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**Wellness Programs with “Teeth”:
What Employers Can Legally Do to
Increase Participation**

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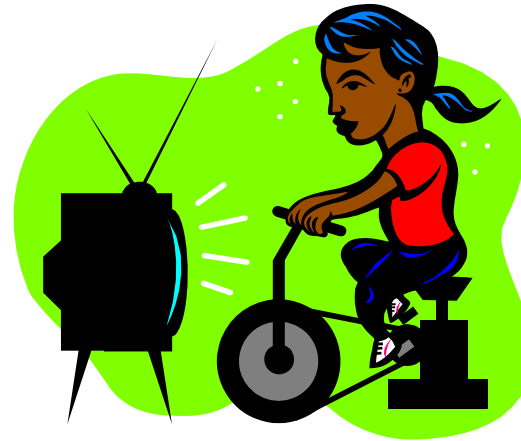
Agenda

- ▶ Types of Wellness Programs
- ▶ Prevalence of Wellness Programs
- ▶ Return on Investment
- ▶ Incentives/Penalties for Participation
- ▶ Legal Constraints
- ▶ PPACA Provisions on Wellness



Types of Wellness Programs

- ▶ Rough definition: Employer-sponsored programs designed to encourage, facilitate, and/or mandate healthy behavior by employees (and sometimes their dependents)



Types of Wellness Programs

- ▶ Programs run a broad spectrum – from newsletters, to on-site clinics, to mandatory behavioral changes
- ▶ Generally backed by incentives, but sometimes by penalties



Types of Wellness Programs

- ▶ Common wellness programs include
 - health risk assessments
 - biometric screenings
 - health coaching
 - gym memberships
 - smoking cessation programs
 - weight-loss programs
 - flu shots and other immunizations
 - newsletters and online resources



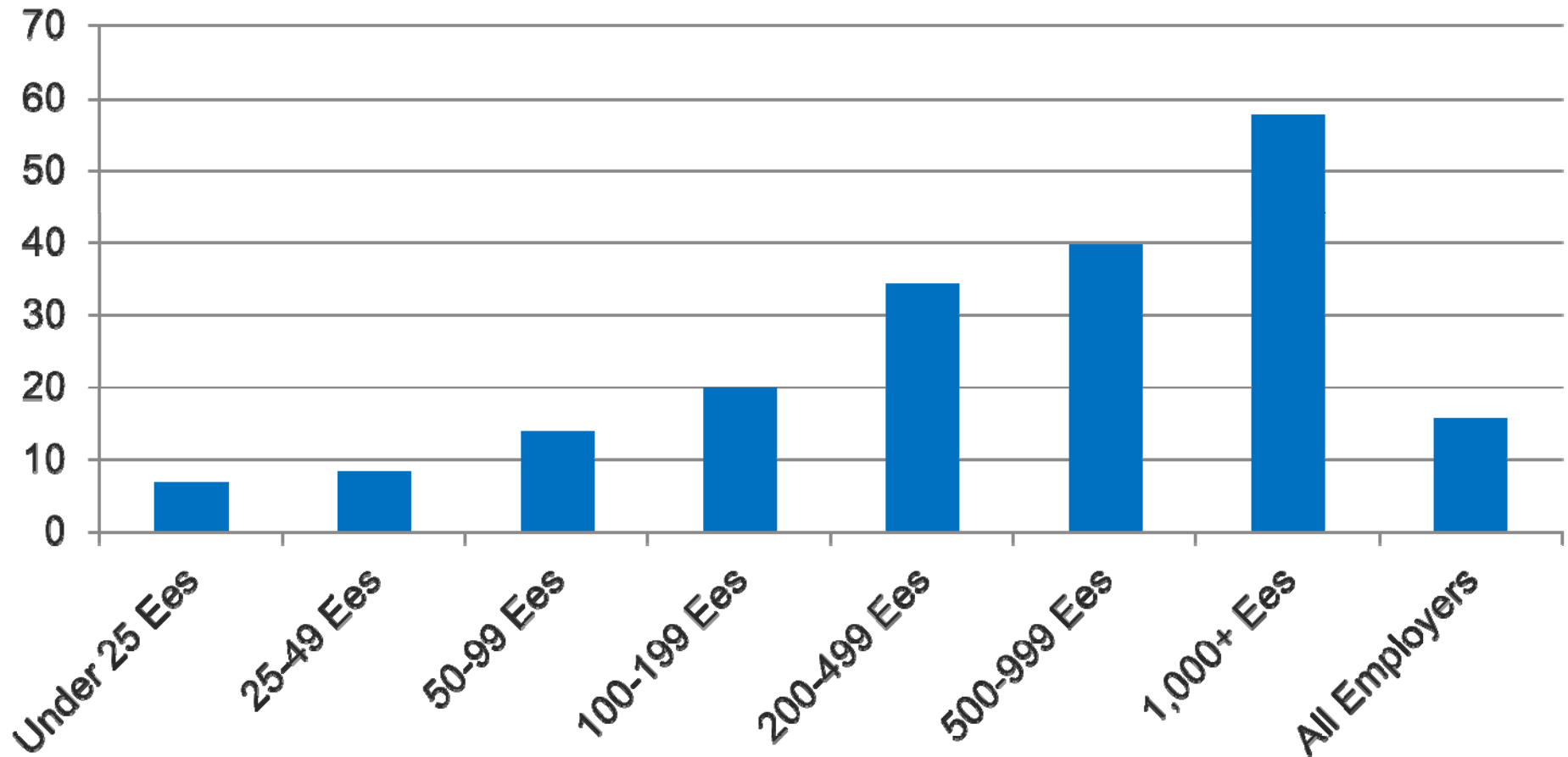
Prevalence of Wellness Programs

- ▶ According to the *Benefits USA 2011/2012 Survey*, the prevalence of wellness programs varies by type of program:
 - Flu shots or immunizations – offered by 91.5% of employers
 - Health risk assessments -- 60%
 - Smoking cessation programs -- 58.8%
 - Biometric screening -- 31.2%
- ▶ When an employer offers a wellness program, 48.2% of employees participate



