

Health Promotion Program Legal Updates (September 14, 2022)

Barbara Zabawa, JD, MPH, • Attorney & President
Center for Health and Wellness Law, LLC



Health Promotion Program Legal Updates

SEPTEMBER 14, 2022

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Lessons from Lawsuits

PRESENTED BY: BARBARA J. ZABAWA, JD, MPH
CENTER FOR HEALTH & WELLNESS LAW, LLC

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Legal Help Desk

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

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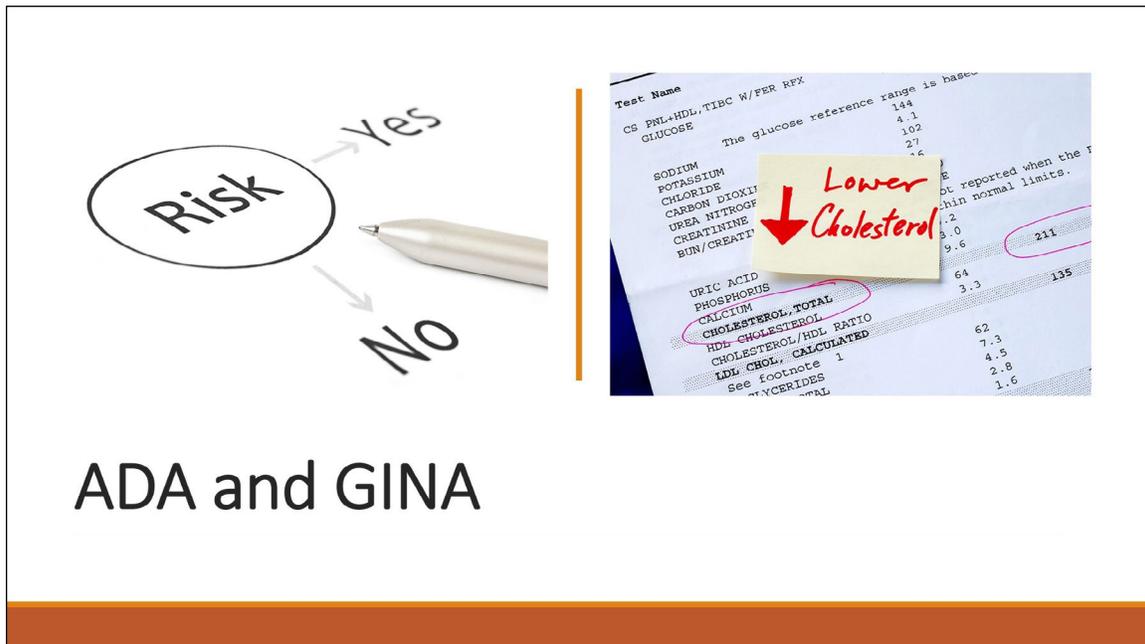
Agenda

- 
ADA AND GINA LAW
- 
AARP V. AUSTIN INDUSTRIES
- 
WILLIAMS V CITY OF CHICAGO
- 
IMPORTANCE OF "MEDICAL BENEFITS"
- 
Q&A

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The image is a composite graphic. On the left, the word "Risk" is written inside a circle. Two arrows point from the circle: one to the word "Yes" above and one to the word "No" below. A pen is positioned between the two arrows. To the right is a photograph of a medical lab report. A yellow sticky note with a red arrow pointing down and the text "Lower Cholesterol" is placed over the report. The lab report lists various tests and their results, including "CHOLESTEROL, TOTAL" and "HDL-CHOLESTEROL".

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

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

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ADA

Medical exams include:

- Procedures
- Tests

That seek information on an employee's health

Prohibition applies regardless of whether employee is disabled.

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ADA

Carves out exception for “voluntary” medical exams part of employee wellness program.

- Pre-EEOC ADA 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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Other ADA Requirements

Section (d)(1) – reasonably designed to promote health/prevent disease

Section (d)(2) – 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

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Other ADA Requirements



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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Other ADA Requirements

Section	Section	Section
Section (d)(4) – Employers should receive aggregate employee health info only unless needed to administer plan	Section (d)(5) – Even if employer complies with ADA wellness rules, including the limit of incentives under the ADA, employers must still comply with other laws	Section (d)(6) – The ADA safe harbor does not apply to wellness programs, even programs part of an employer's health plan.

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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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Other GINA Requirements

Section (2)(i) – Can collect employee genetic information as part of wellness program if reasonably designed to promote health or prevent disease; Employer may not deny employee an **“inducement for participation of either employee or spouse”** because spouse has biometrics that are too high.

