



# 2019 Employee Benefits Webinar Series

## Wellness Programs

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It's our business  
to be there for you in the

**MOMENTS  
THAT  
MATTER.**

WORLD CLASS. LOCAL TOUCH.

# Agenda

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- What is a wellness program?
- Key laws and their impact
  - HIPAA nondiscrimination and wellness rules
  - Americans with Disabilities Act
  - Genetic Information Nondiscrimination Act
  - Internal Revenue Code
- Examples of Wellness Programs and Incentive Limits
- Questions?
- Appendix: Other laws affecting wellness programs

# What is a Wellness Program?

# What is a Wellness Program?

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- There is no single, specific definition for wellness program, but wellness programs feature one or more of the following elements:
  - They help participants better understand their current health
  - They provide opportunities for participants to improve their health
  - They use incentives to encourage participation, and/or
  - They attempt to lower participant healthcare costs

# Sources of Law Affecting Wellness Programs

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## Administration Laws

Data Privacy  
(HIPAA, ADA & State)

ERISA

Internal Revenue Code

COBRA

## Non-Discrimination Laws

GINA

PDA

Title VII  
Civil Rights Act

State Protections

ADEA

HIPAA

ADA

# When is a Wellness Program a Group Health Plan?

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- “Group health plan” (GHP) generally means a plan that provides or pays for the cost of medical care
- A wellness program that provides or pays for the cost of medical care will generally be deemed to be a GHP
- Many wellness programs may be regulated by the ACA, ERISA, COBRA, HIPAA, etc.
- Wellness programs that are not GHPs may still be regulated by various laws such as the ADA and GINA

# When is a Wellness Program a Group Health Plan?

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- Wellness programs are frequently integrated with an existing GHP
  - Wellness program eligibility is based upon enrollment in an employer's medical plan
  - The incentives are tied to the medical plan such as a premium reduction or surcharge or cost sharing is impacted
  - The incentives are provided through another GHP (e.g. an FSA or HRA)
  - The cost of the wellness program is included in the premium contribution for an existing GHP

**Example:** A participant earns a lower medical plan premium by completing a health risk assessment, biometric screening, and being tobacco free

- An integrated wellness program is part of the overall GHP
  - Certain compliance requirements (e.g. summary plan description, Form 5500 filing, etc.) can be accomplished by piggybacking on the GHP

# When is a Wellness Program a Group Health Plan?

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- Standalone wellness programs will sometimes be considered GHPs all by themselves
  - Wellness program eligibility is not based upon enrollment in another benefit
  - The program includes one or more elements that are considered providing medical care to participants (e.g. biometric screening, physical examinations, health coaching with a licensed health care provider)
  - The incentives tend to be cash, cash equivalents, or merchandise and are not tied to other GHPs
  - The wellness program, eligible participants, and benefits are readily identifiable and the wellness program includes ongoing administration (this is an ERISA standard and determines welfare plan status)

**Example:** A participant earns points that can be used toward the purchase of merchandise through a wellness vendor website by completing a biometric screening

# Key Laws and Their Impact

# HIPAA's Nondiscrimination Rules

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- HIPAA generally prevents GHPs from discriminating against participants based upon a health factor with respect to:
  - Eligibility to participate
  - Premiums toward coverage
  - Benefits or other cost sharing
- The term “health factor” includes a participant’s health status or medical condition, medical history, claims experience, treatment, etc.
- GHP may treat groups of “similarly situated individuals” differently for these purposes if not based upon a health factor
  - Groups based on bona fide employment classifications (e.g. full-time/part-time, active/retiree, different business unit) if consistent with employer’s practice
  - Participants can be treated differently from spouses and/or dependents