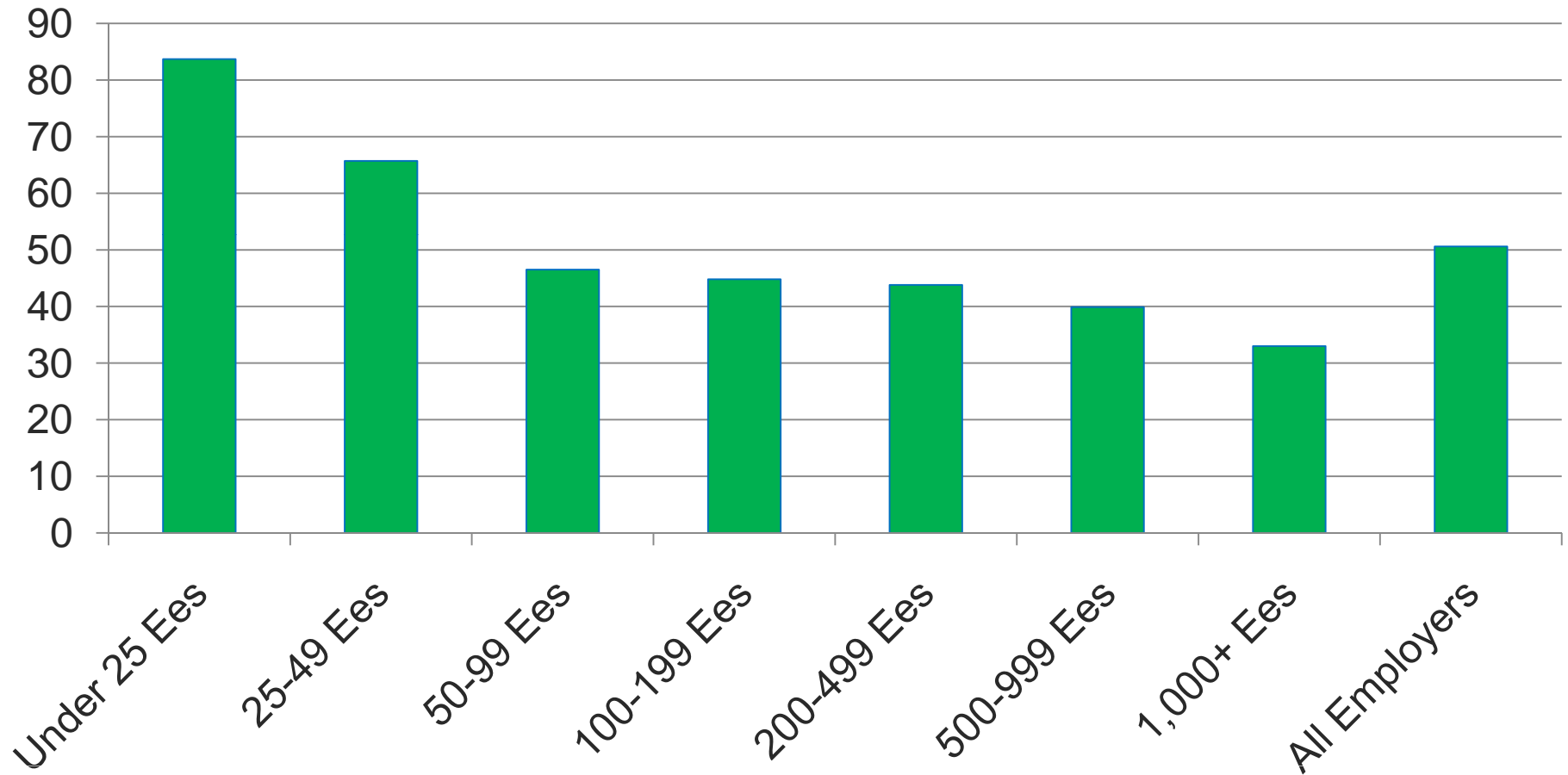
2011 UBA Health Plan Survey

Percentage of Employers Offering Wellness Program



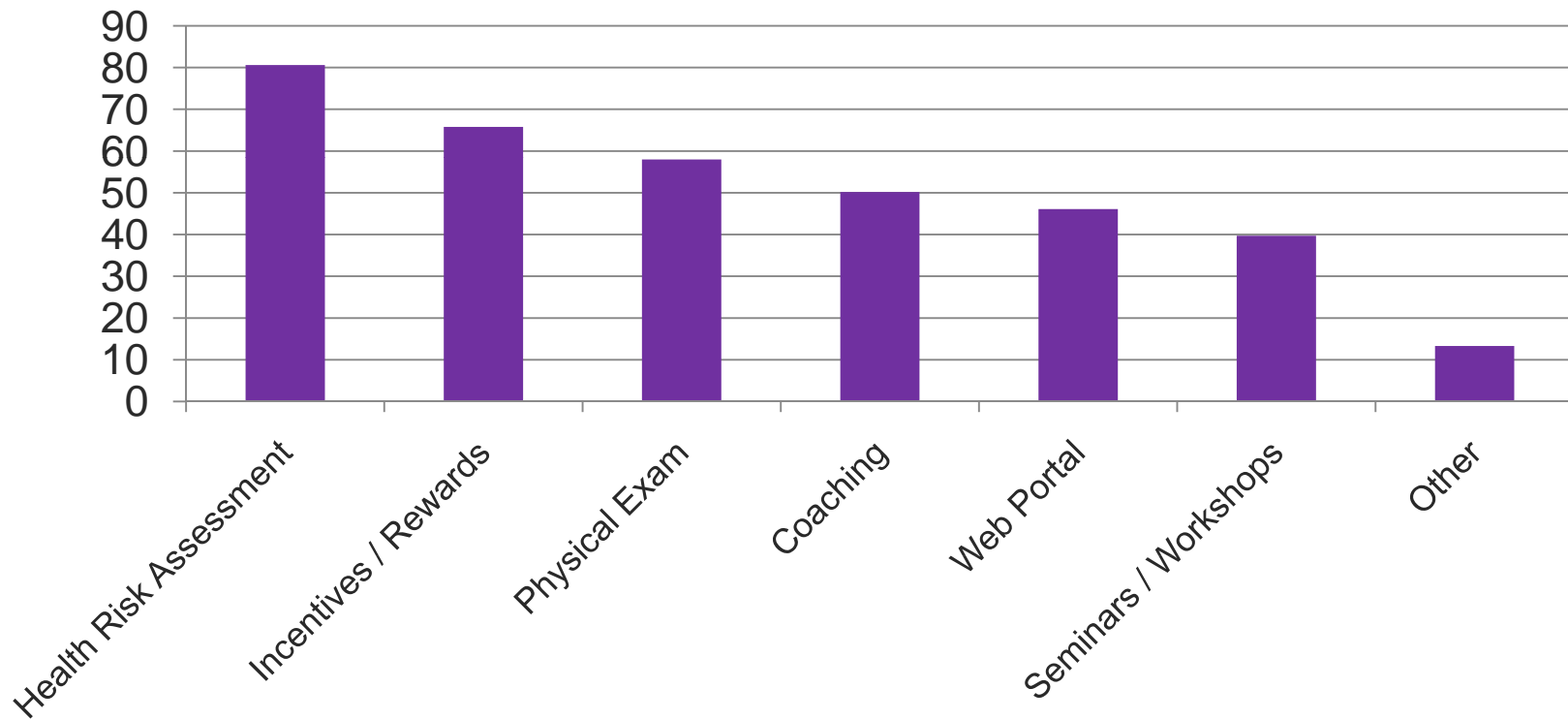
2011 UBA Health Plan Survey

Percentage of Programs Offered Via Insurer



2011 UBA Health Plan Survey

Wellness Program Components



Return on Investment - Goals

▶ Primary employer goals in implementing wellness programs:

○ Healthier employees

- Reduced health, disability, and workers' compensation costs
- Fewer safety incidents (less down time)



○ Greater productivity

- Reduced absenteeism
- Reduced presenteeism



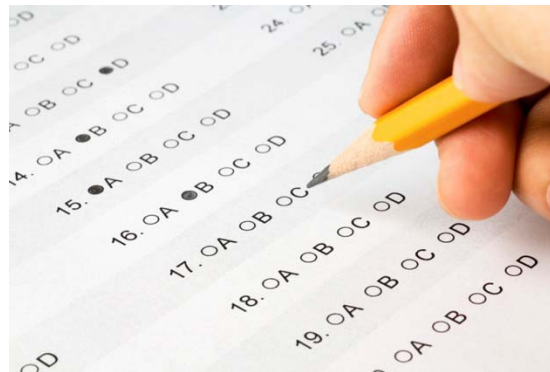
Return on Investment - Goals

- Better organizational culture
