

HERO WEBINAR

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EMPLOYEE WELLNESS PROVISIONS: KEEPING UP WITH THE EEOC/ADA RULES

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TODAY'S DISCUSSION

• Applicable federal regulations:

- HIPAA
- ACA
- ADA
- GINA
- Inconsistencies in the regulations and how to navigate
- Group participation: example plan designs to identify issues or concerns
- Practical actions and best practices

FEDERAL WELLNESS RULES ON INCENTIVES

	HIPAA (2006)	Affordable Care Act (2010)	ADA/GINA (EEOC) (2016)
Size of financial impact:	20% of total cost employee enrolled in (assuming other dependents may access as well)	Same as HIPAA but 30% and up to 50% if amount > 30% is limited to tobacco use	30% of total cost for employee-only coverage in least expensive option. Tobacco included if tested via "exam" but not if attestation.
Applicable types of incentives:	Outcomes-based	Health contingent activity- only and outcomes-based (note impact to affordability calculation)	Participation and Health Contingent that require and exam or answer to health question(s) deemed "disability related"
Incentive method(s):	Premium contributions and/or cost-sharing mechanisms within health plan	Same as HIPAA	All forms (cash, PTO days, merchandise, de-minimus rewards, cost-sharing etc.)
Reasonable alternative standard:	inadvisable or unreasonably		Required for all disability- related and same as ACA for outcomes-based

FEDERAL WELLNESS RULES CONTINUED....

	HIPAA (2006)	Affordable Care Act (2010)	ADA/GINA (EEOC) (2016)
Applicable to:	Health plan participants	Health plan participants	All employees (and spouses via GINA)
Design requirements:	"Reasonably designed to promote health and prevent disease"	Same as HIPAA plus "minimum of report to summarize health risks and recommendations"	Same as ACA
Privacy notice:	Follows health plan privacy notice	Follows health plan privacy notice	Model notice issued June 2016
Frequency:	Not specified	At least 1 time per year	At least 1 time per year

THE HEADLINES: WHAT'S IN THERE?

- Children (even adult children) may not be included in incentive program soliciting health information or requiring exam, but spouses can.
- Outcomes and participation-based incentives count toward cap.
- "In-Kind" incentives (paid time off, movie tickets, t-shirts) count; even de-minimus.
- October 2016 opinion indicates that only the elements that require an exam or require individuals to answer disability-related questions count. HRA's may not count if questions can be skipped.
- Incentives >30% are okay if you can earn maximum rewards without exam or DI questions
- Privacy notice requirements adopted: model notice issued, June 2016.

ADA RULES

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- Employers must maintain employee medical information:
 - On separate forms;
 - In separate medical files;
 - Treat information as confidential medical record.

ADA RULES

 Programs that collect medical information must provide employees with notice.



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• Title II generally prohibits <u>employers</u> from collecting genetic information or discriminating against employees or applicants because of genetic information.

• Exception for <u>voluntary</u> 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.
- Any disclosure of genetic information to employer should be in <u>aggregate</u> only.

"Genetic information"

- Genetic tests of individual or family members
- Manifestation of disease or disorder in family members ("family medical history")
 - "Family" includes spouses and adopted children and dependents of spouses.
- Receipt of genetic services

• Title II requires employers to:

- Maintain written genetic information separate from personnel files
- Treat such files as confidential medical record
- May keep genetic information in same file as ADA medical information

GINA AND ADA

- Employers may not condition participation in a wellness program or provide any reward to an employee, spouse or other covered dependent in exchange for agreement to:
 - Sell
 - Exchange
 - Share
 - Transfer
 - Otherwise disclose genetic information

HIPAA

- According to federal Department of Health and Human Services:
- "Where a workplace wellness program is offered as part of a group health plan, the individually identifiable health information collected from or created about participants in the wellness program is PHI and protected by the HIPAA Rules. While the HIPAA Rules do not directly apply to the employer, a group health plan sponsored by the employer is a covered entity under HIPAA,[1] and HIPAA protects the individually identifiable health information held by the group health plan (or its business associates). HIPAA also protects PHI that is held by the employer as plan sponsor on the plan's behalf when the plan sponsor is administering aspects of the plan, including wellness program benefits offered through the plan.[2]
- Where a workplace wellness program is offered by an employer directly and not as part of a group health plan, the health information that is collected from employees by the employer is not protected by the HIPAA Rules. However, other Federal or state laws may apply and regulate the collection and/or use of the information."
- From <u>https://www.hhs.gov/hipaa/for-professionals/privacy/workplace-wellness/</u>.

HR 1313 – PRESERVING EMPLOYEE WELLNESS PROGRAMS ACT

- 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
- "Notwithstanding any other provision of law" overrides ADA and GINA wellness rule requirements.

QUESTIONS?

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POLL QUESTION 1. HOW FAMILIAR ARE YOU WITH "PRESERVING EMPLOYEE WELLNESS PROGRAMS ACT (HR 1313)"?

A. VERY FAMILIAR
B. SOMEWHAT FAMILIAR
C. HEARD OF IT BUT NOT FAMILIAR
D. NEVER HEARD OF IT

POLL QUESTION 2. IT'S A FALSE CHOICE FOR SURE, BUT IF YOU HAD TO JUDGE, WHAT IS MORE IMPORTANT FOR YOUR ORGANIZATION, INCREASING EMPLOYEE ACCOUNTABILITY FOR HEALTH OR PROTECTING EMPLOYEE PRIVACY?

