

Legal Issues in Wellness Q&A – the following questions were asked during the two webinar sessions in October 2017

Note: the links provided in the slide handouts for the model notice regarding Wellness Programs under the ADA, as well to the regulatory language for the notice of reasonable alternative standards, may not have worked. The links can be found here:

ADA Model Wellness Program Notice: <https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm>
Notice of Availability of Reasonable Alternative as found in the Final Regulations 26 CFR § 54.9802-1(f)(6):
<https://www.gpo.gov/fdsys/pkg/CFR-2012-title26-vol17/xml/CFR-2012-title26-vol17-sec54-9802-1.xml>

Q: So if we are just offering a wellness program that is provided through the insurance company and they offer gift cards for so many points if they choose to participate, so are we good with all these laws?

A: Not necessarily, although the type of program you describe is more likely to be in compliance. All group health plans that are subject to HIPAA portability will need to comply with the HIPAA nondiscrimination rules, and GINA and the ADA apply to both employers and group health plans directly. As the sponsor of a group health plan, you will be responsible for ensuring compliance, even if the insurance company is ultimately administering the program. The taxability of a gift card provided by the insurance company is debatable. If the insurance company offers wellness rewards to everyone who has any insurance with the company regardless of their affiliation with any group health plan, then it might be easier to argue that the gift card is not taxable because it is given by the insurance company rather than your employer, but if the gift cards are given only to those participating in an employer group health plan, they should be taxed as income.

Q: Does GINA 30% per EE override HIPAA's 30% of cost of coverage?

A: Yes, if your wellness program, or a portion of it, must comply with more than one law, the more restrictive limit applies, which will usually be the ADA/GINA limit.

Q: We are offering a biometric screening but it will be totally voluntary whether they want to do it or not, so what laws will this violate?

A: It may not violate any law, but you'll have to meet all of the requirements of the ADA because a biometric screen is a medical exam. Even if there are no incentives for participating or penalties for not participating, you will still need provide notice to your employees (see the sample notice linked above) and maintain strict confidentiality. If you do provide incentives or penalties of any kind, they would need to fall below the 30% threshold.

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Q: Is it lawful to require biometric screening?

A: Not usually. The ADA prohibits requiring medical tests unless they are job-related and consistent with business necessity. You can offer limited incentives or penalties for completing biometric screens, as long as you comply with the ADA's wellness program requirements and HIPAA nondiscrimination rules (if incentives or penalties are contingent on health status).

Q: Besides the taxes, does GINA, ADA, or HIPAA laws and rules apply to a wellness program that is not attached the healthcare plan at all?

A: Yes, absolutely. GINA and ADA rules apply to employers as well as health plans. HIPAA nondiscrimination rules only apply to health plans subject to HIPAA portability rules.

Q: If a walking program was to have gifts for reaching a certain level of steps, and still have the ability to receive a participation gift at random, is this okay under an activity-based program?

A: This sounds like an activity-based program, so would likely require compliance with HIPAA nondiscrimination rules. The ability to receive a participation gift at random would not change that fact or be a reasonable alternative standard. You will still need to provide a reasonable alternative standard to get the gifts at each level if a person could not complete the walking program levels due to a medical condition or their medical condition makes it inadvisable for them to attempt it.

Q: Spouses are required to sign a written authorization under GINA. Are employees also required to sign an authorization? Who is responsible to have the authorization signed/completed? Where should it be stored? What is a good source to share with employers regarding (specifically) the GINA notice? Do you have a sample authorization form? Can employers simply use the ADA wellness program notice and add a date/signature line for the GINA authorization?

A: To comply with GINA both the employee and a participating spouse must sign a prior written, knowing and voluntary authorization for the employer to collect genetic information/family medical history. The employer or plan sponsor will typically be responsible for obtaining this authorization. There is significant overlap between the contents of the ADA model notice and requirements for GINA authorization, but the laws target different types of information. We recommend consulting with your legal counsel to have a notice and authorization specifically tailored to your wellness program and the information it collects.

Q: What are the requirements for reasonable alternative standard for smoking cessation? For example, what if a group provides a credit for non-nicotine users?

A: If the credit is provided based solely on an individual's self-reported nicotine use (not a blood screen, for example), you would need to follow the HIPAA nondiscrimination rules. You can come up with any reasonable alternative way for a nicotine user to achieve the reward; it does not need to be related to

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smoking. If you provide an alternative that says they must attend a smoking cessation class, however, you'd have to provide the credit upon completion – it could not be dependent on a non-smoking outcome.

Q: Would a pre-diabetes program (attend 16 classes) be a participation or a activity based? The employer is paying for the program on a pay per performance rate, but the incentive to the employee is just based on the attendance of the 16 classes over 4 months.

A: The answer will depend on the finer details of the program. If attendance is just that, and the incentive is strictly whether you attend or not, I would think it is participation based. However, if attendance presumes some sort of adherence to a “program”, for example, a pre-diabetes diet, or completion of homework, it might be activity-based because it might be unwise to follow the program due to a medical condition. Unfortunately we cannot give you legal advice based on your specific facts, but those are the things you must consider under the regulations.

Q: Would asking questions on member's race or ethnicity fall under the GINA act? If so, what are the provisions? Race and ethnicity impact health and can help an employer make decisions on what types of condition management to implement. So in your opinion, in the example I gave below, using race and ethnicity to help stratify for enhanced clinical outreach is legal or illegal?

A: GINA does not prohibit asking questions about race or ethnicity. Using race and/or ethnicity to discriminate in employment or benefits has long been illegal, and part of the reason GINA was enacted was to ensure that genetic information wasn't being used in a way that unfairly stigmatized or discriminated against certain ethnic groups. In other words, GINA furthered the protection against discrimination based on race or ethnicity that was already on the books to ensure there wasn't a way that back-door unlawful discrimination could occur. I encourage you to reach out to your legal counsel for an opinion regarding your desired use of race and ethnicity, but generally speaking collecting and using race/ethnicity data is not illegal as long as it is not used for a discriminatory purpose.

Q: If an employer has a HRA with a questionnaire and biometric screening and everything is kept confidential and sent directly to the employee only, then is it true that this act would be considered nondiscriminatory.

A: The fact that everything is sent to the employee only would not necessarily make it non-discriminatory, it would just not violate the *confidentiality* provisions of GINA, ADA, or HIPAA. The other tests will still apply.

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