 - Fewer voluntary resignations
 - Greater trust in management
 - More employees willing to recommend employer to other potential employees

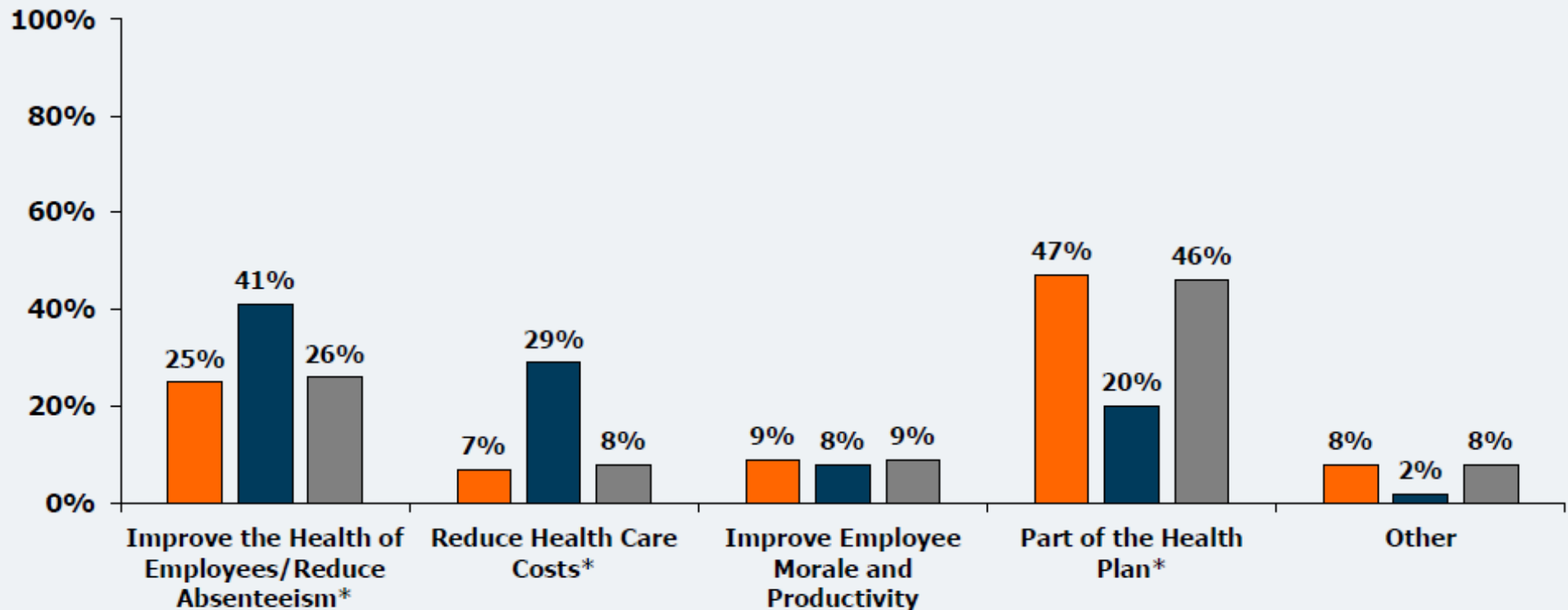


Return on Investment - Goals

- ▶ Per Kaiser Family Foundation's *2011 Survey of Employer Health Benefits*, the primary reasons given by employers for implementing wellness programs are as follows:



Among Firms Offering Health Benefits and Wellness Programs, Percentage of Firms Reporting the Following as the Firm's Primary Reason for Offering Wellness Programs, by Firm Size, 2011



* Estimate is statistically different between All Small Firms and All Large Firms within category ($p < .05$).

