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# Compliance Considerations for Wellness Programs

September 27, 2018



SPEAKER



**Jim Pshock**  
Bravo Founder and CEO

# Agenda:

1. Recap of applicable regulations
2. 1/1/19 issue and previous EEOC comments
3. Recent EEOC reply to Bravo questions
4. Plan adjustments to consider
5. Q & A

# The Long and Winding Wellness Road



<b>1990</b>	ADA okay with “voluntary” wellness programs; includes a safe harbor
<b>2000</b>	EEOC states that a wellness program is voluntary if employer neither requires participation nor penalizes employees who do not participate
<b>2006</b>	IRS, HHS, DOL exempt wellness programs from HIPAA non-discrimination rules if meet certain requirements (including 20% incentive limit)
<b>2009</b>	<ul style="list-style-type: none"> <li>• GINA amends HIPAA to restrict genetic testing</li> <li>• EEOC announced it agrees with HIPAA's 20% standard</li> <li>• EEOC rescinds the earlier 20% agreement saying it needs to do further research</li> </ul>
<b>2010</b>	ACA passed - expands the 2006 HIPAA rules allowing incentive limit increase to 30% of the total cost of coverage and agencies to increase up to 50%.
<b>2012</b>	Seff v. Broward County – 11 <sup>th</sup> Circuit relies on ADA safe harbor
<b>2013</b>	<ul style="list-style-type: none"> <li>• EEOC hearing</li> <li>• IRS, HHS, DOL issue new wellness rules including participatory, health-contingent activity-only and health-contingent outcomes-based incentives; capped health contingent at 30%; expand to 50% for tobacco-use</li> </ul>
<b>2014</b>	<ul style="list-style-type: none"> <li>• EEOC filed 3 lawsuits alleging wellness plans violated ADA and GINA</li> <li>• EEOC request for TRO for Honeywell Corp. denied</li> </ul>
<b>2015</b>	<ul style="list-style-type: none"> <li>• Senate hearing</li> <li>• The “Preserving Employee Wellness Programs Act” (S.620) (H.R.1189) introduced</li> <li>• House hearing</li> <li>• EEOC issues proposed rules to amend the ADA and GINA</li> </ul>
<b>2016</b>	<ul style="list-style-type: none"> <li>• EEOC issues final ADA and GINA regulations</li> </ul>





UNITED STATES COURT HOUSE

# AARP v EEOC Background

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## **AARP vs. EEOC:** Background

- Pre-2016, little guidance from the EEOC on the level of incentive or penalty that may deem a health inquiry or exam as “involuntary” under the ADA.
- After pressure from earlier court decisions, the EEOC provided guidance in 2016, allowing incentives or penalties up to 30% of the cost of the least expensive employee-only coverage; regardless if employee was actually enrolled in the health plan.
- AARP sued the EEOC. In response to the suit, the court asked the EEOC to support justification on their 30% safe harbor, the EEOC failed to do so.
- On December 20, 2017, U.S. District Judge John Bates ruled that the 30% portion of the EEOC regulations (and only this portion) shall be vacated as of 1/1/2019.

**EEOC Options:** What to put in place by January 1, 2019

**Initially, the EEOC indicated that they may do one of the following:**

1. Nothing
2. Issue new guidance
3. Take a wait-and-see approach, choosing to study the issue further or await the resolution of potential appellate proceedings

Bravo and like-minded entities met with EEOC officials in April 2018. It was clear that next steps hinged largely upon the confirmation of new EEOC commissioners



**“It’s highly unlikely we can implement a new regulation prior to 2021.”**

**Victoria Lipnic**, Acting Commissioner, EEOC

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## EEOC Meeting Notes

### Key points:

- New commissioners not sworn in yet
- Vacatur only applies to 30% safe harbor
- Original Title V safe harbor may still apply to some wellness programs
- Value-based benefits, incentives tied to closing gaps in care, single-page physician forms are all still arguably “exams,” less risk but still risk
- EEOC unlikely to formally change enforcement guidance
- New regulation timeline still 2021 (if drafted this year)
- “Deemer” provision is unlikely but possible
- Most risk may be with spouse HRA as all “health questions” are “family history” (technical vs. spirit of regulation)