Section (2)(ii) – Allows employer to “offer an inducement” to employees for completing HRAs with family medical history questions as long as inducement available even if questions are unanswered.

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Other GINA Requirements

Section (2)(iv) – Prohibits employer from providing “any inducement” to employee, spouse or other covered dependent in exchange for sale or disclosure of genetic information

Section (2)(v) – Can’t deny access to health insurance or retaliate against employee because spouse refuses to provide information about his or her health to the wellness program

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Other GINA Requirements



Section (2)(vii) – other rules unaffected



Section (c)(2) – Employer doesn’t violate GINA when it obtains genetic information on voluntary basis, as long as GINA requirements are met, including those concerning authorization **and inducements**.

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Other GINA Requirements

- Authorization must contain several elements, such as:
 - Be easy to understand;
 - Description type of genetic information to be obtained and purpose for which it will be used;
 - Describe restrictions on disclosure of genetic information;
 - Genetic information is collected for purposes of providing health or genetic services;
 - Information only provided to individual and licensed health care professionals involved in providing genetic services and not disclosed to employer except in aggregate terms.

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GINA Helpful Tips

To avoid GINA noncompliance:

- **Do not** tie financial incentives to participation in HA or biometric screen of employee's family members
- **Do not** ask employees family medical history questions;
- **If you do** ask employees family medical history questions:
 - Get employee's **written authorization**
 - GINA carves out exception for collecting genetic information under "voluntary wellness program"
 - **Don't tie financial rewards** to answering those questions
 - Incentive should be available regardless if participant answers family medical history questions
 - Ask the questions **after** open enrollment

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New Lawsuits

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AARP v. Austin Industries

Filed charge with EEOC on July 19, 2022

Austin Industries, a national construction company, tied \$1200-\$2400 premium surcharge who did not participate in wellness program.

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AARP v. Austin Industries

Wellness program requires employees and spouses to submit to biometric screenings and meet specific wellness standards

- Achieve certain weight requirements

AARP argues the wellness program violates the ADA and GINA

Example: Shawn Jones – employee of Austin Industries

- Surcharges of \$1200-\$2400/year amount to several months' worth of utility payments or grocery bills

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Williams v. City of Chicago

Complaint filed in January 2020

Alleged:

- City automatically enrolled 35,000 to 45,000 people in the Chicago Lives Healthy Wellness Program since 2012.
- Employees were required to submit to a biometric medical screening and examination or face a \$25.00 per month deduction from their bi-weekly paycheck.
- Penalty also applied if an employee's spouse or partner did not participate in the wellness program, increasing the total penalty to \$50.00 per biweekly paycheck, or \$1200 per year.

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Williams v. City of Chicago

Alleged (cont.):

- Some plaintiff employees complained that the threatened fines caused them mental anguish about losing their jobs if they refused to participate in the wellness program.
- Other plaintiff employees stated that the program is too intrusive and infringes on their right to privacy.
- About 85% of the employees and spouses enrolled in the wellness program due to the threat of monetary penalties . As a result, those employees have had their personal health information shared with numerous companies without their knowledge or consent.
- Of the remaining employees and spouses who did not participate, the complaint alleges that the City has collected \$1.9 million in non-participation charges.

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Williams v. City of Chicago

ADA & GINA Claims

The \$50/month penalty amounts to an involuntary medical exam and inquiry and is therefore illegal under the ADA (for employees) and GINA (for spouses).

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<p>Williams v. City of Chicago</p>	<p>Racketeering, Conspiracy and Accounting Claims</p> <p>The City created an “enterprise” that conspired to sell and market personal health information for a profit.</p> <p>City must account for how it has used the \$1.9 million it has collected in non-participation fees.</p> <p>City took plaintiffs’ property (earned wages) without just compensation in violation of 5th and 14th Amendments to US Constitution</p>
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<p>Williams v. City of Chicago</p>	<p>Breach of Fiduciary Duty Claim</p> <p>Union leaders breached their fiduciary duty when they agreed to, sponsored, cooperated, participated and promoted the City’s discriminatory practices through the wellness program.</p> <p>The Union refused to remedy their actions when approached by union members.</p> <p>Plaintiffs withdrew complaints against all defendants except City.</p>
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Williams v. City of Chicago

City moved to dismiss all claims.

Many of the plaintiffs' claims were filed too late or without correct legal procedure.

