

Health Promotion Program Legal Update: Q1 – 2020 (January 15, 2020)

Barbara J. Zabawa, JD, MPH

Health Promotion Program Legal Updates

January 15, 2020

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A Real-Life Case Study on Workplace Wellness Compliance

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Agenda

- HIPAA
- ADA
- GINA
- EEOC Update
- Real Life Case Q&A
- Q&A

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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.
 - ▶ i.e., can impose an incentive of up to 30% of the cost of coverage.
 - ▶ 29 CFR s. 2590.702(a)(1)

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HIPAA

- ▶ 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.
 - ▶ No reasonable design requirement
 - ▶ Health-contingent programs must meet 5 factor test.

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HIPAA

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

HEALTH STATUS



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HIPAA

- ▶ 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

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HIPAA

- ▶ Two types of health-contingent programs:
 - ▶ Activity
 - ▶ Outcomes-based
- ▶ ***Both must meet 5 factor test.***

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HIPAA

▶ Examples of Activity-Only:



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HIPAA

▶ Examples of Outcomes-based:



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HIPAA

► 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.

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HIPAA

► 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

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Test Your HIPAA Knowledge

- ▶ ABC Health System offers annual wellness program consisting of a health premium reduction if you see your primary care physician. Does ABC need to offer employees who don't want to see their PCP a reasonable alternative standard?

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Answer

- ▶ No. This is a participatory program (incentive is not tied to a health factor, just visiting PCP), so HIPAA requires that the incentive be offered to all similarly situated individuals.

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Test Your HIPAA Knowledge

- ▶ Same facts as before, except ABC still wants to offer a RAS to employees who don't want to see their PCP. Can they?

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Answer

- ▶ Yes, of course.

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Test Your HIPAA 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?

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Answer

- ▶ **Health contingent.** Definition of “health contingent” is a program that requires an individual to satisfy a standard related to a health factor to obtain a reward (or requires an individual to undertake more than a similarly situated individual based on a health factor in order to obtain the same reward). Employees who are contacted to participate in health coaching because of a health issue in order to receive the same reward would be subject to a health contingent program.

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ADA and GINA



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ADA and GINA

- ▶ Does your wellness program collect employee health information through a health risk assessment or biometric screen?
 - ▶ If yes, **ADA wellness rules** apply
- ▶ Does the health information collection include asking employee family medical history questions?
 - ▶ If yes, **GINA wellness rules** apply
- ▶ Does the health information collection include information from an employee's spouse or children?
 - ▶ If yes, **GINA wellness rules** apply

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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

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ADA

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

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ADA

- Before 1/1/19 incentives could be limited to 30% of cost of self-only coverage
 - ▶ Applied regardless of group health plan status
 - ▶ Applied to programs with HRAs/Biometric Screens
 - ▶ ***Expired as of 1/1/19***

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AARP v. EEOC

- ▶ AARP sued EEOC in October 2016
- ▶ Argued ADA and GINA incentive maximums of 30% total cost of self-only coverage
 - ▶ Arbitrary
 - ▶ Unjustified
- ▶ AARP complained that EEOC used to say “voluntary” medical exams meant no incentives, the rules stated 30% incentive limit still “voluntary.”

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AARP v. EEOC

- ▶ In August 2017, the District Court of the District of Columbia ruled in favor of AARP.
- ▶ Refused to defer to EEOC’s judgment in interpreting meaning of “voluntary”
- ▶ Questioned whether EEOC truly evaluated incentive limit
 - ▶ Stakeholder concern that 30% incentive level likely to be coercive for employees with low incomes
 - ▶ Affect disproportionately those with disabilities

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AARP v. EEOC Current Status

- ▶ EEOC expects to issue proposed rules in January 2020
 - ▶ EEOC now has a quorum of commissioners
 - ▶ Fall Regulatory Agenda Delayed Proposed Rules from December to January
- ▶ Any rule change must be consistent with the AARP court’s order, which found that the 30% wellness incentive maximum to be without justification under the ADA’s “voluntary” requirement.
- ▶ Final rule not likely until at least late 2020, maybe early 2021.

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Remaining Provisions of ADA

- ▶ Still references “incentives” and “rewards”
 - ▶ EEOC Attorney didn’t disagree that references were significant
- ▶ Program must still be “voluntary”
- ▶ Voluntary as long as employer
 - ▶ Does not require participation
 - ▶ Does not deny or limit coverage to nonparticipants
 - ▶ Does not retaliate against employees
 - ▶ Provides written notice
- ▶ Reasonably designed to promote health and prevent disease

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Remaining Provisions of ADA

- ▶ Employers should receive aggregate employee health info only unless needed to administer plan
- ▶ Even if employer complies with ADA wellness rules, **including the limit of incentives** under the ADA, employers must still comply with other laws
- ▶ The ADA safe harbor does not apply to wellness programs, even programs part of an employer’s health plan.

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ADA

- ▶ Must provide **equal opportunity** for disabled employees to participate in programs and offer reasonable accommodations.

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Test Your ADA Knowledge

- ▶ ABC Employee Joan Smith is 30 years old and has a disability. ABC has hired Wellways, a wellness vendor, to administer its wellness program for group health plan employees. Wellways sends the following message to employees: “Sign up for your HRA by October 1 or lose \$75 per month. You can register online here.”
 - ▶ Permissible under the ADA?

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Answer

- ▶ Not sure. Would employees perceive this as voluntary? What could Wellways do to reduce its risk?

