

# Wellness Checkup



TEXAS ASSOCIATION of COUNTIES  
HEALTH AND EMPLOYEE BENEFITS POOL



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# Wellness Roadmap

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- HIPAA Wellness Rules
- ADA
- GINA
- ERISA
- COBRA
- ACA
- HIPAA Privacy
- Tax



# Stop #1

## HIPAA Wellness Rules

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# HIPAA Wellness Rules: What is a GHP?

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- Apply to group health plans (GHPs) that provide “medical care”
- Broad definition of “medical care”
- Includes amounts paid for “prevention” or “affecting” body
- Look to DOL guidance on EAPs
- Look to IRS guidance on “medical expense” under Code section 213(d)



# HIPAA Wellness Rules: Examples

## *Where is the line?*

- *Probably Not Subject to HIPAA*

- Health Newsletter
- Email Appointment Reminders
- Weight Watchers Class
- Fitness Center
- Subsidy for Healthy Options in Cafeteria
- Pedometers / FitBit

- *Probably Subject to HIPAA*

- Comprehensive, Individualized Coaching
- Disease Management
- Annual Physical / Biometric Screening
- Flu Shot?
- Biometric Screenings?
- Smoking Cessation?



# Quick Refresher: HIPAA Wellness Rules

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- HIPAA wellness rules apply if program offers an incentive that is—
  - Based on physical activity
    - Example: Participant receives gift card for exercising
  - Based on attaining a particular outcome related to a health factor
    - Example: Participant receives \$100 for attaining low blood pressure
    - Example: Plan charges higher premium for tobacco use



# Quick Refresher: HIPAA Wellness Rules

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- HIPAA wellness rules do not apply if
  - There is no incentive
  - Incentive is provided merely for participation
    - Example: Participant receives \$100 for attending a nutrition class
    - Example: Participant receives health insurance premium credit for undergoing annual physical exam (and not based on results of exam)
  - Benign discrimination in favor of individual with adverse health status
    - Example: Participants with diabetes receive free \$100 eye exam
    - But be careful – to be benign discrimination, must treat those with adverse health status better than general population (if extra requirement for those with diabetes, would be subject to HIPAA wellness rules)



# HIPAA Wellness Rules: 5 Factors

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- Annual qualification
- Reasonable design
- 30% incentive limit (up to 50% for tobacco programs)
- Must provide reasonable alternative if can't meet standard
- Notice of reasonable alternative (regulations have sample language)

*Based on cost of coverage in which individual is enrolled, when combined with other HIPAA wellness program incentives*



# HIPAA Wellness Rules: Example

## Bluebeard Company Health Plan Wellness Program

- Wellness Program Incentives
  - \$100 if take Health Risk Assessment
  - \$100 for Annual Physical
  - \$100 if Walk 30 Minutes/Day
  - \$100 if Favorable BMI
  - \$200 if Tobacco Free
- Annual Premium is \$1,000
- 30% Limit is \$300
- 50% limit (for tobacco) is \$500

- **Not counted:**
  - HRA or Annual Physical (participatory programs, not health-based)
- **Counted:**
  - Walking and BMI programs (health-based) subject to 30% limit
  - Total incentive \$200, so ok
- **Counted:**
  - Tobacco Program (health-based) subject to 50% limit (when combined with above)
  - Total incentive \$400, so ok



# Stop #2

## ADA Wellness Rules

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# Quick Refresher: ADA Wellness Rules

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- ADA restricts an employer's ability to—
  - Make disability-related inquiries
  - Require medical examinations that are not job-related
- Wellness programs that include disability-related inquiries or medical examinations must comply with ADA wellness rules
  - Example: Health risk assessment questionnaires
  - Example: Biometric screenings (blood pressure, cholesterol)



# ADA Wellness Rule: 4 Factors

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- Reasonable design (including reasonable accommodation if needed)
- Confidentiality requirements similar to HIPAA privacy
- Voluntary / not gatekeeper to be in plan
- Notice requirement about how information is collected and used (EEOC has issued model)
- ~~30% incentive limit~~



## Real Life Issues: AARP v. EEOC

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- ADA says wellness programs must be “voluntary”
- EEOC rules determined that 30% incentive limit is voluntary
- AARP brought suit claiming that EEOC had no basis for 30% limit
- Court agreed and ultimately vacated EEOC rule, effective 1/1/19
- Applies to 30% limit under ADA and GINA rule



## Real Life Issues:

Post-AARP – What will happen if no rules?

