

# Legal Update for Wellness Programs

Presented by  
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## Overview

- Laws applicable to wellness programs
- Final regulations under the ADA
- Final regulations under GINA
- Wellness program example

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# Types of Wellness Programs and Related Laws

Group Health Plan Based	Employment Based
ADA	ADA
GINA	GINA
Tax Laws	Tax Laws
State Laws	State Laws
ERISA	
HIPAA	
Affordable Care Act	



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# HIPAA Requirements

- HIPAA applies if reward tied to group health plan OR wellness program is itself a group health plan
- Participatory = no cap
- Health contingent (activity-only or outcome-based) =
  - 30% of self-only coverage
  - 30% of coverage level if dependents can earn reward
  - 50% for programs including tobacco cessation



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## ADA Requirements

- Employers may not make disability-related inquiries or require a medical examination
- Exceptions:
  - Bona fide benefit plan for underwriting purposes
  - Voluntary exams and medical histories as part of a wellness program



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## “Disability-Related Inquiry”

- Question or series of questions likely to elicit information about a disability
- Examples:
  - Asking an employee whether he or she is disabled
  - Asking an employee whether he or she is currently taking, or in the past has taken, prescription drugs or medications
  - “What impairments do you have?”



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## “Medical Examination”

- Procedure or test that seeks information about an individual’s physical or mental impairments or health
- Examples:
  - Blood pressure screenings
  - Cholesterol tests
  - Psychological tests designed to identify a mental disorder or impairment



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## ADA Final Regulations

- To comply with final ADA rules, wellness program must:
  - Be reasonably designed to promote health or prevent disease;
  - Be voluntary (including limits on rewards); and
  - Provide prescribed notice to participants



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## ADA Final Regulations

- “Reasonably designed to promote health or prevent disease”
  - Has a reasonable chance of improving the health of, or preventing disease in, participating employees
  - Is not overly burdensome
  - Is not a subterfuge for violating the ADA or other laws prohibiting employment discrimination
  - Is not highly suspect in the method chosen



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## ADA Final Regulations

- “Voluntary”
  - May not require employees to participate
  - Must limit reward to 30% of total cost of self-only coverage
  - May not deny coverage under any group health plan or particular benefits package within a group health plan for non-participation
  - May not take adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees



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## ADA Final Regulations

- Notice requirement
  - Written so that the employee is reasonably likely to understand
  - Describes the type of medical information that will be obtained and the specific purposes for which it will be used
  - Describes restrictions on disclosure of the employee's medical information, the individuals with whom it will be shared, and the methods that will be used to ensure that it is not improperly disclosed



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## GINA

- Restricts acquisition and disclosure of genetic information
- “Genetic information” includes medical information with respect to a family member
  - “Family member” includes a spouse



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## GINA Final Regulations

- Permits financial incentives for spouse to complete HRA or biometric screening, subject to relevant rules
- Prohibits penalties to employee for spouse's manifestation of disease or disorder
- Prohibits incentives for information about manifestation of disease or disorder in an employee's child
- Limit of 30% for spouse's participation



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## AARP v. EEOC

- AARP says: 30% incentive limit is too high and inconsistent with the meaning of “voluntary”
- EEOC says: our interpretation should be given deference
- Court says: insufficient evidence that 30% cap on incentives is the “right” number for determining voluntariness
- Result: EEOC must reconsider rules, but rules remain in place while EEOC reconsiders



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## H.R. 1313

- Preserving Employee Wellness Programs Act
- Provides a statutory “fix” for the HIPAA/ADA/GINA disconnect
- If a wellness program complies with the HIPAA wellness rules, it would be deemed to comply with the ADA and GINA
- Status: stuck in the House since March 2017



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## Wellness Program Example

Company provides wellness incentives as follows:

- \$100/month premium discount each for employee and spouse HRA
- \$50/month premium discount if employee averages 8,000 steps per day
- \$50/month premium discount if employee certifies that he/she is tobacco free or completes cessation course
- \$75/month premium discount if the employee submits to a blood draw that screens cholesterol and A1C
- \$100 each if employee or spouse participates in stress management coaching via telephone



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## Wellness Program Example

Total annual cost of coverage

(employee and employer shares of the premium, without any wellness rewards)

- Employee: **\$7,000**
- Employee+1: **\$10,000**
- Family: **\$15,000**



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## Wellness Program Example

Maximum Permissible Rewards	
HIPAA (w/o tobacco): 30% of coverage level	Employee: <b>\$2,100</b> Employee+1: <b>\$3,000</b> Family: <b>\$4,500</b>
HIPAA (w/ tobacco): 50% of coverage level	Employee: <b>\$3,500</b> Employee+1: <b>\$5,000</b> Family: <b>\$7,500</b>
ADA: 30% of employee-only	<b>\$2,100</b>
GINA: 30% of employee-only	<b>\$2,100</b>



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# Wellness Program Example

HIPAA (w/o tob.)	HIPAA (w/ tob.)	ADA	GINA



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# Wellness Program Example

HIPAA (w/o tob.)	HIPAA (w/ tob.)	ADA	GINA
		\$1,200 HRA	\$1,200 HRA



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# Wellness Program Example

HIPAA (w/o tob.)	HIPAA (w/ tob.)	ADA	GINA
\$600 steps	\$600 steps	\$1,200 HRA	\$1,200 HRA



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# Wellness Program Example

HIPAA (w/o tob.)	HIPAA (w/ tob.)	ADA	GINA
\$600 steps	\$600 steps	\$1,200 HRA	\$1,200 HRA
	\$600 tobacco		



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## Wellness Program Example

HIPAA (w/o tob.)	HIPAA (w/ tob.)	ADA	GINA
\$600 steps	\$600 steps	\$1,200 HRA	\$1,200 HRA
	\$600 tobacco	\$900 blood draw	



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## Wellness Program Example

HIPAA (w/o tob.)	HIPAA (w/ tob.)	ADA	GINA
\$600 steps	\$600 steps	\$1,200 HRA	\$1,200 HRA
	\$600 tobacco	\$900 blood draw	\$100 stress mgmt?
		\$100 stress mgmt?	



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## Wellness Program Example

HIPAA (w/o tob.)	HIPAA (w/ tob.)	ADA	GINA
\$600 steps	\$600 steps	\$1,200 HRA	\$1,200 HRA
	\$600 tobacco	\$900 blood draw	\$100 stress mgmt?
		\$100 stress mgmt?	
<b>TOTAL: \$600</b>	<b>TOTAL: \$1,200</b>	<b>TOTAL: \$2,200</b>	<b>TOTAL: \$1,300</b>



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## Wellness Program Example

HIPAA (w/o tob.)	HIPAA (w/ tob.)	ADA	GINA
\$600 steps	\$600 steps	\$1,200 HRA	\$1,200 HRA
	\$600 tobacco	\$900 blood draw	\$100 stress mgmt?
		\$100 stress mgmt?	
<b>TOTAL: \$600</b>	<b>TOTAL: \$1,200</b>	<b>TOTAL: \$2,200</b>	<b>TOTAL: \$1,300</b>

### Maximum Permissible Rewards

HIPAA (w/o tob.)	HIPAA (w/ tob.)	ADA	GINA
<b>E: \$2,100</b>	<b>E: \$3,500</b>	<b>\$2,100</b>	<b>\$2,100</b>
<b>E+1: \$3,000</b>	<b>E+1: \$5,000</b>		
<b>F: \$4,500</b>	<b>F: \$7,500</b>		



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# Thank you!

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