THE NEW ERA OF HEALTH AND DISABILITY LAW: EMPLOYER-SPONSORED WELLNESS PROGRAMS

I. Background

A. What is a "Wellness Program"?

An employer-sponsored "wellness program" is any program or initiative designed to improve the health and well-being of an organization's employees. The goals of a wellness program can vary, from increasing productivity to improving employee retention. In the United States, saving on health care costs is the number one reason that employers institute wellness programs. A 2008 study appearing in the Journal of Occupational and Environmental Medicine (JOEM) showed that employers can save $1.65 in health care expenses for every dollar devoted to a comprehensive wellness program.[1]

Wellness programs often target specific behaviors and "health factors" for improvement, such as poor nutrition, physical inactivity, stress, obesity and smoking. Wellness programs can combat these health factors and, ultimately reduce healthcare costs, by raising awareness of healthy habits, testing for diseases, assessing health risks for the employer and offering incentives to employees that encourage them and their families to adopt healthier habits.[2]

This paper discusses some common examples of employer-sponsored wellness programs and the law that affects such programs. Particular attention is paid to the Patient Protection and Affordable Care Act of 2010 (PPACA), the Health Insurance Portability and Protection Act (HIPAA), the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).

B. Common Examples of Wellness Programs:

1. Gym reimbursements
2. Paid smoking cessation programs
3. Subsidized co-pays
4. Health care discounts based on:
    a. Maintaining a certain body mass index (BMI)

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[1] Highmark, Inc. Press Release (Feb. 11, 2008), available at: https://www.highmark.com/ hmk2/about/newsroom/2008/pr021108.shtml.

[2] Working Well: A Global Survey of Health Promotion and Workplace Wellness Strategies, Executive Summary (Nov. 2010), http://www.buckconsultants.com.

b. Regular exercise

c. Taking health and nutrition classes

C. Wellness Programs May Be Affected By Several Different (and Somewhat Competing) Federal Laws, Including:[3]

1. The Patient Protection and Affordable Care Act of 2010 (PPACA), (P.L. 111-148, as modified by the Health Care and Education Reconciliation Act, P.L. 111-152)

2. The Health Insurance Portability and Accountability Act (HIPAA) (non-discrimination and privacy laws)

3. The Americans with Disabilities Act (ADA)

4. The Genetic Information Nondiscrimination Act (GINA)

5. The Age Discrimination in Employment Act (ADEA)

6. Title VII of the Civil Rights Act of 1964 (Title VII)

D. These Laws Reveal Conflicting Federal Policy Goals:

1. They encourage measures that improve employee health.

2. But they also aim to prevent discrimination based on health status, disability and other protected classes.

II. The PPACA

A. This Act Evinces A New Federal Policy Favoring Wellness Programs Aimed At Preventing Illness.

According to a survey of 1300 employers conducted by the Midwest Business Group on Health, 60% of employers are likely or very likely to create or expand their wellness programs as a direct result of the PPACA.[4]

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[3] Note that whether the benefits provided to an employee under a wellness program constitute taxable income is an open question. Employers are advised to have tax counsel review their programs. *See, e.g.,* Congressional Research Service, *Wellness Programs: Selected Legal Issues,* 7-5700 R40661 (Dec. 13, 2010).

[4] https://www.mbgh.org/templates/UserFiles/Files/Key%20Findings%20of%20Dec%202010%20Survey%20of%20Employers%20Reacton%20to%20Health%20Reform(2).pdf.

B. New Wellness Program Provisions:

1. *Grants for Small Businesses*.[5] The law sets aside $200 million in grants for small businesses to institute a wellness program, provided the employer has fewer than 100 employees working 25 or more hours and provided the employer did not have a wellness program in place as of March 23, 2010 (the date of law's signing).

