INSIGHTS FROM VITALITY

Vitality and the Legal Environment of Wellness

A TECHNICAL BRIEF

Vitality™

This document is made for both internal and external use.

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INTRODUCTION

In 2013, important federal legislation was passed that affects all group health plans offering wellness programs. Final rulings on the use of incentives in wellness programs and the protection of an individual's health information are now codified and statutory. How will your wellness benefits be affected?

On May 29, 2013, the Departments of Labor (DOL), Treasury (DOT) and Health and Human Services (DHHS) issued final regulations that reflect changes made by the Patient Protection and Affordable Care Act (or Affordable Care Act or ACA) to wellness programs subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) nondiscrimination rules.[1]

While the regulations retain the same general principles and framework as prior guidance, the departments amended some of the concepts first introduced in the proposed regulations. Specifically, they subtly reworked the definition and analysis for the various types of nondiscriminatory wellness programs. They also increased the maximum reward available to wellness program participants from 20 to 30 percent of the total cost of coverage, and up to 50 percent of the cost of coverage for programs with a tobacco-cessation component.

Though certain provisions of the ACA have received a moratorium on enforcement, the regulations for wellness programs are effective for all group health plans with plan years beginning on or after January 1, 2014.

As important, in January 2013 DHHS issued the final ruling on privacy and security protections for individual health information that were originally established under HIPAA.[2] Previously, the HIPAA Privacy and Security Rules focused on healthcare providers, health plans and other entities that process health insurance claims. The changes expanded many of the requirements to these entities' business associates, such as contractors and subcontractors, that receive Protected Health Information (PHI). The ruling strengthens these protections and also implements changes to the HIPAA rules under a number of authorities, including the Health Information Technology for Economic and Clinical Health Act (HITECH) and the Genetic Information Nondiscrimination Act of 2008 (GINA).

Obviously, both rulings impact the design of existing or considered wellness programs, incentive structure(s) and the manner in which wellness programs protect individual health information privacy and security.

To examine these issues further, Vitality has created this brief to give employers a clearer understanding of federal wellness regulations and what it means to stay compliant.

Legal Disclaimer: The Vitality Group does not provide legal advice, both in general and in this document explicitly.
This document provides context and references to assist administrators and legal teams in reviewing the legal implications of the Vitality program.
We strongly urge that you consult your own legal advisor with any concerns you may have.

THE LAWS AT PLAY

This table outlines the basics of the federal regulations that affect wellness programs as well as serves as a resource that details how The Vitality Group interprets these regulations and, in our opinion, provides a program that can make employers seamlessly stay in compliance.

THE LAWS AT PLAY	CONCERNS THE LAW PRESENTS	HOW VITALITY MAKES IT EASY TO COMPLY
ACA **Program Structure**	Wellness programs must comply with the ACA's five basic requirements: 1) Opportunity to qualify 2) Size of reward 3) Reasonable design 4) Reasonable alternative 5) Notification	The Vitality program has been enhanced to satisfy these requirements in a streamlined manner. As the standard program is meant to be a 12-month period, all awards that are part of, or result from, the program can be earned once per year. These rewards, which will be explained in more detail, can be easily accounted for by the employer to ensure appropriate size. Claims analyses year over year have proven that the program not only reasonably promotes health and wellness, but also favorably impacts healthcare costs. Vitality's ability to make the Reasonable Alternative Standard (RAS) and notification requirements compliant and easy on our clients is explained in further detail below.
ACA **Size of the Reward**	Any health-contingent reward must not exceed 30% (or 50% if tobacco is included) of total healthcare coverage costs.	Vitality has analyzed all Vitality Rewards® to ensure our clients are fully informed about the rewards offered through the program and, therefore, the limit on the rewards that the client may offer separately from the program.
ACA **Reasonable Alternative Standards**	To be compliant with the new regulations for every health-contingent outcome that has a reward attached, a Reasonable Alternative Standard must be provided as well as (if necessary) a full medical waiver.	For every health-contingent outcome, Vitality's member journey builds in reasonable alternatives that satisfy the regulation as well as continue to promote improvement in the member's health and wellness. In addition, for all health-contingent standards available on Vitality, Vitality can fully administer medical waivers and provide Vitality Points™ as needed without the member ever having to report or notify their employer.
ACA Communication	For all rewards attached to a health-contingent standard that are communicated to a member, the member must also be made aware of the Reasonable Alternative Standard or medical waiver option in the same communication.	Throughout the Vitality program interface and on all applicable communications templates, standard language taken from the regulations is provided to make compliance easy.
HIPAA **Data Security**	As our clients' wellness company, The Vitality Group will hold, store and maintain extensive amounts of PHI. Clients and members must be sure it is safe.	Vitality stores and maintains all the data in a completely secure and HITECH-compliant environment. Our COO functions as our Security Officer and ensures data safety. As laws, rules and industry best practices change, Vitality improves in line with — or in advance of — these marketplace changes.
HIPAA **Member Privacy**	To participate in a wellness program, members must provide extensive information about their health, habits and even results. HIPPAA requires strict privacy protections for this type of individual health information.	Vitality's HIPAA Compliance Committee works to ensure we are completely compliant with the law and continues to take a conservative approach to ensure compliance and comfort with both our clients and members. More importantly, Vitality works to be completely transparent to our members regarding what information is being collected, who it is being shared with and why. This can all be found in our Terms and Conditions and Privacy Statement, which must be viewed and agreed upon prior to use of the program.
The Other Laws: **ADA, ADEA, GINA and ERISA**	A number of additional regulations must be taken into account when designing a wellness program.	Vitality has worked hard to ensure its program is not only legally compliant in and of itself, but also makes compliance with all laws easy for clients to achieve. Our reports are designed to never share more information than necessary with an employer and avoid all implications of both the ADA and ADEA. In addition, our medical waivers adhere to all requirements of the ADA. Moreover, as we are a stand-alone wellness company, neither ERISA nor GINA applies, yet we still utilize these laws as guidelines throughout our program.

THE AFFORDABLE CARE ACT (ACA) AND WELLNESS PROGRAMS

The use of Vitality incentives of any kind, including the Vitality Mall, subsidies or Vitality Squares™, makes Vitality a Health-contingent Wellness Program. To help make it easy for our clients to be compliant, we have designed Vitality to meet the most stringent requirements of the new law.

The ACA clearly endorses the value of appropriately designed workplace wellness programs as having the potential to promote health and prevent disease. The goal of the final ruling on *Incentives for Nondiscriminatory Wellness Programs in Group Health Plans* was to clarify the sustained confusion regarding the scope of HIPAA and originally published ACA rules governing wellness programs. These regulations set forth criteria for wellness programs that must be satisfied in order to qualify as meeting the wellness nondiscrimination exception to HIPAA.[3]

The ACA regulations differentiate between two types of wellness programs, participatory and health-contingent, then break down the latter category further into activity-based vs. outcome-based programs.[4]

Participatory Wellness Programs: These are programs that do not provide a reward or do not include any conditions for obtaining a reward that are based on an individual satisfying a standard related to a health factor. An example is a program that provides a reward for participating in a biometric screening but does not base any of the reward on any outcomes achieved. So long as a Participatory Wellness Program is provided to all similarly situated individuals, the program is not required to satisfy any other standards.