Note: 4% percent of firms reported "Don't Know" to the question about their primary reason for offering wellness.

Source: Kaiser/HRET Survey of Employer-Sponsored Health Benefits, 2011.

■ All Small Firms (3-199 Workers)
■ All Large Firms (200 or More Workers)
■ All Firms

Return on Investment - Math

- ▶ “Presenteeism” refers to productivity losses that occur when employees come to work but underperform due to illness or stress



- A 2002 Dow Chemical study found that annual presenteeism costs per employee (\$6,721) exceeded both direct health care costs (\$2,278) and costs attributable to absenteeism (\$661)
- So wellness programs can actually save an employer more money by reducing presenteeism than by reducing health care costs or absenteeism

Return on Investment - Math

- ▶ Study by Towers Watson and the National Business Group found significantly lower voluntary attrition rates at organizations with highly effective wellness programs than at organizations whose programs have low effectiveness (9% versus 15%)



Return on Investment - Math

- ▶ A 2010 study found that, for each \$1.00 spent on wellness programs, employers reaped savings of \$3.27 on health care costs and \$2.73 in reduced absenteeism



Return on Investment - Math

- ▶ Per the 2011 Kaiser Survey, employers believe that wellness programs produce healthier employees and reduce health care costs
 - 65% of employers believe that their employees are healthier
 - 54% of employers believe that health care costs are reduced
 - Large employers are somewhat more likely than small employers to hold these views



Incentives / Penalties



Incentives / Penalties

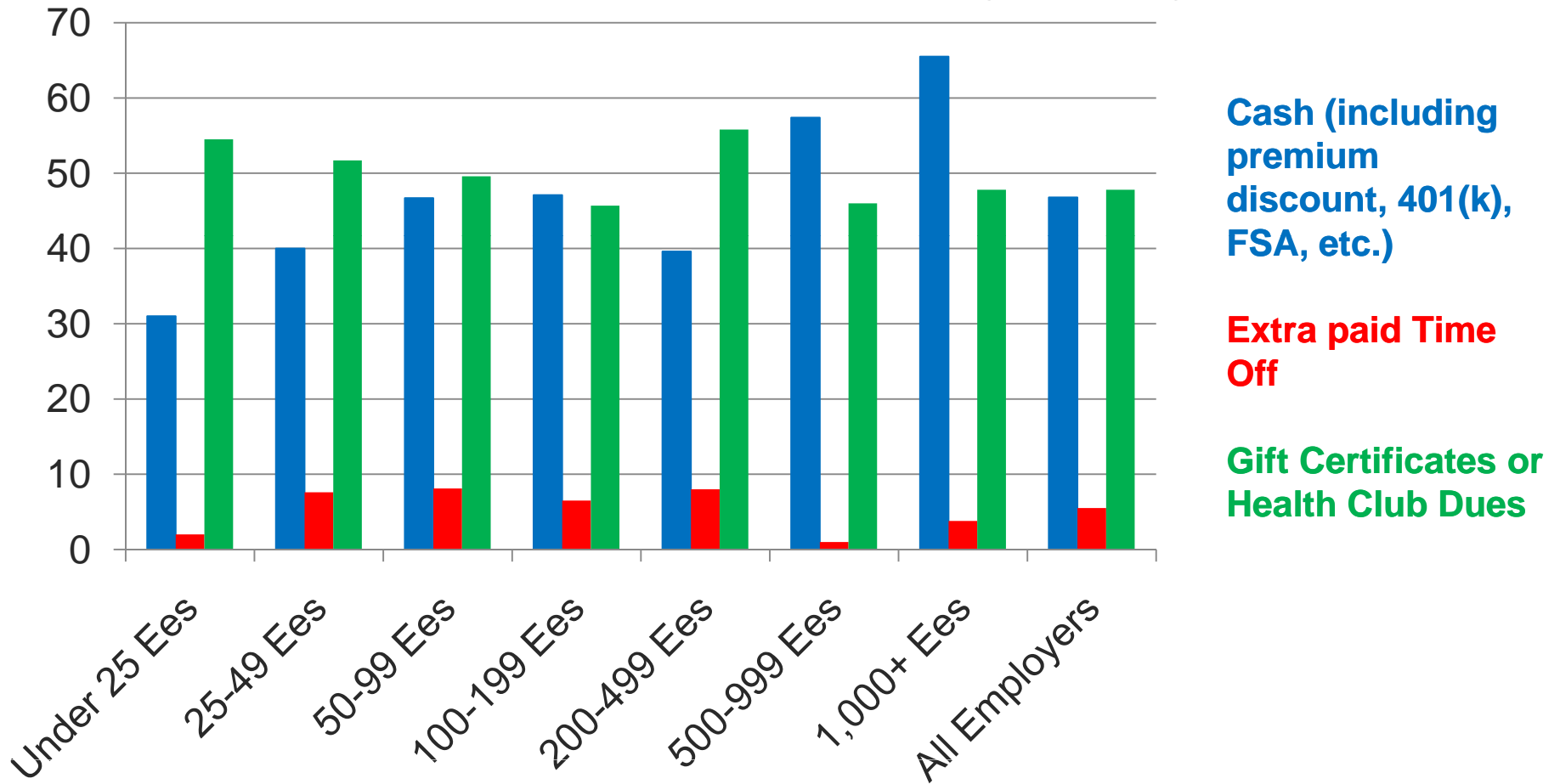
▶ Common incentives

- Premium discounts
- Reduced deductible
- Lower coinsurance rate
- Cash or gift card
- Free health products
- Employer HSA or HRA contribution
- Free health coaching and/or relevant drugs



2011 UBA Health Plan Survey

Prevalence of Listed Incentives by Employer Size



Smoking Disincentives

- ▶ GE imposes \$625 annual surcharge and provides free nicotine replacement therapy (replacing \$750 payment to stop smoking, after non-smokers complained)
- ▶ Baylor University charges smokers an extra \$50/year; going to \$650/year in 2012
- ▶ Beginning in 2012, Baylor will no longer hire smokers (already implemented by Scott's Lawn Service)



