



# What's Next with the ACA and Wellness

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- \*Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Michael Bowling, or another licensed attorney.



# Agenda



Regulatory  
Landscape



2020  
Compliance  
Options



ADA Safe  
Harbor



Conclusion





# Wellness Regulatory Landscape

# Three Key Regulatory Schemes

- Employer-sponsored wellness programs face three complementary and sometimes conflicting regulatory schemes:
  - HIPAA/Affordable Care Act (ACA)
  - Americans with Disabilities Act (ADA)
  - Genetic Information Non-Discrimination Act (GINA)



# HIPAA/Affordable Care Act (ACA)

Participatory	Health-Contingent	
	Activity-Only	Outcome-Based
Participate & receive your incentive	Complete the activity, receive the incentive	Achieve the metric, receive the incentive
Examples: - Gym membership discount - Health education classes - HRA completion	Examples: - Walking, Diet, Exercise Programs	Examples: - Total cholesterol <200 - BMI <27.5
Requirements: - Allow everyone to participate	Requirements: - Allow everyone to participate - Opportunity to qualify for incentive at least 1x/year - Reasonable chance of improving health or preventing disease - Offers reasonable alternative where participation is unreasonably difficult or medically inadvisable - Provide notice of reasonable alternative standard	
Incentives: - Not applicable	Incentives: - Cannot exceed 30% of the total cost (employer+employee contributions) for the coverage in which the employee is actually enrolled - Increases to total of 50% to the extent additional % connected to tobacco cessation program	
<b>Applies to wellness programs that are a part of a group health plan</b>		



# American with Disabilities Act (ADA)

- Regulated by EEOC
- Applies to employer-sponsored wellness programs, whether included as part of group health insurance or as separate employee benefit
- Requirements:
  - Reasonably designed to promote health or prevent disease
  - “Voluntary”
    - Does not require participation
    - Does not deny coverage or limit benefits for those who do not participate
    - Does not take adverse action, retaliation, interfere, coerce, intimidate, or threaten



# Genetic Information Non-Discrimination Act (GINA)

- Regulated by the EEOC
- Applies to employer-sponsored wellness programs, whether included as part of group health insurance or as separate employee benefit, that seek “genetic information”
  - E.g., genetic testing, family medical history, spouse’s medical history
- Requirements:
  - Reasonably designed to promote health or prevent disease
  - Provision of genetic information “voluntary” (i.e., not requirement to provide, no penalty for not providing)
  - Knowing, voluntary, and written authorization





# But what about incentives?

- EEOC initially issued regulations that tied “voluntariness” to level of incentives
  - Wellness program not voluntary if incentive greater than 30% of total cost of employee-only coverage
- AARP sued EEOC in 2016, arguing regulations permitted “coercive” levels of incentive
- Court ruled EEOC did not sufficiently justify incentive levels in its regulations and ultimately vacated incentive-related portions of its ACA and GINA regulations

The AARP logo is displayed in a bold, red, sans-serif font. The letters are thick and blocky, with a slight shadow effect. The 'A' has a distinctive shape with a curved top. The logo is centered horizontally on a white background.



2020  
Compliance  
Options

# What Is Your Goal?

- Any decision on next steps for your wellness program should begin with firm understanding of your strategic goal(s) for wellness (and, if linked, your group health plan)
  - Short vs. long-term cost savings
  - Creating “culture of wellness”



# Option 1: No Wellness Program

- Wellness programs are costly, and research findings are (at best) mixed as to efficacy
  - E.g., recent large-scale study by researchers at University of Chicago and Harvard showed participating employees report greater rates of positive health behaviors but without significant effects on clinical measures of health, health care spending, or utilization
- Getting out of the “wellness game” eliminates compliance concerns under ACA, ADA, and GINA



# Option 2: Participation-Only Wellness Programs

- Support healthy behaviors
  - Subsidize health through fitness centers, diet and exercise programs, health education
  - Ensure employees get appropriate rest and lunch breaks
  - Consider sources of stress in the work environment
  - Tailor options in your company cafeteria
- Collect no direct data!
- Avoid physical exams, biometrics, and HRAs
- Avoid ADA and GINA entanglements, while fostering “culture of wellness”



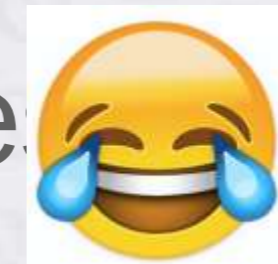
## Option 3: Maintain Health-Contingent Program But with Reduced Incentives

- Maintain current activity-only or outcome-based program
- Reduce incentives to levels that *you believe* would be considered “non-coercive” by a reasonable person at your lowest pay scale
- Trust that forthcoming regulatory guidance will still permit limited financial incentives for “voluntary” wellness programs



# Option 4: Tailor Program to EEOC Regulations

- If not already in compliance with vacated EEOC regulations, tailor your program to EEOC's regulations (including up to 30% incentives)
- Trust that EEOC enforcement actions – and potentially aggrieved employees – will avoid action against programs that fit within EEOC's now-defunct proposal
  - Keep in mind that, while not ruling on the issue, court in *AARP v. EEOC* expressed skepticism regarding level of incentive proposed by EEOC to be voluntary
- Or trust that Congress will come to the re.





# ADA Safe Harbor



# ADA's Safe Harbor Provision

- 42 U.S.C. § 12201(c)(2):  
Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict –  
a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law



# Application of Safe Harbor Subject to Substantial Disagreement

- EEOC has taken position that ADA safe harbor provision does not apply to wellness programs (29 C.F.R. § 1630.14(d)(6))
  - Deferred to by *EEOC v. Orion Energy Sys., Inc.*, 208 F. Supp. 3d 989 (W.D. Wisc. 2016)
- At least two courts determined – prior to EEOC’s issuance of regulations - that wellness programs integrated with group health plans are “bona fide benefit programs” protected by “safe harbor”
  - *Seff v. Broward County, Fla.*, 691 F.3d 1221 (11<sup>th</sup> Cir. 2012)
  - *EEOC v. Flambeau, Inc.*, 131 F. Supp. 3d 849 (W.D. Wisc. 2015), *aff’d on other grounds*, 846 F.3d 941 (7<sup>th</sup> Cir. 2017)
- Keep in mind that ADA “safe harbor” does not apply to HIPAA/ACA or GINA requirements





Conclusion

# So, Where Do We Go From Here?

- Chart a course of compliance that balances your strategic goals and risk tolerance
- Await further guidance from EEOC, the courts, or both
- Seek the advice of a good attorney





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