   The program must be available to all employees and must be comprehensive and include the following components:

   a. Initiatives on health awareness (health education, preventative screening, health risk assessments (HRAs))

   b. Efforts to maximize employee participation including financial or other incentives

   c. Programs to change unhealthy behaviors and "lifestyle" choices, which may include coaching, counseling, seminars, and self-help educational materials

   d. Efforts to create a supportive environment such as workplace policies that encourage healthy habits, increased physical activity and improved mental health

2. *Technical Assistance for Employers.* The Centers for Disease Control and Prevention (CDC) will be available to train the employer's staff on how to evaluate existing wellness programs. Assistance is provided through web portals and call centers (not available yet).[6]

3. *Increased Incentives for Employees.* As discussed in greater detail below, employers may now offer incentives to employees to participate in health-plan-based wellness programs up to an amount equal to 20% of the premium paid by employees (and up to 30% for plans beginning in 2014). The incentive may be raised to 50% of the employee premium with the permission and at the discretion of the Secretary of Health and Human Services (HHS). This is intended to give the employer greater flexibility to design a program and offer incentives for employee participation. The incentives, however, may not be so high as to constitute "subterfuge" for discrimination based on health status, also prohibited under the Act.[7] The increased incentive does not apply to grandfathered plans.

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5 Pub. L. 111-148, Sec. 10408.

6 *Id.* at Sec. 4303.

7 Pub. L. No. 111-148, Sec. 2705.

4. *Reporting Requirements*. The law requires the Secretary of HHS to develop regulations requiring health plans to submit reports on a regular basis regarding the implementation and efficacy of their wellness programs.[8] The reports must be available to enrollees and the general public.[9]

5. *No Co-Pays for Preventative Care.* Group health plans and health insurers are now prohibited from requiring co-pays on any preventative services so identified by a designated independent expert panel (the U.S. Preventative Services Task Force) and co-pays are eliminated for certain recommended immunizations, breast cancer screenings, and other preventative care screenings for women and children.[10] This requirement applies only to plans beginning in 2014.

III. Anti-Discriminatory Controls Over Wellness Programs

A. HIPAA: "Health Plans" That Discriminate Based on "Health Factors" Must Meet HIPAA Requirements

HIPAA amended the Employment Retirement Income Security Act (ERISA), the Public Health Service Act (PHSA), and the Internal Revenue Code to prevent discrimination on the basis of health, claims experience, health care experience, medical history, genetic information and insurability. HIPAA, however, provides an exception for wellness programs that are reasonably designed to promote health or prevent disease.[11]

1. *Is Your Wellness Program a "Health Plan" Governed by HIPAA?*

HIPAA applies only to wellness programs that are tied to group health insurance plans. Two kinds of wellness programs exist that are *not* subject to HIPAA requirements:

a. Wellness Programs Not Tied to Healthcare Plan. Where the employer offers a reward or incentive unrelated to a healthcare plan and/or does not require anything more than participation to receive an incentive (no requirement to meet healthcare standard), HIPAA is not implicated as long as the program is made available to all employees. Other federal laws, however, such as the ADA or GINA, may still apply, as detailed below. Incentives may include cash or raffle tickets, for example, but they must

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8 *Id.* at Sec. 1001.

9 *Id.*

10 *Id.* at Sec. 2713.

11 29 U.S.C. § 1182b (HIPAA "do[es] not prevent a group health plan and a health insurance issuer from establishing premium discounts or rebates or modifying otherwise applicable co-payments or deductibles in return for adherence to programs of health promotion and disease prevention (i.e., wellness programs).").

not involve discounts in insurance deductibles or co-pays. Such programs include:

i. Cash for meeting a health standard (e.g., reward for quitting smoking). *But, extreme care must be taken for this kind of reward because the chances of violating the ADA, ADEA and/or Title VII are high.*

ii. Health fairs

iii. Weight Watchers classes

iv. Healthy cooking or other "lifestyle" classes

v. Reimbursement of Gym memberships

vi. Personal trainers

vii. Work time for exercise

viii. Wellness websites

ix. Subsidized flu shots

x. Responding to Health Care Assessments (HCAs) (but, as explained below, HCAs are particularly susceptible to ADA and GINA violations).

b. Wellness Programs Tied to Healthcare Plan But NOT Contingent on Meeting "Health Status" Standard.

Examples include:

i. Insurance discounts for participating in smoking cessation program *without regard to whether the employee quits smoking*.

ii. Insurance discounts or waiver of deductibles and co-pays for preventative prescription drugs (mandatory for new plans under PPACA).

iii. Insurance discounts for taking health or nutrition classes.

