

Side-by-Side Comparison of HIPAA & ADA WELLNESS PROGRAM REQUIREMENTS

The following table offers a quick comparison of the basic requirements under the HIPAA final regulations for wellness programs and the 2016 Regulations interpreting the ADA as it relates to wellness programs that include disability-related inquiries or require medical examinations. It is not intended to be an exhaustive discussion of either the HIPAA wellness rules or the ADA.

REQUIREMENT	HIPAA/HCR RULE	FINAL ADA RULE
Reasonable Design	<p>No reasonable design requirement for participatory programs</p> <p>Health-contingent program must be reasonably designed to promote health or prevent disease</p> <ul style="list-style-type: none"> » Satisfies standard if reasonable chance of improving health of, or preventing disease in, individuals » Cannot be (1) overly burdensome; (2) a subterfuge for discriminating based on a health factor; or (3) highly suspect in the method chosen to promote health or prevent disease 	<p>Any employee health program must be reasonably designed to promote health or prevent disease. A program satisfies that standard if it:</p> <ul style="list-style-type: none"> » Has a reasonable chance of improving the health of, or preventing disease in, participating employees » Is not (1) overly burdensome; (2) a subterfuge for violating the ADA or other laws prohibiting employment discrimination; or (3) highly suspect in the method chosen to promote health or prevent disease
Voluntary	No voluntary participation requirement	<p>Participation in programs that include disability-related inquiries or medical exams must be voluntary. To be voluntary, employer must not:</p> <ul style="list-style-type: none"> » Require employees to participate » Deny coverage under any of its GHPs or benefits packages within a GHP for non-participation, or limit the extent of benefits for nonparticipants » Take adverse employment action, retaliate against, interfere with, coerce, intimidate, or threaten employees » In addition, the employer must give employees a notice—see below
Uniform Availability	<p>Participatory programs must be available to all similarly situated individuals</p> <p>Health-contingent programs must make “full reward” available to all “similarly situated” individuals</p>	No uniform availability requirement, but see the reasonable accommodation requirement below

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Frequency of Reward	<p>No frequency requirement for participatory programs</p> <p>Health-contingent programs must provide eligible individuals opportunity to qualify at least once per year</p> <p>» If eligible individual declines opportunity at enrollment for plan year, plan is not required to provide another opportunity until enrollment for next plan year, even if individual actually commences activity (e.g., tobacco-cessation educational program) midyear</p>	<p>No frequency requirement</p>
Reward Amount	<p>No reward limit for participatory programs</p> <p>Health-contingent program reward generally cannot exceed 30% of the coverage option in which the employee participates</p> <p>» The level can be 50% to the extent the additional percentage is in connection with a program designed to prevent or reduce tobacco use</p> <p>» Reward limit must be based on total cost of employee-only coverage. But if any class of dependents may participate, reward can be based on total cost of coverage (employer plus employee contributions) in which employee and any dependent are enrolled</p>	<p>Wellness program incentives that are contingent on ADA-covered medical examinations or disability-related inquiries cannot, in the aggregate, exceed 30% of total cost of employee-only coverage (participation by dependents does not allow limit to be based on cost of family coverage)</p> <p>» 30% includes both participatory and health-contingent programs</p> <p>» Incentive can be reward or penalty, financial or in-kind</p> <p>» Smoking-cessation program that merely asks whether an employee uses tobacco is not a disability-related inquiry</p> <p>Limit is always based on cost of employee-only coverage, but coverage that sets the cost may vary depending on the number of group health plans sponsored by the employer and whether coverage in one of those plans is required to participate in the wellness program</p> <p>Where multiple health coverage options are offered, and the wellness program is available regardless of the option chosen, incentive cannot exceed 30% of cost of employee-only coverage for the lowest-cost option</p>

REQUIREMENT	HIPAA/HCR RULE	FINAL ADA RULE
<p>Reasonable Alternative/ Accommodation</p>	<p>No reasonable alternative/ accommodation requirement for participatory programs</p> <p>Health-contingent, activity-only reward will be “available” to all similarly situated individuals if—(1) Program allows reasonable alternative standard (RAS) (or waiver of standard) for any individual for whom it is unreasonably difficult due to a medical condition to satisfy the standard; and (2) program allows RAS (or waiver of standard) for any individual for whom it is medically inadvisable to attempt to satisfy the standard</p> <p>» If reasonable, activity-only program can seek verification from individual’s personal physician that a health factor makes it unreasonably difficult for individual to satisfy or medically inadvisable for individual to attempt to satisfy otherwise-applicable standard</p> <p>Health-contingent, outcome-based program must allow RAS (or waiver of standard) to anyone regardless of the reason</p> <p>» Never reasonable to seek verification that a health factor makes it unreasonably difficult to satisfy, or medically inadvisable to attempt to satisfy, otherwise-applicable outcome-based standard as a condition of providing a RAS to the initial standard</p>	<p>Employer must provide reasonable accommodations (modifications or adjustments) to enable employees with disabilities to have equal benefits and privileges of employment, which includes participation in employee wellness programs</p>
<p>Notice</p>	<p>No notice requirement for participatory programs</p> <p>For health-contingent program, plan or issuer must disclose in all plan materials describing terms of wellness program, the availability of a RAS to qualify for reward (and, if applicable, possibility of waiver of standard)</p> <p>» Statement must include contact information and also state that recommendations of individual’s personal physician will be accommodated. If plan materials merely mention that wellness program is available, without describing terms, no need to include such disclosure</p>	<p>Employer must provide notice to employee clearly explaining type of medical information that will be obtained and specific purposes for which information will be used</p> <p>» Must disclose restrictions on disclosure of employee’s medical information and parties with whom information will be shared</p> <p>» Must disclose methods that will be used to ensure medical information is not improperly disclosed</p>