

EMPLOYEE WELLNESS PROGRAMS

COMPLIANCE AND LEGAL UPDATES



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TODAY'S PRESENTER



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SOURCES OF REGULATION

Wellness programs can be subject to regulation by numerous laws, including:

- Affordable Care Act (ACA)
- Health Insurance Portability and Accountability Act (HIPAA)
- Employee Retirement Income Security Act (ERISA)
- Consolidated Omnibus Budget Reconciliation Act (COBRA)
- Americans with Disabilities Act (ADA)
- Genetic Information Nondisclosure Act (GINA)
- Fair Labor Standards Act (FLSA)
- Internal Revenue Code (IRC)
- National Labor Relations Act (NLRA)
- State Laws



THE TALE OF TWO WELLNESS PROGRAMS

Sources of regulation vary depending on the type of employer and whether the plan is a “Group Health Plan” (“GHP”):

	GHP	Non-GHP
ACA	√	
HIPAA	√	
ERISA	√*	
COBRA	√**	
ADA	√	√
GINA	√	√
FLSA	√	√
IRC	√	√
NLRA	√	√
State Laws	<i>sometimes</i>	√

*Church and governmental GHPs are exempt from ERISA. They are always subject to state law.

**Church plans are also exempt from COBRA.



WELLNESS PROGRAM HIERARCHY



WHEN ISN'T A WELLNESS PROGRAM A GHP?

Generally speaking, a wellness program is not a GHP if it:

- Is offered to all employees regardless of their enrollment in the employer's health plan, and
- Does not provide any “medical care”

Example:

- A wellness program would not be a GHP if employees receive \$100 for attending a class on nutrition or if employees receive a free gym membership



WHEN IS A WELLNESS PROGRAM A GHP?

Group Health Plan: A group health plan is an employer-sponsored welfare benefit plan to the extent that the plan provides medical care (...including items and services paid for as medical care) to employees or their dependents directly or through insurance or otherwise

Medical Care: means amounts paid for:

- the diagnosis, cure, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body



WHEN IS A WELLNESS PROGRAM A GHP?

Common things that will cause a wellness program to become a GHP:

— Providing “medical care”

- Health Risk Assessments (i.e. health surveys) that provide advice and analysis with personalized coaching (“HRA”)
- Immunizations (e.g., flu shots)
- Blood pressure screenings
- Biometric screenings (e.g., BMI, cholesterol)

— Premium Discounts or Surcharges:

- Example: Providing a medical premium discount to employees who complete health screenings



WELLNESS PROGRAM HIERARCHY

Wellness Programs

Non-Group Health Plans

Group Health Plans



AFFORDABLE CARE ACT (ACA)

Under the ACA, all GHPs must meet certain requirements, such as:

- Providing free preventive care for a mandatory list of services (unless plan is grandfathered)
- Ensuring no lifetime or annual limits on essential health benefits
- Providing participants with a Summary of Benefits and Coverage describing the plan



AFFORDABLE CARE ACT (ACA) (CONT' D)

It is important that if your wellness program is a GHP, that it is carefully structured to comply with these rules

- The best way to limit risk is to limit participation in the wellness program to those employees who participate in your major medical coverage
- Preamble to the final regulations on excepted benefits seems to eliminate the option of compliance by wrapping the wellness program into your Employee Assistance Program (EAP)
- Failure to comply with ACA can trigger excise tax of \$100 per day per affected individual!



HIPAA NON-DISCRIMINATION REQUIREMENTS

HIPAA generally prohibits a GHP from discriminating among similarly situated individuals based on their health status

Plans usually cannot charge individuals different premiums based on the presence or absence of a health factor

— It makes no difference whether a monetary incentive tied to a wellness program is expressed as a premium “discount” or a “surcharge”



HIPAA NON-DISCRIMINATION REQUIREMENTS (CONT' D)

If wellness programs comply with HIPAA's non-discrimination rules, they fall within an exception to HIPAA's general non-discrimination requirement