Alternatively, because ACA allows incentives, so should the ADA and GINA

- AARP v. EEOC lawsuit did not say no incentives were permissible

Financial incentives do not undermine voluntary choice (cites Orion Energy Systems)

It is legal under HIPAA to disclose PHI to wellness program vendors under a BAA

There was no conspiracy with the incentives offered because employees received health insurance benefits

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Williams v. City of Chicago

On July 25, 2022, the court issued an opinion and order

Dismissed plaintiffs' ADA claim because plaintiff did not specify "disability discrimination" on the EEOC form. Had form been filled out correctly, this claim would have likely survived.

The GINA claims relate to the "Genetic Information" checkbox that Williams selected in his EEOC charge. So, the GINA claims survive dismissal.

- The employee plaintiffs with covered spouses when City asked spouses medical history questions.
- Claims of employees with spouses survive
- Claims of spouses are dismissed because spouses may not bring GINA claims against employer – only employees can

Question of whether a Wellness Program is voluntary is a "question of fact." Because plaintiffs say the program was not voluntary, court must take allegation as true at motion to dismiss stage.

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Williams v. City of Chicago

Opinion and Order, cont...

Constitutional claim: In order to have a property interest in a benefit, they must have a legitimate claim of entitlement to the benefit.

Property interests in employment arise in two ways:

- 1. By an independent source such as state law; or
- 2. By a clearly implied promise of continued employment.

Plaintiffs argue that they have property interest in wages earned. Court classified the \$50 deductions as additional premium for health insurance. There is no state law or contractual promise requiring health insurance without additional \$50 premium. As a result, there is no property interest in health insurance premium to be at a certain cost and therefore no Takings Clause claim.

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Key Takeaways from Lawsuits

Williams case confirms that “voluntary” is in eye of beholder (“Question of fact”).

The AARP is still interested in pursuing wellness programs

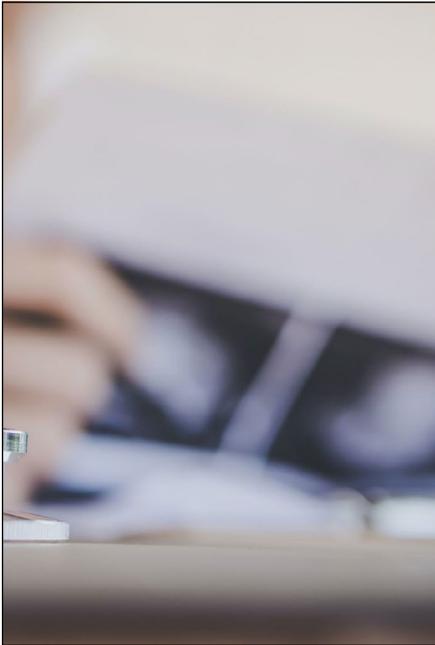
Constitutional claims such as taking property may be difficult to bring against government employers

Employees are willing to sue employers for wellness programs that seem too invasive of privacy and/or too costly for participation

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Medical Benefits and ERISA Compliance

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Medical Benefits

KEY QUESTION:

Are HRAs or biometric screens “medical benefits” that require employers who sponsor such events to comply with ERISA, COBRA, HIPAA, ACA?

ERISA applies to “employee welfare benefit plans.”

“A plan or program established or maintained by employer for purpose of providing medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident or disability.”

- ERISA § 3(1).

No definitive guidance from DOL about whether HRAs/biometric screens = medical benefits

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Medical Benefits

What is purpose of HRAs/biometric screens?

Do they provide medical benefits to employees? Benefits in the event of sickness, accident or disability?

Or, are they used more for data collection so employer can understand the health of its employee population and inform the need for other services?

If used primarily for data collection, arguably the purpose is not for providing medical benefits.

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Medical Benefits

Plus, if use health coaching as follow up to HRAs/biometric screens, health coaches should not be providing medical benefits.

- Outside coaching scope of practice.

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Medical Benefits

It is advantageous to employer to exclude HRAs/biometric screens from “medical benefits” definition

Avoid compliance with ERISA Parts 1, 4-6, which cover the following requirements:

Reporting and Disclosure, such as filing Form 5500 annual reports, being included in the plan’s Summary Plan Description, and record retention requirements.

Fiduciary Responsibility

Criminal and Civil Enforcement Procedures

Continuation Coverage (i.e., COBRA requirements).

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Q&A

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WELCOA Members should retain legal counsel to obtain definitive answers.

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Questions?

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