



# **Workplace Wellness Compliance**

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# Agenda

- Group Health Plan Status
- HIPAA/ACA
- EEOC Cases
- ADA Final Rule
- GINA Final Rule
- Other Laws
- Quiz Questions



**Preliminary Question**

**Group health plan?**



# Preliminary Question

## Group Health Plan:

- Provides “Medical Care”
  - To employees/dependents directly or through insurance

# Preliminary Question

## Medical Care:

- **Regards individual's physical condition or state of health; and/or**
- **Relates to the**
  - **Relief or alleviation of health or medical problems**

# Preliminary Question



**Medical Care is NOT:**

**Program that furthers general good health**

- **Fitness classes**
- **Nutrition classes**

# Why Do We Care?

Group Health Plan	Non-Group Health Plan
ADA	ADA
GINA	GINA
FLSA	FLSA
ADEA	ADEA
IRC	IRC
Title VII	Title VII
State Laws	State Laws
HIPAA	
ACA	
ERISA	
COBRA	

# Incentive Rules



- HIPAA/ACA
- ADA final rule
- GINA final rule



# HIPAA/ACA



- HIPAA Nondiscrimination
  - Generally prohibits discrimination by group health plans based on “health factors.”
  - Carves out exception for wellness programs
    - Can vary benefits (including cost-sharing) based on whether person meets standards of a wellness program.



# HIPAA/ACA

- To qualify for wellness program exception, must meet certain conditions:
  - Participatory programs must only be offered to “similarly situated” individuals.
    - No limit on financial incentives.
  - Health-contingent programs must meet 5 factor test.

# HIPAA/ACA

- Distinction between participatory and “health contingent” is whether reward is tied to:

**HEALTH STATUS**



# HIPAA/ACA



- Participatory program examples:
  - Fitness center membership reimbursement
  - Reward for participating in health assessment
  - Waiver of health plan cost-sharing for preventive items or services
  - Smoking cessation program reimbursement
  - Reward for attending health education seminar

# HIPAA/ACA

- Two types of health-contingent programs:
  - Activity
    - May seek verification from physician that health factor makes it unreasonably difficult or medically inadvisable to satisfy activity.
  - Outcomes-based
    - May not seek verification
- ***Both must meet 5 factor test.***

# HIPAA/ACA

- **Five factors:**

1. Qualify for the reward at least once/year.
2. Total reward may not exceed 30% (50% for tobacco prevention programs) of total cost of coverage.
3. Reasonable design to promote health or prevent disease.

# HIPAA/ACA



- **Five factors (cont.)**

- 4. Full reward must be available to all similarly situated individuals.

- Must provide reasonable alternative standard (or waiver of standard)

- 5. Disclosure of reasonable alternative standard (or waiver) in plan materials describing the wellness program terms.

- SPD
    - Communications disclosing individual did not meet initial outcomes-based standard

# HIPAA/ACA

- **Other Pointers:**
- **Retroactive payment after end of plan year**
- **Must assist employees in finding/paying for educational program**
- **Reasonable Time Commitment**
  - **Nightly, one-hour class unreasonable**



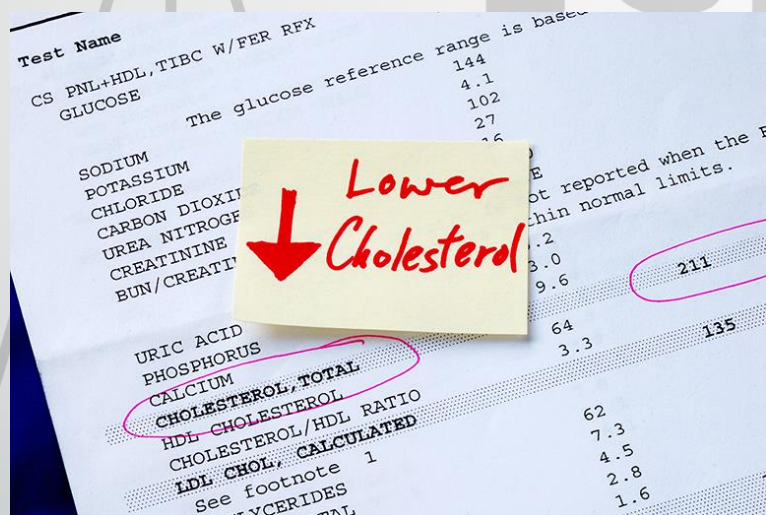
# Test Your HIPAA/ACA Knowledge

- ABC Health System offers annual wellness program consisting of HRA and biometric assessment. Employees and covered spouses who participate in the HRA and biometric test receive a reduced health insurance premium.
  - Participatory or health contingent?