Use of HSA Contributions

- ▶ Nonunion employees of BAE will be forced into a high deductible plan, but will receive \$200 HSA contribution for **each** of the following (up to \$800 total):
 - Completing a health risk assessment
 - Undergoing biometric testing
 - Calling a “health coach”
 - Achieving health goals set with the coach

Other Specific Examples

- ▶ Chicago will begin charging \$50/month for nonparticipation in wellness program
- ▶ Humana offers camping gear, cameras, and Caribbean hotel rooms for doctors' visits and blood tests
- ▶ Inter-company competitions to lose weight (al la TV's "The Biggest Loser"), arranged by HealthyWage.com



Other Types of “Teeth”

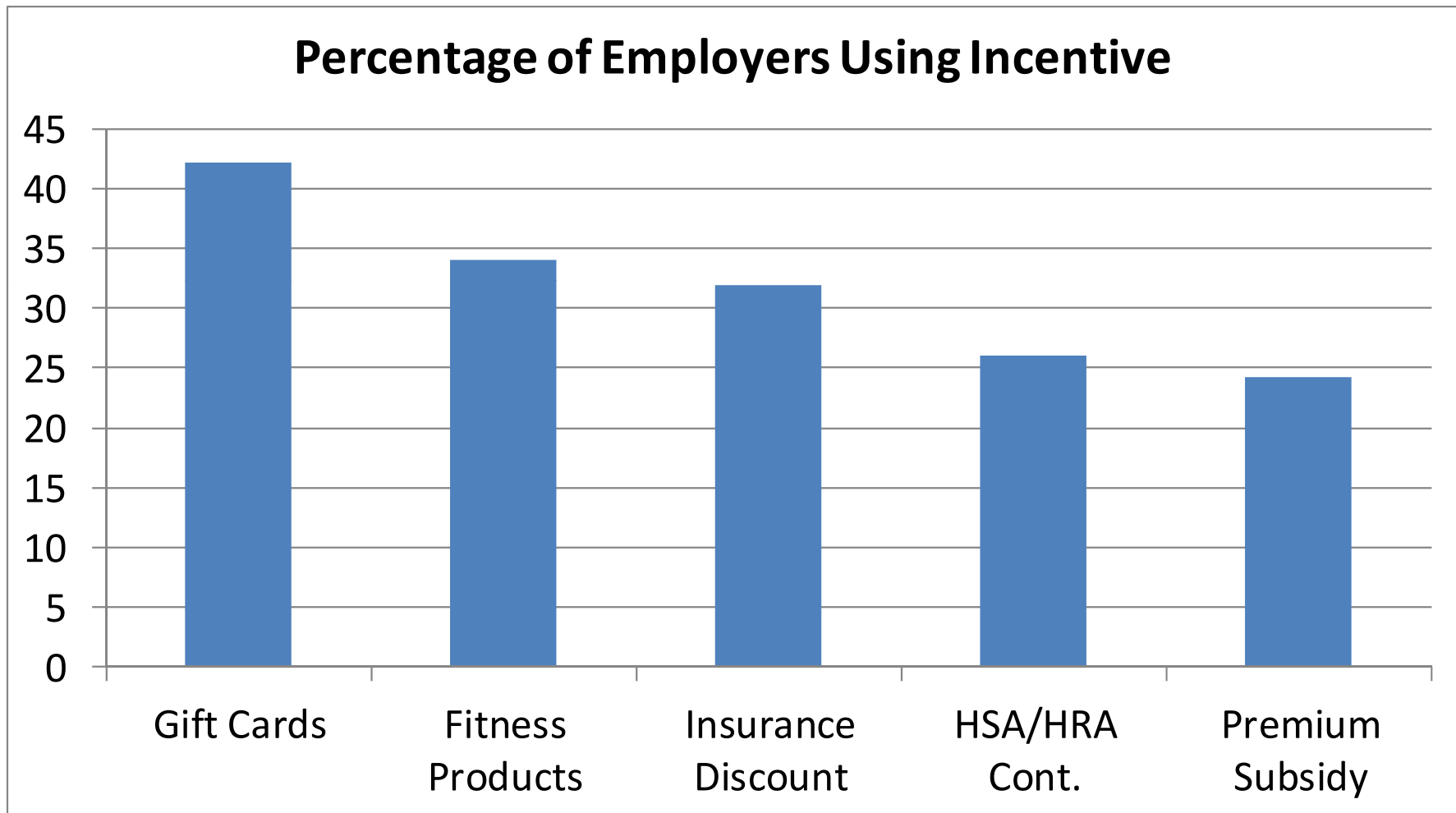
- ▶ Serious Penalties for non-participation:
 - Force non-participants into health plan’s high deductible option
 - Deny health coverage to non-participants
 - Terminate non-participants from employment