Activity-based Wellness Programs: A subcategory of Health-contingent Wellness Programs, these require an individual to perform or complete an activity related to a health factor in order to obtain a reward or avoid a penalty. However, these do not require an individual to attain or maintain a specific health outcome. The regulations provide safeguards to ensure individuals who may be unable to participate in or complete the activity due to a health factor are given a reasonable opportunity to qualify for the reward or avoid the penalty.

Outcome-based Wellness Programs: The second subcategory of Health-contingent Wellness Programs, these require an individual to attain or maintain a specific health outcome in order to obtain a reward or avoid a penalty. The regulations provide safeguards to ensure that individuals who may be unable to achieve or maintain a specific health outcome due to a health factor are given a reasonable opportunity to qualify for the reward or avoid the penalty.

REQUIREMENTS FOR INCENTIVES IN NONDISCRIMINATORY HEALTH-CONTINGENT WELLNESS PROGRAMS

All wellness programs must be offered to all similarly situated individuals. Health-contingent Wellness Programs, based on a person's health status, must meet additional requirements. The final ACA regulations retain the five requirements for incentives in nondiscriminatory wellness programs originally mandated by HIPAA but increase the maximum incentives employers can offer for participation in a designated program:

1. **Frequency of opportunity to qualify:** The program must give individuals eligible to participate the opportunity to qualify for the reward at least once per year.
2. **Size of reward:** The total reward offered to an individual cannot exceed 30 percent of the total cost of employee coverage under the plan (including both employer and employee contributions) or 50 percent of that cost if the program includes a smoking-cessation component. If any dependents may participate in the program, the reward cap applies to the total cost of coverage for the individual plus eligible dependents (such as family coverage or employee-plus-one coverage).
3. **Reasonable design:** The program must be reasonably designed to promote health and prevent disease.
4. **Uniform availability and Reasonable Alternative Standard (RAS):** The reward must be available to all similarly situated individuals. The program must allow a Reasonable Alternative Standard (or waiver of the initial standard) for obtaining the reward to any individual for whom it is unreasonably difficult due to a medical condition, or medically inadvisable, to satisfy the initial standard.
5. **Notice of Availability of Reasonable Alternative Standard (RAS):** The plan must disclose in all materials describing the terms of the program the availability of a Reasonable Alternative Standard (or the possibility of a waiver of the initial standard).

WHAT TYPE OF PROGRAM IS VITALITY?

Vitality incorporates elements of all three types in one comprehensive program. The program was designed to be inclusive of all ages, genders and health and fitness levels. As members use the program, they can earn Vitality Points and increase their Vitality Status® in many different ways. For those customers who choose the Vitality Mall, each point earned also earns a Vitality Buck to redeem on the Mall. These rewards can be based on participation (getting a full biometric screening done), activity (taking 10,000 steps per day) and/or outcomes (being in healthy range for a given health factor). The program does not distinguish between points earned for participatory actions vs. points earned for a specific activity completion or health outcome.

The use of Vitality incentives of any kind, including the Vitality Mall, subsidies or Vitality Squares, makes Vitality a Health-contingent Wellness Program. To help make it easy for our clients to be compliant, we have designed Vitality to meet the most stringent requirements of the new law.

Clients that prefer to provide a strictly Participatory Wellness Program must be careful not to utilize any Vitality incentives.

Whether clients prefer a simple participatory approach or a full outcome-based program, or wish to target single or multiple health risks, Vitality offers a solution that is comprehensive, uncomplicated, accessible, verifiable and able to support single or multiyear strategies.

The following page provides a snapshot of Vitality Rewards and their respective status under the new ACA regulations.

VITALITY REWARD	DESCRIPTION/EXPLANATION	WHAT TYPE OF REWARD IS IT?	WHO FUNDS THE REWARD?
Vitality HealthyFood™	The Vitality HealthyFood program provides all registered Vitality members a 5% credit on Great for You™ foods purchased at Walmart.® Those who complete a Vitality Check receive a 10% credit.	**Participatory** Merely requires a member to participate in the program, and does not require any health-contingent result.	Vitality
Vitality Partner Health Club Subsidy	A Partner Health Club subsidy is a varied amount based on Vitality Status and requires that Vitality members ▪ Be an active member of a partner health club ▪ Work out 12 times per quarter *A member can only receive a subsidy or a rebate, not both.*	**Health-contingent (Outcome-based)** Because the size of the subsidy is based on Vitality Status, Vitality considers this reward health-contingent.	Client
Health Club Rebate	Vitality members can receive an annual reimbursement up to $200 for a non-partner health club membership. To be eligible for this reward, Vitality members must ▪ Complete their Vitality Health Review (VHR) ▪ Be an active member of the non-partner health club for four months *Members may only receive a subsidy or a rebate, not both.*	**Participatory** Any member can receive this benefit without having to perform any actual activity or achieve an outcome.	Client
Smoking-Cessation Rebate	Vitality members can receive reimbursement up to $200 once per lifetime for a smoking-cessation program. To receive this reward, Vitality members must ▪ Be an active member of Vitality ▪ Complete their VHR	**Participatory** This reward is not dependent on the member quitting smoking. Any member can receive this benefit without having to perform any actual activity or achieve any outcome.	Client
Weight Loss Rebate	Vitality members who have a BMI higher than 30 can receive reimbursement up to $200 once per lifetime for an in-person weight loss program. To receive this reward, Vitality members must ▪ Be an active member of Vitality ▪ Complete their VHR	**Participatory** Because any member with a BMI over 30 can receive this benefit without having to perform any actual activity or achieve an outcome (i.e., losing weight), the reward is not health-contingent.	Client
Vitality Mall	The Vitality Mall is an online mall in which our members can redeem their Vitality Bucks® for various items, such as gift cards, movie tickets, merchandise, etc.	**Health-contingent (Outcome-based)** Because a member's Bucks are a combined incentive based on points earned via participatory and health-contingent requirements, Vitality considers all Bucks redeemed (and therefore the Vitality Mall) as a health-contingent incentive.	Client
Vitality Hotel Discount	Members can purchase up to six (6) hotel night vouchers at a discounted rate. ▪ The discounted rate is based on Vitality Status, decreasing in cost as members engage in the program ▪ The base discount is provided for Bronze members (those who complete the VHR) ▪ The remainder of Vitality Status levels can be attained via points achieved for having outcomes within range ▪ The cost and discount of the voucher varies based on hotel brand and type of voucher	**Health-contingent (Outcome-based)** Because the size of the discount varies with Vitality Status, Vitality considers this reward health-contingent.	Client (pays the difference between the amount member pays and the cost of the voucher)
Vitality Squares	Vitality Squares is an engagement tool for all Vitality members to utilize once per month to win prizes based on their Vitality Status.	**Health-contingent (Outcome-based)** Because members have an opportunity to win larger prizes as they improve in status, Vitality Squares falls within the health-contingent category.	Vitality

VITALITY AND REASONABLE ALTERNATIVE STANDARDS (RAS)

Both types of Health-contingent Wellness Programs require the option of Reasonable Alternative Standards (RAS) to allow disabled or medically exempt individuals to earn a reward.

