



# A Changing Landscape: The Interplay Between HIPAA, the ADA, and GINA

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Health & Benefits

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# Federal Laws Regulating Wellness Programs

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- HIPAA (DOL, IRS, HHS)
  - Comprehensive regulatory scheme for implementing wellness programs under ERISA
  - Permits “participatory wellness programs” and “health contingent wellness programs,” with latter further divided into “activity-only wellness programs” and “outcome-based wellness programs”
    - Under HIPAA, only health contingent wellness programs must limit size of reward to 30% of total cost of elected coverage (50% for tobacco cessation programs) and make available reasonable alternatives for rewards contingent on outcomes
- GINA (EEOC)
  - Prohibits employers from offering rewards or incentives to employees to provide health plans with genetic information
    - Genetic information includes employee’s family medical history
    - Family includes relatives by blood and marriage (e.g., spouse)
- ADA (EEOC)
  - Prohibits employers from making medical inquiries of employees unless
    - Job-related and for business necessity or
    - Voluntary
      - ♦ Medical exams and disability-related inquiries (e.g., HRQs or biometrics screenings) are permitted only if voluntary

## Recent Challenges to Employer Wellness Programs

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- EEOC alleged in three separate claims that employer-based wellness programs violate ADA because programs are not “voluntary”
  - Orion Industries and Flambeau, Inc.
    - Employees who do not participate in biometric screenings and health status questionnaires forfeit employer health care coverage and/or must pay entire cost of health care coverage
    - In the case of Orion Industries, the EEOC alleges the employee was fired for refusing to participate and raising objections to the program
  - Honeywell International
    - Employees who do not take biometric screenings pay a \$500 surcharge and forfeit eligibility for a \$1,500 HSA contribution
    - Employees and spouses are assessed \$1,000 each if tobacco screenings are not completed (alleged ADA and GINA violations)
- Congress considering legislation to conform the wellness program rules

## EEOC Issues Proposed Wellness Program Regulations Under ADA

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### **EEOC issued proposed regulations to define what is “voluntary” under the ADA**

- Can't require employees to participate
- Can't deny coverage or limit benefits if employee refuses to answer disability related inquiry or take a medical exam (like a health risk assessment)
- Outlines permissible financial incentives that an employer may offer in “voluntary” wellness program
  - Limits incentives on participation-only programs to 30% of cost of employee-only coverage
  - More restrictive than those under the HIPAA wellness rules
- Clarifies when smoking cessation programs are subject to these requirements
  - If the program simply asks about smoking status, the EEOC proposed regulations do not apply and the HIPAA limit of 50% for tobacco program applies
  - If the program actually tests for tobacco use, the EEOC proposed regulations do apply and the EEOC limit of 30% of the total cost of employee only coverage applies

## EEOC Issues Wellness Program Regulations Under GINA

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- Proposed EEOC regulations define “voluntary” wellness program under GINA
- Employers may obtain genetic information (i.e., family medical history) as part of health or genetic services only when those services are reasonably designed to promote health or prevent disease
- An employer may offer an inducement to an employee whose spouse
  - Is covered under the employee’s health plan;
  - Receives health services offered by employer, including as part of wellness program; and
  - Provides information about his or her current or past health status as part of a Health Risk Assessment (HRA)
- Total inducement to employee and spouse under GINA and ADA may not exceed 30% of total annual cost of coverage for plan in which employee and any dependents are enrolled
  - Maximum share of inducement attributable to employee’s participation in wellness program equals 30% of cost of self-only coverage
  - Remainder may be provided in exchange for spouse providing information to wellness program about current or past health status
  - Remainder =
    - [30% of total cost of coverage for plan in which employee and dependents are enrolled] minus
    - [30% of total cost of self-only coverage]

## Meanwhile, Back at the Courthouse

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- Western District of Wisconsin ruled on the Flambeau case in December and held
  - The company’s requirement to participate in a health risk assessment or biometric screen did not violate the ADA
  - The requirement fell within the ADA’s safe harbor that allows wellness programs that are part of an insurance benefit plan
    - In order to fall within the safe harbor, the program must be based on underwriting, classifying, or administering risks
  - Similar to a holding in 2011 in *Seff v. Broward County*, in which the 11th Circuit Court of Appeals found that the County’s wellness program also fell within the safe harbor for insurance benefit plans
  
- Calls into question the EEOC’s proposed regulations, as these Courts did not look to whether the programs were voluntary, but whether they fell within the safe harbor for insurance plans



# Questions?

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