

HEALTH & WELFARE PLAN LUNCH GROUP

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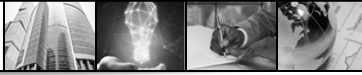
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1. Wellness Promotion/Prevention: Overcoming Legal and Compliance Hurdles



Wellness Promotion/Prevention: Overcoming Legal And Compliance Hurdles

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Compliance Issues

- Practical and legal compliance issues may arise with Disease Management and Wellness Programs under . . .
 - HIPAA Nondiscrimination Requirements
 - Americans With Disabilities Act (ADA)
 - Genetic Information Nondiscrimination Act (GINA)
 - Age Discrimination in Employment Act (ADEA)
 - ERISA/ACA Compliance Issues
 - HIPAA Administrative Simplification (Privacy, EDI, and Security)
 - COBRA
 - ERISA
 - Income Tax
 - Plan Design/Integration Issues (e.g., HRAs and HSAs)
 - State law

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What are the rules for wellness program incentives?

- All incentives not limited to a "medical care" expense are taxable wages
 - Not taxable:
 - Health plan premium or cost share reduction
 - HSA contribution
 - HRA contribution
 - Taxable
 - Cash
 - Gym membership
 - Fitbit or other item



Wellness Program Landscape-Federal Rules

- HIPAA Portability Rules (as amended by ACA) for wellness programs that condition rewards on completion of certain activities or satisfaction of health standards.
- Title I of the Genetic Information Nondiscrimination Act (GINA)
 - Administered by Tri-Agencies
- HIPAA Privacy
- EEOC's final ADA regulations governing "employee health programs"
- EEOC's final regulations regarding Title II of GINA



HIPAA/ACA Rules

- Applies only to health contingent programs that provide a reward
- Distinction between participation based and health contingent
 - *Participation based*—(i) none of the conditions for obtaining a reward is based on satisfying a standard related to a health factor/activity or (ii) there is no reward associated with the program
 - *Health contingent based*-a program that requires an individual to achieve a standard related to a health factor (Outcome Based) or to participate in or complete certain activities to obtain a reward (Activity Based)



HIPAA/ACA Rules

- Health contingent must satisfy the following 5 factors:
 - Reward is limited to appropriate percentage
 - Up to 30% of the total cost of self only coverage in which employee is enrolled (or family coverage if family allowed to participate) for non-tobacco cessation programs
 - If tobacco cessation program is offered, the maximum percentage is 50%
 - Annual qualification
 - Reasonable design
 - Uniform availability/reasonable alternatives
 - Activity based-only required if medically unable to satisfy standard
 - Outcome based-anyone who does not satisfy the standard
 - Notice of reasonable alternatives



Title I of GINA (Impact on Wellness Programs)

- May ask for family medical history *after enrollment in the plan*, but only if there is no incentive/penalty tied to the request
 - Health Risk Assessment provided *after enrollment* asks for family medical history; \$10 premium discount for anyone who completes it—Not O.k.
 - Health Risk Assessment provided *after enrollment* does not ask for family medical history; \$10 premium discount for anyone who completes it—O.k.
 - Also o.k. if family medical history requested provided that no incentive or penalty imposed if answered.
 - “Firewall” employees (i.e. plan sponsor personnel identified by the plan, in accordance with HIPAA privacy rules that are permitted to have access to PHI) may have access to the information as necessary for plan administration purposes



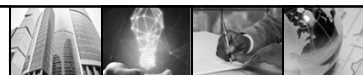
EEOC Final ADA Regulations

- ADA prohibits employers subject to ADA (15 or more employees) from making post-hire disability related inquiries or requiring a medical exam, except for business necessity, unless it is part of a voluntary employee health program
- The final regulations address rules for “employee health program”
 - Virtually every “wellness program” qualifies as employee health program
 - Final regulations identify rules applicable to ALL wellness programs
 - Final regulations identify special rules applicable to programs that include “disability related inquiries” or require medical exams



EEOC Final ADA Regulations

- Rules applicable to all wellness programs
 - Reasonably designed to promote health and prevent disease. The following do NOT satisfy this standard:
 - A program that requires a significant amount of time to obtain a reward.
 - A program that imposes unreasonably intrusive procedures.
 - A program that imposes significant costs related to medical examinations.
 - A program that exists mainly to shift costs to targeted employees.
 - A program that exists simply to collect information for the employer to estimate future health care costs.