2. *HIPAA Requirements*. A wellness program may incentivize employees to meet certain health-status standards provided the program adheres to the following requirements under HIPAA:[12]

[12] 29 C.F.R. § 2590.702(f)(2). The PPACA effectively codifies the HIPAA regulations regarding wellness programs. P.L. 111-148, § 1201.

a. Incentive/reward must not exceed 20% of what the employee pays under the plan (the PPACA raises the limit to 30% for new plans effective on or after January 1, 2014);[13]

b. Program must be reasonably designed to promote health or prevent disease (cannot be a subterfuge to discriminate based on a health status - e.g., smokers, employees with heart problems, obese employees);

c. All employees must have a chance to qualify for the reward/incentive at least once per year;

d. The reward/incentive must be made available to all "similarly situated individuals"; and

e. There must be an alternative standard or waiver of the standard for individuals for whom it is "unreasonably difficult" or "medically inadvisable" to attempt to meet the standard (employee may seek certification from a physician). The program materials must describe the availability of the alternative or waiver. Examples of reasonable alternatives include:

   i. Instead of a reward for achieving lower cholesterol, reward the employee for attending an informational class about cholesterol.

   ii. Instead of a reward for achieving a lower BMI, reward participation in a walking program.

B. Wellness Programs May Not Discriminate on the Basis of Disability, Race, Age or Other Protected Status

1. ADEA & Title VII

Title VII prohibits discrimination on the basis of race, color, religion, sex and national origin.[14] The ADEA prohibits discrimination against persons over forty concerning, among other things, employee compensation and benefits.[15] Both statutes permit "disparate impact" claims, meaning employees may sue based on the systemic discriminatory effects of a policy or practice.[16]

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13 Pub. L. 111-148 Sec. 1201.

14 42 U.S.C. § 2000e-2.

15 29 U.S.C. §§ 621, *et seq*.

16 *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (Title VII); *Smith v. City of Jackson*, 544 U.S. 228 (2005) (ADEA).

A wellness program that establishes a standard that is more difficult for individuals in a protected class to meet may create a disparate impact in violation of Title VII or the ADEA.

For example, non-Hispanic African American individuals over twenty years of age experience a much higher incidence of diagnosed diabetes than do non-Hispanic whites (12.6% of the population vs. 7.1%).[17] A wellness program aimed at preventing or stemming diabetes among its employees and that requires the achievement of certain health standards in that regard may have a disparate impact on African American employees, in possible violation of Title VII.

A program that includes certain physical fitness goals may similarly have a disparate impact on employees over forty, in possible violation of the ADEA.

2. **ADA**

   a. Background. The ADA prohibits discrimination against "qualified individuals" on the basis of disability with regard to job application procedures, hiring, advancement, discharge and the privileges of employment.[18]

   b. The Expanded Definition of "Disability"

      i. Under the ADA, a disability is **(a) an impairment (b) that substantially limits (c) a major life activity**. The ADA Amendments Act of 2008 (ADAAA)[19] greatly expanded the definition of disability. Prior to the ADAAA, litigation over whether the impairment was substantially limiting or whether it affected a major life activity was common. While the EEOC has not yet promulgated final regulations of the ADAAA, the Act itself as well as its legislative history now indicates the term "disability" is to be interpreted much more broadly than in the past. This probably means less litigation over whether the condition concerns a major life activity or whether it is substantially limiting. In other words, more employees are likely to be considered disabled than before the ADAAA.[20]

         This could now mean that obese individuals, those with cholesterol or blood pressure issues and, possibly, those addicted to nicotine could be

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17 http://www.diabetes.org/diabetes-basics/diabetes-statistics/.

18 42 U.S.C. § 12112.

19 Pub. L. 110-325.

20 29 C.F.R. § 1630, at 44832; *id.* at § 1630.2(j)(2)(i).

covered under the definition of "disability."[21] Because the ADA often touches on these and other conditions typically targeted by wellness programs, however, the ADAAA brings wellness programs into sharp focus.

