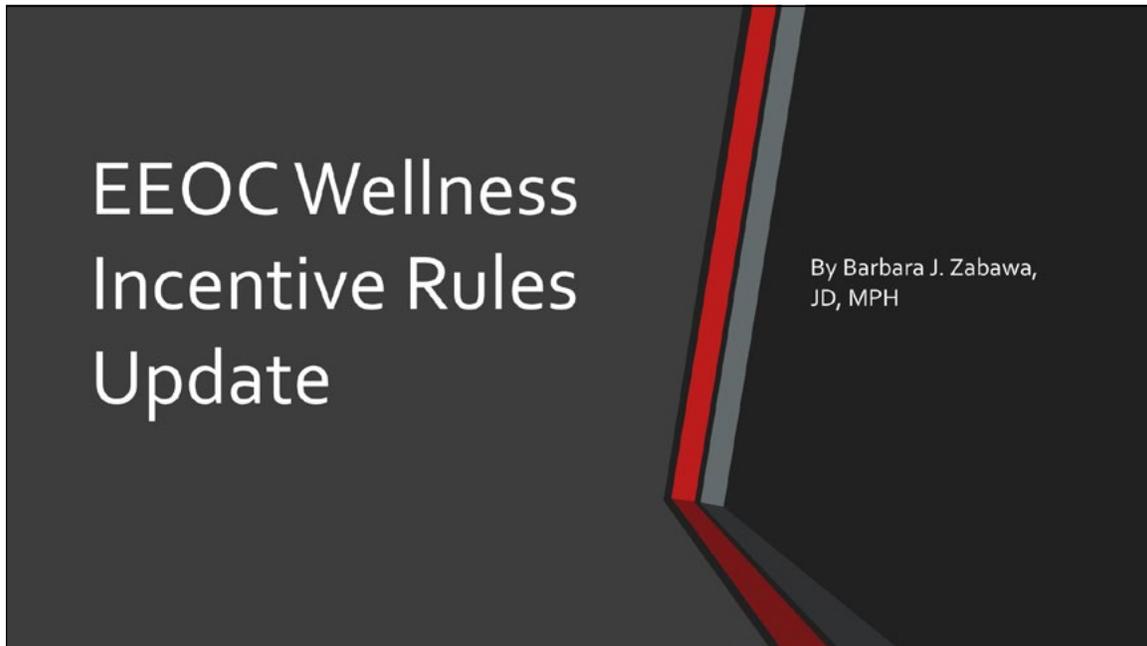
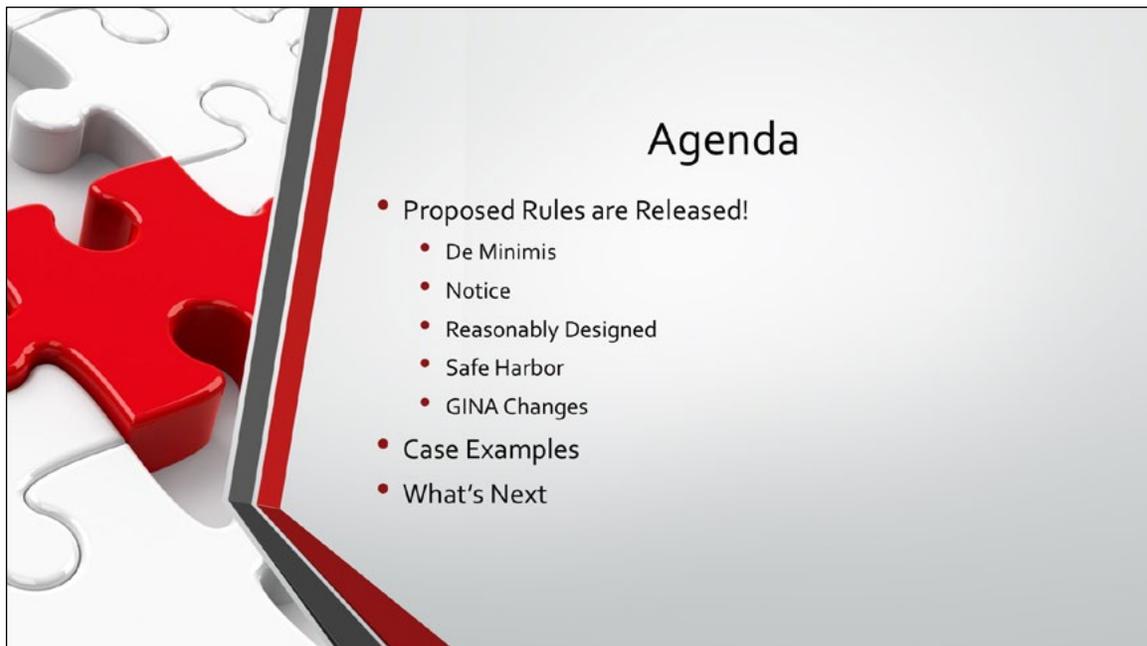


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De Minimis

Would apply to non-group health plan and participatory wellness programs that collect health information.