EEOC Final ADA Regulations

- Rules applicable to all wellness programs
 - Satisfy ADA's confidentiality requirements:
 - May not disclose identifiable medical information to the employer except as necessary for the employer to administer the health plan.
 - May not require employees to waive confidentiality protections or agree to the sale or exchange of medical information as a condition of participating in the program.



EEOC Final ADA Regulations

- Special rules applicable to programs that include “disability related inquiries” and/or require a medical exam
 - Program must be “voluntary”
 - Key analysis points:
 - What is a “disability related inquiry?”
 - What is a medical exam?
 - What is considered “voluntary”?



EEOC Final ADA Regulations

- What is a disability related inquiry? A question or series of questions designed to elicit information about an ADA disability.
 - Asking an employee about a disability or how the disability occurred or inquiring about the nature or severity of an employee’s disability.
 - Asking an employee to provide personal medical history.
 - Asking about an employee’s genetic information.
 - Asking an employee what prescriptions that they are taking.
 - **Asking an employee a broad question about any impairments the employee has (e.g. what impairments do you have?)**
- **Asking about tobacco use is NOT a disability related inquiry!!!!**



EEOC Final ADA Regulations

- What is a “medical exam”? A procedure or test that seeks information about a person’s physical or mental impairments
- Factors to consider:
 - whether the test is administered by a health care professional;
 - whether the test is interpreted by a health care professional;
 - whether the test is designed to reveal an impairment or physical or mental health;
 - whether the test is invasive;
 - whether the test measures an employee’s performance of a task or measures physiological responses to performing the task;
 - whether the test normally is given in a medical setting; and
 - whether medical equipment is used.
- Screening to test for tobacco use is subject to rules



EEOC Final ADA Regulations

- When is a program voluntary?
 - Employees are not required to participate. For example, an employee’s refusal to participate does not result in termination.
 - Employees who choose not to participate are not denied eligibility in any group health plan or group health plan option offered by the employer.
 - The employer takes no adverse employment action or does not retaliate against those who choose not to participate.
 - The employee receives a notice that contains certain information.
 - Any inducements provided in connection with the program are limited to 30% of “benchmark”



EEOC Final ADA Regulations

- What are the notice requirements?
 - The notice is written so that the employee from medical information is being obtained is reasonably likely to understand it (EEOC provided model notice)
 - The notice describes the medical information that is obtained as part of the program and the specific purposes for which it is obtained;
 - The notice describes the restrictions on the disclosure of the employee's medical information and the identity of any employer representatives or third parties with whom the information will be shared;
 - The methods the employer will use to protect the confidentiality of such information (including whether it complies HIPAA's privacy and security rules, if applicable).
- EEOC gives flexibility on how to send
 - May send with other materials. Take Caution not to bury the elements in the other materials



EEOC Final ADA Regulations

- Inducement connected to disability related inquiries/medical exam limited to 30% of total cost of self only coverage of "benchmark"
 - If employer offers only one health plan option, then 30% of self only coverage
 - If employer offers multiple health plan options, and doesn't limit inducement to a particular option (e.g. those enrolled in PPO option only), then 30% of lowest cost self only coverage
 - If employer does not offer group health plan, then 30% of the total cost of self-only coverage for the second-lowest-cost silver plan for a 40-year-old nonsmoker in the state or federal health care exchange in the state of the employer's principal place of business



EEOC Final Regulations

- ADA and HIPAA nondiscrimination:
 - HIPAA nondiscrimination rules do not apply to participation based programs but ADA Rules do
 - Voluntary requirement limits reward for “participation” based to 30% if connected to a disability related inquiry/medical exam
 - ADA imposes no limitations on inducements related to tobacco use inquiries but HIPAA does



Title II GINA Regulations

- May provide inducement for spouse’s medical history
 - Medical history = manifestation of disease
 - Inducement limited to 30% of total cost of *self-only* coverage
 - Same Benchmark rules as ADA regulations
 - Total cost of family coverage not relevant
 - Reasonably designed to promote health and prevent disease
 - May not restrict access to health plan if spouse refuses to provide information
 - May not condition participation in program/give inducement in exchange for agreement permitting sale/disclosure of genetic information
 - CANNOT GIVE INDUCEMENT FOR DEPENDENT’S INFORMATION (EVEN IF ADULT)



Title II GINA Regulations

- Issues:
 - Can you give inducement to adult child? No.
 - What about prenatal wellness programs? Unclear how such programs are impacted.
 - Can you still ask for dependent's medical history as long you don't provide an inducement for it? Yes.