The RAS requirements are similar for activity-only and outcome-based programs; however, there are also a few key differences:

- For Activity-based Wellness Programs, the RAS for obtaining the reward must be provided for any individual for whom (for that period) it is either unreasonably difficult due to a medical condition to meet the otherwise applicable standard, or for whom it is medically inadvisable to attempt to satisfy the otherwise applicable standard.
- For Outcome-based Wellness Programs, an RAS must be provided to all individuals who do not meet the initial standard to ensure that the program is reasonably designed to improve health and is not a subterfuge for underwriting or reducing benefits based on health status.

Vitality makes the new RAS requirement simple for all clients, with built-in alternatives for each health factor and outcome.

REASONABLE ALTERNATIVE STANDARD REQUIREMENTS FOR BOTH ACTIVITY-ONLY AND OUTCOME-BASED WELLNESS PROGRAMS

- The reward for meeting the alternative standard must be equal to the reward for meeting the original standard.
  - For example, if it takes a few extra months for a member to complete the alternative standard and the incentive is offered monthly, the reward must be prorated back to the date the member failed to meet the original standard.
  - The equal reward value must be provided during the same benefit year.
- In lieu of providing the alternative standard, the employer has the option to waive the original standard and provide the reward.
- The alternative standard:
  - Is not required to be available prior to an individual requesting it
  - May be provided to the entire class of similar individuals, or may be determined on a case-by-case basis
  - Must not require the individual to incur additional cost, and must be made readily available
  - Must include a reasonable time commitment (requiring attendance at a nightly, one-hour class would be unreasonable, for example)
  - Must meet standards provided by the individual's personal physician, if applicable
  - Must fulfill the requirements set forth by the ACA as if the standard were the original standard, subject to special rules for outcome-based alternatives to outcome-based standards

REASONABLE ALTERNATIVE STANDARD — ADDITIONAL REQUIREMENTS BY PROGRAM CATEGORY

Activity-only *Health-contingent*	**Outcome-based** *Health-contingent*
Verification (i.e., physician's note) may be requested by employer prior to providing an alternative standard.	Any individual who does not meet the original standard must be provided a Reasonable Alternative Standard. If the alternative standard is itself outcome-based, two additional special rules apply. The standard 1. Cannot be a different level of the same measurement used for the original standard without allowing additional time to comply 2. Must allow a second Reasonable Alternative Standard to be defined by the individual's personal physician, if the physician joins in the request

VITALITY REASONABLE ALTERNATIVE STANDARD EXAMPLES

HEALTH MEASURE	IN RANGE	REASONABLE ALTERNATIVE
Body Mass Index (BMI)	18.5 to 24.9	▪ If ≥ 25, lose 5% of body weight
Body Mass Index (BMI)	18.5 to 24.9	▪ If ≤ 18.5, see your doctor about your low BMI and submit proof of visit
Blood Pressure – Diastolic **Blood Pressure – Systolic**	Less than 121/ Less than 80	▪ Regular physical activity through a fitness device, gym, mobile app or Healthy Habits (presented as an achieved goal) ▪ Online nutrition interactive content (presented as an achieved goal)
Total Cholesterol **OR** **LDL Cholesterol (mg/dl)**	Less than 200 OR CHD risk Low & Less than 160 CHD risk Med & Less than 130 CHD risk High & Less than 100	▪ Regular physical activity through a fitness device, gym, mobile app or Healthy Habits ▪ Online nutrition interactive content
Fasting Glucose (mg/dl)/ HbA1c	Less than 100	▪ Regular physical activity through a fitness device, gym, mobile app, or Healthy Habits ▪ Online nutrition interactive content
Cotinine	Negative result	▪ Online tobacco-cessation interactive content
Pregnancy		▪ Letter from doctor confirming that member is receiving regular (or complying with) prenatal care

HOW THE VITALITY CONTRIBUTION MANAGER™ (VCM) WORKS

The Vitality Contribution Manager (VCM) is an optional feature that can integrate with employer group payroll systems to allocate a higher or lower share of health plan costs to employees, depending on their Vitality engagement. The allocation can take the form of reduced or increased monthly health insurance premium, HRA/HSA contributions, etc. This approach, as long as it remains compliant with ACA rules, may reduce annual costs to clients through employee contribution adjustments while it encourages employee accountability for lifestyle choices.

Many clients choose to utilize the VCM in addition to utilizing the Vitality Mall. Others offer rewards on their own for results obtained by Vitality; most commonly, these rewards are linked to a member's Vitality Status. Such a hybrid program is simple to design.

Some examples:

- ***Separate VCM incentive for achieving a specific Vitality Status –*** This reward structure is the one most often recommended by Vitality. While status is viewed as health-contingent, the member journey provides the needed RAS to make compliance easy.
- ***Separate VCM incentive for specific health outcome(s) –*** This structure is more detailed and typically has two tiers:
  1. A measurement, test or screening as part of an initial standard
  2. A larger program that then targets individuals who do not attain or maintain the specific health outcome

The RAS requirement may be met via an educational program or an activity may be offered to achieve the same reward, and, of course, the value caps apply. All rewards provided under an Outcome-based Wellness Program must remain within the ACA's retroactivity guidelines. If one member is eligible for a reward upon verification of being in range and another member completed the reasonable alternative but is not in range, both rewards must take place at the same time. In other words, if an employer is providing testing to verify in-range results in November and person X is not in range but successfully satisfies the Reasonable Alternative Standard in February, X's reward must be provided as if he satisfied the requirement in November. This is an important factor to consider when determining a VCM strategy.

Clients can avoid the budget concern of retroactive payments and allow ample time for all members to achieve the wellness goals if all incentives are awarded in the year *following* the outcome. For example, all members who achieve Gold Status in year one receive the full benefit in year two.

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VITALITY STATUS: A ROBUST, PROPRIETARY MEASURE OF HEALTH ENGAGEMENT

Vitality's recommended structure of the VCM is the requirement to achieve specific levels of Vitality Status, a patented approach that links participation in a wellness program to insurance contributions. Vitality Status combines activity and outcomes into one simple and easy-to-understand engagement metric while it balances incentives for participation and outcomes. Vitality offers a variety of incentives and is designed to encourage its members to explore and engage in activities that promote health or prevent disease. Information obtained through biometric screenings is used to encourage and guide members to adopt lifestyle behaviors proven to maintain health or prevent disease using the rewards associated with status as the motivation.

The Vitality Status design brings with it built-in Reasonable Alternative Standards (RAS) so that members of any age, health or fitness level can complete a multitude of different activity combinations to increase their status. As members complete various activities, they earn Vitality Points. The more points they earn, the higher their Vitality Status and the greater their rewards. Vitality Points and Vitality Status were developed and designed to be closely linked to the most important factors that determine health risks and outcomes. This linkage allows employers to get a robust measure of the level at which their members are taking care of their health, regardless of their starting point.