Trip Update: Key Points from April 19-20

# Initially unclear what (if any) risk mid-year renewal groups face as of 1/1

- ✓ Unclear if screenings conducted in 2018 to earn incentives in 2019 could rely upon safe harbor
- ✓ Informal comment suggested 2019 screenings/HRA's most relevant

*“Don’t incentivize in 2019 to answer questions or complete HRA in 2019.”*

# Bravo and PHA submit clarifying questions to the EEOC.

**Here are their responses...**

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## July 2018 EEOC Replies to Bravo and Coalition

**“If an incentive was adopted for a plan year while the ADA and GINA wellness regulations were in effect, an employer likely would not have to alter the incentive, as long as the size of the incentive falls within the limitations set forth in the regulations.”**

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## July 2018 EEOC Replies to Bravo and Coalition

**“We do not know at this time whether, and to what extent, the Commission will consider the **affordability standard** in determining how to approach wellness program incentives after **1/1/2019.**”**



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## July 2018 EEOC Replies to Bravo and Coalition

**“Providing an alternative that would not require such inquiries (disability-related inquiries and/or screenings), may be an acceptable alternative...  
Must be a real choice and availability of alternative must be clearly communicated.”**

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## July 2018 EEOC Replies to Bravo and Coalition

**“Arguably, even employees who do not complete an annual exam with their personal physician are being penalized for non-participation because they are worse off than employees who have had exams.”**

## Other Comments

**“Previous enforcement targeted extremely aggressive plans.”**

**“Penalties are always more problematic than true rewards.”**

**“At the heart of this is the need to restrict employer access to sensitive data.”**

# Industry Noise

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# Is Wellness Worth It?

The screenshot shows a news article on the website [www.ideastream.org](http://www.ideastream.org). The article title is "DeWine Announces New Wellness Initiative To Cut Healthcare Costs". The main image shows Governor Mike DeWine and his running mate Jon Husted at a podium with a sign that says "DeWine Husted FOR OHIO'S FUTURE". A woman in a dark suit stands to the left of the podium. The article text below the image reads: "Gubernatorial candidate Mike DeWine announced a new plan to prevent chronic disease among Ohioans. [Lecia Bushak / ideastream]". Below the image is a "Featured Audio" player with a progress bar at 00:00 / 01:02. At the bottom of the article, it says "News" and "Republican candidate for governor Mike DeWine and his running mate Jon Husted announced a new wellness".

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## The American Heart Association provides evidence and direct health

New business builds up principles for conducting

NEWS PROVIDED BY  
**The American Heart Association**  
Apr 30, 2018, 10:00 ET

DALLAS, April 30, 2018 /PR... dedicated to building healthier communities, is

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### DeWine Announces New Wellness Initiative To Cut Healthcare Costs

Gubernatorial candidate Mike DeWine announced a new plan to prevent chronic disease among Ohioans. [Lecia Bushak / ideastream]

