Legally Incentivizing Health Assessment and Biometric Screen Participation

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Agenda
- Importance of Group Health Plan Status
- HIPAA/ACA
- EEOC Case Update
- ADA Final Rule
- GINA Final Rule
- Quiz Questions

Wellness Program Laws
DISCRIMINATION
(Insensitive to needs/privacy)
(Equal Opportunity)
We Can’t All Be Triathletes

We All Want to Feel Good

Preliminary Question

Group health plan?
Preliminary Question

Group Health Plan:
• Provides “Medical Care”
  • To employees/dependents directly or through insurance

Preliminary Question

Medical Care:
• Regards individual’s physical condition or state of health; and/or
• Relates to the
  • Relief or alleviation of health or medical problems

Preliminary Question

Medical Care is NOT:
Program that furthers general good health
• Fitness classes
• Nutrition classes
Why Do We Care?

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HIPAA/ACA

- HIPAA Nondiscrimination
  - Generally prohibits discrimination by group health plans based on “health factors.”
  - Carves out exception for wellness programs
  - Can vary benefits (including cost-sharing) based on whether person meets standards of a wellness program.

HIPAA/ACA

- ACA changes to HIPAA (eff. 1/1/14):
  - Codifies 2006 wellness program rules into 42 USC s. 300gg-4(i).
  - Increases the “reward” from 20% to 30% of the cost of coverage (50% for tobacco use prevention programs).
  - Adds stricter requirements for health-contingent plans.
HIPAA/ACA

• To qualify for wellness program exception, must meet certain conditions:
  • Participatory programs must only be offered to “similarly situated” individuals.
  • No limit on financial incentives.
  • Health-contingent programs must meet 5 factor test.

HIPAA/ACA

• Distinction between participatory and “health contingent” is whether reward is tied to:

  HEALTH STATUS

HIPAA/ACA

• Participatory program examples:
  • Fitness center membership reimbursement
  • Reward for participating in health assessment
  • Waiver of health plan cost-sharing for preventive items or services
  • Smoking cessation program reimbursement
  • Reward for attending health education seminar
HIPAA/ACA

- Two types of health-contingent programs:
  - Activity
    - May seek verification from physician that health factor makes it unreasonably difficult or medically inadvisable to satisfy activity.
  - Outcomes-based
    - May not seek verification
  - Both must meet 5 factor test.

HIPAA

- Examples of Activity-Only:

HIPAA/ACA

- Examples of Outcomes-based.
**HIPAA/ACA**

**Five factors:**

1. Qualify for the reward at least once/year.
2. Total reward may not exceed 30% (50% for tobacco prevention programs) of total cost of coverage.
3. Reasonable design to promote health or prevent disease.

**Five factors (cont.)**

4. Full reward must be available to all similarly situated individuals.
   - Must provide reasonable alternative standard (or waiver of standard)
5. Disclosure of reasonable alternative standard (or waiver) in plan materials describing the wellness program terms.
   - SPD
   - Communications disclosing individual did not meet initial outcomes-based standard

**Other Pointers:**

- Retroactive payment after end of plan year
- Must assist employees in finding/paying for educational program
- Reasonable Time Commitment
  - Nightly, one-hour class unreasonable
Test Your HIPAA/ACA Knowledge

1. ABC Health System offers annual wellness program consisting of HRA and biometric assessment. Employees and covered spouses who participate in the HRA and biometric test receive a reduced health insurance premium.
2. Participatory or health contingent?

Test Your HIPAA/ACA Knowledge

1. ABC Health System contacts wellness program participants whose HA or biometric results indicate some health risk. The purpose of the contact is to offer the at-risk participants health coaching services. If the participant refuses coaching, he or she loses $50 per pay period in premium savings until he or she engages with a coach.
2. Participatory or health contingent?