One of the easiest wellness program strategies to implement is to combine participatory requirements, such as completing a Vitality Health Review and a Vitality Check, with a requirement to reach a certain Vitality Status. RAS options are offered for every health-contingent factor in the program activities. This structure is ideal for the first year of a wellness program. Status allows employers to target each of the key outcomes while giving all employees equitable options and ample privacy.

Vitality Status is earned in many ways that include both activities, such as workouts, and health outcomes or their reasonable alternatives. An employer will never know the specific activities completed to achieve status. The privacy of the Vitality Status allows all of these factors to play a role without an employer requiring more detailed information about the employee's specific engagements or outcomes.

Vitality Status can also be used by the employer year over year to increase the degree of challenge in the wellness program and still provide a clear and concise standard to its members. Employers can also use status in conjunction with other requirements, such as adding a health factor requirement (for example, a blood pressure in-range goal). Of course, this approach will require additional lengths of time for members to achieve goals; however, such a multiyear strategy is also well supported by Vitality with appropriate RAS as needed.

Vitality Status reports provide program engagement information without divulging any member's exact points, activities or "Protected Health Information" or PHI. Utilizing Vitality Status as the achievement requirement for rewards creates a built-in reasonable alternative to earn rewards, as required by the ACA. The Vitality program has built all of this into the program as standard, so employers do not need to self-administer any alternative or accommodation. Each status level can be reached in a variety of ways. Below is an example of five different ways to reach Silver Status.

VARIOUS WAYS TO ACHIEVE VITALITY SILVER STATUS

VITALITY STATUS	MEMBER A'S ACTIVITIES	MEMBER B'S ACTIVITIES	MEMBER C'S ACTIVITIES	MEMBER D'S ACTIVITIES	MEMBER E'S ACTIVITIES
Bronze *Completes HRA*	▪ VHR completed	▪ VHR completed	▪ VHR completed	▪ VHR completed	▪ VHR completed
Silver *Participating in Wellness*	▪ Biometric screening with the majority of results in range	▪ Biometric screening with several results out of range ▪ Health calculators	▪ CPR certification ▪ First-aid certification ▪ Dental screening ▪ Flu shot ▪ Three verified workouts a week for 14 weeks	▪ Sports league participation ▪ Mental Well-Being Review ▪ Marathon athletic event	▪ Biometric screening with only blood pressure in range ▪ Online nutrition course

HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA)

HIPAA imposes both a privacy and security rule to ensure that the use, sharing and disclosure of an individual's health information (Protected Health Information or PHI) are limited.

In addition, HIPAA generally prohibits group health plans from discriminating against individual participants and beneficiaries in eligibility, benefits or premiums based on a health factor. As an exception to this general rule, HIPAA does allow for premium discounts or rebates or modification to otherwise applicable cost sharing (copayments, deductibles or coinsurance) in return for adherence to certain programs of health promotion and disease prevention, i.e., wellness programs. As more and more companies embrace wellness and adapt program policies and parameters, recent rulings updated and amended the original 1996 HIPAA law to prevent wellness programs from discriminating against a member based on health status.

Individuals, organizations and agencies that meet the definition of a covered entity under HIPAA must comply with the requirements to protect the privacy and security of PHI and must provide individuals with certain rights with respect to their PHI. If a covered entity engages a business associate to help it perform its healthcare functions, HIPAA requires the business associate to also comply with the requirements to protect the privacy and security of PHI. In other words, covered entities' business associates are directly liable for compliance with certain provisions of the HIPAA rules.

HOW VITALITY COMPLIES

As a business associate to all our clients, The Vitality Group abides by HIPAA rules to the fullest extent of the law. In response to the recently published HIPAA Omnibus Rule, we have appropriately updated our Business Associate Agreement (BAA). We have an internal HIPAA Compliance Committee that trains and updates all employees on appropriate changes or improvements to our company policies. Many committee members have tenure since the April 14, 2003, original compliance date. We have never had a reportable disclosure or breach, nor have we ever been a defendant in any litigation alleging a breach or violation of HIPAA.

To ensure strict HIPAA compliance for our clients and members, The Vitality Group maintains strict policies and procedures surrounding both the privacy and security of PHI, including the sharing of information with clients and third parties, via:

- ***Contractual Arrangements –*** The Vitality Group provides its standard BAA to all new clients. Our legal department is fully equipped to answer questions surrounding the BAA, its implications and any questions or concerns clients may have. If a client prefers to utilize their own BAA, The Vitality Group is always willing to review a client's preferred document.
- ***PHI Disclosure[5]–*** A major purpose of the HIPAA privacy rule is to define and limit the circumstances in which an individual's PHI may be used or disclosed by covered entities. Unless the information is being shared with the individual; DHHS for enforcement actions; or treatment, payment or administration of healthcare operations, it may not be disclosed without express authorization from the individual. The Vitality Group does not disclose any identifiable member PHI unless permitted by law. Any report or sharing of information requested by a client is reviewed by our legal team and chief privacy officer to ensure it is permitted by law or is de-identified. If a client requests a customized report or asks The Vitality Group to share information that includes identifiable PHI with the employer or another third party, express authorization by each member must be received by The Vitality Group. (This would include administration fees.)
- ***Third-party Data Integration –*** Vitality can accept data from any third party for certain wellness programs except for health risk assessments. The data must be transmitted in a Vitality-prescribed format over a secure network, and acceptance of such data may be subject to an administration fee. Once the data are received and maintained by Vitality, the same policies and procedures regarding the data's privacy and security will be maintained as though Vitality collected the data itself.
- ***Management of Consent Requirements –*** In order for The Vitality Group to legally share any member PHI, we require that we physically collect and manage member authorizations. Should a client request the sharing of member data outside of that provided in the standard Vitality portal, an administration fee could apply.
- ***Technology –*** We apply the highest level of security technology to protect member information. (For more information on the exact specifications on our security technology, please reach out to your Vitality contact.)

FREQUENTLY ASKED QUESTIONS ABOUT THE NEW LEGAL ENVIRONMENT AND VITALITY

Q. When do the new wellness program rules go into effect?
A. The new regulations become effective for all health plan years starting on or after January 1, 2014.

Q. If I customize incentives, how can I be sure I am in compliance?
A. The Vitality Group can work with clients to determine appropriate health goals and how to achieve them within the new regulations. We are not, however, in a position to give legal advice and so we caution clients and prospects to seek their own legal counsel when designing their wellness program.

Q. What Reasonable Alternative Standards does Vitality use?
A. Vitality is designed to make the new Reasonable Alternative Standard requirement simple for all clients. The program satisfies the most stringent legal requirements and automatically provides eligible members with appropriate reasonable alternatives for each health factor and outcome.

Q. How does The Vitality Group deliver HIPAA-compliant reporting on outcomes?
A. Outcomes will always be considered PHI under HIPAA. Vitality is designed to make reporting on such factors both simple and compliant.