Featured Audio

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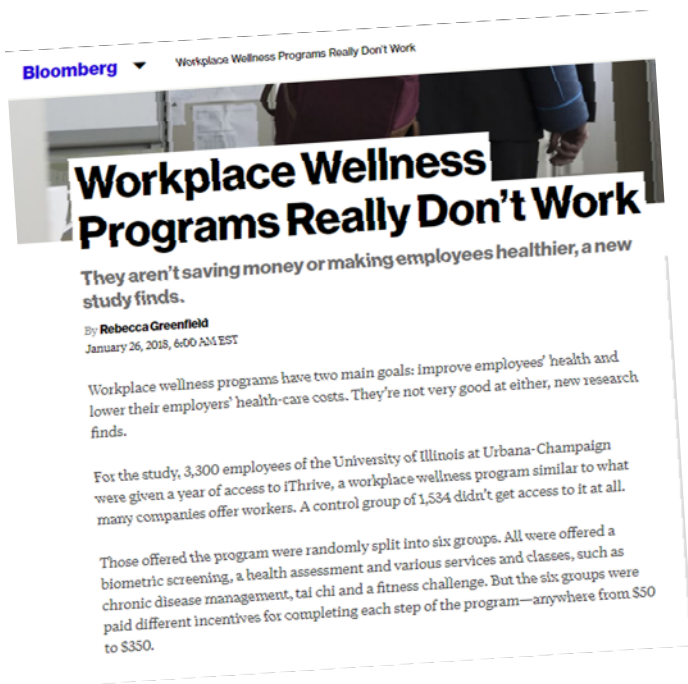
News

Republican candidate for governor Mike DeWine and his running mate Jon Husted announced a new wellness

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AUGUST 25-26 SEP 10-11 & 18-19

## Dr. Michael Roizen's Response: Chief Wellness Officer; Cleveland Clinic



We read with alarm Rebecca Greenfield's piece "Workplace Wellness Programs Don't ..." The article's sweeping generalizations are a disservice to integrated population health and wellness programs healthcare organizations can — and should — be offering.

Cleveland Clinic's Employee Health Plan offers voluntary incentives for enrollees to hit specific healthcare goals they set in collaboration with their primary care providers. **These goals aren't one size fits all; they are tailored to each member's objectives, whether it's exercise, controlling blood pressure, or losing weight.**

The results: over **62% of employees participate** in the incentive program, earning them better health and lower costs while **reducing healthcare spend \$250 million over** the last four of our eight year population health and wellness program.

Source: <https://www.bloomberg.com/news/articles/2018-01-26/workplace-wellness-programs-really-don-t-work>



## Mayo Clinic Study: Results

Financial Incentives	No Financial Incentives
62% completion rate	26% completion rate
Mean weight loss: 9.08 pounds	Mean weight loss: 2.34 pounds
Penalty participants more likely to continue participation	Those not meeting their goal were not likely to continue participation

**“Employers need to find the right incentives to gain and sustain meaningful employee participation in wellness programs. In addition to premium contributions, gift cards, travel vouchers, electronics and other prizes, even additional paid time off and bonus cash can be powerful motivators.”**

**Michael Levy**  
*President, Online Rewards*

Source: <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/weight-loss-incentives.aspx>