(a) *Major Life Activity.* Whether a condition is a disability often hangs on the definition of "major life activity." The ADAAA expanded this definition to specifically include:

(1) Caring for oneself;

(2) Performing manual tasks;

(3) Seeing;

(4) Hearing;

(5) Eating;

(6) Sleeping;

(7) Walking;

(8) Standing;

(9) Lifting;

(10) Bending;

(11) Speaking;

(12) Breathing;

(13) Learning;

(14) Reading;

(15) Concentrating;

(16) Thinking;

(17) Communicating; and

(18) Working.

[21] Congressional Research Service, *Wellness Programs: Selected Legal Issues,* 7-5700 R40661 (Dec. 13, 2010).

(19) It also now "includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. [22]

(20) Although not final, the proposed regulations for the ADAAA state that the definition of disability shall be interpreted broadly and that the definition of "major life activities" shall be expanded to include 2 non-exhaustive lists that, beyond the statutory examples, include:

i) Interacting with others;

ii) Reaching; and

iii) Sitting

(21) The regulations also added a long list of specifically covered major bodily functions including functions of the

i) Special sense organs;

ii) Skin;

iii) Musculoskelatal system; and

iv) Genitourinary system.[23]

(b) *Substantially Limits.* The regulations also clarify that the term "substantially limits" "need not 'significantly' or 'severely' restrict a major life activity to meet the standard," specifically incorporating Congress' rejection of *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 134 (2002), which construed 'substantially limit' much less broadly.[24]

c. The ADA and Wellness Programs**:** ADA issues that arise in the context of wellness programs involve: (1) the employer's obligation to provide reasonable accommodations to disabled employees in order to ensure participation in the program; (2) the ADA's prohibition against medical inquiries and examinations in certain circumstances (typically, health risks assessments, discussed in a separate section, below); and (3) the

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22 Pub. L. 110-325, Sec. 3406 § 3.

23 29 CFR § 1630, p. 48432.

24 *Id.*

prohibition against adverse employment actions on the basis of person's actual or perceived disability.

i. *Reasonable Accommodation.* If a bona fide wellness program conditions a reward on a health factor that a disabled employee cannot achieve (e.g., lowering cholesterol, lifting a certain amount of weight), the employer must comply with the ADA's reasonable accommodation requirements, including engaging in the "interactive process," to develop a reasonable alternative that satisfies the goals of the wellness program and the needs of the individual.[25]

ii. *Medical Inquiries and Examinations:* Discussed under section IV, below.

iii. *Disparate Treatment.* Individuals may not be discharged or otherwise be subject to an adverse employment action on the basis of their disability or their perceived disability. A discharged disabled employee may claim, for instance, that the stated reason for the discharge was pretext for the employer's desire to eliminate "unhealthy" employees. As evidence, the employee could point to the failure to achieve a rebate or some other reward after failing to participate or succeed in a wellness program.

3. **State Laws.** State laws may provide protections beyond those provided in the ADA and these protections may lead to claims based on wellness programs. Colorado, for instance, prohibits employers from discharging an employee for lawful conduct performed outside of work and off the clock.[26] Lawful conduct includes smoking. A discharged smoker could claim that he was fired for being a smoker and, as evidence, he could rely on the employer's zealous (but otherwise legal) smoking cessation program.

IV. Health Risk Assessments (HRAs), the ADA and GINA

The ADA and GINA have their most significant impact on Health Risk Assessments (HRAs). HRAs are the most common component in any wellness program. HRAs are surveys that include questions about workers' habits, personal health and family medical histories. They are used to direct workers into wellness programs such as weight-loss classes and smoking cessation programs. Even though many employers offer incentives to complete the HRAs, employers have historically experienced a low response rate. As a result, the trend among employers is to make them mandatory.[27]

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[25] 42 U.S.C. § 12102(1); 29 C.F.R. § 1630.2.

[26] C.R.S. § 24-34-402.5.

[27] Victoria E. Night, Wall Street Journal, July 28, 2009, *Treading Carefully with Wellness Programs*.

Employers, however, must be careful. HRAs are rarely affected by HIPAA because incentives or requirements to complete an HRA do not require the employee to meet a health status standard. HRAs may, however, run afoul of the ADA if they ask disability-related questions or ask questions likely to elicit a disability-related response. They may also violate GINA if they ask questions pertaining to an employee's family medical history.

