A PUBLICATION OF THE WELLNESS COUNCIL OF AMERICA

DESIGNING A LEGALLY COMPLIANT WELLNESS PROGRAM

WELCOA WHITEPAPER BY

Barbara J. Zabawa, JD, MPH • the Center for Health & Wellness Law, LLC

(REV. 2019)

ORIGINAL RESEARCH

LEGALLY INCENTIVIZING HEALTH ASSESSMENT AND BIOMETRIC SCREEN PARTICIPATION

Barbara J. Zabawa, JD, MPH • the Center for Health & Wellness Law, LLC

Suggested citation for this article: Zabawa, B. (Rev. 2019). Legally Incentivizing Health Assessment and Biometric Screen Participation. A white paper published by WELCOA and the Center for Health & Wellness Law, LLC.

DISCLAIMER

The information contained in this White Paper is based on the state of the law as of the date of publication. Any subsequent changes to the law will not be reflected in the analysis set forth below.

Abstract

Offering rewards or financial incentives to encourage employee and family member participation in workplace health assessments (HAs) and biometric screens are gaining attention and popularity. Yet, not all the attention has been good. On the legal front, the Equal Employment Opportunity Commission (EEOC) has addressed the use of these financial incentives through rules. Although workplace wellness program designers have relied on the financial incentive guidance provided by the Health Insurance Portability and Accountability Act (HIPAA) and Affordable Care Act (ACA), such guidance is not legally sufficient. Workplace wellness program designers must also familiarize themselves with the requirements under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA), particularly when HAs and biometric screens offer financial incentives in return for employee medical and family medical history information. This White Paper outlines the legal parameters under key workplace wellness program laws to help program designers start on the path to compliance in the critical area of HA and biometric screen activities. Readers should note that the legal parameters discussed in this White Paper are current as of 2019 and do not capture any future modifications to the current rules.

Introduction

The issue that seems to be igniting push back from employees and the government are financial incentives, the use of which by employers is gaining popularity. According to the Rand Corporation study, of the 51% of employers who offer workplace wellness programs, 69% use financial incentives as a strategy to encourage employees to use wellness programs.[1] A majority of employee wellness programs, 72% to be exact, include health assessments (HAs) and biometric screens.[2] Incentives are most common for health assessment completion and lifestyle management programs, with about 30% of employers with a wellness program offering such incentives.[3] Financial incentives may include cash, cash equivalents (e.g., discounted gym memberships), and novelty items (e.g., t-shirts or gift cards).[4] Employers also link incentives to the employees' share of health plan premiums, health reimbursement account contributions and plan cost-sharing, with incentives impacting the employee share of health plan premiums being the most popular.[5]

Evidence shows financial incentives increase wellness program participation. According to the Rand study, employers who do not use incentives had a median employee participation rate of 20%, compared to a 40% median employee participation rate for employers who used monetary or nonmonetary incentives.[6] Employers that used penalties or surcharges for not participating boosted their median employee participation rates to 73 percent.[7] Other studies find that older men are most likely to respond to incentives, as are employees who are in generally poorer health, and that most employees want incentives to help motivate them to make lifestyle improvements.[8]

The Laws Behind Offering Financial Incentives

Several federal laws address offering financial incentives in workplace wellness programs. Specifically, offering financial incentives in conjunction with completing HAs or biometric screens implicates the Health Insurance Portability and Accountability Act (HIPAA), the Affordable Care Act (ACA), the Americans with Disabilities Act (ADA) and the Genetic Information and Nondiscrimination Act (GINA).

HIPAA/ACA

HIPAA nondiscrimination rules were the first rules to create the ability to offer financial incentives within workplace wellness programs, and the ACA expanded upon that ability.[9] HIPAA/ACA divides wellness programs into two groups: 1) participatory; and 2) health contingent. Health contingent programs are further divided between activity-only and outcomes-based programs.