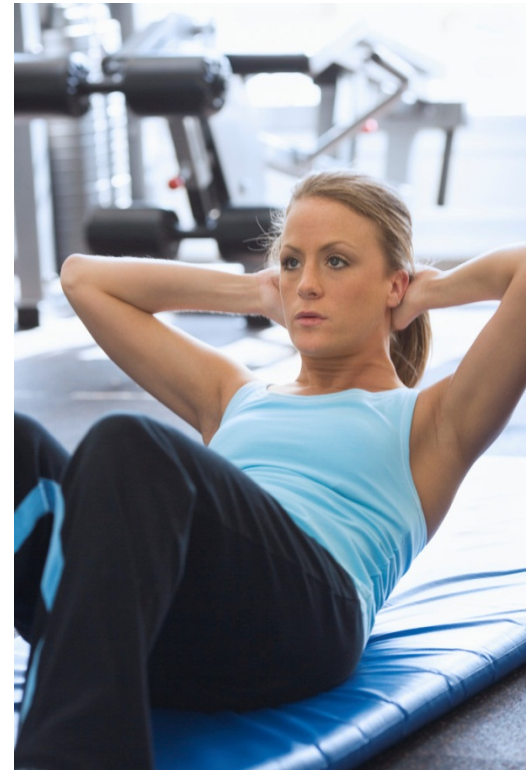
- These rules are the primary set of regulations governing wellness programs
- These rules have been expanded and updated by the ACA



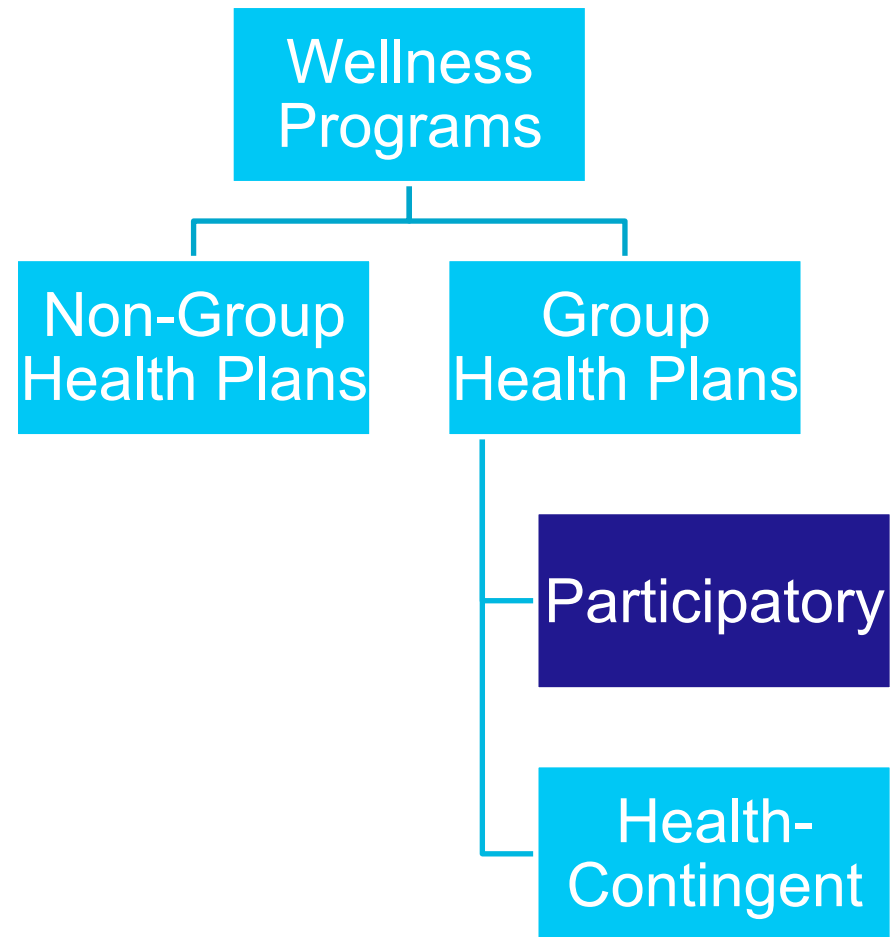
HIPAA NON-DISCRIMINATION REQUIREMENTS (CONT' D)

Different requirements apply depending upon whether the wellness program is:

- A “participatory” program, or
- A “health-contingent” program



WELLNESS PROGRAM HIERARCHY



HIPAA – PARTICIPATORY PROGRAM

A “participatory program” is one that does not provide an award or ***does not include any conditions on obtaining a reward based on satisfying a standard*** related to a health factor

Examples:

- A program that reimburses all or part of the cost of fitness center membership
- Diagnostic testing program that provides a reward for participation rather than outcome
- A program that provides a reward to employees for attending a monthly no-cost health education seminar