A. The ADA and the ADAAA

Under the ADA, employers are prohibited from requiring an employee to take a "medical examination" [28] and from inquiring whether the employee has a "disability" or as to the "nature and severity of the disability," unless the examination or inquiry is "job related and consistent with business necessity."[29] Importantly, this restriction covers *all employees* not just employees with or perceived to have a disability; a plaintiff need not establish the existence of a disability to bring suit regarding an HRA. An employer may always make inquiries into the ability of the employee to perform job-related functions.[30]

The ADA makes an explicit exception for examinations or inquiries made as part of a *voluntary* wellness program, provided any medical records obtained "are maintained in a confidential manner and not used for the purpose of limiting health insurance eligibility or of preventing occupational advancement."[31]

Because the ADAAA broadened the definition of "disability," HRAs are now more likely to make impermissible disability-related inquires than before the ADAAA. Employers, therefore, must review their HRAs for ADA compliance. The following analysis may provide a helpful start.

- Is the question a "disability-related inquiry" or "medical examination"?
  No: No ADA issue.
  Yes: →
- Is the question voluntary and will the information elicited be kept confidential and separate from personnel and insurance files?
  Yes: No ADA issue
  No: →
- Is the question "job-related and consistent with business necessity"?
  Yes: No ADA issue

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[28] *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA),* http://www.eeoc.gov/policy/docs/ guidance-inquiries.html.

[29] 42 U.S.C. § 12112(d)(4)(A).

[30] *Id.*

[31] *Id.* at 4(B). http://www.eeoc.gov/policy/docs/guidance-inquiries.html. H.Rept. 101-485, pt. 2, at 75 (1990).

No: ADA violation.

The analysis begs at least three critical questions: (1) what are disability-related questions?; (2) what is a "medical examination"? *and* (3) what is *voluntary*?

1. **"Disability-Related Questions":** questions (or series of questions) likely to elicit information about a disability."[32] Because the ADAAA will require a broad interpretation of "disability," as explained above, the chances now of asking a disability-related question are high.

    a. Examples of disability-related questions:

        i. Are you taking prescription drugs?

        ii. Have you ever filed a workers' compensation claim?

        iii. What is your blood pressure?

        iv. What is your weight?

        v. Do you smoke?

    b. *Non*-disability-related questions typically inquire about behaviors and not health conditions. Examples include:

        i. When is your baby due?

        ii. How often do you exercise?

        iii. What time do you eat dinner?

        iv. How many hours of sleep do you get each night?

2. **Medical Examination**: an examination will typically require the employee to do something physical beyond answering a question.[33]

    a. Examples of medical examinations:

        i. Range of motion tests; and

        ii. Psychological tests designed to identify mental disorder.

    b. Non-medical examinations:

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[32] *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA)*, http://www.eeoc.gov/policy/docs /guidance-inquiries/html.

[33] *Id.*

i. Physical agility tests simulating job functions;

ii. Testing for current drug use; and

iii. Psychological tests that measure personality traits such as honesty, preferences, and habits.

3. **"Voluntary"**

a. EEOC Enforcement Guidance: a question or examination is voluntary "as long as the employer neither requires participation nor penalizes employees who do not participate."[34] The EEOC's interpretation of "voluntary" is strict and may even preclude awards for participating in an HRA.

i. In March 2009, the EEOC withdrew an Opinion Letter that had stated an HRA administered as part of a wellness program that met the requirements of HIPAA and that did not exceed 20% of the employee's premium payment would not violate the ADA. The new Opinion Letter opines that conditional on an employee's right to receive health insurance on participating in an HRA is not voluntary and not job-related or consistent with business necessity and, thus, violated the ADA. According to the EEOC, such an HRA will violate the ADA.[35]

ii. It is now an open question whether *any* inducements to participation (even those not exceeding 20% of the employee's premium payment, as allowed under HIPAA) render a program *involuntary*. Accordingly, employers offering incentives for participation in an HRA that includes disability-related questions proceed at their own risk.[36] The standard for voluntariness under GINA, explained below, may offer some guidance on the issue.