# Test Your HIPAA/ACA Knowledge

- ABC Health System contacts wellness program participants whose HA or biometric results indicate some health risk. The purpose of the contact is to offer the at-risk participants health coaching services. If the participant refuses coaching, he or she loses \$50 per pay period in premium savings until he or she engages with a coach.
  - Participatory or health contingent?

# ADA and GINA



Test Name

CS PNL+HDL, TIBC W/FER RFX

GLUCOSE

The glucose reference range is based on 144, 4.1, 102, 27, 16

SODIUM

POTASSIUM

CHLORIDE

CARBON DIOXIDE

UREA NITROGEN

CREATININE

BUN/CREATININE

URIC ACID

PHOSPHORUS

CALCIUM

**CHOLESTEROL, TOTAL**

**HDL CHOLESTEROL**

**HDL CHOLESTEROL/HDL RATIO**

**CHOLESTEROL/HDL RATIO**

**LDL CHOL, CALCULATED**

See footnote 1

TRIGLYCERIDES

211

135

62

7.3

4.5

2.8

1.6



# ADA



- Prohibits discrimination by employers on basis of disability in regard to terms, conditions and privileges of employment.
  - Discrimination includes:
    - Requiring medical examinations; and
    - Making inquiries as to whether employee has disability unless such exam or inquiry is:
      - Job-related and consistent with business necessity
- Must provide equal opportunity for disabled employees to participate in programs and offer reasonable accommodations.

# ADA



- Medical exams include:
  - Procedures
  - Tests
- That seek information on an employee's health
- Prohibition applies regardless of whether employee is disabled.

# ADA



- Carves out exception for “voluntary” medical exams part of employee wellness program.
  - Pre-EEOC ADA rules, EEOC Enforcement Guidance said wellness program is voluntary as long as employer neither:
    - Requires participation; nor
    - Penalizes employees who do not participate.

# ADA



- Safe harbor for administering terms of bona fide benefit plan
  - Based on underwriting risks, classifying risks or administering such risks.
  - Applies whether exam/inquiry is voluntary or not.
  - *Seff v. Broward County*, 691 F.3d 1221 (11<sup>th</sup> Cir. 2012) and *EEOC v. Flambeau, Inc.*, Case No. 14-CV-638 (Dec. 31, 2015).

# EEOC Not a Fan of ADA Safe Harbor







# EEOC Take on ADA Safe Harbor

- Safe harbor does not apply to worksite wellness programs
- Safe harbor meant for true insurance practices
- Legislative history makes no mention of wellness programs in context of safe harbor
- EEOC's interpretation of ADA (including applicability of safe harbor provision) should trump a court's interpretation

# EEOC Take on ADA Safe Harbor

- Language in final rule:
  - “The ‘safe harbor’ provisions in s. 1630.16(f) of this part applicable to health insurance, life insurance, and other benefit plans do not apply to wellness programs, even if such plans are part of a covered entity’s health plan.”



# Orion energy systems

- Very similar facts to Flambeau case
- Court rejected safe harbor
  - Agreed with EEOC's reasoning in the Final ADA Rule
  - Generally wellness programs unrelated to basic underwriting and risk classification
    - Implementation of wellness program usually occurs after premium established
  - Orion adopted its wellness program separately from health plan and wellness program not included in Orion's SPD.
  - EEOC did not overstep its authority in issuing ADA regulations about the safe harbor.
  - Final ADA rules are reasonable.



# EEOC Final ADA Rules

- Issued on May 16, 2016
- Compliance with incentive provisions by first day of first plan year that begins on or after January 1, 2017.