HIPAA – PARTICIPATORY PROGRAM (CONT' D)

For *participatory programs*, the regulations require only that the program be *available to all similarly situated individuals regardless of health status*

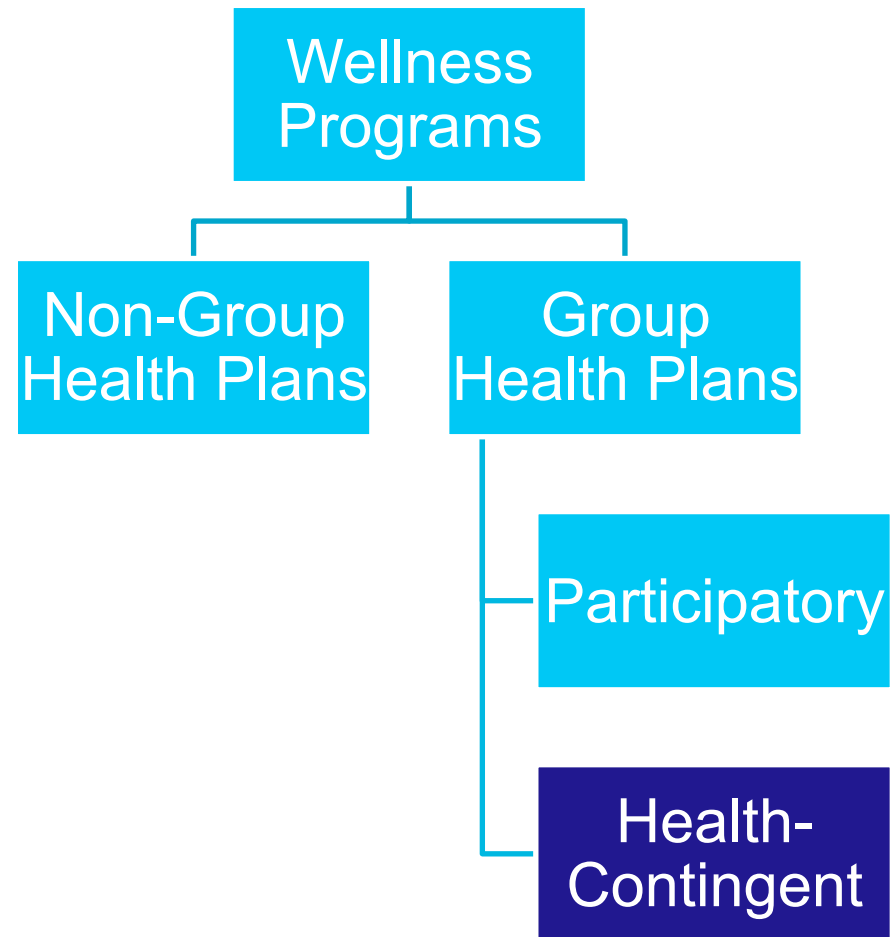
— If factors other than health status limit a participant's ability to participate, a participatory wellness program does not discriminate based on a health factor

— Examples:

- An individual cannot attend a seminar on the weekend because he has conflict → no discrimination based on a health factor
- An individual cannot attend a seminar due to health reasons (e.g., because he is on disability at the time) → an accommodation would be necessary



WELLNESS PROGRAM HIERARCHY



HIPAA – HEALTH-CONTINGENT PROGRAMS

A “health-contingent program” is one that requires an individual to ***satisfy a standard related to a health factor*** (or requires the participant to ***do more than a similarly situated individual*** to obtain the same reward because of a health factor)