Means "water bottle" or "gift card of modest value."

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Not De Minimis

- Group health plan, health contingent wellness programs
 - Follow HIPAA/ACA Rules
 - 30%/50%
- Health contingent includes both
 - Outcomes based
 - Activity based

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Group Health Plan Guidance

- The program is only offered to employees who are enrolled in an employer-sponsored health plan;
- The incentive is tied to cost-sharing or premium reductions (or increases) under the group health plan;
- The contract for wellness program services is between the wellness vendor and the group health plan or health insurance issuer; or
- The wellness program is a term of coverage under the group health plan.

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De Minimis for Spouses and Children

- Applies to both non-group health plan and group health plan wellness programs.
- Rationale: because GINA does not have insurance safe harbor like ADA
- Still unable to incentivize employees to answer Family Medical History questions.

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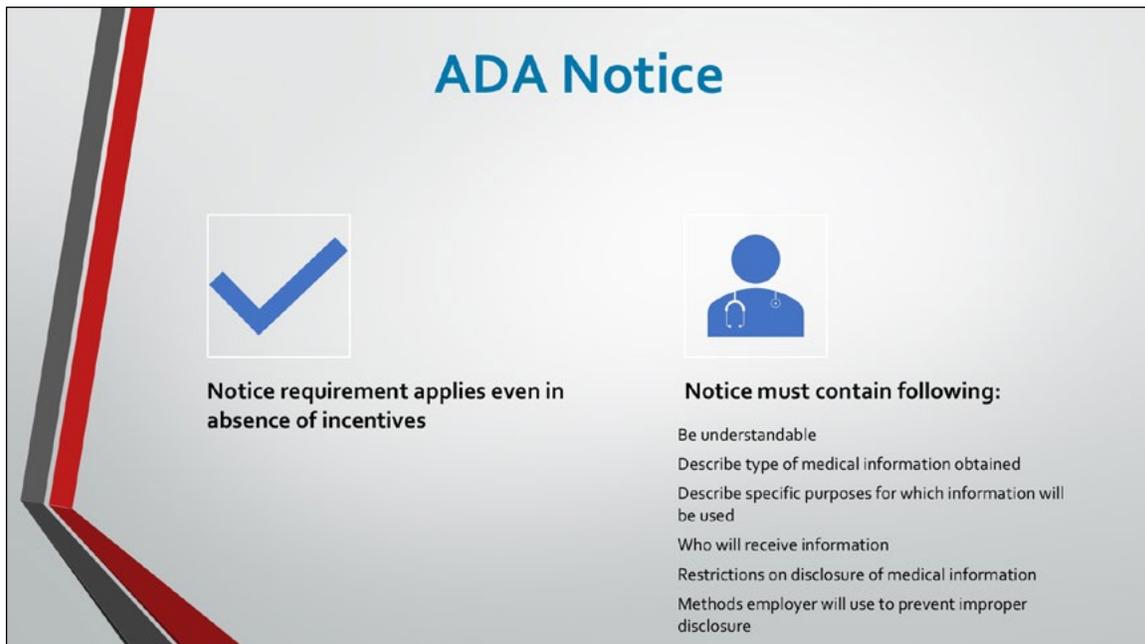
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No More ADA Notice?

- Because of de minimis incentive limit, employees won't participate unless they feel comfortable with how information handled.

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ADA Notice



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

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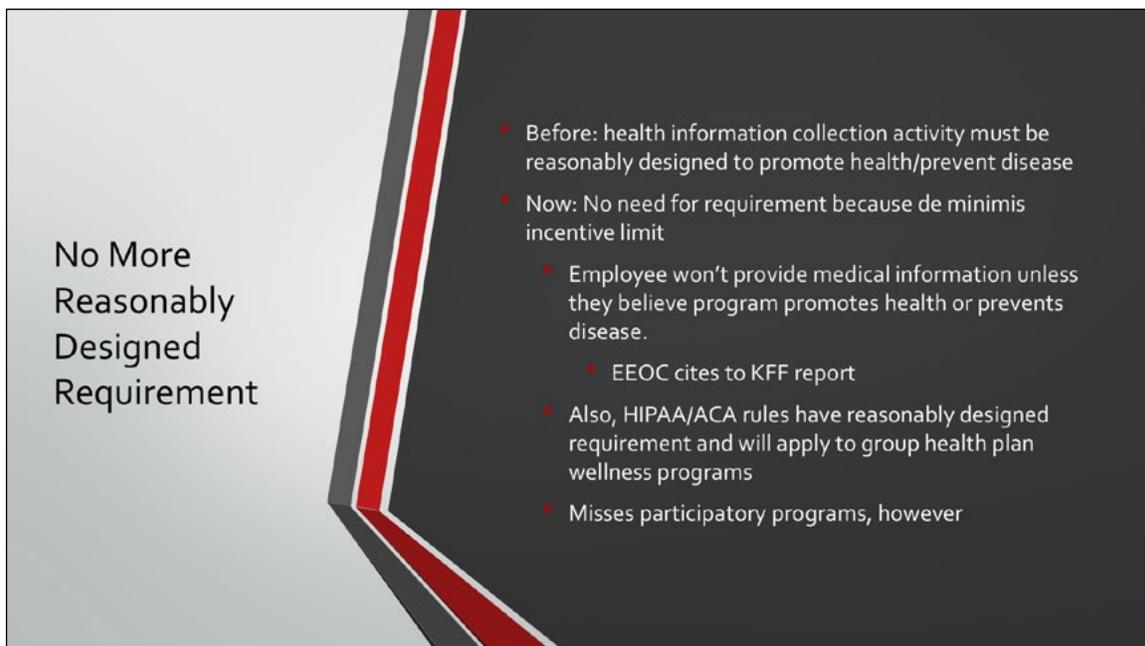
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GINA Authorization Still Required

