

Quick Reference Chart of TAXES AND PENALTIES

This Quick Reference Chart provides a brief summary of the taxes, penalties, and other consequences that might apply to a wellness program if it fails to satisfy one of the various laws regulating it. The chart is not intended to be an exhaustive discussion of the applicable taxes and penalties or the situations that may trigger their application.

TOPIC	EXAMPLE OF VIOLATION	LAW: POTENTIAL CONSEQUENCE(S)
Tax Withholding on Rewards	Failure to withhold employment taxes (i.e., income tax withholding, FICA, and FUTA) from cash or cash equivalent wellness rewards (e.g. gift cards or gift certificates) or from noncash wellness rewards that are taxable (e.g., discounts that are not excludable as “qualified employee discounts” under Code §132)	Code: Failure-to-pay penalty of .5% per month of the amount of tax that was not paid, up to a maximum of 25% of the tax due; failure-to-deposit penalty of 10% of the deposits that are made more than 15 days late and within 10 days of 1st notice from IRS; interest on underpayments
Health-Contingent Rewards	Reward greater than maximum permitted for health-contingent program (i.e., 20% of the cost of coverage prior to 2014), no alternatives offered, or fails to meet other requirements of special exception to HIPAA’s nondiscrimination rules for health-contingent wellness programs	Code: Excise taxes of \$100/day for each individual to whom the failure relates, reported on Form 8928 ERISA: DOL civil enforcement action PHSA: Penalties of up to \$100/day for each affected individual
Rewards in Form of Cafeteria Plan Contributions	Rewards in the form of employer cafeteria plan contributions to employee health FSAs or HSAs cause the cafeteria plan to fail the Code §125 cafeteria plan nondiscrimination rules	Code: Loss of favorable tax treatment for highly compensated participants and/or key employees
Rewards in Form of Health FSA or HRA Contributions	Rewards in the form of health FSA or HRA contributions discriminate in favor of highly compensated individuals in violation of Code §105(h)	Code: The amount of the discriminatory benefit is included in the income of the highly compensated individuals receiving that benefit
Rewards in Form of HSA Contributions Made outside a Cafeteria Plan	HSA contributions made outside of a cafeteria plan fail the HSA comparability requirements	Code: 35% excise tax on all employer HSA contributions (including any contributions that otherwise would have complied with the comparability rules); reported on Form 8928
Coordination with HSA Eligibility	Wellness program design causes employees to become ineligible for HSA contributions (e.g. because wellness program provides significant benefits in the nature of medical care or treatment and is considered a non-high deductible health plan), but the employer and/or the employee continue to contribute pre-tax to the employee’s HSA	Code: 6% excise tax for each taxable year for all excess contributions

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Handling Protected Health Information	Program fails to meet its HIPAA privacy or security obligations	HIPAA/HITECH: Civil penalties may be imposed; the amount of the penalties depends on the culpability of the violator and can be as high as \$50,000 per violation
Participation After COBRA Qualifying Events	Program that is subject to COBRA fails to comply (e.g., failure to offer, provide timely notices)	Code: Excise taxes of \$100/day (\$200/day if more than one qualified beneficiary affected by same event); reported on Form 8928 ERISA: Penalties up to \$110/day for notice violations; employees or dependents may sue to recover COBRA coverage; attorney's fees and interest may be awarded to prevailing party PHSA: Employees or dependents may sue to recover COBRA coverage
Disclosure of Program Terms and Conditions—SPDs and SMMs	Program that is subject to ERISA fails to provide SPDs and SMMs to a participant requesting the same	ERISA: Penalty of up to \$110/day for failure to provide within 30 days of written request; willful failures to provide may result in criminal penalties
Disclosure of Program Terms and Conditions—SBCs	Program that is subject to the PHSA mandate to provide a summary of benefits and coverage willfully fails to provide SBC with the required information	PHSA/ERISA/Code: Fine of up to \$1,000 (\$1087 effective August 1, 2016) for each failure (per enrollee)
Annual Reporting	Program that is subject to ERISA fails to file Form 5500	ERISA: Penalty of up to \$1,100 (\$2,063 effective August 1, 2016) per day during the period of the failure for each Form 5500
Claims Procedures	Program that is subject to ERISA fails to follow ERISA's claims procedures	ERISA: Participant may be permitted to proceed directly to court; program may lose a deferential standard of review
Interference with ERISA-Protected Rights	Employer terminates an employee for refusing to participate in a wellness program or failing to meet a wellness standard	ERISA: Terminated employee may be able to sue under ERISA Section 510
Payroll: Reporting Work Time	Employer fails to credit employee's time participating in mandatory wellness program as required by FLSA	FLSA: Employer could be required to pay back wages, civil penalties, and liquidated damages

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Compliance with PHSA Mandates (Under Health Care Reform)	Program that is or relates to a “group health plan” subject to health care reform rules does not comply with one of the PHSA mandates (e.g., mandated coverage of preventive care; prohibitions on lifetime and annual limits, rescissions of coverage, limitations on preexisting condition exclusions; and mandated coverage of adult children until age 26)	<p>Code: Excise tax of \$100/day for each individual to whom such failure relates; reported on Form 8928</p> <p>ERISA: DOL civil action and/or civil penalties; participant lawsuits under ERISA</p> <p>PHSA: Civil penalties of up to \$100/day for each affected individual</p>
Health Risk Assessments	A wellness program subject to Title I of GINA requests, requires, or purchases genetic information from an employee or his or her family member(s) for a nonpermissible reason	<p>GINA/Code: Excise tax of \$100/day for each individual to whom such failure relates; reported on Form 8928</p> <p>GINA/ERISA: DOL civil action and/or civil penalties of \$100 (\$110 effective August 1, 2016) per day for each individual to whom such failure relates; participant lawsuits under ERISA</p> <p>GINA/PHSA: For non-federal governmental plans and health insurance issuers, civil penalties of up to \$100/day</p>
Adverse Employment Actions Based on Genetic Information	Employer unlawfully discriminates against a program participant on the basis of genetic information.	GINA: For violations under Title II, remedies for an employment discrimination action could include compensatory and punitive damages, reasonable attorney’s fees, and injunctive relief
Program Design and Operation: Disability-Based Distinctions	<p>Program discriminates against an individual on the basis of disability with respect to access to wellness program benefits or with respect to obligations imposed upon the individual</p> <p>Or, violation of the ADA’s prohibition on involuntary medical examinations and inquiries</p>	ADA: Employer could be sued for legal and equitable relief, reasonable attorney’s fees and other reasonable costs of the action
Program Design and Operation: Age-Based Distinctions	An employer impermissibly terminates or decreases wellness incentives for an employee or group of employees over the age of 40	ADEA: Employer could be sued for lost wellness program benefits, reasonable attorney’s fees and other reasonable costs of the action; court may double the award of damages that fits into the “backpay” category if violation deemed willful
Program Design and Operation: Distinctions Based on Protected Classifications	Program discriminates on an impermissible basis (race, color, religion, sex (including pregnancy), or national origin) against an individual with respect to eligibility to receive coverage, terms and conditions of coverage, and charges for coverage	Title VII: Employer could be sued in court for legal and equitable relief, reasonable attorney’s fees, and other reasonable costs of the action