Health Contingent Wellness Programs:

1. **Activity-Only** → Provides a reward if an individual performs or completes an activity related to a health factor, but it does not require the individual to satisfy any specific health outcome
  - ▼ Examples: walking or exercise programs in which a reward is provided just for participation, or rewards for taking a health risk assessment without requiring any further action
2. **Outcome-Based** → Requires an individual to either attain or maintain a specific health outcome
  - ▼ Examples: not smoking or achieving certain biometric screening results

# Five Requirements for Health-Contingent Wellness Programs

1.	Frequency of Opportunity to Qualify	Eligible individuals must be given an opportunity to qualify for the reward at least once per year
2.	Maximum Reward Size	May not exceed 30% of the total cost of employee-only coverage (50% in the case of programs designed to reduce or prevent tobacco use)
3.	Reasonable Design	Reasonable chance of improving the health of or preventing disease in participating individuals  It is not overly burdensome, is not a subterfuge for discriminating based on a health factor, and is not highly suspect in the method chosen to promote health or prevent disease
4.	Uniform Availability	Must provide <u>reasonable alternative standards</u>
5.	Notice Requirements	Must disclose the options to qualify for the reward through reasonable alternative standards



# Health-Contingent Wellness Programs & Reasonable Alternative Standards

## Universal Availability → Reasonable Alternative Standards (“RAS”)

### ▼ When are RAS required?

- ▼ *Activity-Only* → Must allow RAS (or waiver of standard) to an individual for whom the standard is (i) unreasonably difficult, or (ii) medically inadvisable
- ▼ *Outcome-Based* → Must always allow RAS for individuals who fail to satisfy initial standard

### ▼ Reasonableness based on facts and circumstances

### ▼ Must satisfy the following:

- ▼ Time commitment required must be reasonable
- ▼ Educational program: plan must make educational program available or assist employee in finding such a program and may not require an individual to pay for the cost of the program
- ▼ Diet program: plan is not required to pay for the cost of food but must pay any membership or participation fee
- ▼ Accommodate requests of individual’s physician

# When is a Reasonable Alternative Standard Reasonable?

- ▼ **Outcome-Based RAS Requirements** → If RAS for outcome-based wellness program is, itself, outcome-based, that “second-level” wellness program must ensure that:
  - ▼ The alternative standard cannot be a requirement to meet a different level of the same standard without additional time to comply
  - ▼ If the individual’s physician joins in the individual’s request for an alternative standard, the physician can be involved in setting (and adjusting) a second alternative standard, consistent with medical appropriateness
- ▼ **When can plan require verification from physician?**
  - ▼ *Activity-Only* → A wellness program may require verification from a physician that an individual’s health factor makes it unreasonably difficult or medically inadvisable to attempt to satisfy the regular standard
  - ▼ *Outcome-Based* → Not for the original applicable standard
    - ▼ May require verification at “second level” if second RAS would be an activity-only wellness program

# Notice of Reasonable Alternative Standards

- ▼ **Wellness rules require that the plan provide notice of the availability of RAS (or waiver of the standard, if applicable)**
- ▼ **Notice must be in all plan materials that describe the health-contingent wellness plan**
- ▼ **Must include contact information for obtaining the RAS**
- ▼ **Must also include a statement that a recommendation of an individual's personal physician will be accommodated**
- ▼ **For outcome-based wellness programs, notice also must be included in any disclosure that an individual did not satisfy an initial outcome-based standard**



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