# HIPAA's Nondiscrimination Rules

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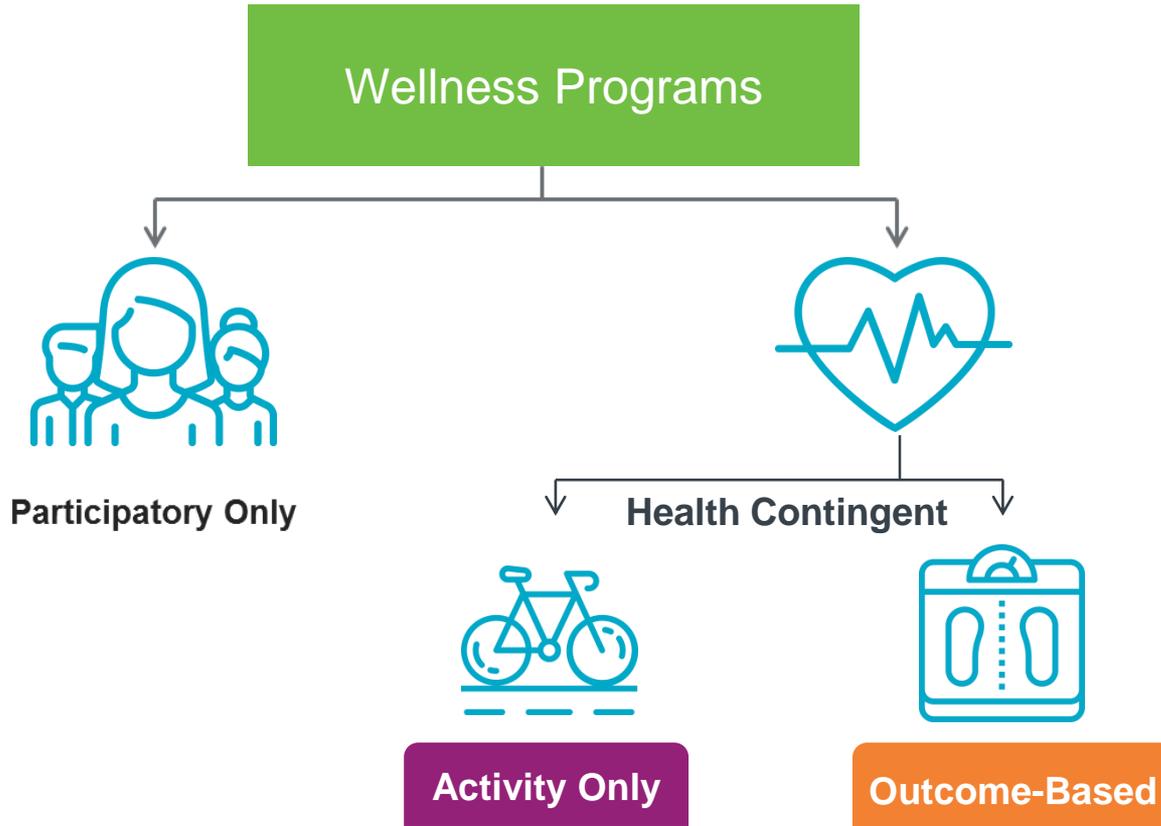
- The nondiscrimination rules do let a plan discriminate in favor of a participant's health status (benign discrimination)

**Example 1:** A plan can permit the coverage of disabled dependents past the plan's normal limiting age without violating HIPAA's nondiscrimination rules

**Example 2:** A plan can provide incentives for expectant mothers to participate in certain prenatal activities

- HIPAA's wellness rules, as modified by the Affordable Care Act, also provide an exception to HIPAA's nondiscrimination rules
  - The most recent final HIPAA wellness regulations were jointly issued by the DOL, IRS, and HHS in 2013

# HIPAA's Nondiscrimination Wellness Rules



# Participatory Only Programs

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- Must be made available to all similarly situated individuals
- Do not provide a reward or do not require individual to satisfy a standard related to a health factor to receive a reward
- Do not count toward HIPAA's incentive limits
- Do not require a reasonable alternative standard (RAS)



# Participatory Only Programs - Examples

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**Example 1:** Providing a premium reduction to employees who complete a health risk assessment regardless of the results or any further action required on the part of the employee

**Example 2:** Providing an HSA contribution for participating in biometric testing without basing any part of the reward on the testing results

**Example 3:** Reimbursing employees for the costs of participating in a smoking-cessation program regardless of whether the employee actually quits smoking for any length of time