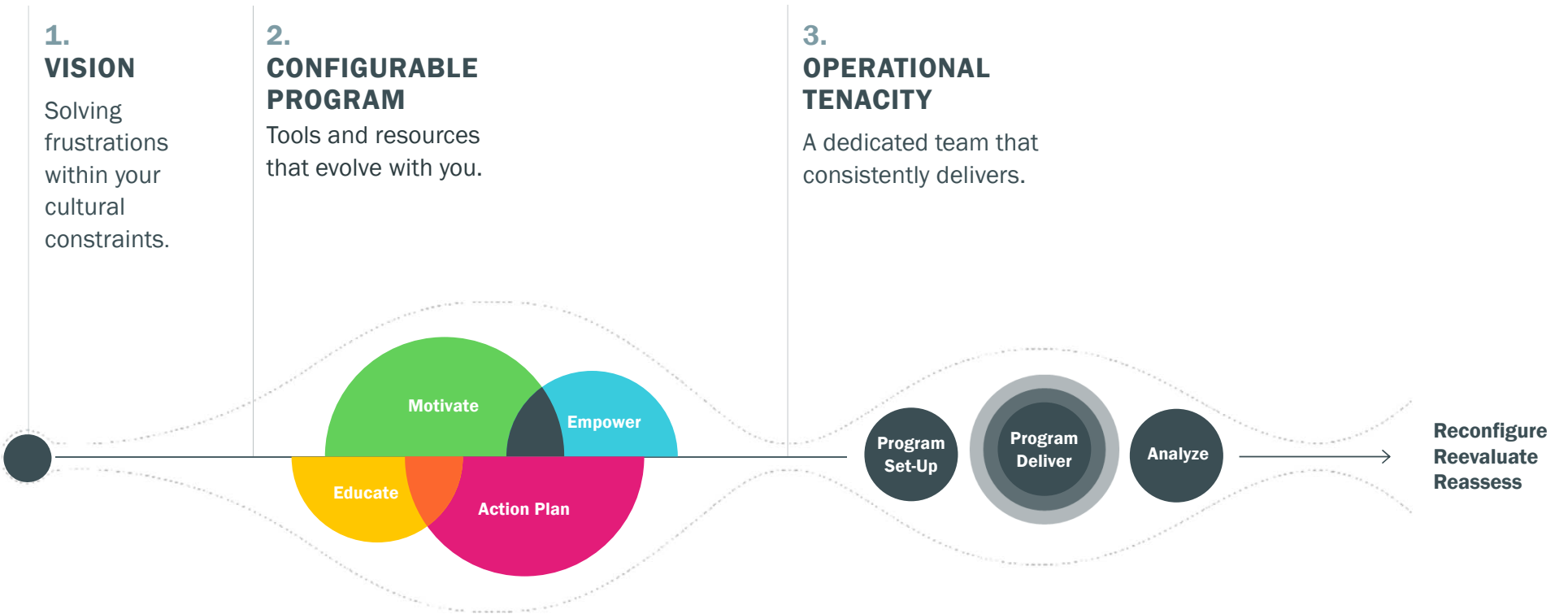


# Bravo 2019 EEOC Plan Design Review

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# Bravo Proven Process



## Practical Examples – Example 1

**Highlighted items do not require an HRA or screening. Maximum reward can be achieved by completing those activities.**

### IMPROVEMENT INCENTIVES

**Get rewarded up to \$500 for meeting any of the following goals:**

- Complete an online coaching program, up to 2 per quarter **(\$25 each)**
- Complete a team challenge, up to 2 per year **(\$50 each)**
- Body Mass Index  $\leq 28$  or Waist  $<34$  (f),  $<37$  (m) **(\$250)**
- Complete a Health Risk Assessment **(\$100)**
- Complete a Biometric Screening **(\$200)**
- Attend a health improvement seminar, up to 4 per year **(\$25 each)**
- Attest to being tobacco free or complete cessation course **(\$250)**
- Improve blood pressure, cholesterol, weight or glucose by 10% **(\$250)**

## Practical Examples – Example 2 - *Before*

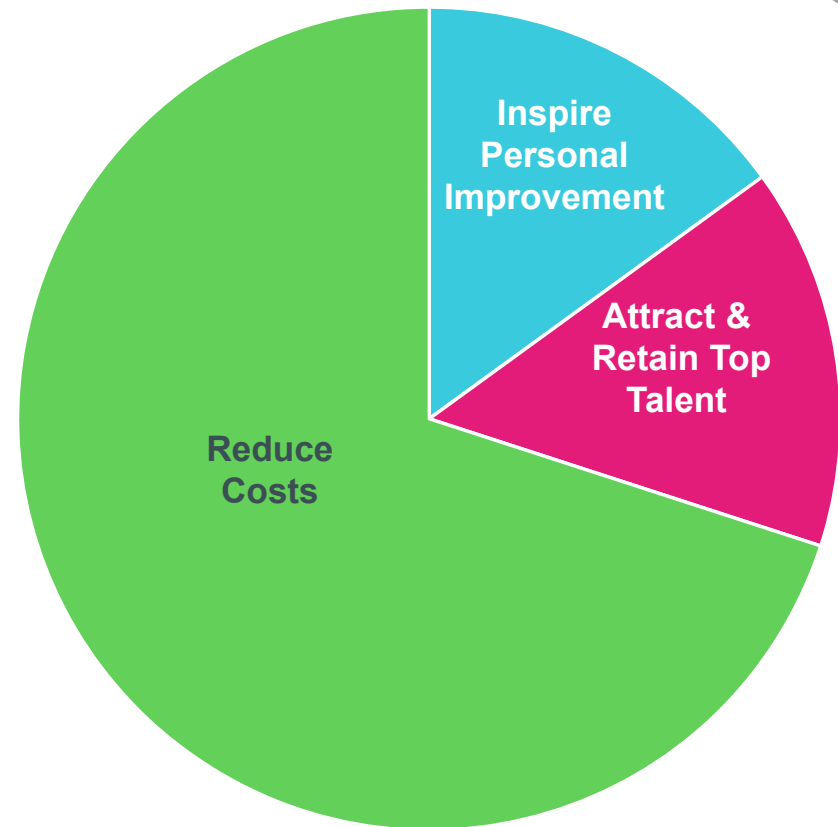
# Sample incentive program that may lose safe harbor protection 1/1/19.