# EEOC Final ADA Rules

- Key Provisions:
  - Incentives must be limited to 30% of cost of self-only coverage
    - Applies regardless of group health plan status

# EEOC Final ADA Rules

- Calculating the incentive
  - Employees enrolled in Employer Plan
    - 30% total cost of self-only coverage (includes both employee and employer contribution)
  - All Employees Regardless of Plan Enrollment
    - 30% total cost of self-only coverage under employer's plan
  - All Employees when Multiple Plans Offered
    - 30% total cost of lowest cost self-only plan available
  - All Employees when No Plan Available
    - 30% cost of self-only coverage under 2<sup>nd</sup> lowest cost Silver Plan for 40 yo/nonsmoker on Exchange





# EEOC Final ADA Rules

- Incentive Limit Applies to
  - Participatory and
  - Health Contingent Programs:
- Only applies to programs with disability-related inquiries or medical exams.

# EEOC Final ADA Rules

- Incentive Limit Applies to
  - Financial
  - In-Kind Incentives
    - Time off
    - Prizes





# EEOC Final ADA Rules

- **Special treatment for tobacco cessation (no change from proposed rules).**



# EEOC Final ADA Rules

- May not deny/limit coverage for nonparticipants.



# EEOC Final ADA Rules

- Programs that collect medical information must provide employees with notice.



# EEOC Final ADA Rules



- Notice requirement applies even in absence of incentives
- Notice must contain following:
  - Be understandable
  - Describe type of medical information obtained
  - Describe specific purposes for which information will be used
  - Who will receive information
  - Restrictions on disclosure of medical information
  - Methods employer will use to prevent improper disclosure

# EEOC Sample Notice

- Available at <https://www1.eeoc.gov/laws/regulations/ada-wellness-notice.cfm?renderforprint=1>.
- References HRAs and biometric screens, but regulation applies more broadly to “medical information” collection.

# EEOC Final ADA Rules

- Employers and vendors must protect health information confidentiality



# EEOC Final ADA Rules

EEOC expects group health plan programs to abide by HIPAA privacy/security rules

- Employer certification requirements for those who administer programs
- Best practice: separate those who handle individually identifiable health information from those who make employment-related decisions
- Use of a third-party vendor may help



# EEOC Final ADA Rules

- Employers and Vendors should have clear privacy policies and procedures related to medical information:
  - Collection
  - Storage
  - Disclosure
  - Encryption
  - Notice of Breach
- Include employee training





# EEOC Final ADA Rules

- May not Require Employee to Agree to Sale, Exchange, Sharing, Transfer of Information
- Review vendor agreements to ensure employees do not unwittingly waive confidentiality protections.

# EEOC Final ADA Rules

- Reasonably designed to promote health/prevent disease
  - Must provide follow-up after collecting medical information
  - Should not be about collecting information only.
  - Different from HIPAA/ACA
    - Only health contingent need to be “reasonably designed”



# EEOC Final ADA Rules

- Must provide reasonable accommodations (Equal Opportunity)



# EEOC Final ADA Rules

Equal Opportunity applies to both participatory and health contingent programs.



# EEOC Final ADA Rules



- Compliance with ADA rules does not mean compliance with other laws:
  - Title VII
  - Equal Pay Act
  - ADEA
  - GINA
  - Other ADA sections

# Test Your ADA Knowledge

- Employees or spouses who refuse to enroll in ABC Health System's wellness program (i.e., refuse to take the HA or biometric test) are offered only one plan option: a consumer driven plan with a high deductible. They are denied access to more comprehensive plan options. Assume this incentive to participate is less than 30% of the total cost of coverage.
  - Permissible under the ADA?

# Test Your ADA Knowledge

- ABC Health Company's wellness program consists of an online HA. ABC's HR department sees the results and sends those results to ABC's health insurer. Employees do not see results.
  - Permissible under the ADA?



# Test Your ADA Knowledge

- ABC administers an online HRA. Participation has been lagging. To help increase participation, the wellness vendor is asked to disclose the names of the nonparticipants to ABC's managers and supervisors, who can then encourage those employees to participate.
  - Permissible under the ADA?



# GINA



- Two applicable titles:
  - Title I – Group Health Plans
  - Title II – Employers

# GINA

- “Genetic information” includes
  - Manifestation of disease or disorder in family members (“family medical history”)
    - Can be discerned from family medical history questions or biometric screenings of family members
    - “Family” includes spouses and adopted children and dependents of spouses; as well as biological family.



# GINA Title I

- Title I generally prohibits group health plans from:
  - Adjusting premium or contribution amounts based on genetic information;
  - Requesting/requiring genetic testing;
  - Requesting/requiring/purchasing genetic information for **underwriting** purposes or in connection with open enrollment.



