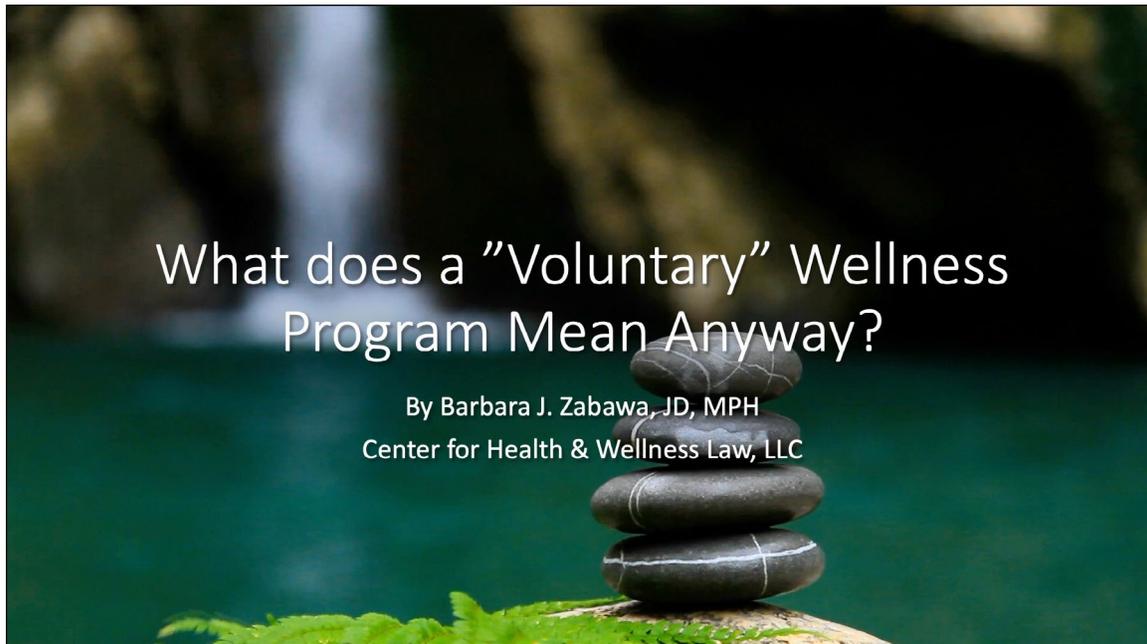


Health Promotion Program Legal Updates (June 8, 2022)

Barbara Zabawa, JD, MPH, • Attorney & President
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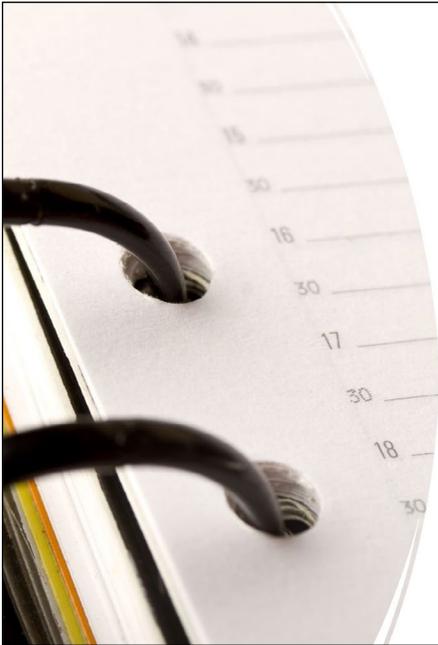
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Legal Help Desk

welcoa.org/legal-help-desk-intake-form/

The Center for Health and Wellness Law, LLC has partnered with WELCOA to offer this new, member-exclusive legal help desk service.

*Please note, WELCOA's help desk is meant for questions or issues that can be addressed in about 10 minutes or less. If your need is more involved, such as reviewing or drafting an agreement or conducting significant legal research, you should retain legal counsel to assist you with those types of projects. The WELCOA compliance help desk is not meant to replace legal advice or consulting or retaining your own legal counsel.