4. **Consequences of Violation:** Damages, which could include non-economic damages, are limited to the caps under Title VII, but because the caps apply on a per plaintiff basis, violations of the ADA could apply to all of a company's employees and be catastrophic.[37]

V. GINA

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34 *Id.*

35 EEOC Opinion Letter, Mar.6, 2009; EEOC Opinion Letter, Aug. 10, 2009.

36 Congressional Research Service, *Wellness Programs: Selected Legal Issues,* 7-5700 R40661 (Dec. 13, 2010).

37 42 U.S.C. § 1981a(a), (a)(2).

A. Background. The statute has two parts: Title I, which prohibits discrimination based on genetic information by health insurers and group health plans, and Title II, which prohibits discrimination based on genetic information in employment. Title II specifically prohibits an employer from requesting, requiring or purchasing genetic information of an employee or a family member of an employee.[38]

B. Specific Prohibitions:

1. *Health Plans/Insurers*: increasing group premiums or contribution amounts based on genetic information, request or requiring an individual or family member to undergo a genetic test, and requesting, requiring or purchasing genetic information prior to or in connection with enrollment, or at any time for "underwriting purposes."

2. *Employers*: requesting, requiring or purchasing genetic information from employees except in very narrow circumstances.

C. Wellness Program Exception. Wellness programs, specifically HRAs, sometimes request family medical history, which is genetic information protected by GINA. A covered entity may request this information in connection with a wellness program/HRA if the following requirements are met:

1. The employer offers health or genetic services, including such services offered as part of a wellness program;

2. The employee provides prior, knowing, voluntary and *written* authorization;

   a. *Inducements Prohibited*: While covered entities may offer certain kinds of financial inducements to encourage participation in the wellness program, they may not offer an inducement to provide genetic information. If employer includes genetic questions in the HRA, it must be made clear to the employee that he/she is not required to answer those questions to receive the HRA incentive/reward.[39]

   b. For example, Employer offers $150 to complete a 100-question survey, 20 questions of which concern family medical history (genetic information). Employees still receive the $150 as long as they answer the 80 non-genetic questions. The assessment must make clear which questions must be answered and which ones need not be answered.

3. Only the employee or employee family member receiving services and the medical professional providing the services receive and know the results of the services; and

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38 42 U.S.C. §2000ff-1(b).

39 29 C.F.R. § 1635.8(b)(2), 75 Fed. Reg. 68935 (Nov. 9, 2010).

4. Any individually identifiable genetic information is not disclosed to the employer except in aggregate terms that do not disclose the identity of specific employees.[40] (But GINA is not violated if the aggregated information makes the information of a specific individual readily identifiable without any effort on the part of the employer, such as when the group is very small).[41]

D. Consequences of a GINA Violation

1. Title II is regulated and enforced against employers by the EEOC.

2. An employee may bring a private suit and seek damages, costs and fees to the same extend as under Title VII (back pay, front pay, compensatory damages).[42]

VI. MISCELLANEOUS

A. ERISA. Wellness programs are generally not subject to ERISA if the program is an employment policy separate from a group health plan. DOL advisory opinions suggest that programs are not subject to ERISA if they do not require direct administration by employer. Otherwise, the program may be a "welfare plan" subject to ERISA rules governing pensions and other similar benefits.[43]

B. NLRA: Employers and unions are directed to "confer in good faith with respect to wages, hours, and other terms and conditions of employment."[44] Health benefits, which may include wellness programs, are likely to be considered mandatory subjects of bargaining.[45]

VII. SUMMARY

In light of the PPACA, GINA and the ADAAA and the significant new health and disability-related employee protections these pieces of legislations provide, it is essential that employers review their wellness initiatives and programs to ensure that they are in the best possible position in relation to these laws. Employers may start with the brief summary analysis provided in the slideshow accompanying this paper.

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40 42 U.S.C. § 2000ff-1(b)(2).

41 29 C.F.R. § 16.35.8(b)(2), 75 Fed. Reg. 68935 (Nov. 9, 2010).

42 42 U.S.C. § 2000ff-6.

43 *See, e.g.,* http://www.dol.gov/ebsa/regs/fab2008-2.html.

44 29 U.S.C. § 158(d).

45 *See* The Developing Labor Law, 1274-81 (John E. Higgins et al ed. 2006).