ADA and GINA
ADA

• Prohibits discrimination by employers on basis of disability in regard to terms, conditions and privileges of employment.
  • Discrimination includes:
    * Requiring medical examinations, and
    * Making inquiries as to whether employee has disability unless such exam or inquiry is:
      * Job-related and consistent with business necessity
  • Must provide equal opportunity for disabled employees to participate in programs and offer reasonable accommodations.

ADA

• Medical exams include:
  • Procedures
  • Tests
  • That seek information on an employee’s health
  • Prohibition applies regardless of whether employee is disabled.

ADA

• Carves out exception for “voluntary” medical exams part of employee wellness program.
  • Pre-EEOC ADA rules, EEOC Enforcement Guidance said wellness program is voluntary as long as employer neither:
    * Requires participation, nor
    * Penalizes employees who do not participate.
ADA

- Safe harbor for administering terms of bona fide benefit plan
- Based on underwriting risks, classifying risks or administering such risks.
- Applies whether exam/inquiry is voluntary or not.

EEOC v. Flambeau, Inc.

Turns ADA proposed rules on their head.

Flambeau

- Employee-only program tied to group health plan
- Biometric testing and HRA
- Health insurance offered only to those employees who completed HRA and biometric test
- Completion not a condition of employment
- Also sponsored weight loss competitions, vending machine modifications, other "organization-wide changes"
Flambeau

Company used information to:
- Identify health risks and common medical conditions
- Estimate cost of providing insurance
- Set premiums
- Evaluate need for stop-loss insurance
- Adjust copays
- Except for tobacco use, information provided to Flambeau in aggregate

Flambeau

Court found in favor of Flambeau
- Applied ADA insurance safe harbor provision
  - Allows employer to establish/administer terms of bona fide benefit plan based on:
    - Underwriting risks
    - Classifying risks
    - Administering such risks.
  - Wellness program requirement was a "term" of its benefit plan
    - No matter that Flambeau did not specify the requirement in its SPD or collective bargaining agreement.

Flambeau

Judge Crabb rejected EEOC's argument that application of ADA insurance safe harbor renders ADA voluntary medical exam exception irrelevant.
- EEOC asserted this position in its proposed ADA rules.
- Difference between safe harbor and voluntary medical exam exception is "obvious."
  - Safe harbor applies to medical exams tied to group health plan.
  - Voluntary medical exam exception applies when medical exams not tied to group health plan.
Flambeau

• EEOC’s proposed ADA rules do not address when and how ADA insurance safe harbor applies to medical examinations that are part of a group health plan.
• EEOC may be correct that relying on ADA insurance safe harbor not appropriate for stand-alone wellness programs unrelated to administration of insurance risks.
• Not the case in Flambeau.

Flambeau Lessons

• EEOC’s proposed ADA rules are at stake.
  • Addressed group health plan medical exam incentives only.
  • Under Flambeau, tying incentives to group health plan medical examinations invokes ADA insurance safe harbor.
  • EEOC dismissed the applicability of ADA insurance safe harbor in proposed rules.
  • EEOC may appeal Judge Crabb’s decision to save its proposed rules or at the very least, must reconfigure those rules to address applicability of ADA insurance safe harbor.

Flambeau Lessons

• Two court decisions (Seff and Flambeau) arrive at similar conclusions about ADA insurance safe harbor.
  • Justifies use of safe harbor in designing workplace wellness HA and biometric screen incentives.
  • Risks still exist
    • Family medical history questions or incentives tied to family participation in HAs or biometric screens may implicate GINA
    • Possible appeal
  • Do mandates provide optimal work environment?
EEOC Not a Fan of ADA Safe Harbor

- Safe harbor does not apply to worksite wellness programs
- Safe harbor meant for true insurance practices
- Legislative history makes no mention of wellness programs in context of safe harbor
- EEOC's interpretation of ADA (including applicability of safe harbor provision) should trump a court's interpretation

EEOC Take on ADA Safe Harbor

- Language in final rule:
  - "The 'safe harbor' provisions in s. 1630.16(f) of this part applicable to health insurance, life insurance, and other benefit plans do not apply to wellness programs, even if such plans are part of a covered entity's health plan."
Recent Cases

- EEOC v. Orion Energy Systems
- EEOC v. Flambeau, Inc.

