

# Health Promotion Program Legal Updates

Webinar Q&A: September 14, 2022

The following questions were submitted during WELCOA's *Health Promotion Program Legal Updates* webinar session that aired on **September 14, 2022**. To help further educate yourself in legal compliance with your wellness program, please review this list of attendee inquiries and the responses provided by presenter and health law attorney, Barbara Zabawa.

**\*\*Please note: The responses provided below do NOT constitute legal advice and should not be used as such. Readers should retain legal counsel to obtain definitive answers. The responses below are for educational purposes only.**

**1. Why is AARP involved exactly? Or do we know if they are offering an alternative standard if can't meet the weight requirement? (e.g., coaching program, etc.) If they aren't, then the employer is definitely in violation.**

I am not exactly sure, but I believe it is because the AARP views its constituent group as including older, disabled workers. The ADA aims to protect employees with disabilities.

**2. What if they were just requiring screening only and no dependency on outcomes?**

The ADA and GINA concern data collection. It doesn't matter if the program is also tied to outcomes.

**3. Is this decision being made in a circuit or federal court?**

Federal court – N.D. of Illinois.

**4. What activities, incentives and rewards can be in a wellness program that provide the least risk?**

Ones that do not undermine the "voluntariness" of the wellness program. That will vary from employer to employer because what constitutes "voluntary" is subjective. The smaller the incentive, though, the lower the risk.

**5. When can you ask employees or family member their vaccination status? I think HIPAA has gone out the window with people asking others their status.**

According to the EEOC, yes, you can. HIPAA would not apply to employers (they are not covered entities). See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

**6. Does the ADA prevent an employer from inquiring about or requesting documentation or other confirmation that an employee obtained a COVID-19 vaccination?**

No. When an employer asks employees whether they obtained a COVID-19 vaccination, the employer is not asking the employee a question that is likely to disclose the existence of a disability; there are many reasons an employee may not show documentation or other confirmation of vaccination besides having a disability. Therefore, requesting documentation or other confirmation of vaccination is not a disability-related inquiry under the ADA, and the ADA's rules about making such inquiries do not apply.

However, documentation or other confirmation of vaccination provided by the employee to the employer is medical information about the employee and must be kept confidential, as discussed in K.4

**7. What if a spouse is asked to complete their own HRA or biometric screening? As opposed to the employee answering questions about their family?**

GINA applies to those situations because that is asking a family member about the manifestation of disease or disorder in that family member



Q&A responses provided by  
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**8. Are premium discounts considered the same as premium surcharges?**

Yes. Incentives can be a reward or penalty.

**9. So, if we have incentives (voluntary program - people can decide if they want to participate) and we have activities that people can choose to earn the incentive, we should be OK, yes? We also give the option for a waiver if they can't meet requirements, though some documentation might be needed.**

Having more options likely makes the wellness program more voluntary.



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