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# Does Your Wellness Program Need a Check-up?

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## Agenda

- Background on Wellness Programs
- Applicable Laws
- EEOC Litigation
- Recently-Issued Final Rules

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## What is a Wellness Program?

- Programs designed to improve the health or well-being of an organization's employees
- Benefits:
  - Increased productivity
  - Improved morale
  - Savings on healthcare costs



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## What is a Wellness Program?

- Examples
  - Gym reimbursements
  - Smoking cessation programs
  - Health insurance discounts
- Means of obtaining medical information from employees
  - Health risk assessment (HRA)
  - Biometric screening for risk factors

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## Types of Wellness Programs

- Participatory
- Health-Contingent
  - Activity-only
  - Outcome-based

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## Participatory

- Wellness programs that either:
  - do not provide a reward; OR
  - do not include any conditions for obtaining a reward that are based on an individual satisfying a standard that is related to a health factor
- Generally available without regard to individuals' health status
- Examples
  - Gym membership reimbursement
  - Reward for simply completing HRA (no further action)

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**HUSCH BLACKWELL****Health-Contingent**

- Requires individuals to satisfy a standard related to a health factor to obtain a reward; OR
- Requires an individual to undertake more than a similarly-situated individual, based on a health factor, in order to obtain the same reward
- “Health factor”
  - health status, medical condition (e.g., physical and mental illnesses), claims experience, receipt of health care, medical history, genetic information, evidence of insurability, and disability

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**HUSCH BLACKWELL****Health-Contingent – Activity Only**

- Requires individuals to perform or complete an activity related to a health factor in order to obtain a reward
  - no requirement of attaining or maintaining a specific health outcome
- Examples
  - Walking, diet, or exercise programs

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## **Health-Contingent: Outcome-Based**

- Requires individuals to attain or maintain a specific health outcome in order to obtain a reward
- Example
  - 1) Biometric screen for high cholesterol blood/pressure/glucose
  - 2) Individuals within the normal/healthy range receive award
  - 3) Individuals outside the normal/healthy range must take additional steps (e.g., take health course or adhere to health improvement action plan) in order to obtain the same reward

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## **Laws Governing Wellness Programs**

- HIPAA
- Affordable Care Act (ACA)
- ADEA
- Title VII
- ADA
- GINA

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## **HIPAA/ACA Non-Discrimination Rules**

- Applicability – wellness programs that are:
  - health-contingent AND part of a group health plan
- Rules:
  - Annual Qualification for Reward/Incentive
  - Program “Reasonably Designed”
  - Limits on Reward/Incentive
  - Reasonable Alternative Standard or Waiver
  - Notice of Reasonable Alternative or Waiver

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## **HIPAA/ACA Rules – Annual Qualification**

- Individuals eligible for the program must be given the opportunity to qualify for the reward at least once per year

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## **HIPAA/ACA Rules - Reasonably Designed**

- Wellness program must be “reasonably designed to promote health or prevent disease”
  - Has a reasonable chance of improving the health or, or preventing disease in, participating individuals
  - Not overly burdensome, subterfuge for discrimination, or highly suspect in the method chosen
  - Program need not be accredited or based on particular evidence-based clinical standards

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## **HIPAA/ACA Rules - Reasonably Designed**

- Programs consisting solely of a measurement, test, or screening (i.e. no feedback) are not reasonably designed to promote health and prevent disease

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- Reward (discount, surcharge, etc.) cannot exceed **30%** of total cost of employee-only coverage under the plan
  - Total cost = employer AND employee contributions
  - 30% of family coverage if any class of dependents may participate in the wellness program
- Reward may increase up to **50%** if the wellness program is designed to prevent or reduce tobacco use

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- Examples
  - Walking program as alternative to running program
  - Completion of educational program
- Activity-only and outcome-based distinctions
- Alternative may be class-wide or case-by-case basis
- Waiver is also permissible
- Same, full reward

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## **HIPAA/ACA Rules – Notice**

- The availability of the reasonable alternative standard (or waiver) must be disclosed in all plan materials describing the terms of a health-contingent wellness program
- Must also include:
  - Contact information for obtaining the alternative; and
  - A statement that recommendations from an individual's personal physician will be accommodated

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## **Disparate Impact Under ADEA/Title VII**

- Beware of disparate impact claims
  - Age
  - Race
  - National origin

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## The ADA and Wellness Programs

- Reasonable accommodations for disabled employees
- No adverse actions based on disability
- No mandatory disability-related inquiries or medical examinations unless **job related** and **consistent with business necessity**

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## ADA – Medical Inquiries and Exams

- **Exception:** Disability-related questions and examinations are permitted as part of Wellness Programs if:
  - Voluntary
  - Confidential
  - Not used to limit insurance eligibility or prevent advancement