Only Pending Case

- Orion Energy:
  - Employee-only program
  - HRA and fitness component
  - Employees required to use range of motion machine in Orion's fitness room
  - HRA asked medical history questions and had blood work component
  - Nonparticipants in HRA required to pay entire premium
  - $50/month penalty for refusing fitness component

EEOC Final ADA Rules

- Issued on May 16, 2016
- Compliance with incentive provisions by first day of first plan year that begins on or after January 1, 2017.
What Does This Mean For Wellness Programs?

• Time for a compliance audit!

EEOC Final ADA Rules

• Key Provisions:
  • Incentives must be limited to 30% of cost of self-only coverage
  • Applies regardless of group health plan status

EEOC Final ADA Rules

• Calculating the incentive
  • Employees enrolled in Employer Plan
    • 30% of total cost of self-only coverage (includes both employee and employer contribution)
  • All Employees Regardless of Plan Enrollment
    • 30% of self-only coverage under employer’s plan
  • All Employees when Multiple Plans Offered
    • 30% of total cost of lowest cost self-only plan available
  • All Employees when No Plan Available
    • 30% of self-only coverage under 2nd lowest cost Silver Plan for 40 year nonsmoker on Exchange
EEOC Final ADA Rules

- Incentive Limit Applies to
  - Participatory and
  - Health Contingent Programs:
  - Only applies to programs with HRAs/Biometric Screens

EEOC Final ADA Rules

- Incentive Limit Applies to
  - Financial
  - In-Kind Incentives
    - Time off
    - Prizes

EEOC Final ADA Rules

- Special treatment for tobacco cessation (no change from proposed rules).
EEOC Final ADA Rules

• May not deny/limit coverage for nonparticipants.

EEOC Final ADA Rules

• Programs that collect medical information must provide employees with notice.

EEOC Final ADA Rules

• Notice requirement applies even in absence of incentives
• Notice must contain following:
  • Be understandable
  • Describe type of medical information obtained
  • Describe specific purposes for which information will be used
  • Who will receive information
  • Restrictions on disclosure of medical information
  • Methods employer will use to prevent improper disclosure
EEOC Final ADA Rules

Employers and vendors must protect health information confidentiality.

EEOC Final ADA Rules

EEOC expects group health plan programs to abide by HIPAA privacy/security rules:

- Employer certification requirements for those who administer programs
- Best practice: separate those who handle individually identifiable health information from those who make employment-related decisions
- Use of a third-party vendor may help

EEOC Final ADA Rules

Employers and Vendors should have clear privacy policies and procedures related to medical information:

- Collection
- Storage
- Disclosure
- Encryption
- Notice of Breach
- Include employee training
EEOC Final ADA Rules
• May not Require Employee to Agree to Sale, Exchange, Sharing, Transfer of Information
• Review vendor agreements to ensure employees do not unwittingly waive confidentiality protections.

EEOC Final ADA Rules
• Reasonably designed to promote health/prevent disease
  • Must provide follow-up after collecting medical information
  • Should not be about collecting information only.
  • Different from HIPAA/ACA
  • Only health contingent need to be “reasonably designed”

EEOC Final ADA Rules
• Must provide reasonable accommodations (Equal Opportunity)
EEOC Final ADA Rules

Equal Opportunity applies to both participatory and health contingent programs.

- Compliance with ADA rules does not mean compliance with other laws:
  - Title VII
  - Equal Pay Act
  - ADEA
  - GINA
  - Other ADA sections

Test Your ADA Knowledge

- Employees or spouses who refuse to enroll in ABC Health System’s wellness program (i.e., refuse to take the HA or biometric test) are offered only one plan option: a consumer driven plan with a high deductible. They are denied access to more comprehensive plan options. Assume this incentive to participate is less than 30% of the total cost of coverage.
  - Permissible under the ADA?
Test Your ADA Knowledge

* ABC Health Company's wellness program consists of an online HA. ABC’s HR department sees the results and sends those results to ABC's health insurer. Employees do not see results.
  * Permissible under the ADA?