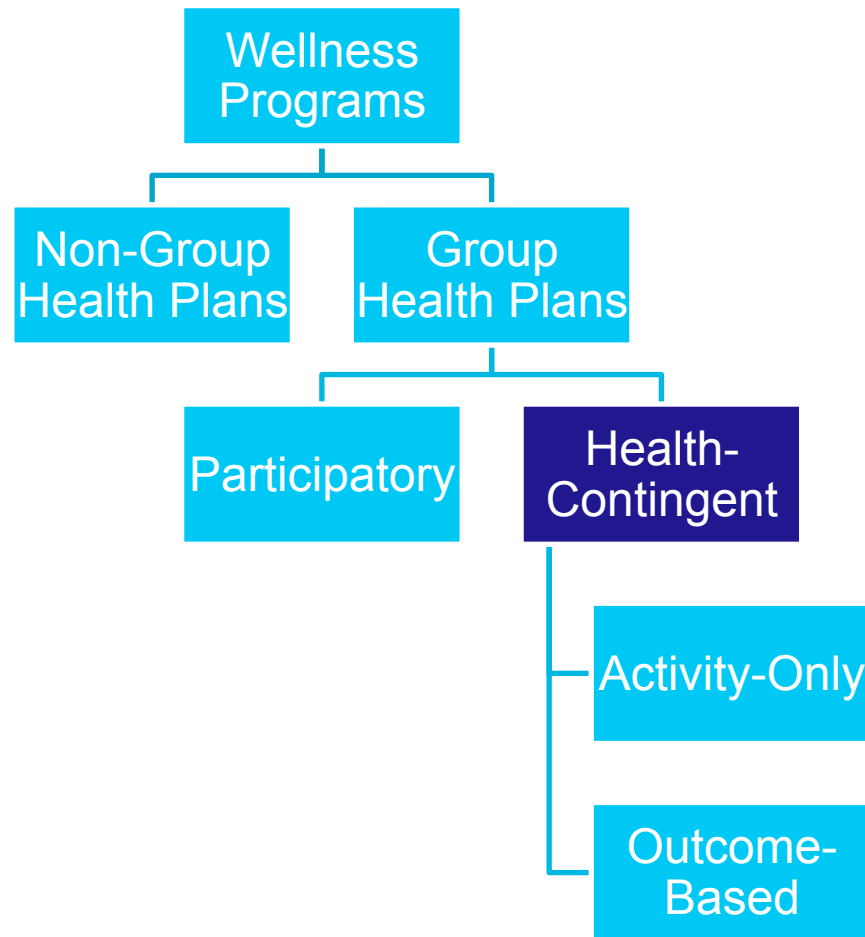
HIPAA – HEALTH-CONTINGENT PROGRAMS (CONT' D)

There are two types of health-contingent programs:

- **Activity-only:** Requires performing or completing an activity related to a health factor
 - e.g., waiving the annual deductible for employees who participate in a walking program
- **Outcome-based:** Requires attaining or maintaining a specific health outcome
 - e.g., providing a premium discount to employees who have a body mass index (BMI) within a specified range, or imposing a premium surcharge on employees who use tobacco



WELLNESS PROGRAM HIERARCHY



HIPAA – HEALTH-CONTINGENT PROGRAMS (CONT' D)

Health-contingent wellness programs must satisfy **five conditions**:

1. Frequency of Opportunity to Qualify
2. Size of Reward
3. Reasonable Design
4. Uniform Availability and Reasonable Alternative Standards
 - Activity-only alternatives
 - Outcome-based alternatives
5. Notice of Availability of Reasonable Alternative Standards



HIPAA – HEALTH-CONTINGENT PROGRAMS

CONDITION #1: FREQUENCY OF OPPORTUNITY

Individuals eligible for the program must be given the opportunity to qualify for the reward at least once per year



HIPAA – HEALTH-CONTINGENT PROGRAMS

CONDITION #2: SIZE OF REWARD

The ACA increased the maximum rewards/penalties available under health-contingent programs, from 20% of the health plan premium, to:

- 50% for programs designed to prevent or reduce tobacco use
- 30% for all other health-contingent wellness programs



HIPAA – HEALTH-CONTINGENT PROGRAMS

CONDITION #3: REASONABLE DESIGN

Health-contingent wellness programs ***must be reasonably designed*** to promote health or prevent disease

A wellness program is reasonably designed if it:

- has a ***reasonable chance of improving the health of, or preventing disease*** in, participating individuals
- is not overly ***burdensome***
- is not a ***subterfuge for discrimination*** based on a health factor, and
- is not ***highly suspect*** in the method chose to promote health or prevent disease



CONDITION #4: UNIFORM AVAILABILITY AND REASONABLE ALTERNATIVE STANDARD

Uniform Availability: The full reward must be available to all similarly situated individuals who satisfy a reasonable alternative standard

— A participant may take some time to request, establish, and satisfy a reasonable alternative standard; the same, ***full reward must be provided to that individual as is provided to individual who meet the initial standard***