In a participatory program, a participant earns financial incentives by merely participating in the program. The participant is not expected to achieve a certain wellness goal, such as losing a certain amount of weight or having a certain blood pressure level. That is in contrast to participants in health-contingent programs. In those programs, financial incentives are tied to achieving a health status goal, such as a certain weight or blood pressure (outcomes-based), or completing an activity that some individuals may be unable to do or have difficulty doing because of a health factor (activity-only), such as severe asthma, pregnancy or a recent surgery. Some examples of activity-only programs may be walking, diet or exercise programs.[10]

HIPAA/ACA limits financial incentives to no more than 30 percent of the cost of health coverage, but the incentive can climb as high as 50 percent of the total cost of coverage to the extent that the additional 20 percent is in connection with a program designed to prevent or reduce tobacco use.[11] HIPAA/ACA calls these financial incentives “rewards,” but the law’s definition of “reward” is a bit misleading. The law defines “reward” as including both obtaining a reward and imposing a penalty.[12] So, the 30 percent (or 50 percent for tobacco cessation programs) limit can be applied to the amount of the reward or the amount of the penalty.

Two key points to remember about the HIPAA/ACA financial incentive law is first, that it applies to group health plans only. If a wellness program is not part of a group health plan program, this incentive law does not apply. Second, the HIPAA/ACA financial incentive limit applies to health contingent wellness programs only. Financial incentive limits under HIPAA/ACA do not apply to participatory programs.

ADA

The ADA is enforced by the Equal Employment Opportunity Commission (EEOC) and prohibits discrimination by employers on the basis of disability in regard to terms, conditions and privileges of employment.[13] Terms, conditions and privileges of employment can include participating in wellness programs. Thus, workplace wellness program designers must ensure that all employees, regardless of disability, have an equal opportunity to participate in the program and offer reasonable accommodations so they may participate and earn any financial incentives.

Discrimination under the ADA includes requiring medical examinations and making disability-related inquiries, including medical history inquiries, unless one of two exceptions applies: 1) such exam or inquiry is job-related and consistent with business necessity; or 2) the medical exam or disability-related inquiry is ***voluntary*** and part of an employee health program available at the work site.[14] The restriction on asking questions about an employee's medical status or conducting medical screenings applies regardless of whether the employee is disabled.[15] The EEOC has defined a medical exam as "a procedure or test that seeks information about an individual's physical or mental impairments or health."[16] These exams may include: 1) vision tests; 2) blood, urine and breath analyses to check for alcohol use or to detect disease or genetic markers; 3) blood pressure screening and cholesterol testing; 4) range of motion tests that measure muscle strength and motor function; 5) pulmonary function tests; and 6) psychological tests that are designed to identify a mental disorder or impairment.[17] Medical exams do not include tests to determine the current illegal use of drugs; general well-being questions; physical agility tests or physical fitness tests to measure an employee's ability to perform job tasks; or psychological tests that measure personality traits such as honesty, preferences and habits.[18]

For purposes of workplace wellness programs, a key term in the ADA prohibition against employee medical exams and medical history inquiries is the word "voluntary;" the ADA permits such exams and inquiries if they are part of a "voluntary" workplace wellness program. Until recently, the only guidance the EEOC provided with regard to the meaning of "voluntary" was that the employer could neither require participation nor penalize employees who do not participate.[19] In May 2016 the EEOC further defined "voluntary" to allow an incentive for health information collection efforts as long as the incentive's value was no more than 30% of the total cost of self-only coverage offered by the employer.[20]

However, as of January 1, 2019, that incentive amount is no longer valid because of a lawsuit brought by the American Association for Retired Persons (AARP) against the EEOC in October 2016.[21]

The AARP sued the EEOC about the incentive rules because the AARP believed that many employees, especially those with low incomes and disabilities, would find an incentive of 30% of the total cost of coverage to be "involuntary." The ADA generally forbids employers from inquiring into an employee's health except in very limited circumstances. One circumstance in which an employer can inquire about an employee's health is through a "voluntary" wellness program. Wellness program inquiries into an employee's health usually take the form of health risk assessments or biometric screens. The AARP's

position was that a 30% incentive to participate in a health risk assessment would violate the ADA's "voluntary" requirement. So, the AARP asked the court to force the EEOC to rescind its incentive rules under the ADA and GINA. The court obliged and vacated the incentive rules as of January 1, 2019.[22]