The Vitality portal provides each member a section that identifies the incentives being offered by their employer, how to earn them and a HIPAA-compliant consent selection that authorizes us to appropriately report to their employer. IMPORTANT: Even with such authorization, Vitality does NOT directly report any individual health-factor details. Instead, our standard report structure is designed to confirm simple yes or no qualification for a given reward, not health factor or outcome details. For example, the member report on a smoking-cessation program does not reveal whether a member is:

- a smoker;
- a nonsmoker who has not received verified cotinine test results;
- a smoker who is enrolled in a smoking-cessation course; or
- a smoker who has chosen not to enroll in the smoking-cessation course.

Rather, reports are designed to reflect whether or not a member is eligible for the incentive. Even when more than one outcome is required to determine qualification for an incentive, our standard report only reflects yes or no eligibility. A client may, however, request an additional, aggregate report that shows how many members qualify for the incentive based on the reasonable alternative vs. the originally required outcome or activity.

Q. What outcome-based incentives does Vitality support? Can clients determine proprietary thresholds on which to base outcome improvements in order to qualify for rewards?
A. Vitality is built to support the following outcomes: BMI, glucose, cholesterol, smoking and blood pressure. We utilize well-recognized health research and guidelines to designate health status for each indicator as low risk, at risk or high risk. Uniformity of thresholds enables us to better serve all client populations effectively and efficiently.

Q. Is a doctor's note acceptable to Vitality to confirm the need for an RAS? If not, what choices would Vitality provide?
A. Yes. We can accept a doctor's note via our Medical Accommodation Form, downloadable from the Power of Vitality member site. This form includes required fields for both the member and the physician to complete in order to fully verify the need and length of time required for the RAS accommodation. Upon receipt of the completed form, Vitality will classify the individual accordingly. For example, if the member cannot exercise at all, he or she will earn an equivalent fitness point for any point earned engaging in other non-outcome-based activities, such as completing an online nutrition course or assessment.

Note that Vitality cannot make independent medical determinations, treatments or diagnoses. As long as we receive adequate documentation and certification from the member's physician, no further investigation will take place.

The following VCM report *would not* require consent from the member to share with an employer; additional data fields, including achievement of a specific outcome, *would* require consent from the member.

MEMBER NAME AND BASIC INFORMATION	STATUS	MET VCM REQUIREMENTS	DATE MET VCM REQUIREMENTS	CONTRIBUTION AMOUNT	VITALITY HEALTH REVIEW COMPLETION DATE	VITALITY CHECK COMPLETION DATE
John Smith	Gold	Yes	10/23/13	$50	8/12/13	9/24/13
Jane Sanders	Silver	No	N/A	N/A	9/30/13	

Q. If a member does not meet a standard, do the new regulations allow that individual to apply for an extended time period in which to complete the activity in order to comply?
A. If the requirements are completion of specific activities, such as an HRA or a biometric screening, the new regulations do not require an extension of time, provided that every employee is granted an opportunity to meet the requirement at least once per plan year. However, time extensions are important with regard to outcome-based programs. The regulations for outcome-based programs state that, "The Reasonable Alternative Standard cannot be a requirement to meet a different level of the same standard without additional time to comply that takes into account the individual's circumstances." So, if an individual joins the organization after the cutoff date, they must be accommodated with an extension.

Q. Is an individual's smoking status considered PHI?
A. Yes. PHI is defined as all "individually identifiable health information" held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper or oral. This is information, including demographic data, that relates to:

- the individual's past, present or future physical or mental health or condition;
- the provision of healthcare to the individual; or
- the past, present or future payment for the provision of healthcare to the individual; and
- identifies the individual, either clearly or for which there is a reasonable basis to believe it can be used to identify the individual.

Q. Is there a difference between sharing one piece of PHI, full biometrics or VHR results?
A. No. A member's PHI, whether one aspect, certain parts or in full, are all considered PHI. It does not matter if Vitality shares one piece of information or a collection of data, the HIPAA privacy and security rules are fully applicable and must be obeyed. If the sharing of information does not fall within a required or permitted disclosure, express authorization must be given to share the member's data.

Q. When does Vitality require individual member consent to share information and why?
A. Individual consent or authorization is required by the HIPAA Privacy Rule for uses and disclosures of PHI not otherwise allowed by the rule. In other words, Vitality is not allowed to share with any third party information that includes PHI or can directly or indirectly infer PHI about a member. The sharing of aggregated data does not require member consent as it is not identifiable at the member level, and therefore not protected under HIPAA.

Within the Vitality program, Vitality consistently requires member consent in two instances. First, if a client would like to receive a detailed VCM report, which includes individual PHI rather than merely showing whether a member has or has not satisfied a requirement, member consent to share this information with the employer is required. In addition, if a client would like to use either a partner or third-party disease management vendor for outreach, Vitality will require the member to not only consent, but authorize the method of contact that the disease management vendor may use.

Q. What is required to satisfy the authorization requirement? Can members change authorization?
A. An authorization or consent must specify a number of elements, including a description of the PHI to be used and disclosed, the person authorized to make the use or disclosure, the person or entity receiving the information and, in some cases, the purpose for which the information may be used or disclosed. Members must always have the ability to revoke their authorization and opt out of the further sharing of their information.

Q. What language is Vitality planning to utilize to properly communicate the Reasonable Alternative Standards, medical accommodations or medical waivers, where applicable?
A. On the portal as a footer for each page:
"If you ever feel you are medically unable to satisfy the requirements or the provided Reasonable Alternative Standard needed to earn Vitality Points, you can complete a medical waiver form and have it signed by a medical professional or physician. The Medical Waiver Form can be found under Forms on the bottom of your Power of Vitality website."

On the medical waiver forms:
"Vitality is structured to encourage its members to improve their health and offers each individual alternatives that are appropriate to their circumstances. Vitality will always accept physician-certified documentation to waive an out of reach requirement due to a medical condition. Please have this form filled out by you and your physician. Once this form is turned in and processed, the appropriate Vitality Points will be awarded."

In cases where Vitality may need generic wording:

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(such as Incentive communications, etc.)
"Any participant for whom it is unreasonably difficult or medically unadvisable due to a medical condition to comply with the Vitality program, or one of its standards, is given the same reward if the participant reaches an alternative standard that satisfies the following criteria: 1) reasonably takes into consideration the participant's medical situation, 2) is not unreasonably burdensome or impractical to comply with and 3) is otherwise reasonably designed based on all the relevant facts and circumstances."

Q. Is the Vitality program considered part of an employer's health plan?
A. The Vitality program is a stand-alone third-party, incentive-based wellness program. Vitality does not provide treatment or payment, but rather is a resource to allow our clients to better administer their own health plans and promote health and wellness.