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Agenda

- Why this subject?
- ADA
- GINA
- FLSA
- Q&A

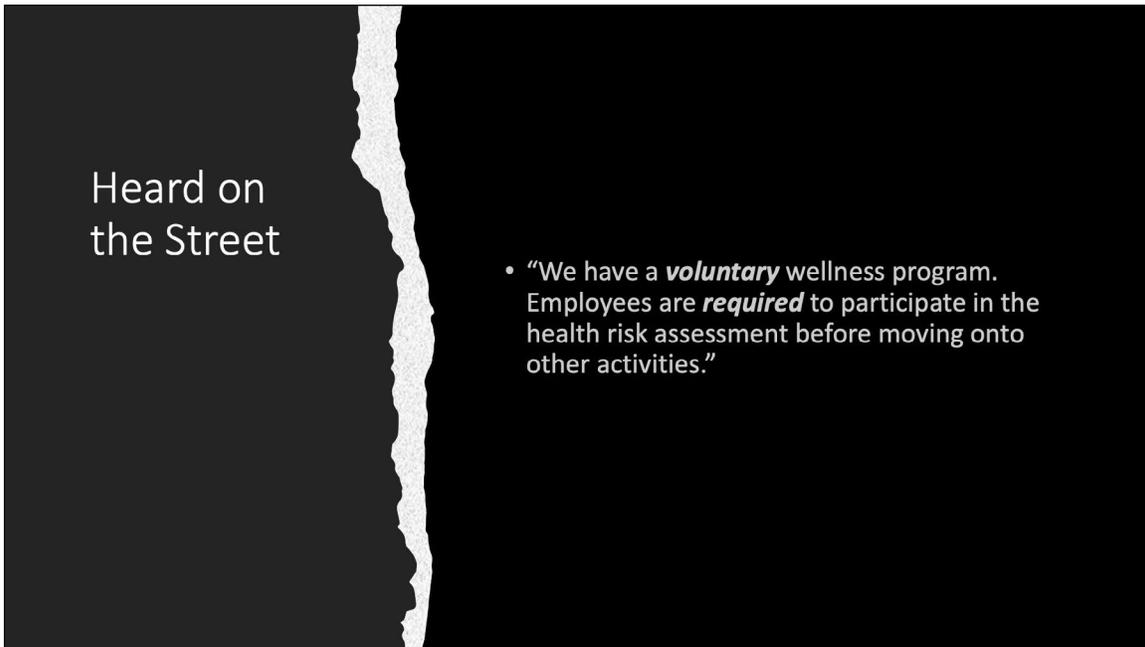
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Heard on the Street

- Employee Benefit News article from May 2022:
- Disconnect between employer and employee views on employee wellness
- Visier survey found 80% executives believe company doing a good job supporting employee wellness
- 46% of employees believe that.

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Heard on the Street

- Other discrepancies between employers and employees:
 - 75% of fully remote execs prefer to work from office at least 3x/week
 - 37% of non-execos agree
 - 72% of execs feel they are being transparent with employees about post-pandemic policies
 - 47% of employees agree
 - 74% of execs say they are doing enough to help employees upskill and gain knowledge
 - 36% of employees agree

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Heard on the Street

- Discrepancies => BURNOUT

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Heard on the Street

 How to fix?

 SURVEY EMPLOYEES!!!