Until the EEOC provides further guidance about what incentive amount may be allowed under the ADA, workplace wellness program designers will need to determine whether their employee population will view any incentive tied to health information collection, such as through HAs or biometric screens, as maintaining the voluntary nature of the program. In addition, employers will still need to comply with these other provisions of the ADA rules:

» Wellness programs that collect employee health information must be reasonably designed to promote health or prevent disease.[23]

» Wellness programs that collect employee health information are voluntary as long as the employer:

- Does not require employees to participate;
- Does not deny or limit coverage for employees who do not participate
- Does not take adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten employees; and
- Provides employees with a written notice that meets certain requirements.[24]

» Except as needed to administer the health plan, employers should not receive employee health information through a wellness program unless it is in aggregate terms that do not disclose, or are not reasonably likely to disclose, the identity of an employee.[25]

» Even if an employer complies with the ADA wellness rules, *including the limit of incentives under the ADA*, employers must still comply with other laws relating to employee wellness programs, such as Title VII, the Equal Pay Act, the Age Discrimination in Employment Act, and GINA.[26]

» The ADA safe harbor provisions in § 1630.16(f) do not apply to wellness programs, even if such plans are part of an employer's health plan.[27]

With regard to the ADA "safe harbor" under § 1630.16(f), the ADA safe harbor is for health plans and allows such plans to conduct medical inquiries and exams, regardless of the voluntary nature of such inquiries or exams, in order to administer the terms and risks of the plan.[28] The EEOC has stated that the safe harbor does not apply to workplace wellness programs, regardless of whether those programs are part of a group health plan or not.[29]

When addressing ADA compliance, it is important to remember the ADA requirement to provide reasonable accommodations to employees with disabilities so that they may fully participate in workplace wellness programs. Specifically:

> Title I of the ADA prohibits discrimination against individuals on the basis of disability in regard to employment compensation and other terms, conditions, and privileges of employment, including fringe benefits available by virtue of employment, whether or not administered by [the employer]. The ADA also requires employers to provide reasonable accommodations (modifications or adjustments) to enable individuals with disabilities to have equal access to the fringe benefits offered to individuals without disabilities.[30]

Thus, workplace wellness program designers should at all times account for equal access to incentives for all employees.

GINA

GINA has two titles of relevance to workplace wellness program design. Title I applies to "group health plans" and Title II applies to employers. The EEOC enforces GINA Title II, while the Departments of Labor, Health and Human Services and Treasury enforce GINA Title I. GINA Title I prohibits group health plans from collecting genetic information, either for underwriting purposes or prior to or in connection with enrollment.[31] "Underwriting purposes" includes changing deductibles or other cost-sharing mechanisms, or providing discounts, rebates, or other premium differential mechanisms in return for activities such as completing an HA or other wellness activity.[32] Thus, group health plans that offer premium discounts, for example, in exchange for completing an HA or biometric screening that collects genetic information (defined below) likely implicate GINA.

GINA Title II prohibits employers from requesting, requiring or purchasing genetic information with respect to an employee or an employee's family member, except in certain limited cases.[33] One of those cases applies to voluntary wellness programs.[34] According to the EEOC, genetic information is not provided voluntarily if the individual is required to provide the information or penalized for not providing it.[35] The EEOC had released further guidance about the voluntary disclosure of genetic information in workplace wellness programs, discussed below.

Some key definitions that apply to workplace wellness programs include "genetic information," "family medical history," "manifestation," and "family." "Genetic information" means information about 1) the individual's genetic tests; 2) the genetic tests of an individual's family members; and 3) the manifestation of a disease or disorder in the individual's family member (i.e., family medical history).[36] "Family medical history" means information about the manifestation of disease or disorder in family members of the individual.[37] "Manifestation" of disease means a person has been or could reasonably be diagnosed by a health care professional with appropriate training and expertise in the field of medicine involved.[38]

"Family" includes individuals related to the employee by blood, marriage or adoption.[39] Therefore, GINA considers an employee's spouse or adopted child a family member subject to the rule.