### IMPROVEMENT INCENTIVES

Get rewarded up to \$1,000 for meeting any of the following goals:

- Body Mass Index  $\leq 27.5$  (**\$400**)  
If your BMI is elevated due to lean muscle mass, waist measurement will automatically correct it (female  $\leq 34.5$  inches, male  $\leq 37$  inches)  
**OR** make an improvement by achieving 5% weight loss per year until BMI  $\leq 27.5$  or healthy weight or waist
- Blood Pressure  $\leq 130/85$  (**\$200**)  
**OR** make an improvement by achieving one category improvement until 130/85 or better
- Glucose  $\leq 110$  or HbA1c  $\leq 6$  (**\$200**)  
**OR** make an improvement by achieving one category improvement until  $\leq 110$  (glucose) or  $\leq 6$  (HbA1c)
- Negative Tobacco (blood test verified) (**\$200**)  
**OR** complete QuitLogix cessation

**Client is faced with financial pressures, rising benefits costs and leverages the wellness program to minimize the impact.**





## Bravo – Interim EEOC Recommended Design – Reduce Costs

Communications would be promoting screening based achievements. Activity options would be upon request.

By participating, employees and spouses can each earn up to **\$800** for achieving or improving on biometric goals toward their annual medical premium! Earn an additional **\$200** for being tobacco-free.

### IMPROVEMENT INCENTIVES

Get rewarded for meeting any of the following goals:

**Body Mass Index  $\leq 27.5$  (\$400)**

If your BMI is elevated due to lean muscle mass, waist measurement will automatically correct it (female  $\leq 34.5$  inches, male  $\leq 37$  inches).

**OR** make an improvement by achieving 5% weight loss per year until BMI  $\leq 27.5$  or healthy weight or waist

**Blood Pressure  $\leq 130/85$  (\$200)**

**OR** make an improvement by achieving one category improvement until 130/85 or better

**Glucose  $\leq 110$  or HbA1c  $\leq 6$  (\$200)**

**OR** make an improvement by achieving one category improvement until  $\leq 110$  (glucose) or  $\leq 6$  (HbA1c)

*Metabolic Syndrome=No is also acceptable.*

*Metabolic Syndrome exists when 3 or more of these factors are true: Waist  $\geq 40$ (m)  $\geq 35$ (f); Triglycerides  $\geq 150$ ; HDL  $\leq 40$  (m)  $\leq 50$  (f); BP  $\geq 130/85$ ; Glucose  $\geq 100$*



### TOBACCO INCENTIVES

Earn an additional **\$200** by:

Negative Tobacco Attestation (**\$200**)

**OR** complete QuitLogix cessation

### Looking for other options?

If you choose not to screen or complete the HRA, there are other ways you can earn the full incentive. Contact Bravo at 877.662.7286 to learn more.