Incentives Versus Penalties

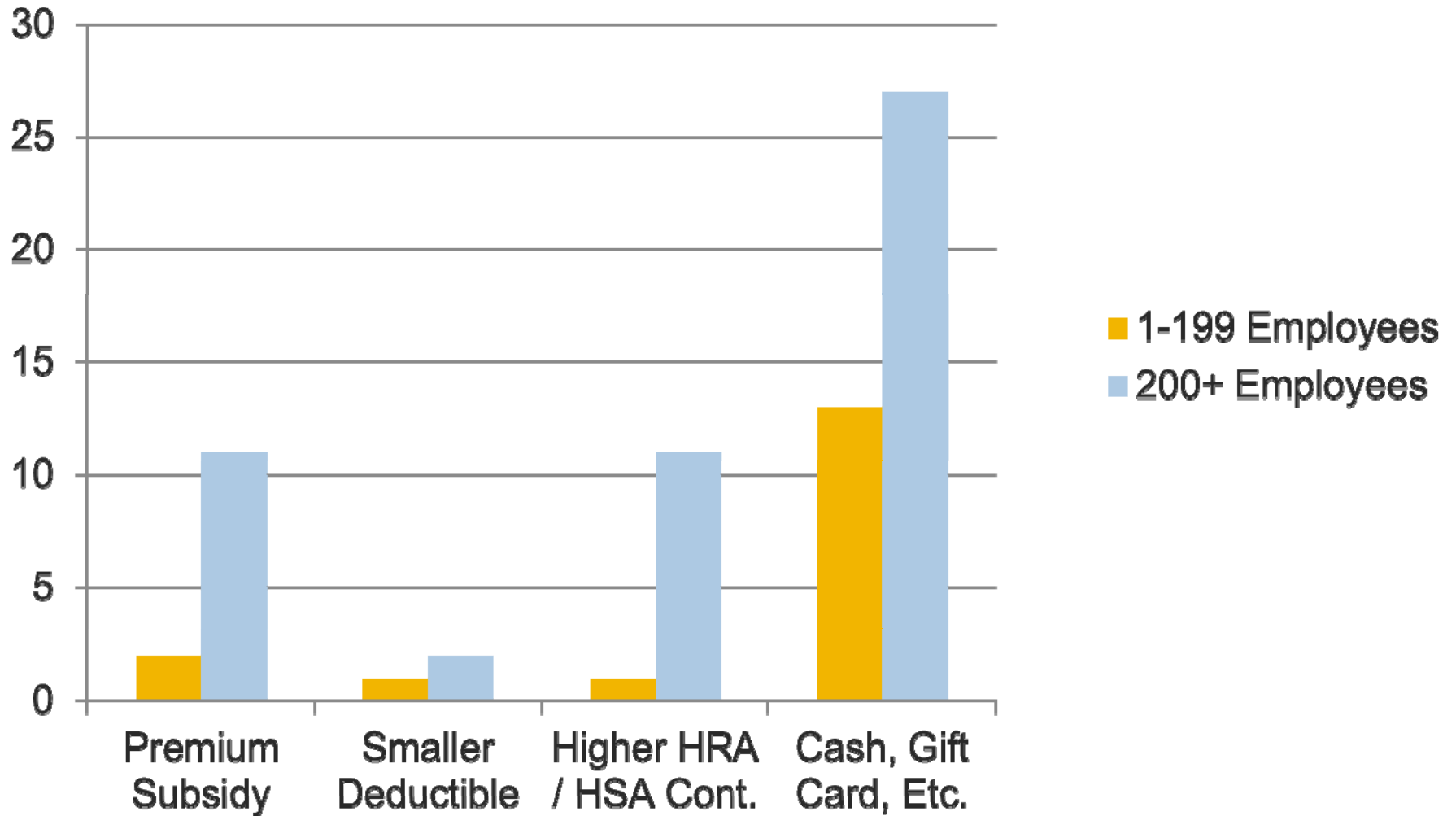
- ▶ Per Towers Watson 2011 Survey (of 248 U.S.-based employers):
 - Financial **rewards** for participation in health management programs have increased by 50% from 2009 to 2011 (now offered by 80% of respondents)
 - At the same time, the use of **penalties** doubled within that time (from 8% to 19% of employers)
 - Penalties are expected to double **again** by 2012 (to be used by 38% of respondents)

Benefits USA Survey



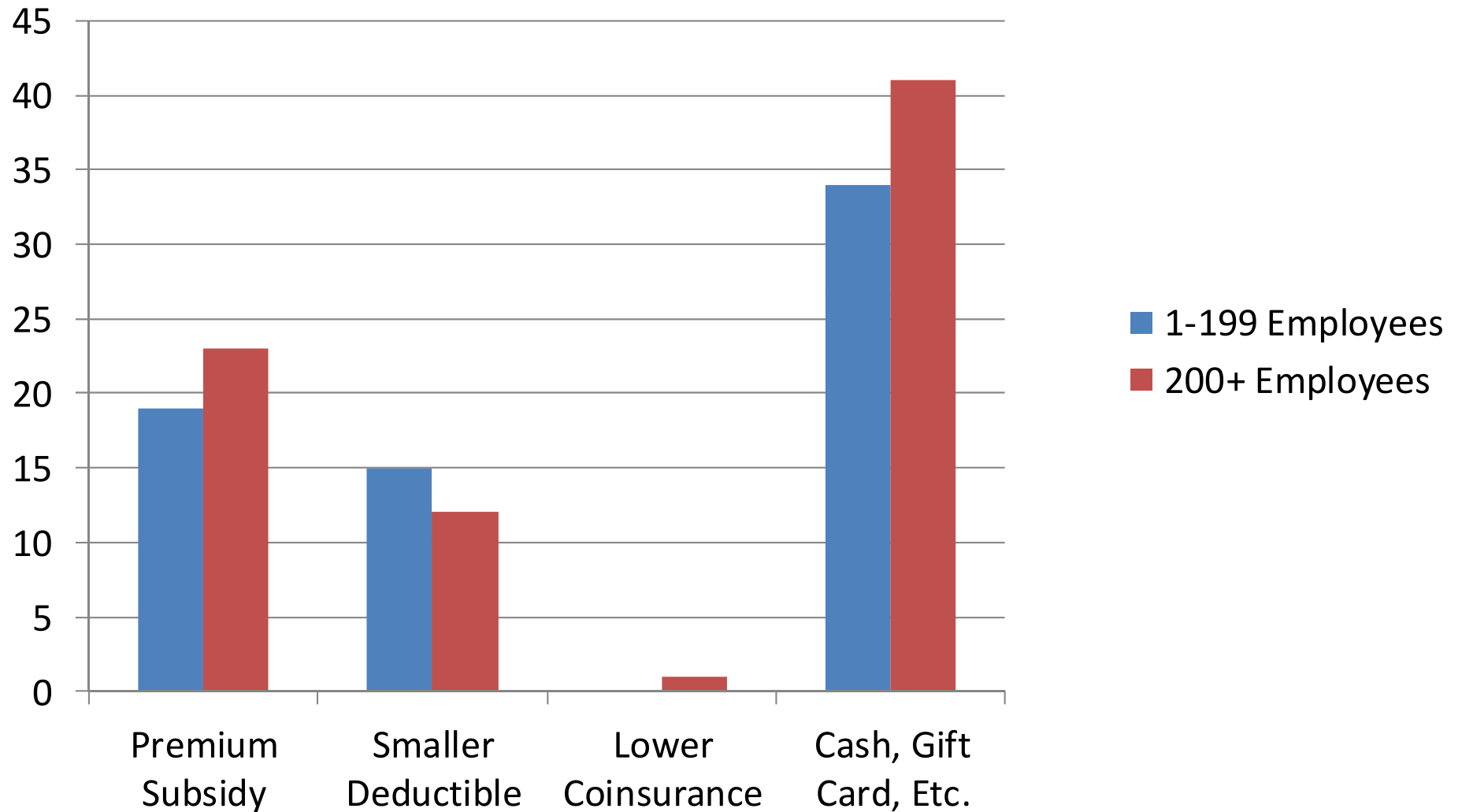
Wellness Program Incentives

(Per 2011 Kaiser Survey)