As highlighted in the above definitions, GINA concerns arise when a workplace wellness program conducts HAs that ask family medical history questions of the employee or conducts biometric screens of an employee's family members whose results can show "manifestation" of a disease or disorder. An employee wellness program, whether sponsored by a group health plan or not, that asks employees and family members questions about whether anyone in their family has or had a disease or disorder may violate GINA if it ties financial incentives to answering those questions. That is because the program arguably is requiring or purchasing "genetic information," undermining the voluntary nature of the disclosure. However, GINA regulations do permit financial inducements for completing an HA containing family medical history questions so long as the employer makes clear that the incentive will be made available whether or not the participant answers those questions.[40]

Furthermore, if a workplace wellness program ties a financial reward to an employee's family member's participation in an HA or biometric screen, the HA or screening program may violate GINA. As noted above, "genetic information" includes information about the manifestation of disease in family members.

"Family members" include spouses and adopted children, as well as family members by blood. HAs or biometric screens of family members may reveal the manifestation of a disease or disorder in those family members. Tying a financial reward, such as a premium discount, to a family member's participation in a biometric screen would violate GINA Title I, which prohibits health plans from using genetic information for "underwriting purposes" (recall that "underwriting" includes offering discounts or other types of payments in return for activities like completing an HA or participating in a wellness program). It would also arguably violate GINA Title II, which prohibits employers from requiring or purchasing "genetic information," unless the biometric screen is part of a "voluntary wellness program."

As noted above, a program is not voluntary if an individual is penalized for not providing the genetic information. Before May 2016, there was little guidance as to what the EEOC considered "voluntary" under GINA. However, at the same time the EEOC released the incentive rules under the ADA, the EEOC also released incentive rules under GINA.[41] Those rules made a limited exception to the general prohibition on offering incentives in exchange for genetic information. Specifically, the rules allowed wellness programs to offer incentives (which may take the form of a reward or penalty and may be financial or in-kind) to an employee whose spouse provides information about the spouse's own manifestation of disease or disorder as part of a HA or medical examination (e.g., to detect high blood pressure or high cholesterol) or both.[42] For the incentive regarding spousal information to be allowed, no reward was allowed to obtain other genetic information about the spouse, such as results of genetic tests. Also, no incentives are allowed for obtaining the current or past health status information of an employee's children or for other genetic information of an employee's child.[43]

The amount of the incentive for obtaining information about the manifestation of disease or disorder of an employee's spouse was 30% of the total cost of self-only coverage. The percentage maximum was measured the same as the ADA incentive maximum. And, just like the ADA incentive maximum, the GINA incentive maximum was vacated as of January 1, 2019 because of the ruling in the AARP v. EEOC case.

But, similar to the ADA, the EEOC left intact a number of provisions under GINA with which employers must still comply. The remaining provisions include:

- A provision that allows an employer to collect employee genetic information as part of an employee wellness program if the program is reasonably designed to promote health or prevent disease. This section specifies that a program is not reasonably designed to promote health or prevent disease if it imposes a penalty or disadvantage on an individual because a spouse's manifestation of disease or disorder prevents or inhibits the spouse from participating or from achieving a certain health outcome. As an example, an employer may not deny an employee an "*inducement for participation* of either the employee or the spouse in an employer-sponsored wellness program because the employee's spouse has blood pressure, a cholesterol level, or a blood glucose level that the employer considers too high."[44]
- A provision that allows an employer to *offer an inducement* to employees for completing health risk assessments that include questions about family medical history or other genetic information, provided the employer makes clear that the inducement will be made available whether or not the participant answers questions regarding genetic information.[45]
- A provision that prohibits an employer from conditioning participation in a wellness program or providing *any inducement* to an employee, spouse or other covered dependent in exchange for an agreement permitting the sale, exchange, sharing, transfer or other disclosure of genetic information.[46]
- A provision that prohibits an employer from denying access to health insurance to an employee, spouse or other covered dependent of the employee, or from retaliating against an employee, because a spouse refuses to provide information about his or her health to an employer-sponsored wellness program.[47]
- A provision that states that the GINA wellness rules do not limit the rights or protections of an individual under the ADA, HIPAA, or other civil rights rules. For example, if an employer offers an inducement for participation in disease management programs or other programs that promote healthy lifestyles and/or require individuals to meet particular health goals, the employer must make reasonable accommodations to the extent required by the ADA: that is, the employer must make modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by other employees without disabilities.[48]
- A provision that states that an employer does not violate GINA when it requests, requires or purchases genetic information of an individual who is receiving health or genetic services on a voluntary basis, as long as GINA requirements are met, including those concerning authorization and *inducements*.[49]

