

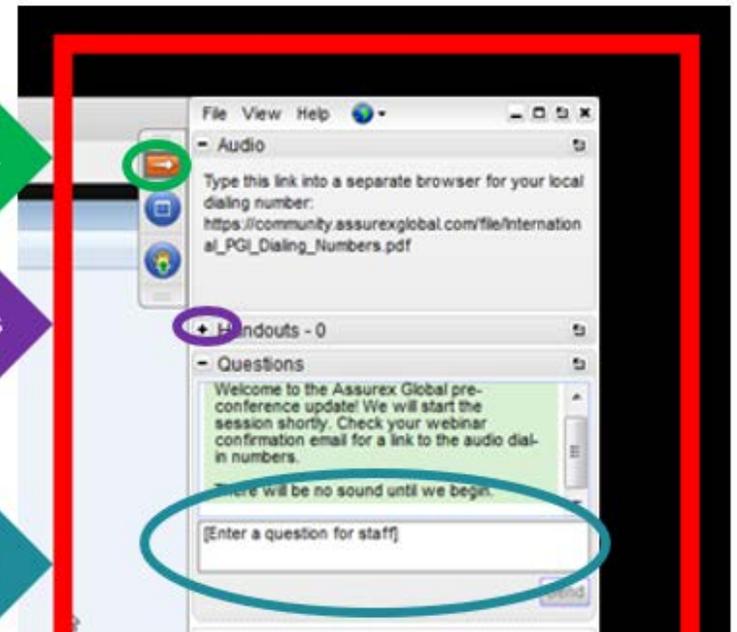
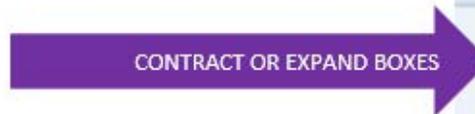
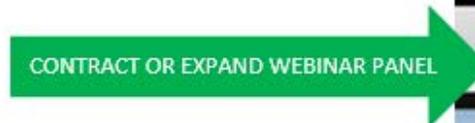
November 16, 2017

# Future of Wellness Plans after AARP v. EEOC Decision

Presented by Benefit Comply

## Wellness

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- You will be able to submit questions during the webinar by using the “Chat” or “Questions” box located on your webinar control panel.
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## Wellness

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# Agenda

- HIPAA Nondiscrimination Rules
- Americans with Disabilities Act (ADA)
- Genetic Information Nondiscrimination Act (GINA)
- Current Developments
- Other Applicable Laws
- Questions / Examples

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# WELLNESS PROGRAM DEFINITION

- The term "wellness program" refers to programs and activities typically offered in association with employer-provided health plans as a means to help employees improve health and reduce health care costs

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# HIPAA Nondiscrimination Rules

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# HIPAA Nondiscrimination Rules

- Prohibit discrimination in health plans based on health status
  - Group health plans that
    - base health plan **eligibility**, **cost of coverage**, or **benefit levels** (e.g., amount of co-pay, deductible, etc.) on
    - an individual's health status (e.g., weight, cholesterol) are “discriminatory”
  - **Exception** for wellness programs that meet certain requirements
- HIPAA wellness rules apply only when the incentive affects the group health plan (e.g. reduced premiums or cost-sharing)
  - HIPAA rules do not apply to wellness incentives that simply provide cash, gifts, etc., which do not impact the group health plan
- Two types of programs under HIPAA wellness rules
  - Participatory wellness programs
  - Health-contingent wellness programs

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# HIPAA Nondiscrimination Rules

- Participatory Wellness Programs – First Exception
  - Incentive(s) not based on satisfying a standard that is related to a health factor
  - Only requirement is that it must be offered to “all similarly situated individuals”
    - No limit on incentives
  - Examples include:
    - Reduced copayment for participation in a biometric screening (incentive(s) are not based on screening outcomes or scores)
    - Medical premium reduction for attending a monthly, no-cost health education seminar

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# HIPAA Nondiscrimination Rules