- Individuals must sign if:
 - Employee provides family medical history information
 - Employee family members provide health information

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No More Reasonably Designed Requirement

- Before: health information collection activity must be reasonably designed to promote health/prevent disease
- Now: No need for requirement because de minimis incentive limit
 - Employee won't provide medical information unless they believe program promotes health or prevents disease.
 - EEOC cites to KFF report
 - Also, HIPAA/ACA rules have reasonably designed requirement and will apply to group health plan wellness programs
 - Misses participatory programs, however

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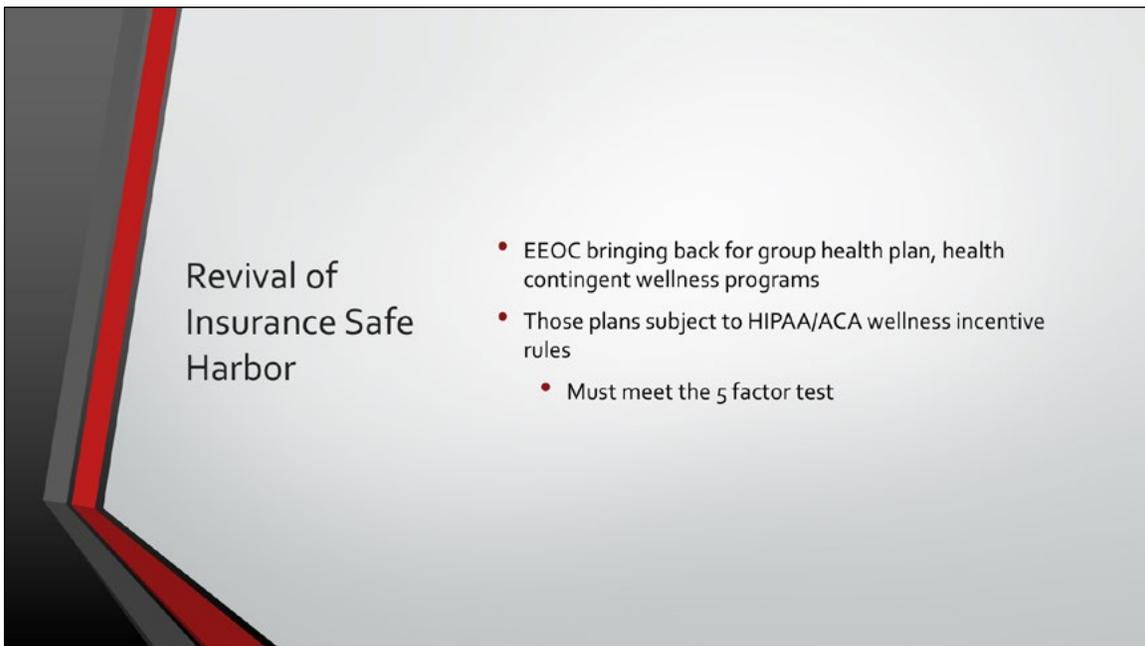
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Revival of Insurance Safe Harbor

- 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.

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Revival of Insurance Safe Harbor

- EEOC bringing back for group health plan, health contingent wellness programs
- Those plans subject to HIPAA/ACA wellness incentive rules
 - Must meet the 5 factor test

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Revival of Insurance Safe Harbor

- EEOC reviving because it ignored “classifying risks” and “administering risks” aspects of safe harbor.
 - Previously focused on “underwriting risks” only.
- EEOC believes wellness program data could help identify key health indicators related to chronic disease that can be tracked over time.
 - Would qualify as “administering risks.”
 - Wouldn't this also be helpful to participatory programs?