# GINA Title II

- Title II generally prohibits **employers** from discriminating against employees or applicants because of genetic information.
- DOL/DHHS/IRS enforce GINA Title I
- EEOC enforces GINA Title II (employment).

# GINA Title II

- Exception for voluntary wellness programs.
  - Individual must provide prior knowing, voluntary and written authorization.
    - Authorization may be electronic;
    - Describes what genetic information will be obtained and the purposes for which it will be obtained;
    - That the individually identifiable information is not accessible to coworkers/supervisors.

# GINA Title II



- May offer financial inducements to complete HRA that includes questions about family medical history or other genetic information.
  - Must make clear, however, that inducement is available regardless if participant answers questions regarding genetic information.

# GINA



- GINA compliance red flags raised if wellness program has **Two Elements**:
  1. Family medical history questions of employees and/or family members (such as part of **HRA**) or **biometric screens** of spouses/dependents; **and**
  2. **Financial incentives** offered for participating in those HRAs or biometric screens.

# GINA Final Rule

- Appeared in May 17, 2016 Federal Register (alongside final ADA rule)
- Allows wellness programs to offer incentives for employee's spouse to provide certain information
  - Information limited to spouse's own manifestation of disease or disorder;
  - Must be part of a health assessment or medical examination or both.



# GINA Final Rule

- Applies to **All** Wellness Programs
  - Unlike proposed GINA rule, incentive rule applies regardless if spouse or employee enrolled in employer health plan.



# GINA Final Rule

- Incentive Limit Calculation:
  - Employees enrolled in Employer Plan
    - 30% total cost of self-only coverage (includes both employee and employer contribution)
  - All Employees Regardless of Plan Enrollment
    - 30% total cost of self-only coverage under employer's plan
  - All Employees when Multiple Plans Offered
    - 30% total cost of lowest cost self-only plan available
  - All Employees when No Plan Available
    - 30% cost of self-only coverage under 2<sup>nd</sup> lowest cost Silver Plan for 40 yo/nonsmoker on Exchange
- 30% Incentive Applies to Spouse and Employee Separately

# GINA Final Rule

- Calculation Example:
  - Cost of family coverage is \$14,000. Self-only cost is \$6,000. Incentive can be up to \$1,800 for employee and \$1,800 for spouse (30% of \$6,000).

# GINA Final Rule



- Can't Require Agreement to Sell Information or Waive Confidentiality
  - Similar to ADA final rule
  - Important to determine where data collected goes

# GINA Final Rule

- Similar to ADA rules, Employers must maintain medical (genetic) information in separate, confidential files.
- GINA prohibits disclosure of genetic information except in limited circumstances:
  - To employee
  - Court order
  - Government officials to ensure GINA compliance

# GINA Final Rule



- Similar to ADA, EEOC urges employers to adopt best practices for protecting confidentiality:
  - Adopt strong privacy policies
  - Train individuals who handle sensitive information
  - Encrypt electronic files
  - Notify employees of breach

# GINA Final Rule

- In addition to Employee, Spouse must provide prior, knowing, voluntary and **written authorization**.
- Authorization must contain several elements, such as:
  - Be easy to understand;
  - Description type of genetic information to be obtained and purpose for which it will be used;
  - Describe restrictions on disclosure of genetic information;
  - Genetic information is collected for purposes of providing health or genetic services;
  - Information only provided to individual and licensed health care professionals involved in providing genetic services and not disclosed to employer except in aggregate terms.

# GINA Final Rule

- Important Take-Away from GINA Final Rule:
  - Collection of spousal manifestation of disease or disorder information should not be done for sake of collecting that information.
  - Purpose should be to provide services through worksite wellness program.





# GINA Final Rule

- Like ADA Final Rule, collection of spousal information must be part of wellness program reasonably designed to promote health or prevent disease.
- Not reasonably designed if:
  - Impose a penalty on individual because of spouse's disorder prevents spouse from participating in program or achieving certain outcome;
  - Collection of information does not include follow-up information or advice or not used to design a program that addresses conditions identified by information.

# GINA Final Rule

- Employers May Not Deny Access to Health Coverage Based on Spouse's Refusal to Provide Information.
- Employers May Not Retaliate Against Employee Based on Spouse's Refusal to Provide Information.