Q. What does it mean to be a "similarly situated" individual? When does this need to be taken into account?
A. Distinctions among groups of similarly situated participants in a health plan must be based on bonafide employment-based classifications consistent with the employer's usual business practice. Distinctions cannot be based on any of the health factors. For example, part-time and full-time employees, employees working in different geographic locations and employees with different dates of hire or lengths of service can be treated as distinct groups of similarly situated individuals, with different eligibility provisions, different benefit restrictions or different costs, provided the distinction is consistent with the employer's usual business practice. This should be considered when designing the VCM, and events such as corporate challenges. If a reward/incentive is in any way involved — including the right to participate in the wellness program itself — we must consider where the line is being drawn between groups of people and why.

Q. Can Vitality release member-specific Vitality Points reports?
A. No. We do not share a report of Vitality Points at the member level. At the core of the Vitality program design is the concept of Vitality Status. Vitality Status is included in each quarterly and annual report provided to our clients. These reports allow clients to make incentive decisions without knowing the exact number of Vitality Points any individual has attained or how those points were earned. (See page 9 for more on Vitality Status.)

Q. What data can be shared with employers or third parties and what factors determine whether information can be shared at all?
A. The Vitality Group strictly adheres to the policies and procedures prescribed by the HIPAA Privacy and Security Rule regarding sharing any member information. Unless the disclosure of protected information is required by law or is a permitted disclosure for the administration of the health plan, we will not share any identifiable information without authorization from the individual member. Each determination whether or not a disclosure is permissible under law is based on the individual's circumstances and factors to be reviewed at the time.

Q. What additional agreements are necessary for data sharing?
A. If data sharing is permissible, with or without individual member authorization, certain agreements must be in place. Vitality must have a fully executed BAA with the covered entity whose information is being shared. In addition, the covered entity will have to execute a Data Sharing Agreement to:

- describe the exact information to be shared;
- determine whether individual member consent is required; and
- describe what the information is being used for so it is clear between the parties.

Once both documents are completed, the implementation team will finalize the proposal and begin the work needed to share the information.

Q. What is marketing as defined by HIPAA?
A. The HIPAA Omnibus Rule, published in early 2013 and effective September 23, 2013, defines marketing as: "communication that encourages the purchase or use of a product or service where the covered entity or business associate receives financial remuneration from a third party for making the communication."

As a result, the rule departs from prior versions in that it requires individual authorization for all communications, whether for treatment or healthcare operations purposes, in which the covered entity receives financial remuneration from the party whose product or service is being marketed for making the communications.

"Financial remuneration" means direct or indirect payment from or on behalf of a third party whose product or service is being described. It is the opinion of The Vitality Group that any third party, partner or otherwise, who uses information provided by Vitality to gain more customers, whether through outreach or directed communications, is practicing marketing.

OTHER RELEVANT LEGISLATION

Age Discrimination In Employment Act (ADEA)

The ADEA prohibits employment discrimination based on age. In general, it requires that age is not a factor in employment and health plan decisions.[6]

Vitality and ADEA

All Vitality members have an equal opportunity to engage in the program and earn status, regardless of their age.

Americans with Disabilities Act (ADA)

The purpose of the ADA is to protect individuals with disabilities against employment discrimination. Regarding wellness programs, the ADA limits the circumstances in which an employer may require physical exams or answers to disability-related inquiries. An inquiry is disability-related if an individual's response could reasonably be expected to disclose the presence of an ADA-protected disability.

For example, "How often do you exercise?" is a question that could hint that a disability exists. Note that disabilities protected by the ADA include obesity, diabetes and hypertension.

The ADA does permit generalized disability-related inquiries if they are completely voluntary and medical information is kept confidential and separate from personnel records. However, a voluntary response to an inquiry may be considered "required" if there is a high incentive or penalty tied to participation. While the amount of incentive required to be considered "voluntary" has not been specified, wellness programs are widespread and have not typically been challenged on the grounds of requiring responses to inquiries by use of incentives.

Vitality and the ADA

Because The Vitality Group collects and secures all member information, it is not possible for the employer to access individual health information. This precludes the possibility of employment discrimination via use of wellness information and removes the risk inherent in offering health assessments and screenings internally.

While a typical outcome-only incentive may be in danger of legal challenge, incentives based on Vitality Status do not discriminate because there is always an alternative way for members with a disability to fulfill the requirements.

Vitality also supports a confidential process in which a disabled employee may contact The Vitality Group to seek an alternative method to attain status and earn incentives.

Consolidated Omnibus Budget Reconciliation Act (COBRA)

COBRA ensures continued health benefits for workers and their families for a limited duration in certain situations. The act was passed to help individuals maintain coverage during transition periods.

COBRA provisions may also apply when ERISA applies, or if the wellness program is considered part of the employee health plan. COBRA may require that employees have the option of paying out-of-pocket to continue their wellness program eligibility after termination of employment.[7]

Vitality and COBRA

Vitality allows the employer to make the decision whether or not the Vitality program will be extended to individuals eligible for COBRA. If selected, these members' Vitality accounts will be maintained as long as the client deems them eligible.

Employee Retirement Income Security Act (ERISA)

ERISA was established to protect the assets of workers and ensure that funds placed in retirement plans or welfare benefit plans are there when employees actually retire or need them.

ERISA applies only to wellness programs that provide medical care, such as biometrics or flu shots, and are presented as a service separate from an existing health plan. If a program directly provides these services and is set up separately from other benefits, the law may require the same plan documentation as a health plan including Summary Plan Documents (SPDs), Form 5500.[8]

Vitality and ERISA

As medical services are not provided by The Vitality Group, ERISA does not apply. However, if necessary, templates for required Vitality documentation are available.

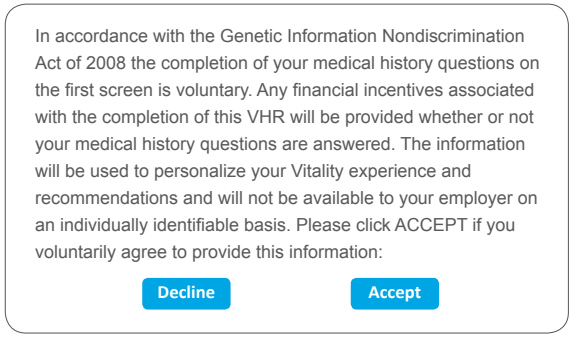
Genetic Information Nondiscrimination Act (GINA)

GINA protects individuals from discrimination based on genetic information. Genetic information is defined as genetic tests, genetic tests of family members or the manifestation of a disease or disorder in a family member. An individual's genes may affect their chances of disease incidence, but this is not an acceptable basis for employment or health plan decisions.

GINA allows employers to gather genetic information from their employees as part of a wellness program *only* if provided on a voluntary basis, but this information cannot be used by the employer in employment or health plan decisions. An incentive tied to genetic information may be viewed as discriminatory, and individuals must give prior voluntary consent before any genetic information can be gathered.[9]

Vitality and GINA

GINA applies to health plans and their administration. While Vitality is not a health plan, and therefore is not *required* to abide by GINA, we have designed our program to satisfy GINA requirements. For example, the Vitality Health Review does not require a member to provide genetic information in order to receive an incentive. In addition, if an employer chooses to include spouses on their program, the popup box to the right is displayed on-screen to ensure that spousal members fully understand they are not required to provide any information in conjunction with the employee's that could be viewed as genetic information.