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GINA Changes

- De Minimis incentives now allowed for employee's children
- Would apply to both group health and non-group health plan participants
- Wellness programs that collect genetic information do not need to be reasonably designed.
 - Employee family members who provide genetic information likely won't participate unless they believe wellness program promotes health/prevents disease.
 - Keeping the provision would “invite confusion.”

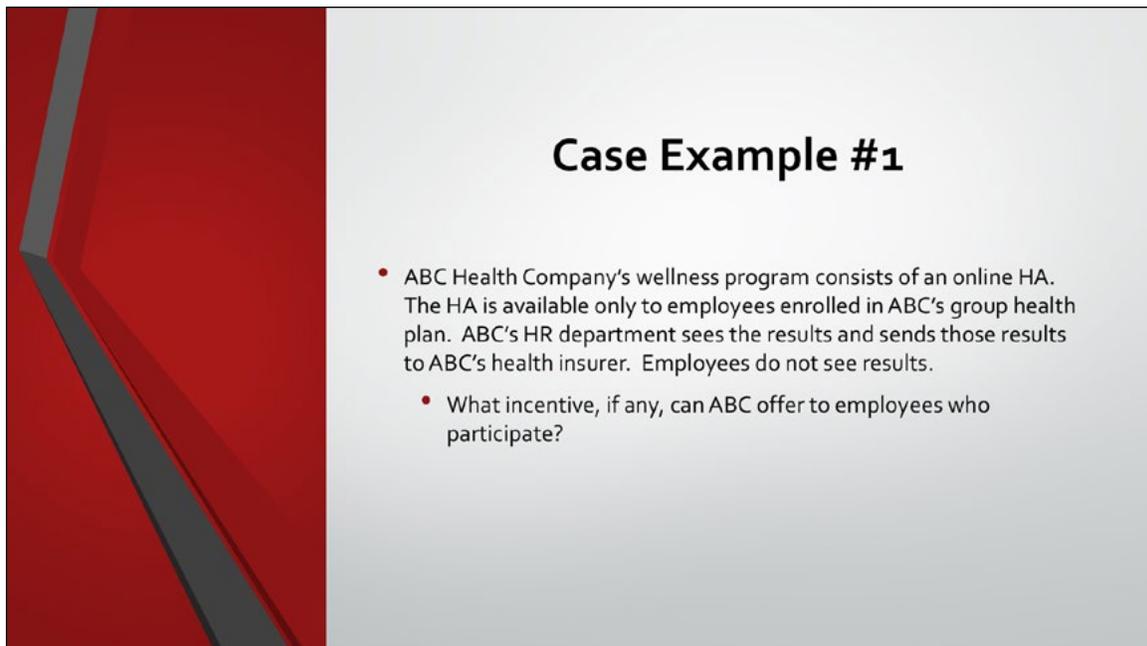
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Answer

- A “de minimis” incentive because this is a participatory program. It doesn’t matter if the wellness program is a group health plan wellness program. It is not a health contingent wellness program, so the de minimis incentive would apply.

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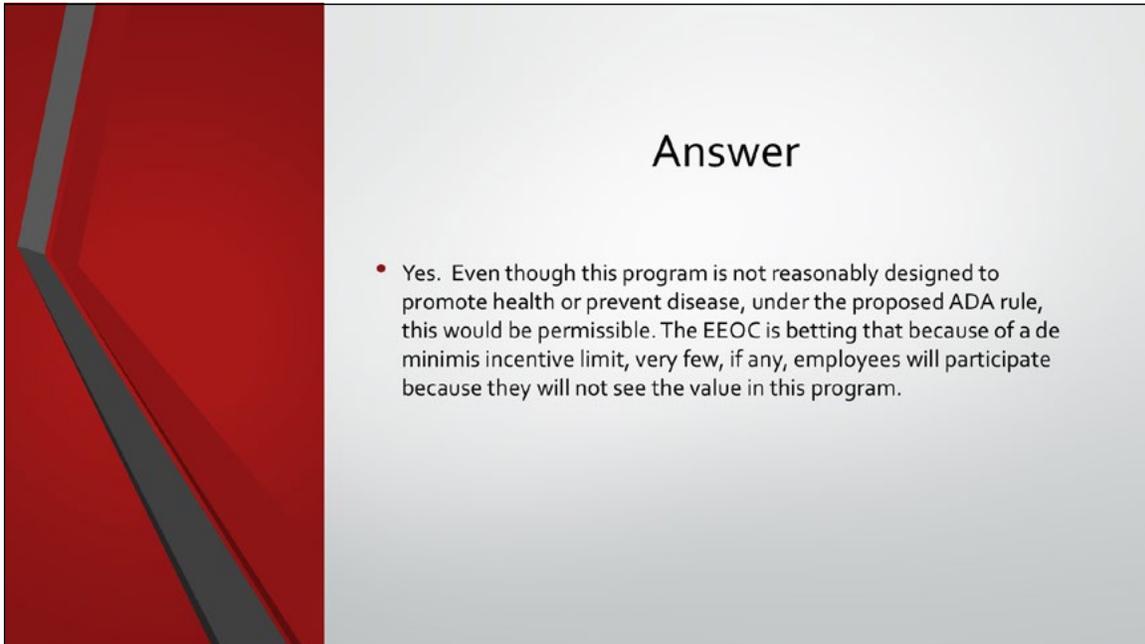
Case Example #2

- 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?