## Bravo – Interim EEOC Recommended Design – Reduce Costs

Communications would be promoting screening based achievements. Activity options would be upon request.

By participating, employees and spouses can each earn up to **\$800** for achieving or improving on biometric goals toward their annual medical premium! Earn an additional **\$200** for being tobacco-free.

### IMPROVEMENT INCENTIVES

#### Get rewarded for meeting any of the following goals:

- **Body Mass Index  $\leq 27.5$  (\$400)**  
If your BMI is elevated due to lean muscle mass, waist measurement will automatically correct it (female  $\leq 34.5$  inches, male  $\leq 37$  inches).  
**OR** make an improvement by achieving 5% weight loss per year until BMI  $\leq 27.5$  or healthy weight or waist
- **Blood Pressure  $\leq 130/85$  (\$200)**  
**OR** make an improvement by achieving one category improvement until 130/85 or better
- **Glucose  $\leq 110$  or HbA1c  $\leq 6$  (\$200)**  
**OR** make an improvement by achieving one category improvement until  $\leq 110$  (glucose) or  $\leq 6$  (HbA1c)

*Metabolic Syndrome=No is also acceptable.*

*Metabolic Syndrome exists when 3 or more of these factors are true: Waist  $\geq 40(m)$   $\geq 35(f)$ ; Triglycerides  $\geq 150$ ; HDL  $\leq 40(m)$   $\leq 50(f)$ ; BP  $\geq 130/85$ ; Glucose  $\geq 100$*



### TOBACCO INCENTIVES

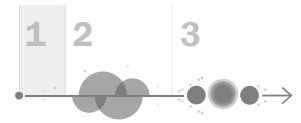
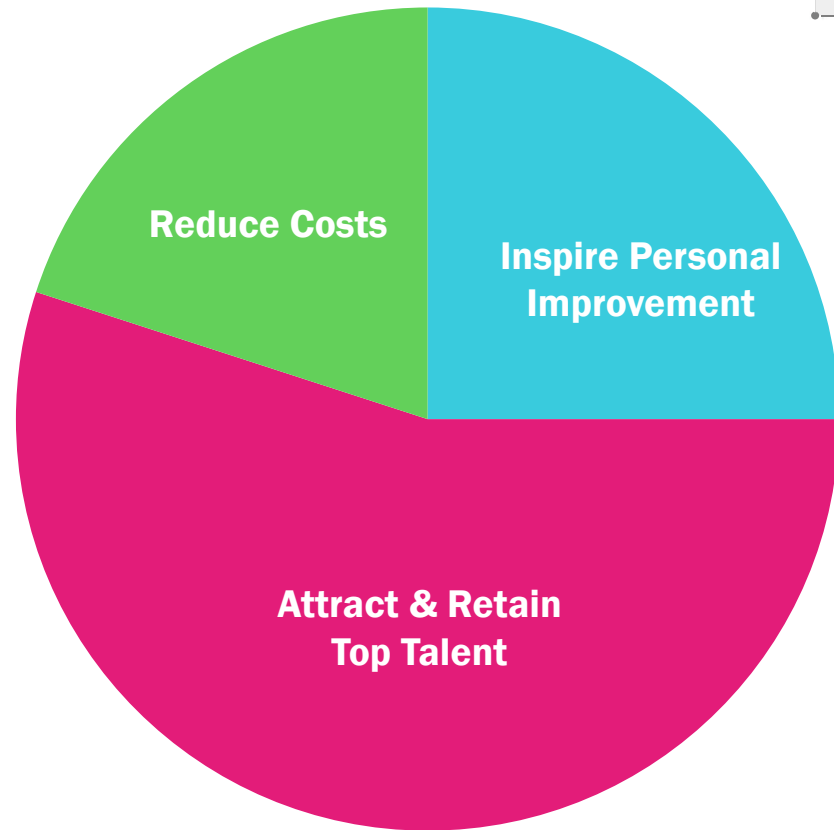
#### Earn an additional \$200 by:

- Negative Tobacco Attestation (**\$200**)  
**OR** complete QuitLogix cessation

#### Once requested, complete any 5 qualifying activities:

- Complete Team Challenge (**2 available**)
- Walk 675,000 steps between X and Y date (90 days)
- Complete Online Health University Courses (**7 available**)
- Complete Personal Health Coaching

**Changes in the labor market force the wellness plan to be more integral in attracting top talent, causing a shift in the way incentives are structured.**



## Bravo – Interim EEOC Recommended Design – Attract & Retain

Robust, well-being comprehensive activities.

By participating, employees and spouses can each earn up to **\$800** for achieving or improving on biometric goals or completing participation incentives toward their annual medical premium! Earn an additional **\$200** for being tobacco-free.

### IMPROVEMENT INCENTIVES

#### Get rewarded for meeting any of the following goals:

**Body Mass Index  $\leq 27.5$  (\$400)**

If your BMI is elevated due to lean muscle mass, waist measurement will automatically correct it (female  $\leq 34.5$  inches, male  $\leq 37$  inches).

**OR** make an improvement by achieving 5% weight loss per year until BMI  $\leq 27.5$  or healthy weight or waist

**Blood Pressure  $\leq 130/85$  (\$200)**

**OR** make an improvement by achieving one category improvement until 130/85 or better

**Glucose  $\leq 110$  or HbA1c  $\leq 6$  (\$200)**

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### TOBACCO INCENTIVES

#### Earn an additional \$200 by:

Negative Tobacco Attestation (**\$200**) **OR** complete QuitLogix cessation

### PARTICIPATION INCENTIVES

#### If you do not earn the \$800 maximum from your improvement incentives, you have the opportunity to participate in the following activities until you reach the maximum incentive:

Complete Team Challenge (**\$200 Each Challenge**)

Walk 675,000 steps between X and Y date (90 days) (**\$300**)

Complete Online Health University Courses (**\$100 Each Course**)

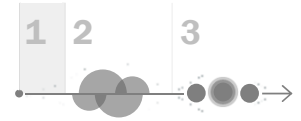
Complete Personal Health Coaching (**\$200 After 4 Sessions**)

Complete Personal Challenge (**\$75 Each Challenge**)

Complete a Screening (**\$200**)



**Bravo's sweet spot is configuring wellness plans to provide a balanced focus on three core goals.**





## Bravo – Interim EEOC Recommended Design – Balanced Vision

By participating, employees and spouses can each earn up to **\$800** for achieving or improving on biometric goals or completing participation incentives toward their annual medical premium! Earn an additional **\$200** for being tobacco-free.

### IMPROVEMENT INCENTIVES

#### Get rewarded for meeting any of the following goals:

Body Mass Index  $\leq 27.5$  (**\$400**)

If your BMI is elevated due to lean muscle mass, waist measurement will automatically correct it (female  $\leq 34.5$  inches, male  $\leq 37$  inches).

**OR** make an improvement by achieving 5% weight loss per year until BMI  $\leq 27.5$  or healthy weight or waist

Blood Pressure  $\leq 130/85$  (**\$200**)

**OR** make an improvement by achieving one category improvement until 130/85 or better

Glucose  $\leq 110$  or HbA1c  $\leq 6$  (**\$200**)

**OR** make an improvement by achieving one category improvement until  $\leq 110$  (glucose) or  $\leq 6$  (HbA1c)

*Metabolic Syndrome=No is also acceptable.*

*Metabolic Syndrome exists when 3 or more of these factors are true: Waist  $\geq 40$ (m)  $\geq 35$ (f); Triglycerides  $\geq 150$ ; HDL  $\leq 40$  (m)  $\leq 50$  (f); BP  $\geq 130/85$ ; Glucose  $\geq 100$*

