

EMPLOYERS AND LAWYERS,

WORKING TOGETHER



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# An Employer's Guide to Wellness Plan Design from a Legal Perspective

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## Agenda

- Overview: What is a workplace wellness program?
- Compliance Traps:
  - Regulatory Compliance
  - Litigation
  - Taxation
- Examples

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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

- Prohibits a group health plan from discrimination in eligibility or contributions based on health factors, including:
  - Health status
  - Genetic information
- Exception for wellness programs, if rules are followed

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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 on reward
- Health contingent (activity-only or outcome-based) reward caps:
  - 30% of self-only coverage
  - 30% of coverage level if dependents can earn reward
  - 50% for programs including tobacco cessation

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## HIPAA Requirements

- Health contingent (cont'd) - must meet HIPAA's four additional wellness program requirements:
  - Promotes good health/disease prevention
  - Annual qualification
  - Available to all similarly situated employees
  - Full disclosure

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# ADA

- Employer may not make disability-related inquiries or require medical examination
  - Disability-related inquiry: questions likely to elicit information about a disability
  - Medical exam: procedure or test seeking information about physical or mental impairments or health
- Exception for **voluntary** medical exams and medical histories as part of a wellness program

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# ADA Final Regulations

- Generally applicable for 2017 and after
- To comply with final ADA rules, wellness program must:
  - Be reasonably designed to promote health or prevent disease
  - Provide reasonable accommodations
  - Be voluntary (including limits on rewards)
  - Provide prescribed notice to participants
  - Follow confidentiality rules

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# ADA Final Regulations

- Reasonable design
  - Reasonable chance of improving employees' health or preventing disease
  - Not overly burdensome
- Reasonable accommodations
  - Applies to all wellness programs, regardless of disability-related inquiry or medical exam
  - Examples: sign language interpreter for nutrition class, written materials in alternate form

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# ADA Final Regulations

- Voluntary
  - May not require employee participation or take adverse employment action or retaliate against employees who do not participate
  - May not deny coverage under a benefit for employees who do not participate
  - May have permissible financial incentives
    - 30% of lowest-cost employee-only coverage, regardless of whether participatory or health contingent or what level of coverage employee actually enrolled in

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# ADA Final Regulations

## ■ Provide notice (sample on EEOC website)

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

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# Confidentiality Requirements

- HIPAA privacy and security protections apply to health information gathered by employer in connection with group health plan
- ADA confidentiality requirements provide medical information may only be disclosed to the covered employer in aggregate form
  - May not require employees to waive confidentiality protections

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# GINA

- Restricts employers from acquiring genetic information from employees
- Prohibits health plans from discriminating based on genetic information
- Includes:
  - Individual's genetic tests
  - Family member's genetic tests
  - Family member's medical history (including employee's spouse)
  - Receipt of genetic services
- "Genetic information" does not include:
  - Individual's health history or current diagnosis
  - Age or gender
  - Tobacco status

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# GINA Final Regulations

- Apply regardless of whether wellness program is part of group health plan
- Permits financial incentives for spouse to complete HRA or biometric screening if:
  - Reasonably designed to promote health or prevent disease
  - Cannot deny access to health plan or any benefit package for failure to provide information
  - 30% of employee-only coverage limit on financial incentives
- Prohibits incentives for information about manifestation of disease or disorder in an employee's child

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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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## Litigation

- What types of plans has EEOC challenged?
  - Requiring HRA participation in order to enroll in health plan
  - Requiring HRA participation – or you lose your job
  - Targeting employees on disability leave

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## AARP v. EEOC

- AARP: 30% incentive limit is too high and inconsistent with the meaning of “voluntary”
- EEOC: our interpretation should be given deference
- Court: 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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## Taxation

- General rule: Wellness incentives or rewards are taxable income to employee
- Exception: Employer-paid portion of health plan premium is not taxable income to employee
- Pointer: Confirm whether subject to 401(k)

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## Example 1: Non-Smoker's Discount Program

- Group health plan premium is \$500 per month. Employee's share is \$175.
- Employees who don't use nicotine only pay \$100.
- Employees who smoke can earn the discount by successfully completing a smoking cessation class.

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## Example 2: HRA Discount Program

- Employer requires employees to complete health risk assessment in order to enroll in health plan.
- Employees who complete the HRA receive \$25 discount on \$175 monthly premium. (Total monthly cost is \$500).

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## Example 3: HRA/Biometric Screen Discount

- Employer requires employees to complete health risk assessment in order to earn health plan premium discount.
- Employees who complete the HRA receive \$25 discount on \$175 monthly premium.
- Employer offers an additional discount of \$100 per month for employees who meet certain metrics on their biometric screening. Those who fail still get the \$25 discount.
- Total monthly cost is \$500.

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## Example 4: New Program Launch

- Employer launches a new wellness program.
- Employees earn points for completing an HRA, completing a biometric screen, meeting certain health standards and being nicotine free. Each point puts their name in the hat for prizes, including several fitness trackers worth over \$100 each.
- Employer raffles off prizes.

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## Example 5: Multiple Discounts

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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## Example 5: Multiple Discounts

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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## Example 5: Multiple Discounts

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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## Example 5: Multiple Discounts

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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## Example 5: Multiple Discounts

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

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## Example 6: Points-Based Program

- What if we convert the rewards to points and required employee to earn 300 points to receive premium discount?
- How do you apply the reward limit in a points-based program?
- Analyze each bucket separately.
- Assume all rewards are earned to determine whether maximum award exceeds cap.

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# Consequences

## ■ ADA/GINA Title II

- Hiring/Reinstatement/Promotion
- Back pay
- Compensatory damages (cap applies)
- Punitive damages (cap applies)
- Attorneys fees
- Posting of notice (\$100 for each separate offense)

## ■ HIPAA/ACA/GINA Title I

- \$100/day per person self-reported excise tax for each violation until corrected
- Additional penalty risk for HIPAA privacy violations depend upon intent and duration

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# Action Items

## ■ Update your notice annually –

- HIPAA mandatory language regarding reasonable alternative standards
- ADA mandatory disclosures

## ■ Review results –

- Data? Is it working?
- Cost? Is it worth it?

## ■ What changes should you consider for the next year?

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# Questions?

*Thank you!*

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