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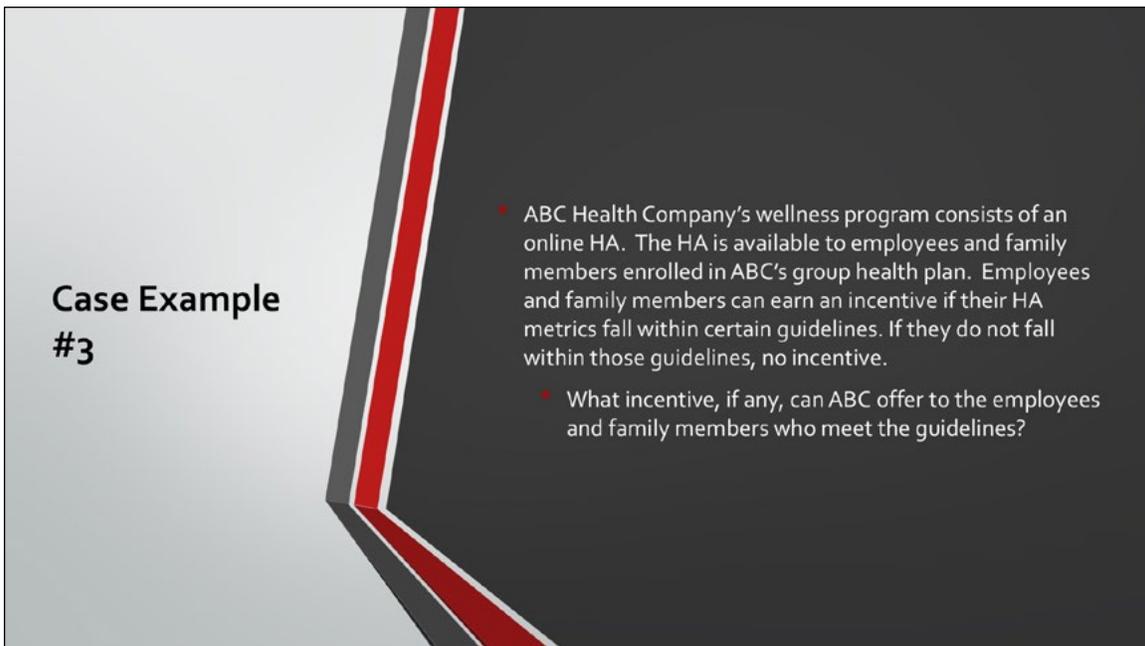
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Answer

- Yes. Even though this program is not reasonably designed to promote health or prevent disease, under the proposed ADA rule, this would be permissible. The EEOC is betting that because of a de minimis incentive limit, very few, if any, employees will participate because they will not see the value in this program.

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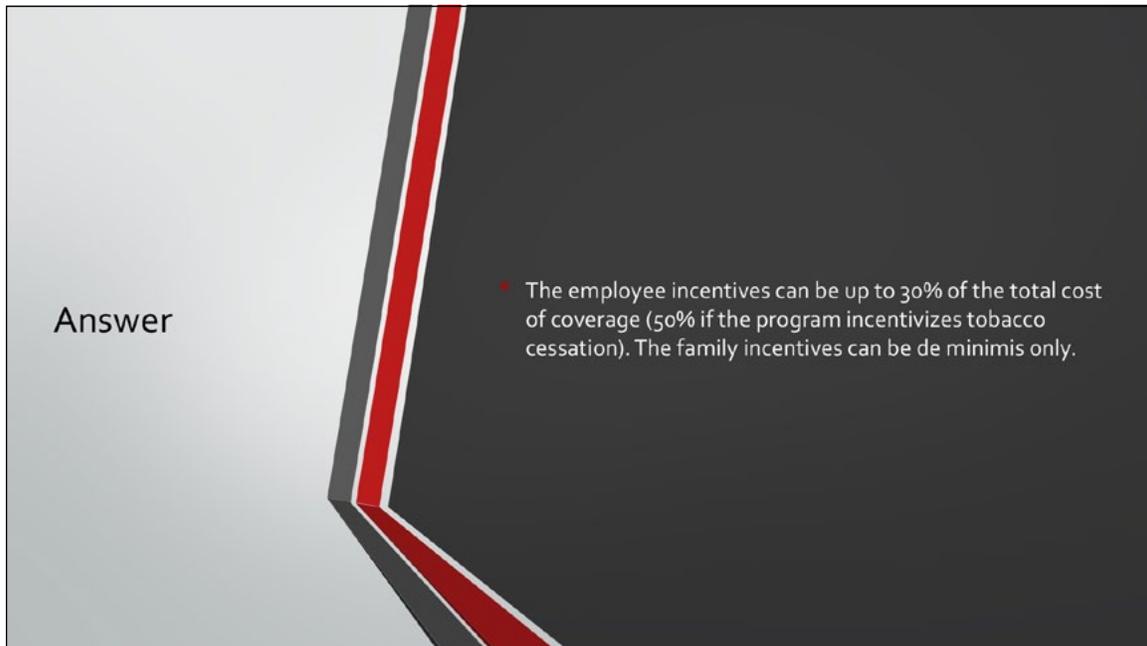
Case Example #3