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Test Your ADA Knowledge

- ▶ Joan complains to HR stating she doesn't want to get an HRA. She doesn't mention her disability and her fear of revealing that disability as part of the HRA. She just says that she and "a lot of other employees" feel like they are being forced to disclose their health information.
- ▶ What should the HR Director do?

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Answer

- ▶ Answers will vary, but here are some possibilities:
- ▶ 1. Eliminate the incentive
- ▶ 2. Reduce the incentive to a de minimis incentive
- ▶ 3. Tie the incentive to something other than disclosing health information
- ▶ 4. Offer an RAS to the HRA
- ▶ 5. Offer an employee focus group to discuss wellness program

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Test Your ADA Knowledge

- ▶ Joan feels better after talking with the HR Director and decides to take the HRA. When she logs onto Wellways' portal, it asks Joan to click a box to agree to the following: "Wellways may use or disclose your health information to improve its wellness program offerings. Any disclosures by Wellways to a third party may no longer be protected by HIPAA." Joan is uncomfortable agreeing to this language. She calls the Wellways representative and asks how she can not click on the box but continue to take the HRA. Wellways responds that she must click on the box or cannot move forward. Permissible?

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Answer

- ▶ Perhaps not. The ADA rules state the following:
- ▶ “A covered entity shall not require an employee to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information (except to the extent permitted by this part to carry out specific activities related to the wellness program), or to waive any confidentiality protections in this part as a condition for participating in a wellness program or for earning any incentive the covered entity offers in connection with such a program.” 29 CFR 1630.14(d)(4)(iv).

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GINA

- ▶ Two applicable titles:
 - ▶ Title I - Group Health Plans (DOL/IRS/HHS)
 - ▶ Title II - Employers (EEOC)

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GINA Title II

- ▶ Generally prohibits **employers** from collecting genetic information from employees or discriminating against employees or applicants because of genetic information.



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GINA

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

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GINA

- ▶ 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.

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GINA

- ▶ May offer employees incentives to complete HRA that includes questions about family medical history or other genetic information.
 - ▶ Must make clear that incentive is available regardless if employee answers FMH questions.

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GINA

- ▶ Before 1/1/19, wellness programs could offer incentives to employee's spouse:
 - ▶ Information limited to spouse's own manifestation of disease or disorder;
 - ▶ Must be part of a health assessment or medical examination or both.
- ▶ *May NOT offer incentives to employee's children to provide genetic information.*

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GINA

- ▶ Before 1/1/19, incentive could be up to 30% of the total cost of self-only coverage.
- ▶ *AARP v. EEOC* case eliminated incentive maximum under GINA as of 1/1/19, just like with ADA.
- ▶ EEOC has promised to issue rules this month
- ▶ Other GINA requirements still apply.

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What Remains in GINA

- ▶ Wellness program must be reasonably designed to promote health or prevent disease.
- ▶ Employer may not deny employee reward because spouse has biometrics that are too high.
- ▶ May ask employees family medical history questions as long as reward available even if questions are unanswered.

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Real Life Case

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Tobacco Surcharges

- ▶ ABC wants its employees and employee family members to go tobacco-free. To do so, ABC asks all health-plan enrollees age 18 and over to sign an affidavit indicating whether the individual uses tobacco. All forms of tobacco products are considered as part of the affidavit.
- ▶ Question: Which wellness incentive laws are implicated?

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Tobacco Surcharges

- ▶ Answer:
 - ▶ HIPAA

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Tobacco Surcharges

- ▶ Question: Is this a participatory or health contingent wellness program?

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Tobacco Surcharges

- ▶ Answer:
 - ▶ Health Contingent

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Tobacco Surcharges

- ▶ Question: Since it is health contingent, what must the wellness program do?

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Tobacco Surcharges

- ▶ Answer:
 - ▶ Meet the 5-factor test

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Tobacco Surcharges

- ▶ Enrollees who indicate they are tobacco users on the affidavit must pay a \$50 per month surcharge, if there is only one tobacco user in the family. If there are two tobacco users in the family, the surcharge is \$100/month. The only other language involving the tobacco surcharge provided to enrollees is the following:
 - ▶ “ABC provides you with resources to stay tobacco-free.”
 - ▶ Question: Is this language compliant?

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Tobacco Surcharges

- ▶ Answer:
 - ▶ No. Under the 5-factor test, enrollees must be notified of an RAS that will allow them to qualify for the same reward (elimination of the \$50 surcharge), as well as contact information for obtaining the RAS and a statement that recommendations of an individual's personal physician will be accommodated.

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Tobacco Surcharges

- ▶ ABC’s plan document also states the following:
- ▶ “Employees are expected to provide accurate and truthful statements on all employment forms. Therefore, if it is determined that you submitted false information related to tobacco use, or did not notify human resources if your situation changed during the plan year, you will be subject to paying the surcharge for the applicable plan year. Providing false information or failing to provide updated information as required may lead to disciplinary action, up to and including termination of employment and possible legal action.”
- ▶ Question: Does this language comply with wellness incentive laws?

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Tobacco Surcharges

- ▶ Answer:
 - ▶ Not really relevant to wellness incentive laws. Whether an employee is truthful to his/her employer relates to workplace standards of conduct policies. As long as the employer has such policies and acts in accordance with those policies, addressing untruthful or fraudulent behavior by employees is more likely to be protected and not deemed discriminatory.

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Q&A REMINDER

The following Q&A session does NOT constitute legal advice and should not be used as such. It is for educational purposes only.

WELCOA Members should retain legal counsel to obtain definitive answers.

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Questions?

► For more information, contact:

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