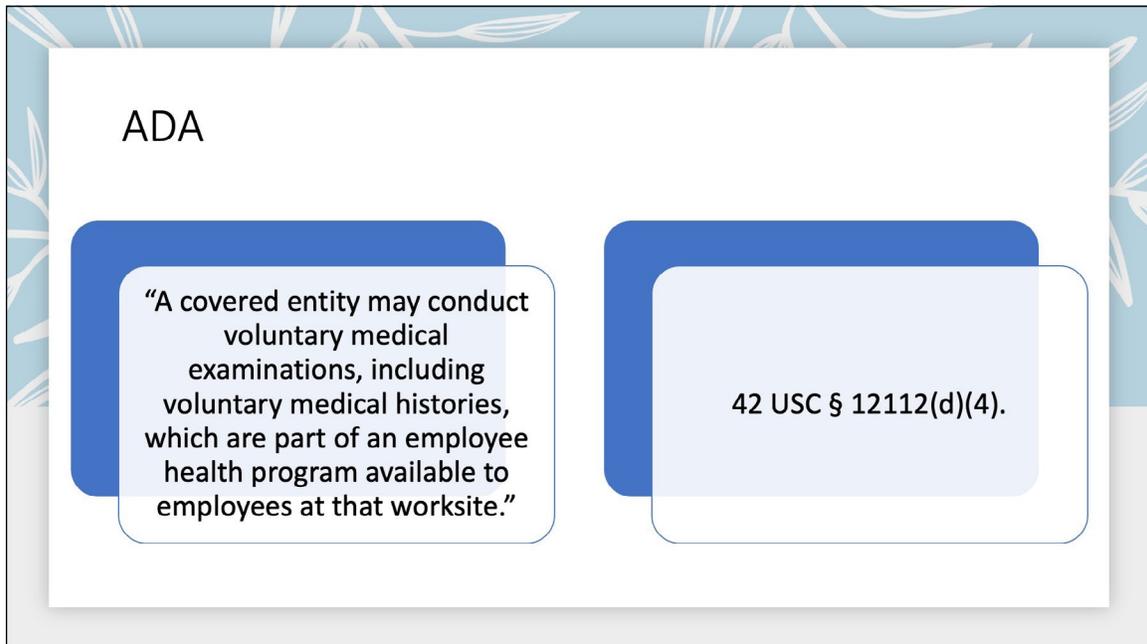
 THEN TAKE ACTION!!!

 From Employee Benefit News (EBN), available at www.benefitnews.com/news/ceos-dont-understand-employee-wellness.

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ADA

“A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite.”

42 USC § 12112(d)(4).

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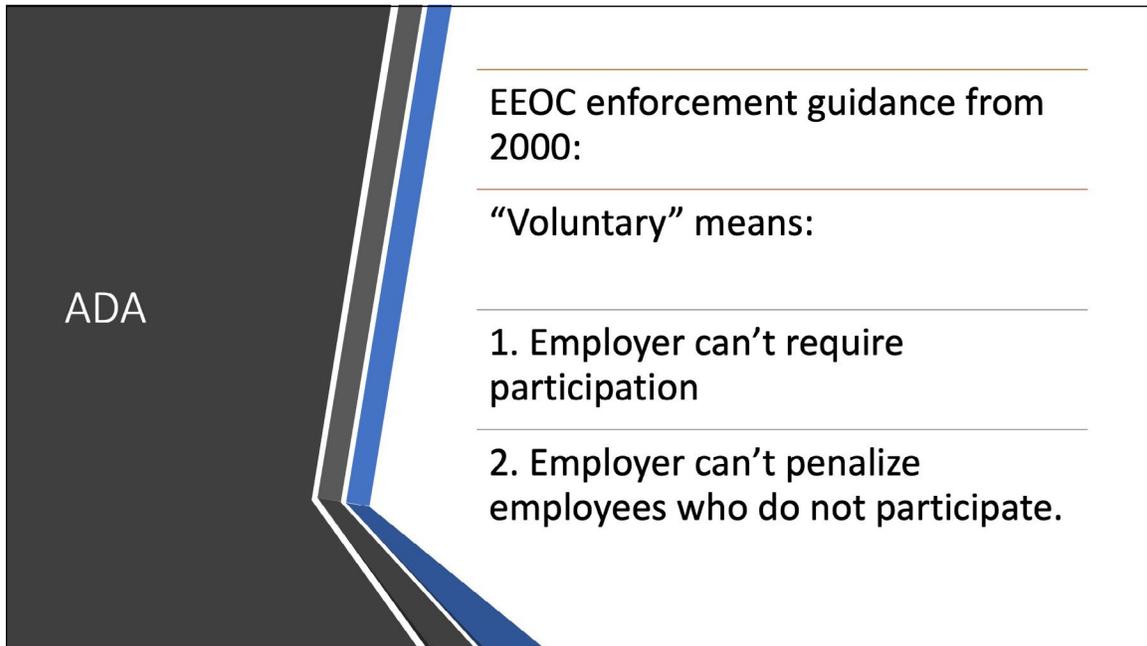
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“Covered entity” = employer