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## **What is a “Disability Related” Question?**

- **Are you taking prescription drugs?**
- **What is your blood pressure?**
- **How often do you exercise?**
- **What is your weight?**
- **How many hours of sleep do you get?**
- **What time do you eat dinner?**
- **Do you smoke?**

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## **What is a “Medical Examination?”**

- **Range of motion tests**
- **Testing for current drug use**
- **Psychological tests designed to identify mental disorder**
- **Physical agility tests simulating job functions**
- **Psychological tests that measure personal traits such as honesty, preference, and habits**

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- The Genetic Information Nondiscrimination Act
- Prohibits requesting, requiring, or purchasing genetic information from employees and/or their family members
- Family medical history = genetic information

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- **Exception:** Family medical history questions are permitted as part of Wellness Programs if:
  - Health or genetic services are provided
  - Voluntary, knowing, and *written* authorization provided by the employee
    - Very strict; no incentives or inducements to provide genetic information
  - Confidential

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**HUSCH BLACKWELL****EEOC Litigation**

- *Seff v. Broward County* (11th Cir. 2012)
  - Group health insurance plan required participants to complete a HRA and undergo biometric testing to obtain a \$20 premium discount for each twice-monthly paycheck.
  - **Holding:** The wellness program need not be explicitly identified in a benefit plan to qualify as a “term” of the benefit plan within the meaning of the ADA’s safe harbor provision.

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**HUSCH BLACKWELL****EEOC Litigation**

- *EEOC v. Flambeau, Inc.* (W.D. Wisc. 2015)
  - The employer mandated that employees complete an HRA and biometric screening to be eligible for the health plan.
  - An employee who did not complete his or her HRA and biometric screening at the appointed time would be subject to disciplinary action.
  - **Holding:** The judge said it fell under the ADA’s safe harbor provision because the employees weren’t at risk of losing their jobs if they chose not to participate in the program.

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**HUSCH BLACKWELL****EEOC Litigation**

- *EEOC v. Orion Energy Systems, Inc.* (E.D. Wisc. 2014)
  - The employer paid 100 percent of the cost of the health plan for employees who completed an HRA and a fitness test.
  - If an employee did not complete an HRA, the employee was required to pay the full cost of the health plan premium.
  - If an employee did not complete the fitness test, the employee was penalized \$50.

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**HUSCH BLACKWELL****EEOC Litigation**

- *EEOC v. Honeywell International, Inc.* (E.D. Minn. 2014)
  - If an employee did not complete biometric testing they would lose HSA contributions up to \$1500 and incur multiple surcharges
  - **Holding:** The district court denied the EEOC's request for injunctive relief on the grounds that the EEOC had not shown a threat of irreparable harm. The case was later voluntarily dismissed.

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- ADA
  - Reasonably designed
  - “Voluntary”
  - Incentive limits
  - Safe harbor
  - Confidentiality
- GINA
  - Incentive limits for spousal information
  - Reasonably designed
  - Anti-retaliation
  - Spousal authorization

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**HUSCH BLACKWELL****ADA – Reasonably Designed**

- As with HIPAA/ACA, must be reasonably designed to promote health or prevent disease
- Testing/screening/collection without follow-up is ***not*** reasonably designed, ***unless*** the information is used to design a program to address the conditions identified
- Information may not be used merely to estimate future healthcare costs

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## **ADA – “Voluntary”**

- Employees must not be required to participate
- Employer may not deny coverage or limit benefits for non-participation
- No retaliation for non-participation
- Notice requirements

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## **ADA – Incentive Limits**

- Incentives do not render program involuntary if reward/surcharge does not exceed 30% of the cost of self-only coverage in the relevant health plan
- Rule provides various health plan bases

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## **ADA – Safe Harbor**

- Safe harbor does **not** apply to wellness programs
- EEOC position conflicts with court rulings

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## **ADA – Confidentiality**

- Collected information may only be provided to employer in aggregate form, so as not to reveal employee identities
- Exception: disclosures necessary to administer the wellness program

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## **GINA – Spousal Information**

- Incentives are permissible when seeking the past or current health status of an employee's spouse
  - (the “manifestation of a disease or disorder”)
- As with the ADA, the reward may not exceed 30% of the cost of self-only coverage under the applicable group health plan

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## **Tips and Best Practices**

- Do not require employee participation
- Do not take adverse employment actions or retaliate against non-participants because of non-participation
- Provide reasonable accommodations
- If collecting health information, provide feedback or use the information to address prevalent conditions

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## **Tips and Best Practices**

- Frame incentives as actual rewards, not penalties
- Make the incentive reasonable
- Train HR staff on responding appropriately to complaints about the wellness program
- Consider how you might be able to make a colorable “safe harbor” argument

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# Questions?

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