# Activity Only Programs

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- A participant must perform or complete an activity related to a health factor but is not required to actually achieve a specific health outcome to receive a reward
- Do count toward HIPAA's incentive limits
- May require a RAS

**Examples:** A premium reduction for completing a fitness or healthy eating challenge without requiring actual weight loss or another health outcome



# Outcome-Based Programs

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- A participant must actually achieve or maintain a specific health outcome to receive a reward
- Do count toward HIPAA's incentive limits
- Requires a RAS

**Examples:** A premium reduction for being tobacco-free, achieving a target BMI, or other biometric testing results



# HIPAA's Incentive Limits

The cumulative amount of all incentives for health contingent programs cannot exceed:

- **30%** of the total cost of coverage (employee + employer contribution)
- **50%** of the total cost of coverage (employee + employer contribution) provided the excess over 30% is related to tobacco cessation incentives

Note: A wellness program could utilize the entire 50% limit on tobacco cessation incentives

- If spouses and/or dependents may participate, the incentive may be based on the total cost of coverage for the tier enrolled (e.g. employee + spouse)
- For practical reasons, many wellness programs limit their incentives to the cost of employee-only coverage

Participants must be given the opportunity to qualify for the reward at least once per plan year

# Reasonable Alternative Standards

## Activity Only



- RAS must be provided if the standard is unreasonably difficult due to a medical condition or medically inadvisable to attempt and may require participant's physician to verify
- RAS must accommodate participant physician's recommendation if standard deemed medically inappropriate or waive standard

## Outcome Based



- RAS must be provided if a participant fails the standard (it doesn't matter why)
- Cannot require proof that standard is unreasonably difficult due to a medical condition or medically inadvisable to attempt
- RAS must accommodate participant physician's recommendation if standard deemed medically inappropriate or waive standard

Note: A participant who completes a RAS **must** be treated as having qualified for the incentive for the **entire** plan year.

# Sample Notice of RAS Availability

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- A notice that reasonable alternative standards are available must be included in all materials describing the standards and incentives for a health contingent program and in any disclosure indicating a participant did not meet an outcomes-based standard

## The 2013 final regulations provides the following samples

*“Your health plan is committed to helping you achieve your best health. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at [insert contact information] and we will work with you (and if you wish, with your doctor) to find a wellness program with the same reward that is right for you in light of your health status.”*

*Your health plan wants to help you take charge of your health. Rewards are available to all employees who participate in our Cholesterol Awareness Wellness Program. If your total cholesterol count is under 200, you will receive the reward. If not, you will still have an opportunity to qualify for the reward. We will work with you and your doctor to find a Health Smart program that is right for you.”*

# Americans with Disabilities Act (ADA)

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- The ADA generally prevents employers from making disability-related inquiries or requiring medical examinations unless:
  - It is related to the performance of the job; or
  - It is part of a voluntary employee health program that maintains the confidentiality of information and is not used to discriminate against employees
- The ADA will apply to wellness programs that include disability-related inquiries and/or medical examinations

**Examples:** Health risk assessments, biometric screenings, testing for tobacco use



# ADA Wellness Requirements

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- The wellness program must be voluntary
  - Employees cannot be required to participate
  - The employer may not limit or deny access to health plan coverage based upon participation (i.e. participation may not be used as a gateway between plan options)
  - The employer may not take adverse employment action or retaliate against employees who do not participate or who fail to meet health outcomes
- Reasonable accommodations must be provided to enable participants with disabilities to earn the incentive (absent undue hardship to employer)



# ADA Wellness Requirements

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- Employer must provide participants with notice about what medical information will be obtained, how it will be used, and how it may be disclosed (similar to HIPAA's privacy and security rules)
  - A [sample notice](#) is available
- The employer and wellness program must act to protect the confidentiality of participant medical information (similar to HIPAA's privacy and security rules)
  - Records will be considered confidential medical records and must be kept separate from personnel files
  - The rules indicate that employees handling this information should not be involved in making employment decisions