HRA Completion Incentives

(Per 2011 Kaiser Survey)



Legal Constraints

- ▶ ERISA
- ▶ HIPAA
- ▶ ADA
- ▶ GINA
- ▶ State Law Considerations





ERISA

- ▶ ERISA applies to “group health plan”
- ▶ Wellness program is a group health plan if it provides actual medical care
 - Flu shots?
 - Biometric screenings/blood tests
 - Disease management
 - Not HRA, fitness classes, or general educational programs



ERISA

- ▶ If ERISA applies, raises issues of reporting, disclosure, and fiduciary obligations
- ▶ COBRA implications 
- ▶ Consider incorporating wellness program into existing ERISA welfare plan
 - Caveat: many employers wish to make wellness programs broadly available to all employees vs.  only employees participating in medical plan

HIPAA Privacy



- If Plan provides medical care, it is a health plan subject to HIPAA Privacy Rules
- The plan cannot share protected health information with the employer
- Employer cannot use information obtained from wellness program to make any employment-related decisions

HIPAA Privacy

- ▶ If separate plan, may trigger separate privacy notice requirements and business associate requirements
- ▶ If tied to fully insured “hands off” medical plan, plan sponsor may be excused from many privacy requirements
- ▶ How does plan share info with employer related to rewards?

HIPAA Nondiscrimination

- ▶ General rule: a *group health plan* cannot discriminate against similarly situated individuals (with respect to deductibles, copayments, premiums, etc.) based on a *health factor*
- ▶ Wellness program exception



HIPAA Nondiscrimination

- ▶ Only wellness programs that are or relate to a *group health plan* must comply with HIPAA

✓ Premium discount

✗ Cash prize



- ▶ Only wellness programs that incent or penalize based on a *health factor* (vs. participation) must comply with HIPAA



✓ Achievement-based

✗ Participation-based

HIPAA Nondiscrimination

▶ Health Factor includes:

- Health status
- Medical condition
- Claims experience
- Receipt of health care
- Medical history
- Genetic information
- Evidence of insurability (including conditions arising from acts of domestic violence and hazardous activities)
- Disability

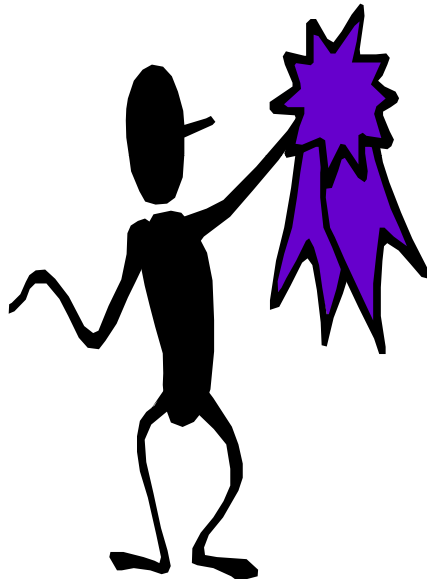


HIPAA Nondiscrimination

- ▶ Programs that require satisfaction of health-related standards may still be permissible if:
 - Limited reward
 - Reasonable design
 - Once-per-year availability
 - Reasonable alternatives
 - Disclosure



Limited Reward



- Reward (or surcharge) cannot exceed 20% of the cost of coverage for the employee
- Cost of coverage = the total amount of employer and employee contributions for the benefit package under which employee is covered
- If employee and dependents are eligible for the wellness program, limit is 20% of the cost of family coverage

Reasonable Design

- ▶ Program must be reasonably designed to promote good health or prevent disease
- ▶ Intended to be an easy standard to meet
 - Excludes only “bizarre, extreme, or illegal” requirements
 - Can include experimental or unproven programs (e.g., aromatherapy, acupuncture)



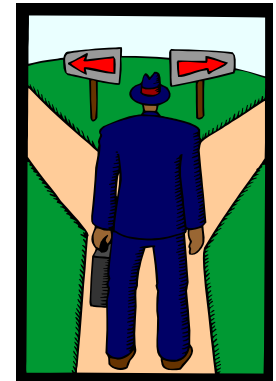
Availability



- ▶ Eligible individuals must be given a chance to participate (qualify for the reward) at least once each year
- ▶ No requirement that employer continue program in subsequent years
- ▶ Example: smoking cessation

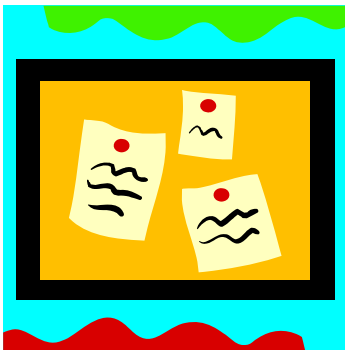
Reasonable Alternatives

- ▶ Program must offer a reasonable alternative way to obtain reward for:
 - Individuals for whom it is unreasonably difficult to meet the standard, due to a medical condition
 - Individuals for whom it is medically inadvisable to attempt to satisfy the standard
- ▶ Employer can require verification (e.g. letter from employee's doctor)
- ▶ Employer need not develop alternative standards in advance



Disclosure Requirements

- ▶ All plan materials describing the terms of the wellness program must disclose the availability of a reasonable alternative standard (but materials need not describe specifics)