- ABC Health Company's wellness program consists of an online HA. The HA is available to employees and family members enrolled in ABC's group health plan. Employees and family members can earn an incentive if their HA metrics fall within certain guidelines. If they do not fall within those guidelines, no incentive.
- What incentive, if any, can ABC offer to the employees and family members who meet the guidelines?

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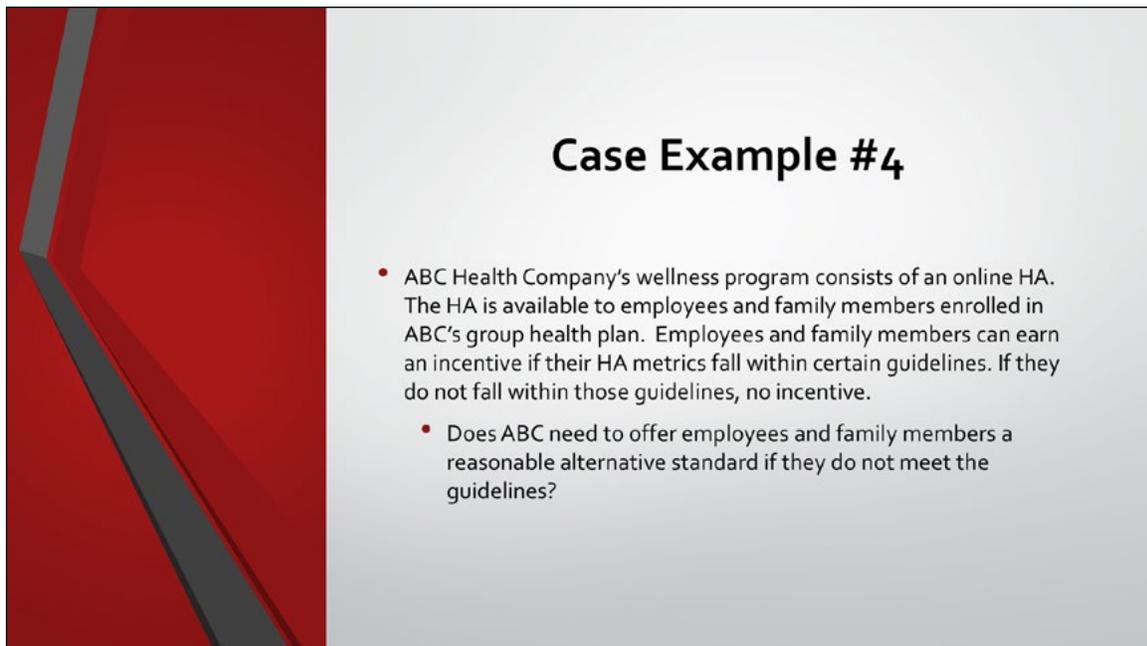
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Answer

- The employee incentives can be up to 30% of the total cost of coverage (50% if the program incentivizes tobacco cessation). The family incentives can be de minimis only.