A. PRIVACY IS PARAMOUNTB. ACCOUNTABILITY MATTERS MOSTC. I JUST THREW AN EGG AT MY COMPUTER

POLL QUESTION 3. WHICH IS MORE LIKELY TO RAISE EMPLOYEE PRIVACY CONCERNS?

- A. OFFERING GENETIC TESTING (I.E. 23ANDME SALIVA TESTS)
- B. OFFERING REGULAR SCREENINGS (BLOOD PRESSURE)
- C. PRIVACY STANDARDS BEING EQUAL, I DON'T SEE EITHER AS MORE CONCERNING THAN THE OTHER
- D. I'LL ADMIT, I DON'T KNOW ENOUGH ABOUT "GENETIC TESTING" STANDARDS TO HAVE AN OPINION YET

POLL QUESTION 4. WHICH INCENTIVES TYPE MAKES YOU MOST CONCERNED ABOUT WELLNESS LEGAL ISSUES?

A. PARTICIPATION BASED
B. PROGRESS BASED
C. OUTCOMES BASED
D. ALL ARE OF EQUAL CONCERN
E. NONE CONCERN ME

POLL QUESTION 5. THE NBGH SURVEY IN 2016 INDICATES USE OF FINANCIAL INCENTIVES IS WANING. WHY?

- A. EMPLOYERS DON'T WANT TO DEAL WITH RELATED LEGAL ISSUES
- B. EMPLOYEE PRIVACY HAS BECOME AN ISSUE
- C. TOO MUCH NEGATIVE PRESS FROM MEDIA
- D. WE'VE MOVED ON TO OTHER ENGAGEMENT STRATEGIES



A. STRONGLY AGREEB. AGREEC. NOT SURED. STRONGLY DISAGREE

Appendix

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Sample Program Designs

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Incentive Structure A

\$8,000 x 30% = \$2400 (\$200/month)

Reward Categories	NIH (Healthy)	Outcome Required	Monthly Incentives	Alternative Goals	
Biometric Screening & HRA (participation)	n/a	n/a	\$50	n/a	
BMI	18.5 – 24.9 kg/m2	≤ 27.5 kg/m2 OR Waist: < 34.5 F < 37 M	\$50	5% weight loss (or work with doctor)	
Blood Pressure	12 0/80 mmHg	≤ 130/85 mmHg	\$25	Improve by one	
LDL Cholesterol	≤ 1 00 mg/dL	≤ 1 30 mg/dL	\$25	risk category (or work with doctor)	
Tobacco / Nicotine	Negative	Negative blood test	\$50	Complete cessation program	

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Incentive Structure B

\$5,000 x 30% = \$1500 (\$125/month)

Reward Categories	NIH (Healthy)	Outcome Required	Monthly Incentives	Alternative Goals	
Biometric Screening & HRA (participation)	n/a	n/a	\$50 \$25 + \$25	n/a	
BMI	18.5 – 24.9 kg/m2	≤ 27.5 kg/m2 OR Waist: < 34.5 F < 37 M	\$50	5% weight loss (or work with doctor)	
Blood Pressure	12 0/80 mmHg	≤ 1 30/85 mmHg	\$25	Improve by one risk category (or work with doctor)	
LDL Cholesterol	≤ 1 00 mg/dL	≤ 130 mg/dL	\$25		
Tobacco / Nicotine	Negative	Negative Attestation	\$50	Complete cessation program	

OTHER OPEN QUESTIONS

Where is the line for health inquiries versus disability inquiries?

Avoid:

- Asking about a disability and/or employees' genetic information.
- Asking "health questions that are likely to elicit information about a disability."
- Asking about current prescription drugs or medications.
- Asking broad questions about impairments.
- General well-being questions (e.g. how are you?) are not considered disability inquiries.
- Questions about tobacco use are not considered "disability related."

Sample Program

Designs:

Compliant or Not?

IS THIS COMPLIANT?

- Employer offers health plan participants \$25 per week if both the employee and the spouse meet two out of three biometric goals.
 - NO.
 - Spouse participation/results should not be a "gatekeeper" to employee rewards.
- Employer offers all employees a free health screening at work as part of their health fair day. Everyone gets a t-shirt and an entry to win a paid day off.
 - YES and NO.
 - If everyone gets a t-shirt regardless of participation, this does not need to be counted towards the maximum allowable.
 - The paid day off is tricky in that you will need to calculate the value of a PTO for each employee that wins. We do not recommend using PTO as an incentive.

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IS THIS COMPLIANT?

- Employer offers all employees a web portal with an HRA, health challenges, financial wellness support and coaching videos. Employees can earn up to 10,000 points by completing activities and use the points to buy merchandise.
 - Maybe.
 - Depends on how it is structured. This is okay assuming the total of all rewards that require participation in an exam and/or answering disability-related questions is under the 30% threshold or there is a way to earn the maximum reward without an exam or answering questions.
 - This is not a best practice as written. There is a question on how to attribute the dollar amount towards the allowable differential (\$3 per point that employer pays rewards vendor or the value of the toaster?).
- Employees may participate in a free biometric screening at work. If they lose 5% of their weight in a year, they get \$50/month off of their premium. If they aren't on the plan, they get \$600 cash (taxable compensation).
 - YES.