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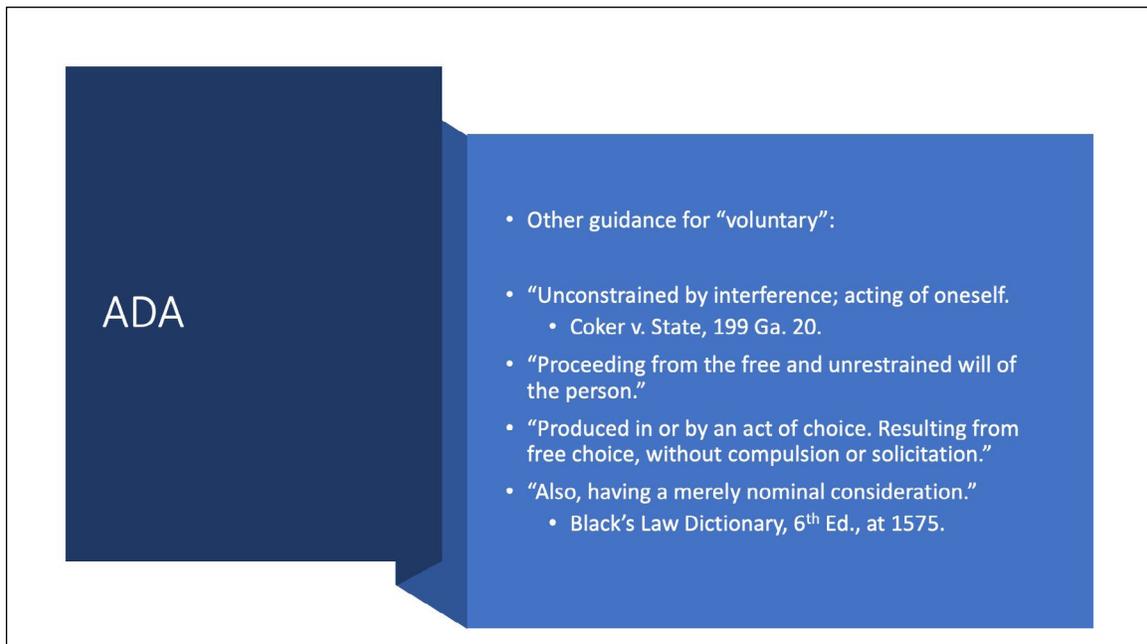
ADA

EEOC enforcement guidance from 2000:

“Voluntary” means:

1. Employer can’t require participation
2. Employer can’t penalize employees who do not participate.

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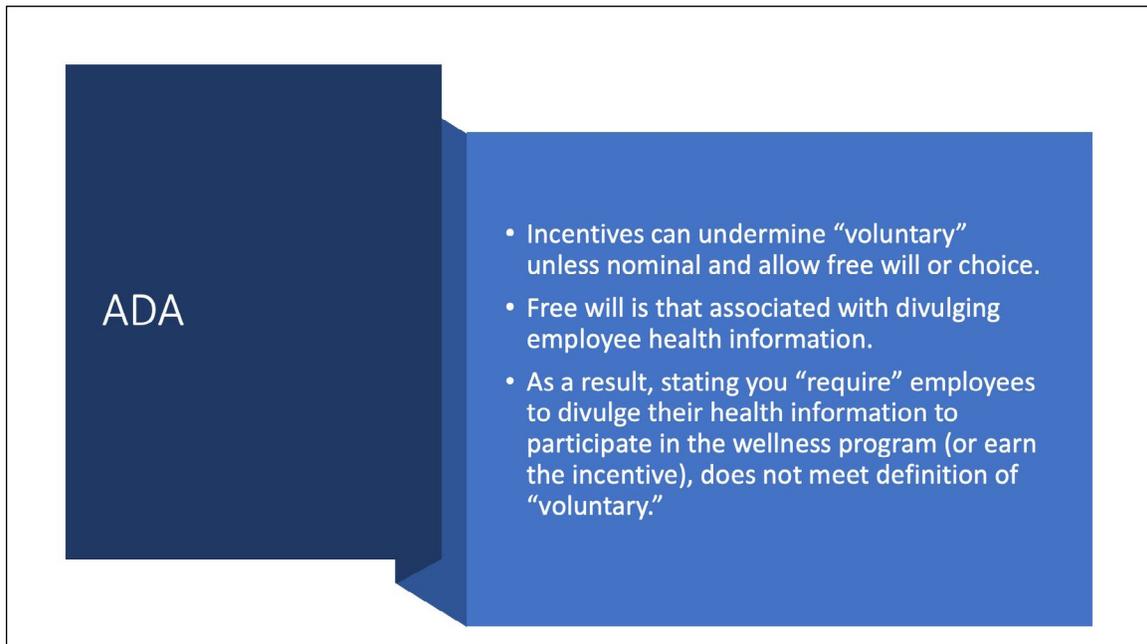
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- Other guidance for “voluntary”:
 - “Unconstrained by interference; acting of oneself.”
 - Coker v. State, 199 Ga. 20.
 - “Proceeding from the free and unrestrained will of the person.”
 - “Produced in or by an act of choice. Resulting from free choice, without compulsion or solicitation.”
 - “Also, having a merely nominal consideration.”
 - Black’s Law Dictionary, 6th Ed., at 1575.

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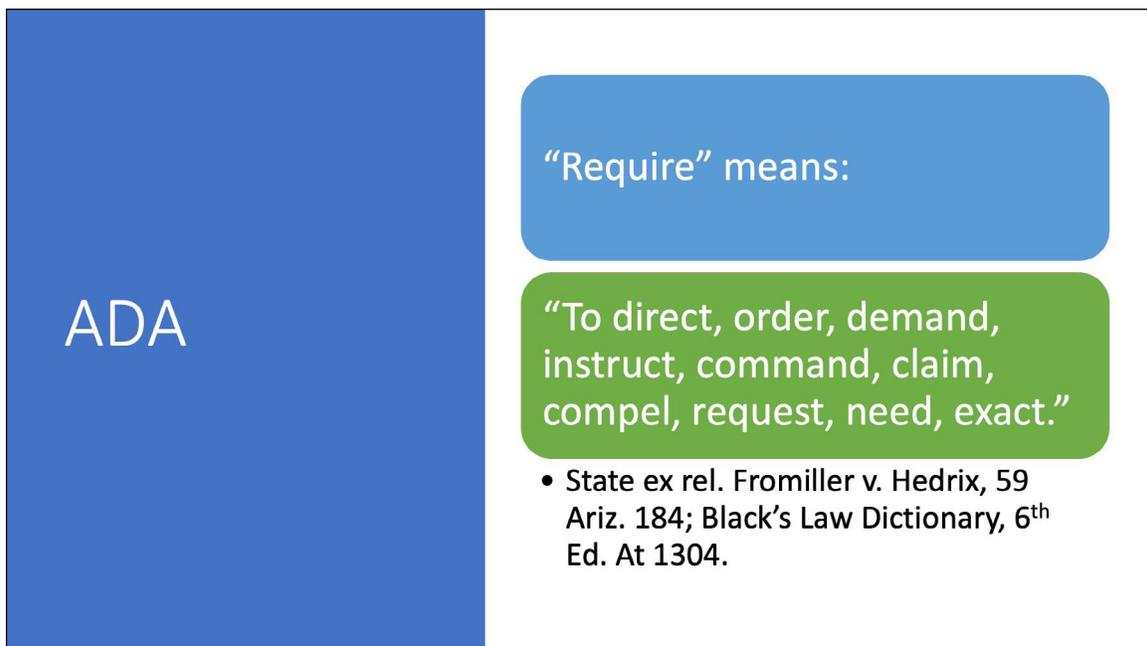
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ADA