# ADA Incentive Limits

## The cumulative amount of all incentives under the ADA cannot exceed:

- If enrollment in a specific option is required or only one is available – **30%** of the total cost of employee-only coverage (employee + employer contribution)
- If enrollment required and multiple options available – **30%** of the total cost of employee-only coverage in the lower cost option
- If enrollment not required and no coverage offered – **30%** of the total cost of the 2nd lowest cost Silver Plan for a 40-year-old non-smoker in the state or federal exchange where the employer's principal place of business is located

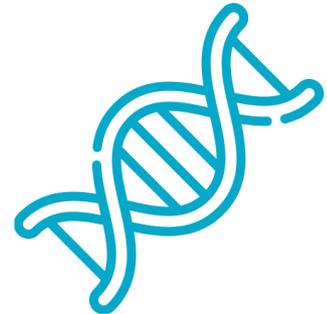
Note: The ADA's incentive limits can include activities considered “participatory only” under HIPAA's wellness rules



# Genetic Information Nondiscrimination Act (GINA)

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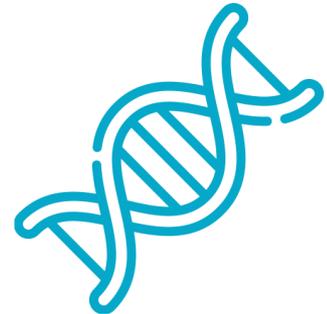
- GINA Title I applies to group health plans and issuers and generally prohibits the collection of genetic information for health plan underwriting purposes
- GINA Title II applies to employer practices and generally prohibits an employer from requesting, requiring or purchasing genetic information with limited exception (there is a wellness program exception)
- GINA's primary effect on wellness programs today relates to the use of health risk assessments



# GINA's Effect on Health Risk Assessments (HRAs)

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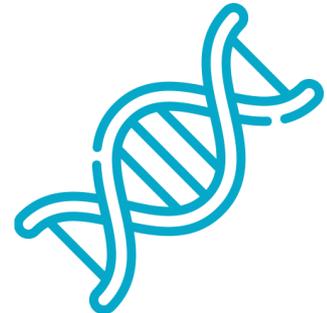
- HRAs requesting family medical history information should not be administered prior to the individual's effective date of group health coverage
- The HRA should include the individual's confirmation that he/she is knowingly and voluntarily providing the requested information
- The HRA should identify any family medical history or other genetic questions and indicate that an employee does not need to answer them to receive an incentive for completing the HRA
- The permitted disclosure of individually identifiable genetic information is generally limited to providers in connection with the wellness program and the individual



# GINA Wellness Program Requirements

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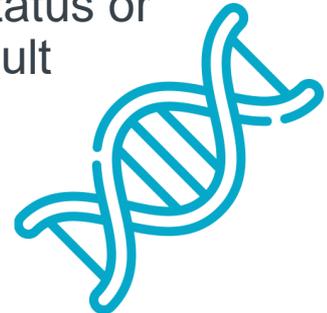
- Individuals must provide written authorization that they are knowingly and voluntarily providing their genetic information
  - An employee and spouse may use the same HRA or other form to provide authorization
  - Employees must be notified they cannot be required to answer any family medical history questions or provide other genetic information to receive a reward
  - The authorization must include a description of how their genetic information will be protected and limitations on its disclosure
- Consistent with the ADA, reasonable accommodations must be provided to enable employees with disabilities to participate (absent undue hardship to employer)



# GINA Wellness Program Requirements

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- An incentive can be provided to the employee for an HRA administered to the employee's spouse if the spouse:
  - Is covered by the employee under the employer's group health plan;
  - Receives health or genetic services offered by the employer (including through the wellness program); and
  - Provides information about his/her current or past health status as part of an HRA
- Employers may not offer rewards for the current or past health status or any genetic information for the employee's children (including adult children)



# GINA Incentive Limits

## The incentive limit under GINA for a spouse to complete an HRA cannot exceed:

- If enrollment in a specific option is required or only one is available – **30%** of the total cost of employee-only coverage (employee + employer contribution)
- If enrollment required and multiple options available – **30%** of the total cost of employee-only coverage in the lower cost option
- If enrollment not required and no coverage offered – **30%** of the total cost of the 2nd lowest cost Silver Plan for a 40-year-old non-smoker in the state or federal exchange where the employer's principal place of business is located

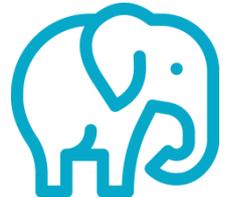
Note: Incentive limits for an employee to complete an HRA are covered under the ADA. The ADA only applies to employees.