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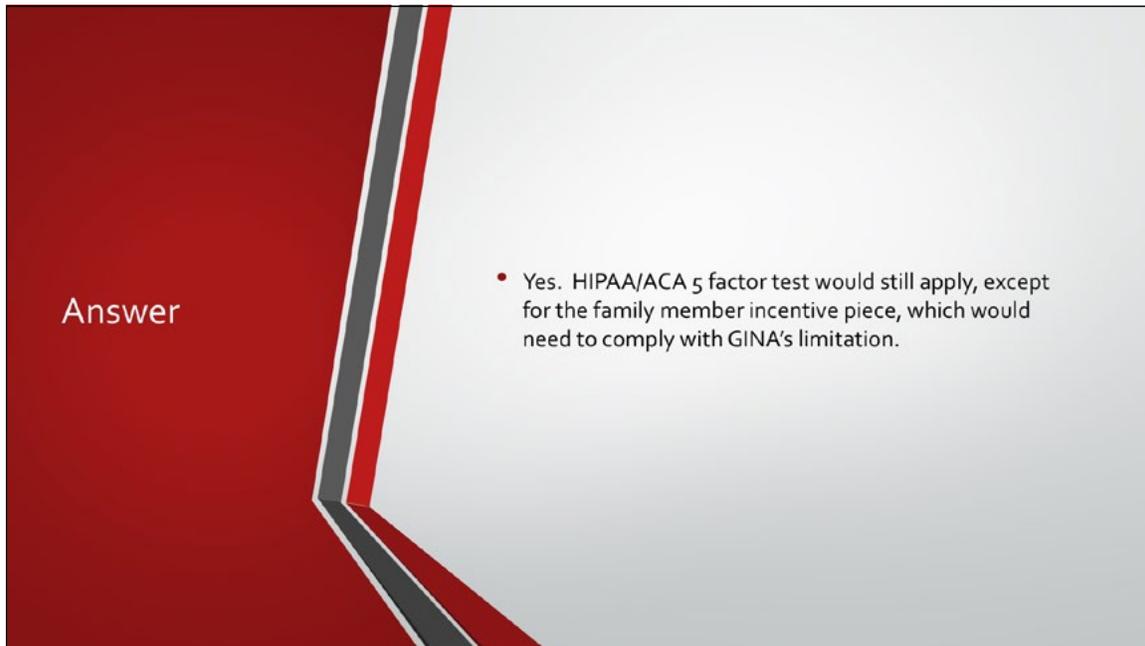
Case Example #4

- ABC Health Company's wellness program consists of an online HA. The HA is available to employees and family members enrolled in ABC's group health plan. Employees and family members can earn an incentive if their HA metrics fall within certain guidelines. If they do not fall within those guidelines, no incentive.
 - Does ABC need to offer employees and family members a reasonable alternative standard if they do not meet the guidelines?

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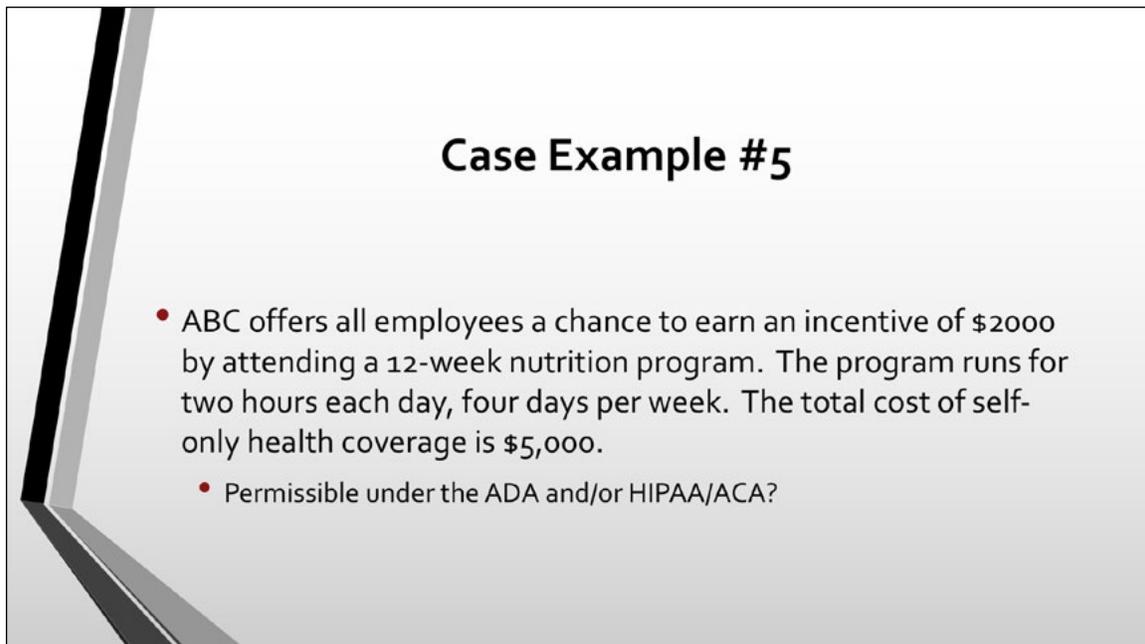
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Answer

- Yes. HIPAA/ACA 5 factor test would still apply, except for the family member incentive piece, which would need to comply with GINA's limitation.