- Incentives can undermine “voluntary” unless nominal and allow free will or choice.
- Free will is that associated with divulging employee health information.
- As a result, stating you “require” employees to divulge their health information to participate in the wellness program (or earn the incentive), does not meet definition of “voluntary.”

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“Require” means:

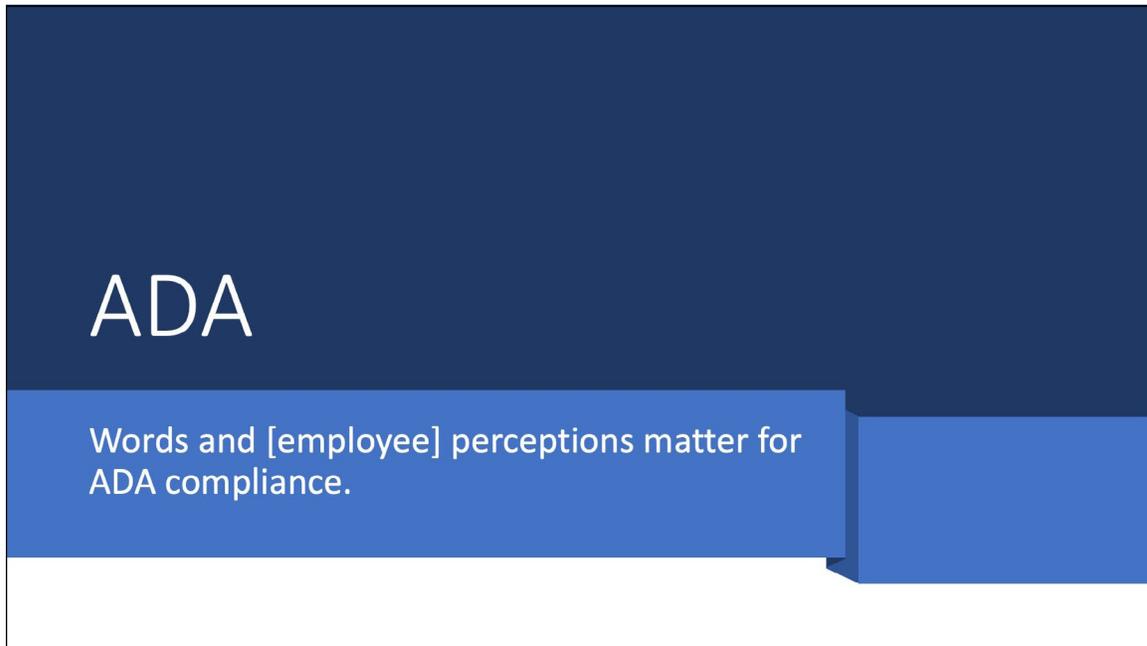
“To direct, order, demand, instruct, command, claim, compel, request, need, exact.”

- State ex rel. Fromiller v. Hedrix, 59 Ariz. 184; Black’s Law Dictionary, 6th Ed. At 1304.