- Health-Contingent Wellness Programs – Second Exception
  - Incentive(s) based on satisfying a standard related to a health factor
  - Two types of health-contingent wellness programs
    - Activity-only
      - Required to perform or complete an activity related to a health factor (e.g. walking, diet, or exercise programs)
    - Outcome-based
      - Required to attain or maintain a specific health outcome (such as not smoking or attaining certain results on biometric screenings)

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# HIPAA Nondiscrimination Rules

- 5 Requirements for Health-Contingent Wellness Programs
  1. Must be given annual opportunity to earn the incentive
  2. Maximum incentive cannot exceed 30% of the total cost of coverage, or 50% for tobacco-related programs
    - If dependents participate, incentive cannot exceed 30% (or 50%) of the total cost of the coverage in which an employee and any dependents are enrolled
    - Combined incentive for both tobacco and non-tobacco related standards may not exceed 50% (30% for non-tobacco related standards)
  3. Reasonably designed to promote health or prevent disease. Must not be overly burdensome or a subterfuge for violating discrimination laws
  4. Must be available to all similarly situated individuals and individuals who qualify by satisfying a reasonable alternative
  5. Must disclose the availability of a reasonable alternative standard in all plan materials describing the terms of the wellness program (model notice available)

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# Americans with Disabilities Act (ADA)

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# ADA

- The Americans with Disabilities Act (ADA) generally restricts employers from making disability-related inquiries or requiring medical examinations of employees unless they are job-related or consistent with business necessity
  - Exception for wellness programs that are considered “voluntary”
  - Examples:
    - Health risk assessment (HRA) that includes disability-related questions
    - Biometric screening programs, which are medical examinations
    - Medical testing to determine tobacco use
- In addition, any wellness program must provide a “reasonable accommodation”, as appropriate, to enable any disabled individual to earn incentives

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# ADA

- EEOC Final Rules – May 2016
  - Apply to any wellness program requiring disability-related inquiries and/or medical examinations
  - Generally effective for plan years beginning on or after January 1, 2017\*
  
- AARP v. EEOC
  - Federal court concluded wellness rules arbitrary and capricious
  - Sent back to EEOC for further review
  - But ... still effective
  - ... for now

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# ADA

- EEOC Requirements (for now):
  - Must be Voluntary: Cannot be denied employer group health plan coverage or be subjected to any adverse employment action, coercion, or intimidation
  - Reasonable Design: Must be reasonably designed to promote health or prevent disease. Must not be overly burdensome or a subterfuge for violating discrimination laws
  - Required Notice: Must provide employees with notice that includes a description of the medical information collected, who will have access to it, and how it will be used and kept confidential – *new model notice available on EEOC's website*

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# ADA

- **EEOC Requirements (continued):**
  - Confidentiality: Information collected provided only in aggregate form that is unlikely to disclose the identity of specific individuals except as necessary to administer the plan. Information must be collected on separate forms, maintained in separate files, and treated as a confidential medical record
  - Reasonable Accommodation: Reasonable accommodation is required if a disability or medical condition prevents an employee from participating or earning an incentive
  - Other: Employees may not be required to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information (except as permitted to carry out activities related to the wellness program), or to waive confidentiality protections available under the ADA as a condition for participating or receiving an incentive

# ADA

- EEOC Requirements (continued):

- Incentive Limits: Maximum incentive cannot exceed 30% of the total cost of employee-only coverage
  - Applies regardless of whether incentive affects the group health plan
  - Applies regardless of whether program is participatory or health-contingent
  - Medical testing to determine tobacco use limits incentives to 30% (not 50%)
  - Total cost of coverage includes both employee and employer contributions

Plan Design	Incentive Limit
Reward available only to those enrolled in the plan	30% of the cost under the plan in which the individual enrolls
Single plan offered, but reward available regardless of whether individual enrolls	30% of the cost under that plan
Multiple plans offered, but reward available regardless of whether individual enrolls	30% of the lowest cost plan
Employer does not offer a group health plan	30% of the second lowest cost Silver Plan through a public Exchange