- If a calendar year plan offers a premium discount and an individual satisfies the reasonable alternative standard on April 1st, the plan must provide the premium discounts for Jan., Feb., and March
- If an individual does not satisfy the reasonable alternative standard until the end of the year, the plan may provide a retroactive payment of the reward for that year within a reasonable time after the end of the year, but cannot provide pro-rata payments over the next year



CONDITION #4: UNIFORM AVAILABILITY AND REASONABLE ALTERNATIVE STANDARD (CONT' D)

Reasonable Alternative: Plans are not required to establish a reasonable alternative standard before an individual's request, as long as a reasonable alternative standard is provided upon request (or the condition is waived)

- Plans can determine a reasonable alternative standard ***for an entire class or on an individual-by-individual*** basis depending on the facts and circumstances
- If the reasonable alternative standard is itself an activity-only or outcome-based wellness program, it must also meet the requirements for an activity-only or outcome-based wellness program, as applicable



CONDITION #5: NOTICE OF REASONABLE ALTERNATIVE STANDARD

Must include language regarding alternative standard in any plan materials describing wellness program

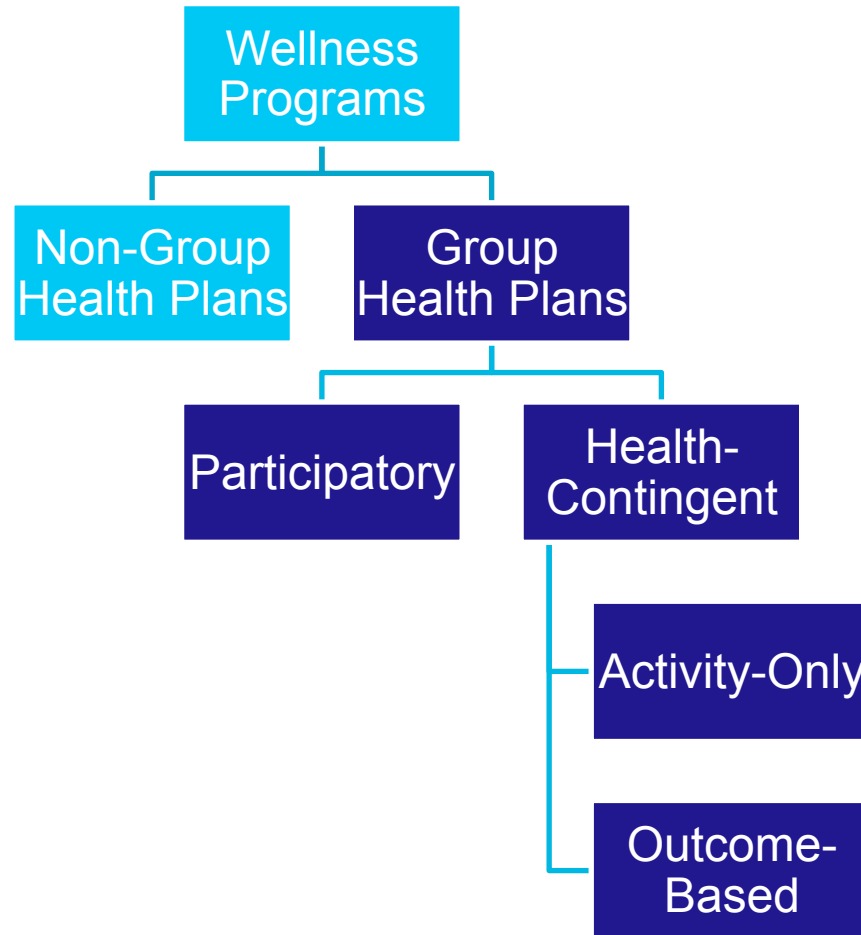
- Must contain contact information for obtaining the alternative standard and a statement that physician recommendations will be accommodated
- ***Model language*** is available on the DOL's website