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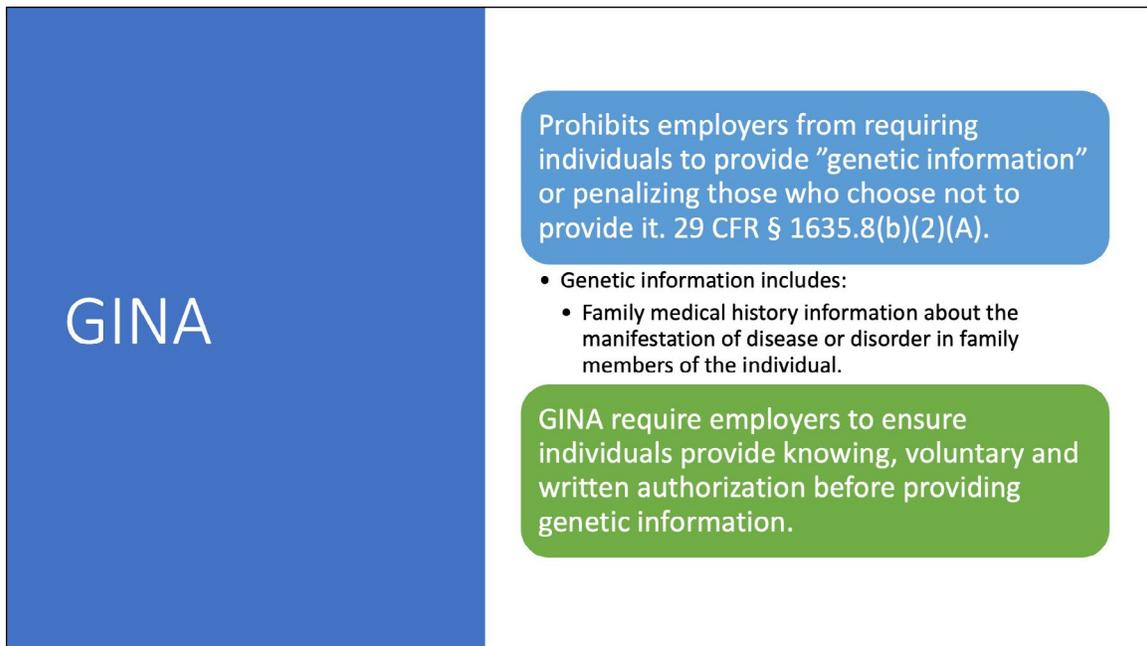
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ADA

Words and [employee] perceptions matter for ADA compliance.

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GINA

Prohibits employers from requiring individuals to provide "genetic information" or penalizing those who choose not to provide it. 29 CFR § 1635.8(b)(2)(A).

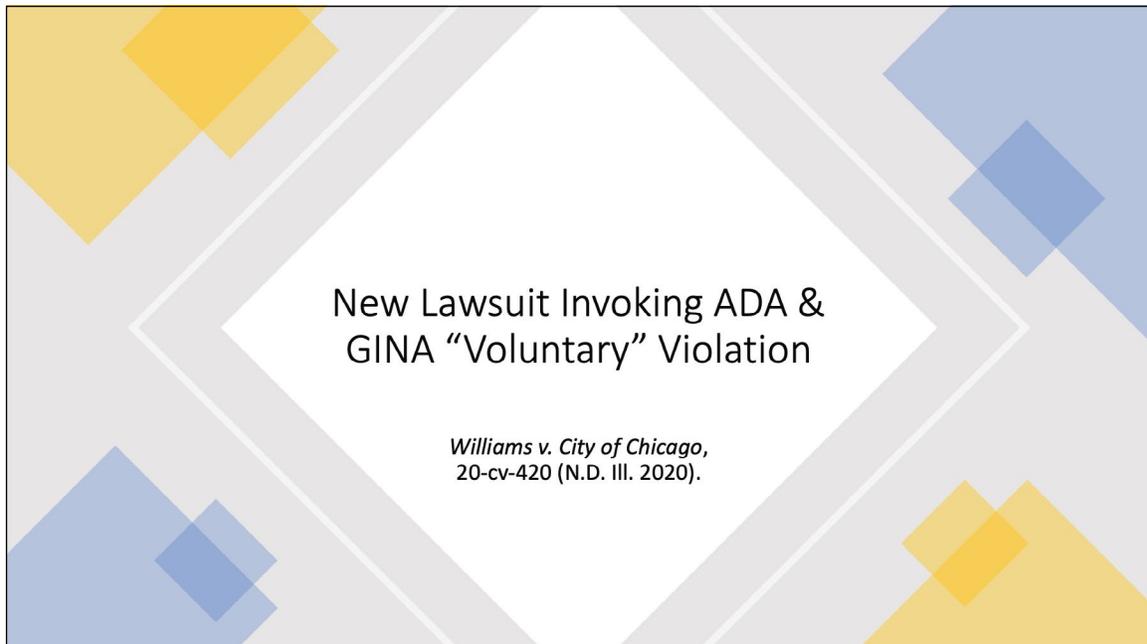
- Genetic information includes:
 - Family medical history information about the manifestation of disease or disorder in family members of the individual.