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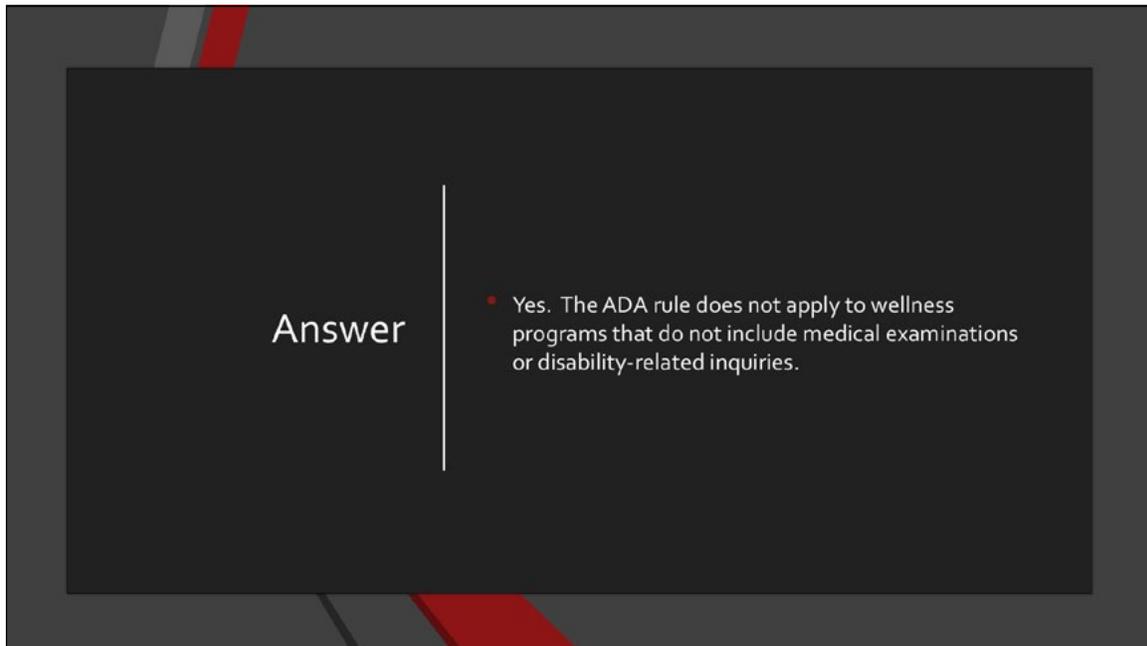
Case Example #5

- ABC offers all employees a chance to earn an incentive of \$2000 by attending a 12-week nutrition program. The program runs for two hours each day, four days per week. The total cost of self-only health coverage is \$5,000.
 - Permissible under the ADA and/or HIPAA/ACA?

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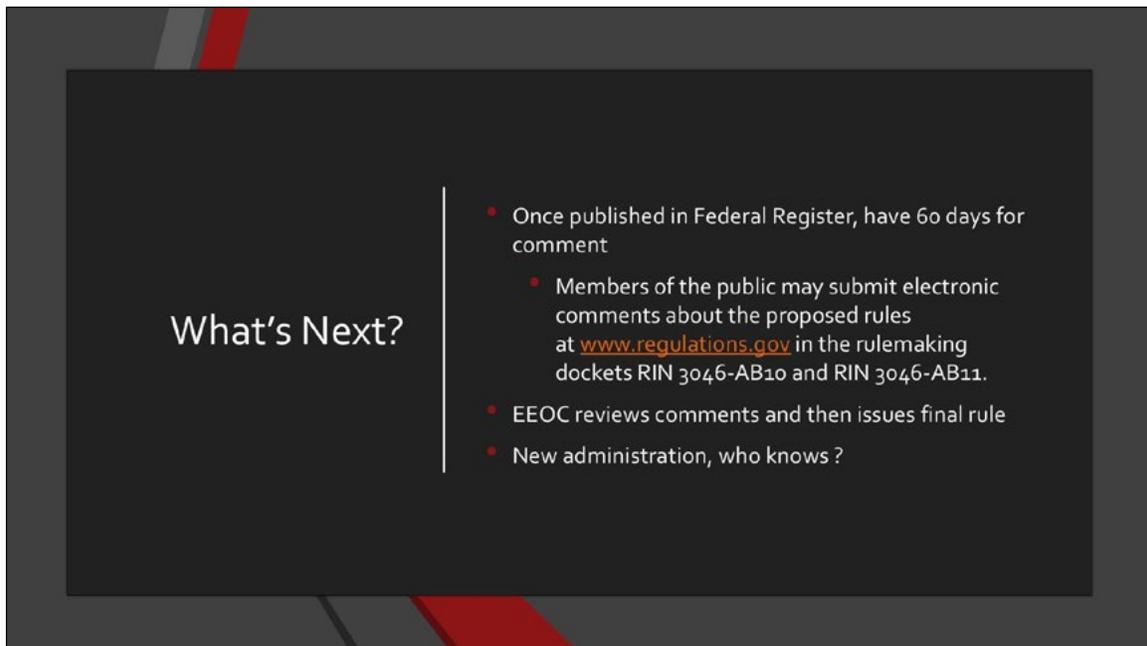
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Answer

- Yes. The ADA rule does not apply to wellness programs that do not include medical examinations or disability-related inquiries.

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What's Next?

- Once published in Federal Register, have 60 days for comment
 - Members of the public may submit electronic comments about the proposed rules at www.regulations.gov in the rulemaking dockets RIN 3046-AB10 and RIN 3046-AB11.
- EEOC reviews comments and then issues final rule
- New administration, who knows ?

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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?

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