In both the remaining GINA and ADA sections, there are multiple references to inducements being used as part of the wellness program. Because there are numerous references to inducements in both the ADA and GINA wellness rules, one could argue that the EEOC expects employers to continue using inducements in wellness programs. The question will be what amount of inducement will still meet both the ADA and GINA requirements that participation in the wellness program be voluntary.

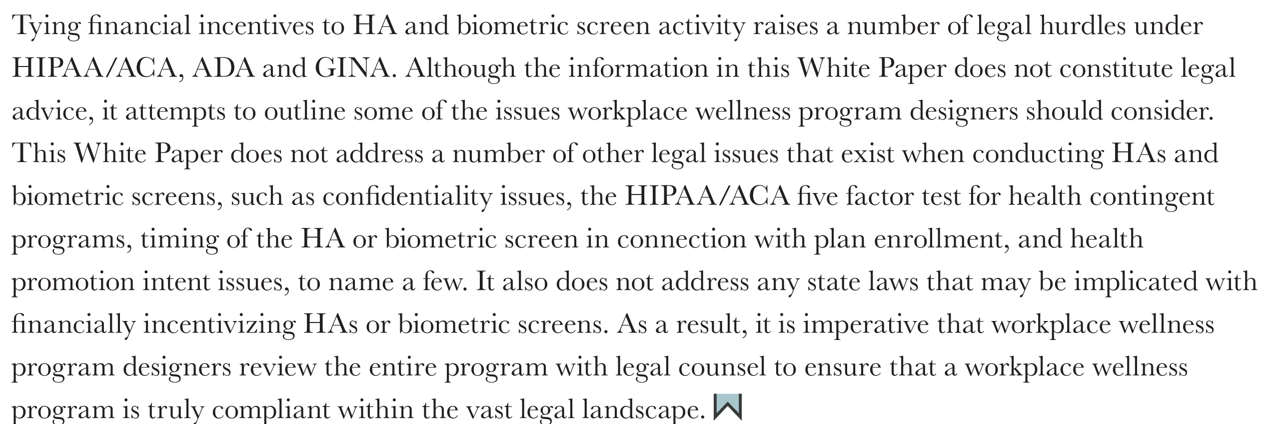
Putting it All Together

So, what do all these laws mean for employee HA and/or biometric screening programs? The following chart summarizes which types of plans must comply with the laws discussed in this paper. The plan types are: Group Health Plan ("GHP") that conducts employee HA or biometric screen ("EEHA"), Non-Group Health Plans ("NGHP") that conduct employee HA or biometric screen, GHPs that conduct family HA or biometric screen ("FAHA")

LAW	GHP EEHA	NGHP EEHA	GHP FAHA	NGHP FAHA
HIPAA/ACA	X		X	
ADA	X	X		
GINA			X	X

Thus, if the HA or biometric screen is part of a group health plan (which many are), the program must comply with the HIPAA/ACA rules. Wellness programs that are not part of a group health plan do not need to comply with those rules. However, wellness programs that include HAs or biometric screens must also comply with the ADA and GINA rules, regardless of the program's group health plan status. Group health plan wellness programs that include HAs or biometric screens must comply with HIPAA/ACA, ADA and if genetic information is collected, GINA as well.