AARP vs EEOC

- AARP challenged ADA and GINA rules' 30% incentive limit as arbitrary, coercive, not "voluntary"
 - Court agreed and vacated the incentive effective 1/1/2019
- Provisions other than voluntariness safeharbor under ADA and GINA rules remain in effect



Back to the Future: What Happens to Incentives in 2019

Statute: Participation must be “voluntary”

Orion case – 100% premium surcharge still voluntary

Seff v Broward County (2012) Voluntariness n/a to health plan underwriting in a “bona fide benefit plan”

What will EEOC position be?

Will lack of EEOC safeharbor facilitate private suits?



Age Discrimination in Employment Act (ADEA)

- ADEA prohibits employers from discriminating against individuals on the basis of age with regard to employment and the privileges of employment (e.g., benefits)
 - Generally can't reduce or terminate benefits due to age
 - May reduce benefits based on equal cost/equal benefit rule
 - ADEA impacts both
 - The ability to stop DM/Wellness program incentives /surcharges upon reaching a particular age and
 - Varying incentives/surcharge due to age
 - Imposing additional requirements for incentive based on age



ERISA/ACA Issues

- Is wellness program a GHP or otherwise part of a welfare benefit plan
 - Plan document, SPD, and 5500 issues
- Under ACA, if a GHP arrangement must be integrated or satisfy ACA requirements on a free standing basis
 - Issues where benefits under wellness program offered to individuals not in GHP

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HIPAA Administrative Simplification

- Are disease management, wellness programs subject to HIPAA Privacy/Security?
 - Yes if
 - The DM/Wellness is part of a "Health Plan" or
 - The DM/Wellness vendor is a "Health Care Provider"
 - Most assume that DM/Wellness is part of a "health plan"
 - Facilitates information sharing with health care providers without authorization and marketing concerns
 - Enables VEBA/Trust funding

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COBRA

- Most "group health plans" are required to provide COBRA continuation coverage to qualified beneficiaries if coverage is lost as a result of certain qualifying events
- COBRA considerations:
 - Is Medical care offered?
 - What type of incentive is offered?
 - Impact of cash incentives/premium reductions?
 - Impact of HRA/HSA incentives?
 - Part of overall health program or stand alone arrangement?
 - Participation limited to plan participants or all employees?
 - What benefit must be provided?
 - What is cost of program?

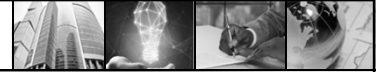
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ACA Tax Issues

- Wellness programs and 4980H
 - Treat tobacco use incentives as if complied with for MV and affordability
 - EEO is considering whether unaffordable = involuntary
 - Ignore non-tobacco incentives
- Cadillac tax Implications
 - Impact of Cadillac tax is to "squeeze" out anything other than base "metal" coverage (and maybe even that)
 - Where does that leave Account based plan incentives
 - Should incentives really be treated as "benefit" or cost of coverage?

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State Law

- Statutory Restrictions:
 - Smokers' Rights: 20 states, including Arizona, Connecticut, District of Columbia, Indiana, Kentucky, Louisiana, Maine, Missouri, Mississippi, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Virginia, West Virginia, Wyoming
 - Example: "An employer may not ... require as a condition of employment, an employee or prospective employee to refrain from using; or ... discriminate against an employee with respect to the employee's compensation and benefits or terms and conditions of employment based on the employee's use of tobacco products outside the course of the employee's or prospective employee's employment."
Ind. Stat. 22-5-4-1



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State Law

- Statutory Restrictions:
 - Lawful Conduct / Lawful Products: 11 states, including California, Colorado, Illinois, Minnesota, Montana, Nevada, New York, North Carolina, North Dakota, Tennessee, and Wisconsin.
 - NY Example: "It shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of: ... an individual's legal use of consumable products prior to the beginning or after the conclusion of the employee's work hours, and off the employer's premises and without the use of the employer's equipment or other property."



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Question & Answer