GINA require employers to ensure individuals provide knowing, voluntary and written authorization before providing genetic information.

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| | |
|------|--|
| FLSA | Requires employers to pay workers for their time spent on “mandatory activities.” 29 CFR § 785.27. n |
| | Do large incentives tied to any wellness activity give the appearance of a “mandatory activity?” |
| | If so, did the employer pay employees for their time spent on the activity? |

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FLSA

- 2018 DOL Opinion Letter:
 - Health benefits fair was voluntary, even though attendance => lower health insurance premium.
 - DOL did not evaluate size of incentive

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Q&A

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.

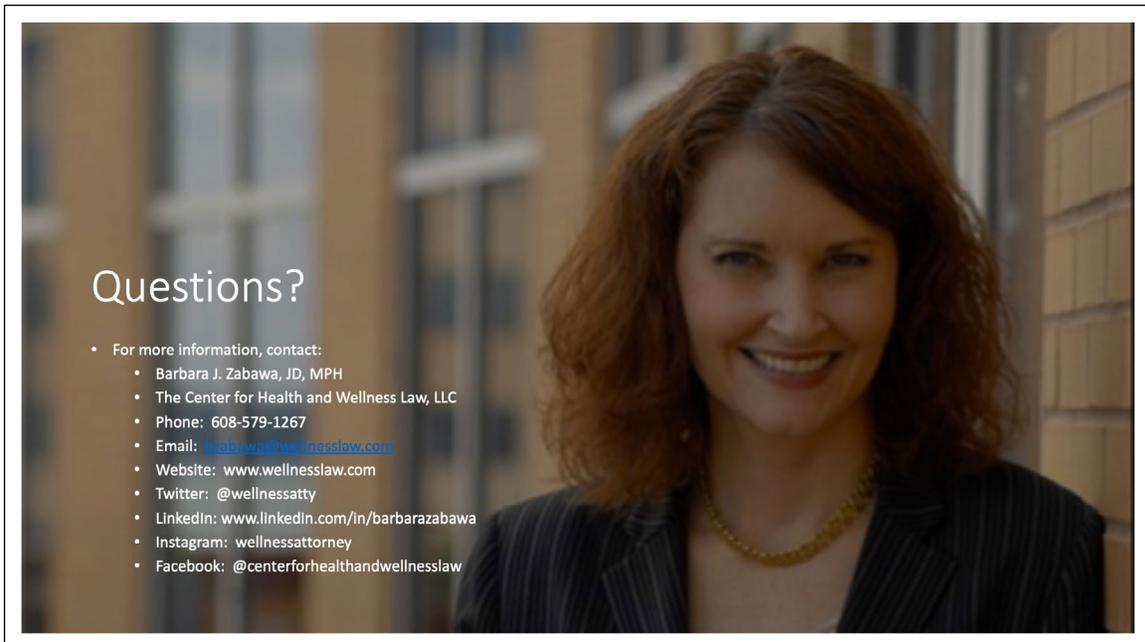
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Questions?

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