Test Your ADA Knowledge

* ABC administers an online HRA. One question asks employees if they do not exercise, why they do not exercise. The intent is to understand employee limitations, such as time, energy, accessibility and perhaps physical or mental, that prevent employees from exercising. ABC does not share results with employees but plans to use the HRA information to design a meaningful wellness program.
  * Permissible under the ADA?

Test Your ADA Knowledge

* ABC administers an online HRA. Participation has been lagging. To help increase participation, the wellness vendor is asked to disclose the names of the nonparticipants to ABC’s managers and supervisors, who can then encourage those employees to participate.
  * Permissible under the ADA?
Test Your ADA Knowledge

- ABC offers all employees a chance to earn an incentive of $2000 by attending a 12-week nutrition program. The program runs for two hours each day, four days per week. The total cost of self-only health coverage is $5,000.
- Permissible under the ADA and/or HIPAA/ACA?

GINA

- Two applicable titles:
  - Title I – Group Health Plans
  - Title II – Employers

GINA

- "Genetic information" includes
  - Manifestation of disease or disorder in family members ("family medical history")
    - Can be discerned from family medical history questions or biometric screenings of family members
  - "Family" includes spouses and adopted children and dependents of spouses, as well as biological family.
GINA Title I

• Title I generally prohibits group health plans from:
  • Adjusting premium or contribution amounts based on genetic information;
  • Requesting/requiring genetic testing;
  • Requesting/requiring/purchasing genetic information for underwriting purposes or in connection with open enrollment.

GINA Title II

• Title II generally prohibits employers from discriminating against employees or applicants because of genetic information.
  • DOL/DHHS/IRS enforce GINA Title I
  • EEOC enforces GINA Title II (employment).

GINA Title II

• Exception for voluntary wellness programs.
  • Individual must provide prior knowing, voluntary and written authorization.
  • Authorization may be electronic;
  • Describes what genetic information will be obtained and the purposes for which it will be obtained;
  • That the individually identifiable information is not accessible to coworkers/supervisors.
GINA Title II

• May offer financial inducements to complete HRA that includes questions about family medical history or other genetic information.
  • Must make clear, however, that inducement is available regardless if participant answers questions regarding genetic information.

GINA Title II

• Employers who offer rewards to employees who voluntarily provide family medical history to participate in disease management programs that address a health condition must also offer reward to individuals with current health conditions or with lifestyle choices that increase risk of developing a condition.

GINA

• GINA compliance red flags raised if wellness program has **Two Elements**:
  1. Family medical history questions of employees and/or family members (such as part of HRA) or biometric screens of spouses/dependents; and
  2. Financial incentives offered for participating in those HRAs or biometric screens.
GINA Final Rule
• Appeared in May 27, 2016 Federal Register (alongside final ADA rule)
• Allows wellness programs to offer incentives for employee's spouse to provide certain information
  • Information limited to spouse's own manifestation of disease or disorder;
  • Must be part of a health assessment or medical examination or both.

GINA Final Rule
• Applies to All Wellness Programs
  • Unlike proposed GINA rule, incentive rule applies regardless if spouse or employee enrolled in employer health plan.

GINA Final Rule
• Incentive Limit Calculation:
  • Employees enrolled in Employer Plan
    • 30% total cost of self-only coverage (includes both employee and employer contribution)
  • All Employees Regardless of Plan Enrollment
    • 30% total cost of self-only coverage under employer's plan
  • All Employees when Multiple Plans Offered
    • 30% total cost of lowest cost self-only plan available
  • All Employees when No Plan Available
    • 30% cost of self-only coverage under 2nd lowest cost Silver Plan for 40 y/o nonsmoker on Exchange
  • 30% Incentive Applies to Spouse and Employee Separately
GINA Final Rule

• Calculation Example:
  • Cost of family coverage is $14,000. Self-only cost is $6,000. Incentive can be up to $1,800 for employee and $1,800 for spouse (30% of $6,000).