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# ADA

## Recommendation:

- Continue to follow current rules
- Monitor developments

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# Genetic Information Nondiscrimination Act (GINA)

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# GINA

- The Genetic Information Nondiscrimination Act (GINA) prohibits an employer from requesting, requiring or purchasing employee “genetic information”
  - Exception for health or genetic services offered as part of a voluntary wellness program if certain requirements are met
- “Genetic information” includes information about:
  - A person’s genetic tests or the genetic tests of the person’s family members
  - A person’s request for or receipt of genetic services (e.g., genetic research, counseling on a genetic condition, genetic education)
  - The manifestation of a disease or disorder in the individual's family member (i.e., family medical history or “health status”)

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# GINA

- **Wellness Program Involving Genetic Information**
  - Employers may ask, but cannot require an employee to disclose genetic information
    - Employee must give prior, knowing, voluntary, and written authorization after getting description of the type of genetic information, its use, and restrictions on its disclosure (e.g., restricted to health professional use, not for employment decisions)
    - Questions eliciting genetic information must not be made prior to or in connection with individual's health plan enrollment
    - Providing incentives to obtain genetic information is generally prohibited
      - Incentives for completing HRA that includes questions about genetic information are permitted, but instructions must identify questions on genetic information and must make clear that the incentive is available regardless of responding to those questions

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# GINA

- EEOC Final Rules – May 2016
  - An individual’s “family medical history” is genetic information of that individual
    - Current or past health data about the employee, which is often collected as part of a health risk assessment (HRA), is NOT “genetic information”
    - Current or past health status of a spouse or child IS the employee’s “genetic information” because it is the employee’s family history
  - No information – health status or genetic – may be requested of the employee’s children (biological or non-biological)
  - Exception for spouses: an employer may offer incentives when requesting information about a spouse’s current and past health status (manifestation of a disease or disorder), often as part of an HRA
- AARP v. EEOC
  - Federal court concluded wellness rules arbitrary and capricious
  - Sent back to EEOC for further review
  - But ... still effective
  - ... for now

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# GINA

- **EEOC Requirements (for now):**
  - Must be Voluntary: Cannot be denied employer group health plan coverage and information collected must not be used for any employment decision in regard to the employee
  - Reasonable Design: Must be reasonably designed to promote health or prevent disease. Must not be overly burdensome or a subterfuge for violating discrimination laws
  - Required Notice and Written Consent: Must obtain written consent from the spouse for the collection of health information after disclosing what will be collected, how it will be used, and how the information will be protected

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# GINA

- **EEOC Requirements (continued):**
  - Confidentiality: Information collected provided only in aggregate form that is unlikely to disclose the identity of specific individuals except as necessary to administer the plan. Information must be collected on separate forms, maintained in separate files, and treated as a confidential medical record
  - Reasonable Alternative: Must waive the requirement or provide an alternative if a disability or medical condition prevents a spouse from participating or earning an incentive
  - Other: Spouses may not be required to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information (except as permitted to carry out activities related to the wellness program), or to waive confidentiality protections available under GINA as a condition for participating or receiving an incentive

# GINA

- EEOC Requirements (continued):

- Incentive Limits: Maximum reward (or penalty) cannot exceed 30% of the total cost of employee-only coverage
  - Applies regardless of whether incentive affects the group health plan
  - Applies regardless of whether program is participatory or health-contingent
  - Total cost of coverage includes both employee and employer contributions
  - If both the employee and spouse qualify for the incentive, maximum incentive limit is 2 X 30% of the total cost of employee-only coverage

Plan Design	Incentive Limit
Reward available only to those enrolled in the plan	30% of the cost under the plan in which the individual enrolls
Single plan offered, but reward available regardless of whether individual enrolls	30% of the cost under that plan
Multiple plans offered, but reward available regardless of whether individual enrolls	30% of the lowest cost plan
Employer does not offer a group health plan	30% of the second lowest cost Silver Plan through a public Exchange