OTHER LEGAL REQUIREMENTS



WELLNESS PROGRAM HIERARCHY



ERISA COMPLIANCE

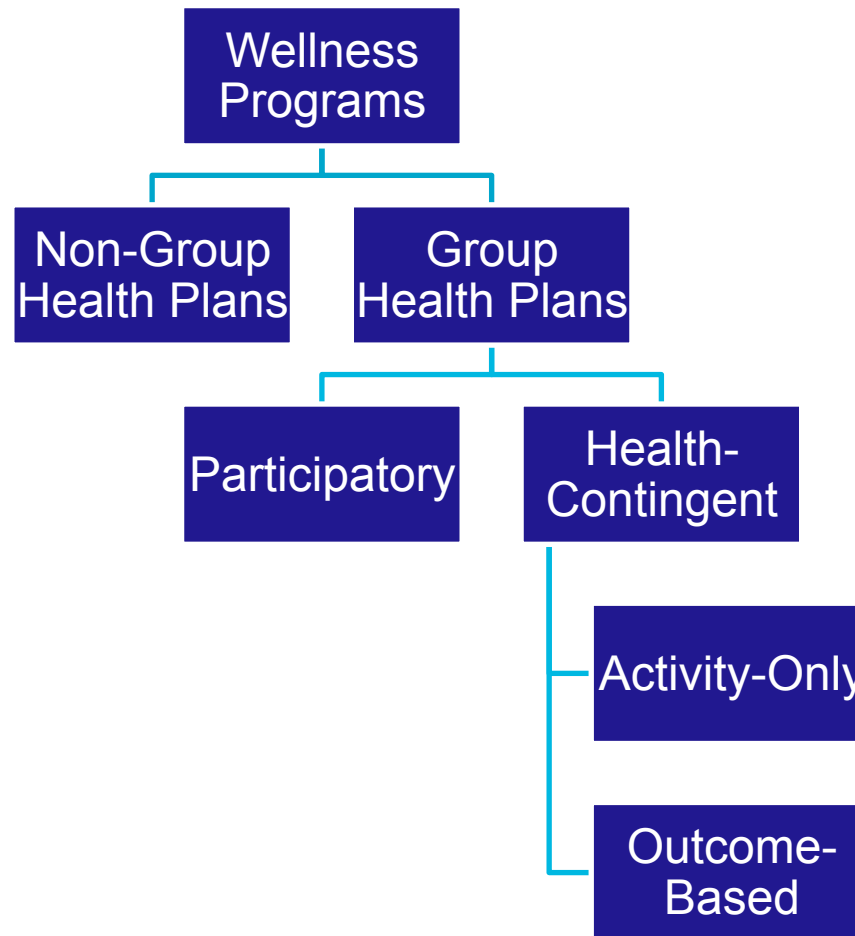
If the wellness program is a GHP and the employer is subject to ERISA, then it must comply with all other aspects of ERISA, including:

- Plan document
- Summary Plan Description (“SPD”)
- Claims procedures, and
- Form 5500 filings

Requirements can be satisfied by incorporating a description of the wellness program in the major medical plan, or by creating a separate plan with cross-references to the medical plan document



WELLNESS PROGRAM HIERARCHY



ADA – DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS

The ADA limits the circumstances under which an employer may:

- Make *disability-related inquiries*, or
 - e.g., questions about current health status asked as part of an HRA
- Conduct *medical examinations*
 - e.g., biometric screenings such as blood pressure and cholesterol screening to determine whether an employee has achieved certain health outcomes



ADA – DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS (CONT' D)

Employers are permitted to conduct disability-related inquiries (e.g., HRA) and medical screenings (e.g., biometrics) only as part of an **employee health program** when:

- participation is “**voluntary**”
- information is maintained according to the **confidentiality** requirements of the ADA, and
- the information is not used to **discriminate** against an employee
 - e.g., employees with disabilities should not be required to complete additional requirements to receive benefits that are generally available to non-disabled individuals



ADA/EEOC – PROPOSED REGULATIONS

On April 20, 2015, the EEOC published new proposed regulations regulating employer wellness programs:

—An ADA-covered wellness program is a qualifying **employee health program** if it:

- has a reasonable chance of improving an employee's health or preventing disease
- is not overly burdensome
- is not a subterfuge for violating the ADA, and
- is not highly suspect in the method chosen to promote health or prevent disease

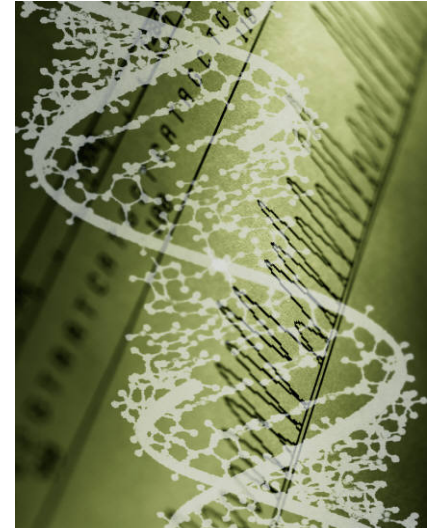


ADA/EEOC – PROPOSED REGULATIONS

- An ADA-covered wellness program will be *voluntary* if:
- the employer does not require participation
 - the employer does not deny coverage under any of its GHPs or limit benefits or benefit packages for employees who do not participate (except in the context of permitted incentives which generally line up with those permitted under ACA)
 - does not take any adverse employment action (including retaliation, coercion, interference and other actions prohibited by the ADA) against an employee who refuses to participate, and
 - provides a notice to employees regarding the wellness program if such wellness program is part of the employer's GHP