- Model disclosure language in regulations

ADA

- ▶ **General rule**: May not make inquiries of employees about disabilities (or require medical exams) unless they are job-related and consistent with business necessity
- ▶ **Exceptions**:
 - Voluntary wellness programs
 - Bona fide benefit plans



ADA – Voluntary Wellness Program

- ▶ According to the EEOC, “voluntary” means an employer neither *requires* participation nor *penalizes* employees who do not participate
- ▶ EEOC Opinion Letter: Requiring employees to complete a health risk appraisal (HRA) as a prerequisite to obtaining insurance violates the ADA (because the loss of the opportunity to obtain health insurance coverage is a penalty)
 - Is the lack of a \$20 premium discount a penalty?
 - What about a \$20 premium surcharge?
 - EEOC has not issued formal opinion on these questions



ADA – Bona Fide Benefit Plan

▶ *Seff v. Broward County*

- Employer did not violate the ADA by penalizing employees who failed to complete HRAs
- Penalty was an extra \$20 biweekly health insurance premium
- Court based its ruling on “bona fide benefit plan” exception, rather than “voluntary wellness” exception (due to “underwriting, classifying or administering risks”)



GINA



- ▶ **General Rule**: Group health plan may not request or require “genetic information” **prior** to enrollment or for “underwriting purposes”
 - “Genetic information” includes family medical history (to 4th degree, including spouses and adoptees)
 - “Underwriting” includes premiums (e.g., discount for completing HRA)

- ▶ **Exception**: Incidental collection
 - But must caution individuals not to provide genetic information in response to open-ended questions

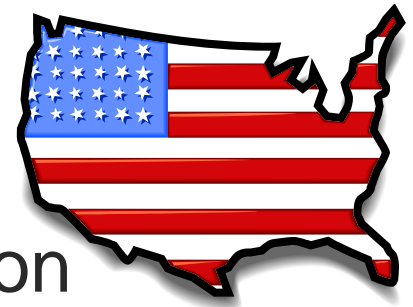
GINA

- ▶ May use **post**-enrollment HRA if:
 - No genetic information is requested, **or**
 - No financial reward is provided for completion of the HRA, **or**
 - All questions concerning genetic information appear in an addendum **and** any financial reward is provided regardless of whether the addendum is completed



State Law Considerations

- ▶ Some states have so-called “lifestyle protection” laws that make it unlawful to discriminate against employees on the basis of off-duty, off-premises use of lawful products (e.g., tobacco use)
- ▶ Mandatory components of wellness programs may violate lifestyle protection laws (e.g., higher premiums for smokers)
- ▶ ERISA preemption may apply, but only if part of an ERISA plan



Example 1



Cash incentive or gift card for completion of HRA

- ERISA: Not applicable because no medical care provided
- HIPAA: Not applicable (not related to group health plan)
- ADA: Voluntary wellness program exception apply?
- GINA: Not applicable as long as HRA doesn't request genetic information

Example 2



Premium discount for completion of biometric screening

- ERISA: Likely applies to biometric screening benefit because constitutes medical care
- HIPAA: Not applicable as long as premium discount is based on *participation* in screening (vs. results)
- ADA: Voluntary wellness program exception apply? Bona fide benefit plan exception apply?
- GINA: Not applicable as long as no genetic information requested

Example 3



Smoking cessation program with premium surcharge for smokers

- ERISA: Likely applies to smoking cessation program if program pays for medical care (counseling; prescription drugs)
- HIPAA: Applies b/c penalty is based on health factor (nicotine addiction); penalty must not exceed 20%; must offer reasonable alternative
- ADA: Is smoking a disability?
- GINA: Not applicable b/c no genetic information involved

Example 4



Targeted disease management program with premium penalty

- ERISA: Yes, because linked to premiums under group health plan
- HIPAA: Depends on whether premium penalty is based on participation or results (e.g. lower cholesterol, weight loss)
- ADA: medical exam or inquiry? penalty?
- GINA: Not applicable if no genetic information requested

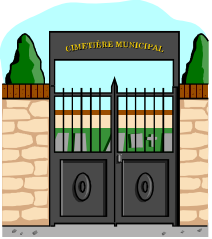
Example 5



Targeted disease management program with reduced deductible

- ERISA: Yes, because linked to reduced deductible under group health plan
- HIPAA: Benign discrimination ok
- ADA: Medical exam or inquiry? Penalty?
- GINA: Not applicable if no genetic information requested

Example 6



Gatekeeper Approach: Limited benefit options based on wellness participation and/or standards

- ERISA: Yes, because linked to health plan
- HIPAA: Yes, if based on health status
- ADA: Yes, if medical inquiry
- GINA: Not applicable if no genetic information requested

PPACA Provisions on Wellness

- ▶ Increase in permissible wellness incentives under HIPAA
- ▶ Wellness program evaluations
- ▶ Quality-of-care reporting
- ▶ Small employer grants



HIPAA Incentives

- ▶ Permissible surcharge/incentive increases to 30% in 2014; regulators permitted to increase it to 50%
- ▶ FAQs indicate that agencies plan to publish regulations adopting the 30% limit before 2014
- ▶ Effect on grandfathered plans unclear



Wellness Program Evaluation

- ▶ CDC to create wellness program evaluation tools for employers
- ▶ CDC to provide training and national surveys
- ▶ Program will not *require* employers to implement wellness programs



Quality-of-Care Reporting



- Non-grandfathered group health plans must provide enrollees and HHS with report describing the plan's quality-of-care provisions
- Insurer provides report for insured plans; plan administrator provides report for self-funded plans
- ▶ Report must include description of design features that prevent hospital readmissions, improve patient safety, or include wellness and health promotion activities
- ▶ HHS to publish additional guidance by March 23, 2012

Small Employer Grants

- ▶ PPACA sets aside \$200 million to fund grant project for small employers
- ▶ Eligible small employers
 - Cannot currently offer a wellness program
 - Must employ fewer than 100 employees working at least 25 hours per week
- Eligible wellness program
 - Must be offered to all employees
 - Must include health education, preventive screenings and assessments, efforts to maximize employee participation, initiatives to change unhealthy behaviors and lifestyle choices, and supportive environment efforts.





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