No other portion of the Vitality program, including our Vitality Check biometric screening, gathers genetic information as it is defined in the legislation.

GLOSSARY OF TERMS

Authorization: If a covered entity wishes to use or disclose an individual's Protected Health Information (PHI) in a manner that is neither required nor permitted, the covered entity *must* obtain the individual's *written* authorization. Such an authorization:

- Must be written in specific terms
- May allow the use or disclosure by either the covered entity or a third party
- Must be in plain language
- Must contain specific information regarding the information to be disclosed or used, the person disclosing and receiving the information, expiration, right to revoke in writing as well as any other pertinent data[10]

Business Associate: A person or organization, other than a member of a covered entity's workforce, that performs certain functions or activities on behalf of, or provides certain services to, a covered entity that involve the use or disclosure of individually identifiable health information. Services must be limited to legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation or financial services.[11] The Vitality Group is a business associate to each of its clients as a holder and manager of their members' PHI.

Business Associate Agreement: When a covered entity uses a third party to perform business associate services, HIPAA requires certain protections for the information to be put in a contract. A covered entity must impose specified written safeguards on the individually identifiable health information used or disclosed by its business associates. Moreover, a covered entity may not contractually authorize its business associate to make any use or disclosure of PHI that would violate HIPAA.[12]

Covered Entity: Can be a healthcare provider, a health plan or a healthcare clearinghouse.[13] All Vitality clients, or the third-party entity in charge of administering their health plans, are covered entities.

De-identified Health Information: Information that neither identifies nor provides a reasonable basis to identify an individual or their health information. Information is only de-identified if the covered entity has no actual knowledge that the remaining information could be used to identify the individual.[14] There are no restrictions under HIPAA on the use or disclosure of de-identified health information.

Incentives: The possibility of an individual obtaining rewards and/or avoiding a penalty.

Penalty: The ACA allows incentives to be offered in the form of a surcharge or other financial or nonfinancial disincentive.

Protected Health Information (PHI): All "individually identifiable health information" held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper or oral. This means information, including demographic data, relating to:

- the individual's past, present or future physical or mental health or condition;
- the provision of healthcare to the individual; or
- the past, present or future payment for the provision of healthcare to the individual; and
- either clearly identifies the individual or provides a reasonable basis to believe it can be used to identify the individual.[15]

Required v. Permitted Uses or Disclosures: A covered entity *must* disclose PHI in only two situations:

1. to individuals specifically when they request access to, or an accounting or disclosure of, their PHI; and
2. to Health and Human Services (HHS) when it is undertaking a compliance investigation, review or enforcement action.[16]

A covered entity *may* use and disclose PHI without an individual's authorization for the following purposes or situations:

- to the individual;
- treatment, payment and healthcare operations;
- opportunity to agree or object;
- incident to an otherwise permitted use and disclosure;
- public interest and benefit activities; and
- limited data set for the purposes of research, public health or healthcare operations.

Of course, a covered entity may disclose PHI to the individual who is the subject of the information at any time.[17]

Rewards: ACA regulations broadly define a reward as:

- a discount or rebate of a premium or contribution;
- a waiver of all or part of a cost-sharing mechanism (such as a deductible, copayment or coinsurance); or
- an additional benefit or any financial or other incentive.

Vitality is considered an employee benefit that offers additional incentives or rewards via the Vitality Mall as well as health club subsidies and Vitality Squares, an interactive game that educates players on healthy food choices. In addition, our Vitality Contribution Manager can be used to discount or rebate a premium or portion of a premium.

If a client chooses to utilize the Vitality Mall and no other incentives, our program has been re-designed to fully comply with the five requirements of nondiscriminatory wellness programs. To account for the 30 percent threshold for Mall rewards, we will provide the maximum dollar retail value of available rewards. The client is responsible for factoring in any other incentives it chooses to offer and making sure that the total amount is less than or equal to the 30 percent threshold (or 50 percent if tied directly to tobacco cessation).

Similarly Situated Individuals: Distinctions among groups of similarly situated participants in a health plan must be based on bonafide employment-based classifications consistent with the employer's usual business practice. Distinctions cannot be based on any health factor. A plan may treat participants and beneficiaries as two separate groups; however, a plan cannot create or modify a classification directed at individual participants or beneficiaries based on one or more health factors.

Vitality Contribution Manager: This is not a reward or a benefit, but rather a vehicle to manage employer rewards/penalties. See the sidebar on page 8 for a complete description.