GINA Final Rule

• Can't Require Agreement to Sell Information or Waive Confidentiality
  • Similar to ADA final rule
  • Important to determine where data collected goes

GINA Final Rule

• Similar to ADA rules, Employers must maintain medical (genetic) information in separate, confidential files.
  • GINA prohibits disclosure of genetic information except in limited circumstances:
    • To employee
    • Court order
    • Government officials to ensure GINA compliance
GINA Final Rule

- Similar to ADA, EEOC urges employers to adopt best practices for protecting confidentiality:
  - Adopt strong privacy policies
  - Train individuals who handle sensitive information
  - Encrypt electronic files
  - Notify employees of breach

GINA Final Rule

- In addition to Employee, Spouse must provide prior, knowing, voluntary and written authorization.
  - Authorization must contain several elements, such as:
    - Be easy to understand;
    - Description type of genetic information to be obtained and purpose for which it will be used;
    - Describe restrictions on disclosure of genetic information;
    - Genetic information is collected for purposes of providing health or genetic services;
    - Information only provided to individual and licensed health care professionals involved in providing genetic services and not disclosed to employer except in aggregate terms.

GINA Final Rule

- Important Take-Away from GINA Final Rule:
  - Collection of spousal manifestation of disease or disorder information should not be done for sake of collecting that information.
  - Purpose should be to provide services through worksite wellness program.
GINA Final Rule

• Like ADA Final Rule, collection of spousal information must be part of wellness program reasonably designed to promote health or prevent disease.
• Not reasonably designed if:
  • Impose a penalty on individual because of spouse's disorder prevents spouse from participating in program or achieving certain outcome;
  • Collection of information does not include follow-up information or advice or not used to design a program that addresses conditions identified by information.

GINA Final Rule

• Employers May Not Deny Access to Health Coverage Based on Spouse's Refusal to Provide Information.
• Employers May Not Retaliate Against Employee Based on Spouse's Refusal to Provide Information.

GINA Helpful Tips

• To avoid GINA noncompliance:
  • Do not tie financial incentives to participation in OA or biometric screen of employee's children
  • Manifestation of disease or disorder of spouse "ok" under final GINA rules
  • Do not ask employees family medical history questions;
  • If you do ask employees family medical history questions:
    • Get employee's written authorization
    • GINA Title II allows exception for collecting genetic information under "voluntary wellness program"
    • Don't tie financial rewards to answering those questions
    • Incentive should be available regardless if participant answers family medical history questions
    • Ask the questions after open enrollment
Test Your GINA Knowledge

* ABC Health System’s HA asks the employee family medical history questions and screens the employee's spouse to determine current health status. Employees or spouses who refuse to participate in the HA and/or biometric screen, which are administered in conjunction with open enrollment, are offered only one plan option: a consumer driven plan with a high deductible. They also forego an employer HSA contribution and must pay $50/pay period more in premium. Assume this incentive to participate is more than 30% of the total cost of coverage.
  * Permissible under GINA?

Test Your GINA Knowledge

* Terry, spouse of employee of ABC Company agrees to provide health status information to help employee earn an incentive through the employer wellness program. Terry logs onto an online portal sponsored by a wellness vendor to provide the information. The portal contains the following privacy statement:
  * We will not share your PHI with any third party, including your employer. We have strict security controls in place to ensure that the information you provide is kept private and secure.
  * Is this privacy statement sufficient under GINA?

Test Your GINA Knowledge

* Terry, an adult child of employee of ABC Company agrees to provide health status information to help employee earn an incentive through the employer wellness program. Terry logs onto an online portal sponsored by a wellness vendor to provide the information. Terry never receives any follow-up after providing her health status information.
  * Permissible under GINA?
Questions?

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