# Test Your GINA Knowledge

- Terry, spouse of employee of ABC Company agrees to provide health status information to help employee earn an incentive through the employer wellness program. Terry logs onto an online portal sponsored by a wellness vendor to provide the information. The portal contains the following privacy statement:
  - We will not share your PHI with any third party, including your employer. We have strict security controls in place to ensure that the information you provide is kept private and secure.
  - Is this privacy statement sufficient under GINA?

# Test Your GINA Knowledge

- Terry, an adult child of employee of ABC Company agrees to provide health status information to help employee earn an incentive through the employer wellness program. Terry logs onto an online portal sponsored by a wellness vendor to provide the information. Terry never receives any follow-up after providing her health status information.
  - Permissible under GINA?

# Other Federal/State



- Fair Labor Standards Act (FLSA)
- Age Discrimination in Employment Act (ADEA)
- Title VII
- Internal Revenue Code (IRC)
- State Laws

# Other Federal/State



- **FLSA**

- Generally requires payment for all hours worked
  - Federal minimum wage
  - 1.5x for overtime (over 40 hours/week)
- May be implicated if you do not plan to pay employees for time participating in wellness programs.

# Other Federal/State



- **FLSA**

- To avoid FLSA, wellness program participation should be:
  - Outside of work;
  - Voluntary;
  - Not job-related;
  - No productive work performed
- Tip: Emphasize voluntary nature of attendance.

# Other Federal/State

- **ADEA**

- Prohibits employers with 20 or more employees from discriminating based on individual's age (40 and over).
  - Older workers might have harder time achieving certain health-related standards/goals.
  - EEOC enforces.
  - *Lee v. City of Moraine Fire Dept.*, 2014 WL 1775621 (S.D. Ohio, May 2, 2014)



# Other Federal/State

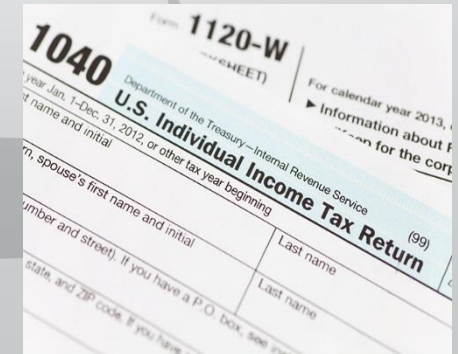


- **Title VII** prohibits employment discrimination based on:
  - Race
  - Color
  - Religion
  - Sex
  - National Origin
- Gender and religious discrimination most likely in wellness program design.

# Other Federal/State

- **Internal Revenue Code**

- Excludes from gross income amounts received for “medical care”
  - Expenses beneficial to general health or wellbeing not “medical care” expenses
    - E.g. Gym memberships usually taxable
    - On-site athletic facilities not taxable
- De minimus benefits excludable
- Cash or cash equivalent incentives not excludable from gross income



# Other Federal/State

- **State Laws:**
- Scope of practice/licensing
  - Flu Shots, Coaching, Diet Advice
- Off-duty conduct protection
  - Smoking, Alcohol
- Negligence and Worker's Compensation
- State Fair Employment Acts
- State insurance laws
- State grant programs



## HR 1313

- “Preserving Employee Wellness Program Act”
- Introduced on March 2, 2017
- May be part of a forthcoming, second wave, ACA repeal and replace bill package in the House



# HR 1313

- Subjects ACA “participatory programs” to maximum incentive of 30% of total cost of coverage
- Wellness programs offered in conjunction with a group health plan need to comply with five-factor test under ACA.
- Wellness programs not offered in conjunction with group health plan must comply with 30% of total cost of coverage incentive limit
  - Not subject to remaining five factors, such as:
    - RAS
    - Reasonably designed
    - Notice



# HR 1313

- How does this translate?
  - Extraordinary freedom for employers to collect and use employee and family member health information.
    - Weakens current privacy protections for employees and their families
  - Can incentivize the collection of employee family medical history and the health information of family members
  - Incentive amount can be higher for employees enrolled in family coverage
  - Can conduct health risk assessments in connection with open enrollment
  - Employers can use health/genetic information for purposes of disease management or offering greater incentives to those with adverse health factors.
  - Would still be subject to ADA and GINA anti-discrimination rules.

# Questions?

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