### TOBACCO INCENTIVES

#### Earn an additional \$200 by:

Negative Tobacco Attestation (**\$200**) OR complete QuitLogix cessation

### PARTICIPATION INCENTIVES

#### If you do not earn the \$800 maximum from your improvement incentives you have the opportunity to participate in the following activities until you reach the maximum incentive:

Complete 1 Team Challenge (**\$200**)

Walk 675,000 steps between X and Y date (90 days) (**\$200**)

Complete 2 Online Health University Courses (**\$200**)

Complete 4 Sessions of Personal Health Coaching (**\$200**)

Complete a Screening (**\$200**)



## **In Summary**

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- Accept that the vacatur is happening 1/1/2019
- Well-designed comprehensive programs should preserve preventive screenings and HRAs with personalized action plans
- Incentives that are large enough to motivate new actions are a proven practice, but don't use more money than needed
- Screenings and incentives alone are not a wellness program. Goals should be reasonable and resources impactful.
- Penalties and punitive designs with little or no support are at risk
- Companies with high morale and trust of leadership have lower risk



Welcome to Bravo's EEOC Risk Evaluator! Answer these 5 simple questions and hit submit, and we'll send you an evaluation within 2 business days.

**Start**

press ENTER

1 → What is the percent of employee-only total premium that requires a screening or HRA to be earned? \*

If the full reward can be earned without completing an HRA or screening, select 0%.

A 0%

B 1-5.9%

C 6-14.9%

D 15-19.9%

E 20-30%

F >30%

G Not sure

# Q & A

Email your question:  
[bravomarketing@bravowell.com](mailto:bravomarketing@bravowell.com)

**bravo**



## What You Need to Know

If no further action is taken by the EEOC, a federal judge has indicated that the “30% of premium safe harbor” portion of the EEOC’s ADA and GINA wellness regulations will be vacated as of 1/1/2019. What does that mean for employers? It depends.

### Answer these questions to help you decide:

1. Does your incentive require the completion of an exam and/or require individuals to answer disability-related health questions?

If not, good news! The regulations don’t apply to all incentives, only incentives that require an exam or a disability inquiry and may cause the exam/inquiry to be deemed *involuntary* or *coercive*.

2. If you answered “yes” to #1, do you offer alternative ways for individuals to earn the full reward without having to complete the exam or answer the disability questions?

No changes are necessary as long as the alternatives are not overly burdensome. For example, you offer \$500 for completing a biometric screening or \$100 per completed health challenge or coaching course (up to 5). Even though \$500 was tied to an exam, the exam wasn’t required in order to earn the maximum incentive.

3. If you answered “no” to #2, are your incentives limited to individuals participating in your health plan and paid as a premium reduction or benefit adjustment, or are they offered to all employees and paid as compensation?

While not a guarantee of compliance with the ADA or GINA regulations, it has largely been accepted that incentives offered by the health plan to those who voluntarily enroll in the health plan, provided the incentives clearly comply with HIPAA and ACA wellness regulations, are far less at risk of legal or compliance concerns than those paid by employers to employees *outside* of a health plan. There is significant case law supporting employers/health plans in this context (pre-EEOC regulations). While there may still be risk, we believe it is substantially less than the risk related to incentives outside of the health plan.

4. If there is no appetite for even the potential risk within a health plan, employers should adjust to a plan as shown in example #2. Bravo offers online coaching programs, group challenges and individual well-being challenges that are engaging, require effort to complete and are proven to inspire positive change. Those who choose to complete a number of these programs instead of seeing their physician, completing a screening, or completing a health assessment will still reap meaningful value from the program.

**Note:** This checklist does not constitute legal advice. Employers and health plans are encouraged to review their specific program design with legal counsel.

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LET'S TALK

For help evaluating your own plan, contact us toll-free at **877.662.7286**.

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**Support/Help** [support@bravowell.com](mailto:support@bravowell.com)

**[www.bravowell.com](http://www.bravowell.com)**



**Jim Pshock**

Bravo Founder and CEO



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