APPENDIX A OUTCOME-BASED INCENTIVE PROGRAMS, CONTRIBUTION STRUCTURES AND EXAMPLES OF LEGALITY PER ACA REGULATIONS

EXAMPLE	PROGRAM DETAILS	CONCLUSION
BMI screening with walking program alternative recommendations **A group health plan provides a reward to participants who have a body mass index (BMI) that is 26 or lower, determined shortly before the beginning of the year.**	■ Participants who do not meet the target BMI are given the same discount if they comply with an exercise program that consists of walking 150 minutes a week. ■ Any participant for whom it is unreasonably difficult to comply with this walking program due to a medical condition (or medically inadvisable to attempt to comply) during the year is given the same discount if they satisfy a Reasonable Alternative Standard that is not unreasonably burdensome or impractical to comply with. ■ All plan materials describing the terms of the wellness program include this statement: "Fitness is Easy! Start Walking! Your health plan cares about your health. If you are considered overweight because you have a BMI higher than 26, our Start Walking program will help you lose weight and feel better. We will help you enroll. (**If your doctor says that walking isn't right for you, that's okay too. We will work with you to develop a wellness program that is.)" ■ Participant X is unable to achieve a BMI that is 26 or lower within the plan's time frame and receives notification. Also, due to a medical condition, it is unreasonably difficult for X to comply with the walking program and so he proposes a program based on the recommendations of his physician. ■ The plan agrees to make the same discount available to X that is available to other participants in the BMI program or the alternative walking program, but only if X actually follows the physician's recommendations.	**The program satisfies the requirements because:** ■ It is reasonably designed to promote health and prevent disease. ■ It makes available to all individuals who do not satisfy the BMI standard a reasonable alternative to qualify for the reward (in this case, a walking program that is not unreasonably burdensome or impractical for individuals to comply with and that is otherwise reasonably designed based on all the relevant facts and circumstances). ■ The walking program is itself an activity-only standard and the plan complies with the requirements that, if there are individuals for whom it is unreasonably difficult due to a medical condition to comply, or for whom it is medically inadvisable to attempt to comply with the walking program, the plan provide a reasonable alternative to those individuals. ■ It discloses the availability of an RAS in all materials describing the terms of the program and in any disclosure that an individual did not satisfy the initial outcome-based standard.
BMI screening with alternatives available to either lower BMI or meet personal physician's recommendations **Same as above except that participants who do not meet the target BMI are expected to reduce BMI by one point instead of a walking program.**	■ At any point during the year, upon request, any individual can obtain a second Reasonable Alternative Standard that is in compliance with the recommendations of the participant's personal physician regarding weight, diet and exercise as set forth in a treatment plan that the physician recommends or to which the physician agrees. ■ The participant's personal physician is permitted to change or adjust the treatment plan at any time and the option of following the participant's personal physician's recommendations is clearly disclosed.	**The program is compliant because:** ■ The stated RAS of qualifying for the reward via a one-point reduction in BMI does not make the program unreasonable because the program makes available a second RAS to qualify for the reward via compliance with the recommendations of the participant's personal physician, which can be changed or adjusted at any time.
Tobacco use surcharge with smoking-cessation program alternative **In conjunction with an annual open enrollment period, a group health plan provides a premium differential based on tobacco use, determined using a health risk assessment.**	■ The following statement is included in all plan materials describing the tobacco premium differential: "Stop smoking today! We can help! If you are a smoker, we offer a smoking-cessation program. If you complete the program, you can avoid this surcharge." ■ The plan accommodates participants who smoke by facilitating their enrollment in a smoking-cessation program that requires participation at a time and place that are not unreasonably burdensome or impractical for participants. ■ The plan is otherwise reasonably designed based on all the relevant facts and circumstances, and discloses contact information and the individual's option to involve his or her personal physician. ■ The plan pays for the cost of participation in the smoking-cessation program. ■ Any participant can avoid the surcharge for the plan year by participating in the program, regardless of whether the participant stops smoking, but the plan can require a participant who wants to avoid the surcharge in a subsequent year to complete the smoking-cessation program again.-	**The premium differential satisfies the requirements.** ■ The program is reasonably designed because the plan provides an RAS to all tobacco users to qualify for the reward (a smoking cessation program). ■ The plan discloses the availability of the RAS in all materials describing the terms of the program.
Tobacco use surcharge with alternative program **Same as above, but with tobacco-cessation requirement.**	■ The plan does not provide participant X with the reward in subsequent years unless X actually stops smoking after participating in the tobacco-cessation program.	**The program is NOT compliant because:** ■ It is not reasonably designed and does not provide an RAS. ■ The plan cannot cease to provide an RAS merely because the participant did not stop smoking after participating in a smoking-cessation program. ■ The plan must continue to offer an RAS whether it is the same or different (such as a new recommendation from X's personal physician or a new nicotine replacement therapy).

APPENDIX B EXAMPLE INCENTIVE STRUCTURES PER ACA REGULATIONS

Please note these do not take into account a client's choice to use the Vitality Mall.

■ An employer sponsors a group health plan. ■ The annual premium for employee-only coverage is $6,000 (of which the employer pays $4,500 per year and the employee pays $1,500 per year). ■ The plan offers employees a Health-contingent Wellness Program with several components, focused on exercise, blood sugar, weight, cholesterol and blood pressure. ■ The reward for compliance is an annual premium rebate of $600.	■ The $600 reward for the wellness program does not exceed the applicable capped amount of 30 percent of the total annual cost of employee-only coverage, $1,800 ($6,000 x 0.30).
■ Same facts as above except that, in addition to the $600 reward for compliance with the Health-contingent Wellness Program, the plan also imposes an additional $2,000 tobacco premium surcharge on employees who have used tobacco in the last 12 months and who are not enrolled in the plan's tobacco-cessation program. ■ Those who participate in the plan's tobacco-cessation program are not assessed the $2,000 surcharge.	■ The total of all rewards (including the surcharge for non-participation in the tobacco program) is $2,600 ($600 + $2,000), which does not exceed the applicable percentage of 50 percent of the total annual cost of employee-only coverage ($3,000). ■ And, tested separately, the $600 reward for the wellness program unrelated to tobacco use does not exceed the applicable percentage of 30 percent of the total annual cost of employee-only coverage ($1,800).
■ An employer sponsors a group health plan. The total annual premium for employee-only coverage (including both employer and employee contributions toward the coverage) is $5,000. ■ The plan provides a $250 reward to employees who complete a health risk assessment, without regard to the health issues identified as part of the assessment. ■ The plan also offers a Healthy Heart program, which is a Health-contingent Wellness Program, with an opportunity to earn a $1,500 reward.	■ In this example, even though the total reward for all wellness programs under the plan is $1,750 ($250 + $1,500), which exceeds the applicable percentage of 30 percent of the cost of the annual premium for employee-only coverage ($5,000 x 0.30), only the reward offered for compliance with the Health-contingent Wellness Program ($1,500) is taken into account. ■ The $250 reward is offered in connection with a Participatory Wellness Program and therefore is not taken into account. ■ Accordingly, the Health-contingent Wellness Program offers a reward that does not exceed the applicable percentage of 30 percent of the total annual cost of employee-only coverage.

[1] Department of the Treasury, Internal Revenue Service, 26 CFR Part 54, TD 9620, RIN 1545-BL07, Department of Labor, Employee Benefits Security Administration, 29 CFR Part 2590, RIN 1210-AB55, Department of Health and Human Services, 45 CFR Parts 146 and 147, CMS-9979-F], RIN 0938-AR48, Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, June 3, 2013. http://www.dol.gov/ebsa/pdf/workplacewellnessstudyfinalrule.pdf.

[2] Department of Health and Human Services, Office of the Secretary, 45 CFR Parts 160 and 164, RIN 0945–AA03, Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules Under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Nondiscrimination Act; Other Modifications to the HIPAA Rules, January 25, 2013. http://www.gpo.gov/fdsys/pkg/FR-2013-01-25/pdf/2013-01073.pdf.

[3] As the regulations outline the requirements for groups to satisfy an exception, these rules are creating the guidelines for satisfying an affirmative defense to use to respond to a claim that the plan discriminated under the HIPAA nondiscrimination provisions.

[4] Examples include (1) a program that provides a reward to employees who complete a health risk assessment regarding current health status, without any further action (educational or otherwise) required by the employee with regard to the health issues identified as part of the assessment, (2) a program that provides a reward to employees for attending a monthly, no-cost health education seminar and (3) a program that reimburses employees for the costs of participating, or that otherwise provides a reward for participating, in a smoking-cessation program without regard to whether the employee quits smoking.

[5] 45 C.F.R. §164.502(a).

[6] http://www.eeoc.gov/laws/statutes/adea.cfm.

[7] http://www.dol.gov/dol/topic/health-plans/cobra.htm.

[8] http://www.dol.gov/compliance/laws/comp-erisa.htm.

[9] http://www.eeoc.gov/eeoc/foia/letters/2011/ada_gina_incentives.html, http://www.eeoc.gov/laws/statutes/gina.cfm.

[10] 45 C.F.R. §164.532.

[11] 45 C.F.R. §160.103.

[12] 45 C.F.R. §164.502(e), 164.504(e).

[13] 45 C.F.R. §160.102.

[14] 45 C.F.R. §164.514.

[15] 45 C.F.R. §160.103.

[16] 45 C.F.R. §164.502(a)(2).

[17] 45 C.F.R. §164.502 (a)(1).

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