### *Two Sides to Every Story*

#### One view (pro-health plan)

- Go back to ADA statute, which says wellness program must be “voluntary”
- No express limit on incentive amounts
- So **any incentive is permissible**, as long as program is not mandatory
- Maybe even bring back ADA safe harbor for employer health plans so ADA n/a at all



#### Another view (pro-AARP)

- Go back to ADA statute, which says wellness programs must be “voluntary”
- Not “voluntary” if incentive is too great
- If no 30% “safe harbor” then **no incentive allowed at all** - under ADA or GINA

Remember HIPAA  
limits still remain

# Stop #3

## Genetic Information Nondiscrimination Act (GINA)

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# GINA: Two Parts

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## Title I

- Enforced by DOL, IRS, HHS (for health plans)
- Health plan cannot offer any type of incentive (even a t-shirt) for completion of a Health Risk Assessment (HRA) that asks family history
- Health plan cannot collect genetic information prior to or in connection with enrollment



# GINA: Two Parts

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## Title II

- Enforced by EEOC (for employers)
- Similar prohibition on asking family history questions
- New rules issued 5/17/16 related to asking questions of spouse / dependent child
- If ask spouse/child questions about OWN condition, considered “family history” of employee, so triggers GINA



# GINA EEOC Wellness Rules

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- Under new rules, cannot have Health Risk Assessment (HRA) incentive for child
- Under new rules, ok to have spousal Health Risk Assessment (HRA) incentive as long as:
  - Voluntary and reasonably designed to promote health or prevent disease
  - Written authorization from spouse
  - ~~30% incentive limit (similar to ADA calculation method)~~



A few more stops before we're  
done . . .

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# COBRA

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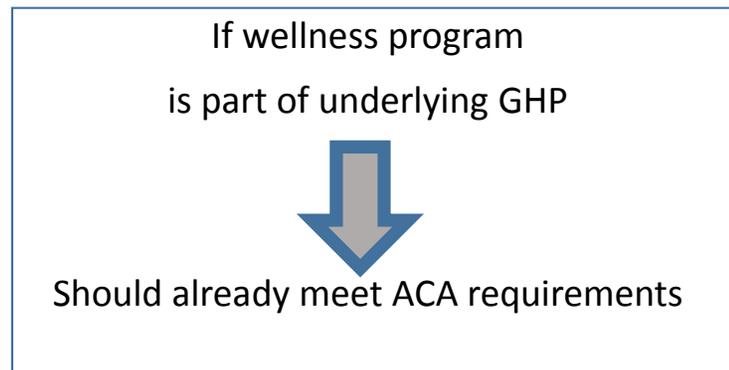
- If employer is involved, also may have COBRA obligation for wellness program
- If wellness program is part of underlying health plan, COBRA election should include wellness program
- If wellness program is stand-alone, may need to offer COBRA separately
- If insured, also may have state “COBRA” laws



# Affordable Care Act

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- Certain ACA mandates apply to a GHP
- For example - OOP max limit, annual/lifetime limit rules, and preventive care requirements



# Affordable Care Act

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## But if wellness program is stand-alone:

- Need to find exception, such as fitting under HIPAA excepted benefit category
- **TREND:** Try to fit under exception for EAPs
  - Only works if no “significant” medical benefits, employer pay all, and not tied to another plan
  - May fit under EAP exception if wellness program only provides limited counseling, but probably not if offers full-blown disease management



# HIPAA Privacy

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- May need privacy procedures to safeguard information
- May need business associate contract with wellness program vendors
- May need authorization to disclose PHI (for example, to employer to pay incentive)
- Also watch out for rules related to marketing if wellness program is promoting a product or service



# Quick Refresher: Taxation of Wellness Rewards (IRS CCA 201622031)

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- Cash wellness rewards are always taxable
  - No de minimis exception; includes gift cards
- Gym fees and other non-excludable wellness rewards are taxable
  - Payment of employee's gym membership fees is a non-excludable benefit that must be included in income and subject to employment taxes
  - Contrast with a de minimis reward (e.g., T-shirt)
- No "double-dipping"
  - IRS has advised on various schemes promoted as wellness programs
    - Salary reductions taken pre-tax as "wellness program premiums," and returned to the employee as a purportedly nontaxable "premium reimbursement" or "reward" under wellness program (e.g., for completing a health risk assessment)
  - IRS confirmed the return of pretax amounts to the employee (even if called a wellness program reward) is taxable income



# Key Takeaways

- What rules does your wellness program trigger?
- Work through each checklist to ensure compliance.
- We will ALL be watching for new EEOC rules / guidance.



# Wellness Scenario: Fitness Challenge—What Rules Apply?

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- Fact pattern:
  - Our company is considering implementing a Fitness Challenge that would involve providing wearable activity-tracking devices to employees who choose to participate.
  - We may also add coaching for employees with certain risk factors
  - We haven't decided whether to offer an incentive, but, if we do, we're considering a drawing for a "grand prize" of a gift card from ABC Sporting Goods
- What compliance issues do we need to consider? (next slide)



# Wellness Scenario #2: Fitness Challenge—What Rules Apply?

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- Compliance considerations include—
  - Is the wellness program a GHP, or part of a GHP?
    - GHP rules include HIPAA (wellness rules and privacy/security rules) and COBRA
  - Do the ADA wellness rules apply?
  - Who will administer the program, and what agreements will be in place with that entity?
  - What are the federal income tax consequences—with respect to providing the tracking devices and the grand prize? (next slide)
  - If we design our wellness program as a group health plan, could it be an ACA excepted benefit?



# Questions?