Conclusion



Tying financial incentives to HA and biometric screen activity raises a number of legal hurdles under HIPAA/ACA, ADA and GINA. Although the information in this White Paper does not constitute legal advice, it attempts to outline some of the issues workplace wellness program designers should consider. This White Paper does not address a number of other legal issues that exist when conducting HAs and biometric screens, such as confidentiality issues, the HIPAA/ACA five factor test for health contingent programs, timing of the HA or biometric screen in connection with plan enrollment, and health promotion intent issues, to name a few. It also does not address any state laws that may be implicated with financially incentivizing HAs or biometric screens. As a result, it is imperative that workplace wellness program designers review the entire program with legal counsel to ensure that a workplace wellness program is truly compliant within the vast legal landscape.

REFERENCES

1. Soeren Mattke, et al., *Workplace Wellness Programs Study: Final Report, Rand Health*, at 69 (2013).
2. *Id.*
3. *Id.*
4. *Id.* at 71.
5. *Id.* (finding that 37% of employers that use incentives use them toward health plan premiums, 5% use them toward health reimbursement account contributions and 3 percent use them to adjust health plan cost-sharing).
6. Soeren Mattke, et al., *Workplace Wellness Programs: Services Offered, Participation and Incentives*, Rand Corporation, at xii-xiii (2014).
7. *Id.*
8. John Wilcox, *Those who need wellness most respond to incentives*, Business Management Daily (April 10, 2015), available at http://www.businessmanagementdaily.com/43247/those-who-need-wellness-most-respond-to-incentives (last visited April 20, 2015); Andrea Davis, *Employees want wellness incentives, despite regulatory uncertainty*, Employee Benefit Adviser (January 30, 2015), available at https://www.benefitnews.com/news/employees-want-wellness-incentives-despite-regulatory-uncertainty (last visited March 26, 2019).
9. 78 Fed. Reg. 33158. 33158-59 (June 3, 2013).
10. 45 CFR § 146.121(f).
11. 45 CFR § 146,121(f).
12. *Id.*
13. 29 USC § 12112(a).
14. 42 USC § 12112(d)(4) (emphasis added).
15. 42 USC § 12112(d)(1).
16. EEOC Enforcement Guidance, No. 915-002 (July 27, 2000).
17. *Id.*
18. *Id.*
19. *Id.*
20. 29 CFR § 1630.14(d)(3).
21. AARP v. EEOC, 16-cv-2113 (D. D.C. August 22, 2016)
22. *Id.*
23. 29 CFR § 1630.14(d)(1).
24. 29 CFR §14(d)(2).
25. 29 CFR § 1630.14(d)(4).
26. 29 CFR § 1630.14(d)(5). (Emphasis added.)
27. 29 CFR § 1630.14(d)(5).
28. 42 USC § 12201(e)(2).
29. *Id.*
30. *Id.* At 21661-62 (citing 42 USC § 12112(b)(5)(A) and 29 CFR § 1630.9)
31. 45 CFR § 146.122(d).
32. 45 CFR § 146.122(d)(1)(ii).
33. 42 USC § 2000ff-1.
34. 29 CFR 1635.8(b)(2).
35. 29 CFR § 1635.8(b)(2)(i)(A).
36. 29 CFR § 1635.3(c).
37. 29 CFR § 1635.3(b).
38. 29 CFR § 1635.3(g).
39. 29 CFR § 1645.3(a).
40. 29 CFR § 1635.8(b)(2)(ii).
41. 81 Fed. Reg. 31143 (May 17, 2016).
42. 29 CFR § 1635.8(b)(iii).
43. *Id.*
44. 29 CFR § 1635.8(b)(2)(i) (Emphasis added.)
45. 29 CFR § 1635.8(b)(2)(ii) (Emphasis added.)
46. 29 CFR § (1635.8(b)(2)(iv) (Emphasis added.)
47. 29 CFR § 1635.8(b)(2)(v).
48. 29 CFR § 1635.8(b)(2)(vii).
49. 29 CFR § 1635.8(c)(2) (Emphasis added.)

WELCOA
WELLNESS WORKS HERE

17002 MARCY STREET, SUITE 140 | OMAHA, NE 68118
402.827.3590 | WELCOA.ORG