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# GINA

## Recommendation

- Same as ADA
- Continue to follow current rules
- Monitor developments

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# Current Events

## Judicial Decisions

- AARP v. EEOC (D.D.C. 2017)
- Acosta v. Macy's (filed in August 2017 in S.D. Ohio)
- EEOC v. Flambeau (7th Cir. 2017)
- Aside: Section 1557

## Observations & Advice

- Lots of disputes
- No major changes -- yet
- Stay conservative
- Monitor

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# Other Applicable Laws

- ERISA
- COBRA
- HIPAA Privacy and Security
- Tax Laws
- Other nondiscrimination laws, including employment discrimination laws

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# Questions / Examples

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# Which Rules Apply?

- Does the wellness program incentive affect the group health plan (e.g. reduced premiums or cost-sharing)?
  - If Yes, then HIPAA rules apply
- Does the wellness program involve medical testing or disability-related questions?
  - If Yes, then ADA rules apply
- Does the wellness program ask about the manifestation of a disease or disorder of the spouse?
  - If Yes, then GINA rules apply

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## Example 1 – Tobacco Surcharge

- Considered a health-contingent program under HIPAA (conditioned on status as smoker or non-smoker)
- Subject to ADA rules if medical testing is used to determine tobacco use
  - If the program simply asks individuals whether they use tobacco or not (e.g. attestation/certification), then ADA will not apply
- Not subject to GINA rules
  - Even if medical testing is used to determine tobacco use in a spouse, that is not considered information about the spouse's manifestation of disease or disorder

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# Example 1 – Tobacco Surcharge

- Under HIPAA rules, the following would apply:
  - Information privacy
  - Annual opportunity to qualify
  - 50% incentive limit
  - Reasonably designed and uniformly available
  - Reasonable alternative available (e.g. smoking cessation classes/counseling or supplies) and notice of such alternative

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# Example 1 – Tobacco Surcharge

- IF MEDICAL TESTING IS INVOLVED, under ADA rules, the following would also apply:
  - Information privacy
  - Participation must be voluntary
  - 30% incentive limit
  - Reasonably designed
  - Reasonable accommodation available if a disability or medical condition prevents an employee from participating or earning an incentive
  - Confidentiality notice required

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## Example 2 – Participatory HRA or Biometric Screening

- Considered a participatory program under HIPAA if incentive is not contingent upon any specific answers or results
- ADA rules apply because the HRA typically involves disability-related inquiries and the biometric screening is considered medical testing
- GINA rules generally apply if the spouse is asked to participate in the HRA or biometric screening

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## Example 2 – Participatory HRA or Biometric Screening

- Under HIPAA, as a participatory program, the only requirement is that the incentive be available to all similarly situated individuals
- Under ADA rules, the following would apply:
  - Information privacy
  - Participation must be voluntary
  - 30% incentive limit (calculated off the employee-only cost of coverage)
  - Reasonably designed
  - Reasonable accommodation available if a disability or medical condition prevents an employee from participating or earning an incentive
  - Confidentiality notice required

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## Example 2 – Participatory HRA or Biometric Screening

- If the spouse is asked to participate, under GINA rules, the following would also apply:
  - Information privacy
  - Participation must be voluntary
  - 30% incentive limit (calculated off the employee-only cost of coverage)
    - If both employee and spouse earn the incentive, the maximum incentive limit is 2 X 30% of the employee-only cost of coverage
  - Reasonably designed
  - Must obtain written consent from the spouse for the collection of health information after disclosing what will be collected, how it will be used, and how the information will be protected
  - Must waive the requirement or provide an alternative if a disability or medical condition prevents a spouse from participating or earning an incentive

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## Example 3 – Fitness Club Reimbursement

- Not tied to the group health plan, so HIPAA does not apply
- ADA would require a “reasonable accommodation”, as appropriate, to enable any disabled individual to earn incentives
- GINA would not apply because no genetic information is involved

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# Other Applicable Laws

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