GENETIC INFORMATION NONDISCRIMINATION ACT (GINA)

- Prohibits discrimination in employment, or under health plan, on the basis of genetic information
- GINA compliance standards differ depending on whether the wellness program is offered as part of or in connection with a GHP
- Before GINA, many employers solicited family medical history information through an HRA



GINA – GROUP HEALTH PLANS AND HEALTH RISK ASSESSMENTS

Post-GINA, GHPs cannot request or collect any genetic information where:

- a reward is offered for completion of an HRA, or
- the HRA is conducted prior to or in connection with enrollment (including open enrollment)

Genetic information is defined very broadly and includes questions regarding family medical history, whether an employee has undergone genetic testing, and/or whether an employee has received genetic services



GINA – GROUP HEALTH PLANS AND HEALTH RISK ASSESSMENTS (CONT' D)

The easiest way for a GHP to comply with GINA is to simply not ask questions about genetics and family history

- Open-ended questions that could invite disclosure of genetic information in response must include a disclaimer that employees should not provide any genetic information in their answer



GINA – NON-GROUP HEALTH PLANS

GINA provides a limited exception for non-GHPs (that are not part of or related to a GHP) to inquire about genetic information, if:

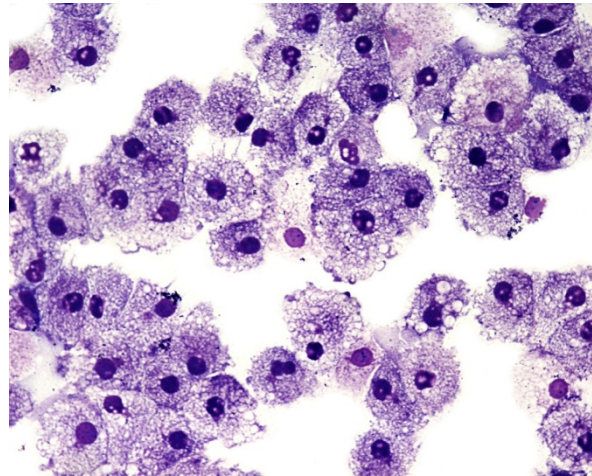
- the employee provides the information voluntarily
- the individual provides prior knowing, voluntary, and written authorization
- individually identifiable information is provided only to the individual (or family member receiving the genetic services) and the licensed health care professionals or board-certified genetic counselors providing the services, and
- the individually identifiable information is only available for purposes of the services and is not disclosed to the employer (or other covered entity) except in aggregate terms that do not disclose the identity of specific individuals



GINA – NON-GROUP HEALTH PLANS (CONT' D)

Genetic information generally is not considered to be provided voluntarily if the individual is required to provide the information or penalized for not providing it

- This requirement prohibits an employer from providing a financial inducement to provide genetic information
- However...



GINA – NON-GROUP HEALTH PLANS (CONT' D)

An employer can offer a financial inducement to complete an HRA that includes information about family medical history or other genetic information, if the form:

- states that the inducement is available whether or not the individual answers the questions regarding genetic information
 - Questions must be specifically identified, such as by segregating them into a separate section
- is written in a way that the individual is reasonably likely to understand it
- describes the information that will be obtained and the general purposes for which it will be used, and
- describes the restrictions that will apply to disclosure of the genetic information



INTERNAL REVENUE CODE (IRC)

Reductions in GHP premiums, deductibles or co-payments for wellness program participation are generally tax-free to employees

Other types of financial inducements typically associated with non-GHP wellness programs are generally taxable

— e.g., cash, gift cards, health club memberships



WELLNESS ALERTS

nixonpeabody.com/EEOC_proposed_compliance_rules_for_wellness_programs



QUESTIONS?

THANK YOU!