# The Elephant in the Room

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- The AARP sued the Equal Employment Opportunity Commission (EEOC) over the ADA and GINA wellness regulations
- Current ADA and GINA enforcement status for wellness programs:
  - The ADA & GINA wellness incentive limits have been vacated as of January 1, 2019
  - BUT the remaining pieces of ADA & GINA wellness programs remains intact (including the ADA's “no gateway” rule)
- We expect the EEOC will try again and provide greater justification for the intended incentive limits



# The Elephant in the Room

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## Wellness Program Options



1. Leave existing wellness programs that comply with the vacated ADA and GINA incentive limits alone without making any design changes
  - It seems unlikely the EEOC will find discrimination and intervene against a wellness program that complies with the incentive limits as originally drafted
  - Wellness programs were doing pretty well in court under the ADA and GINA before the final regulations were issued
2. Modify existing wellness programs by eliminating or reducing incentives for activities that are subject to the ADA and/or GINA
3. Determine whether to implement new wellness program activities with incentives that are subject to the ADA and/or GINA

# Internal Revenue Code (IRC)

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- Incentives provided through or to a GHP, including reduced premiums, changes in cost sharing, and contributions to spending accounts (including FSAs and HRAs), are generally excludable from employee taxable income under IRC Sections 105 and 106
  - While usually not considered GHPs, employer contributions to HSAs are also excludable from employee taxable income under IRC Section 106
  - These incentives may be subject to IRC nondiscrimination testing rules



# Internal Revenue Code (IRC)

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- Incentives provided as merchandise may be excludable from employee taxable income under IRC Section 132 as a de minimis fringe benefit
  - Higher end merchandise (e.g. expensive electronics, appliances, vehicles) are taxable income events for the employee
- Incentives provided as cash or cash equivalents (e.g. gift cards) are always included in the employee's taxable income
  - There is no de minimis exception or other taxable income exclusion event for a cash or cash equivalent item (frequently overlooked by employers)
  - This is likely also a compensation practice subject to state law



# Examples of Wellness Programs and Incentive Limits

# Wellness Program Incentives – Example 1

Total cost of employee-only coverage = \$6,000/year (\$500/month)

Total cost of employee + spouse coverage = \$14,400/year (\$1,200/month)

Wellness Activity	Incentive	HIPAA	ADA (using vacated limits)	GINA (using vacated limits)
HRA – Employee HRA including disability inquiries and medical history	\$250 HSA contribution	Participatory only activity; does not count toward HIPAA incentive limit	Includes disability inquiries and medical history; \$250 counts toward incentive limit	Does not request spousal health information; does not count toward incentive limit
Biometric – Employee must achieve target biometrics	\$600/year premium discount (\$50/month)	Outcomes-based activity; \$600 counts toward HIPAA incentive limit; RAS applies	Includes medical examination; \$600 counts toward incentive limit	Does not request spousal health information; does not count toward incentive limit
Tobacco – Employee must certify he/she is tobacco free	\$1,200/year premium discount (\$100/month)	Outcomes-based activity; \$1,200 counts toward HIPAA incentive limit; RAS applies	Does not include a medical examination or disability inquiry; does not count toward incentive limit	Does not request spousal health information; does not count toward incentive limit
<b>Total applicable incentive</b>		<b>\$1,800</b>	<b>\$850</b>	<b>N/A</b>
<b>Total incentive permitted</b>		<b>\$3,000 (50% x \$6,000 if excess over \$1,800 used on tobacco incentives)</b>	<b>\$1,800 (30% x \$6,000)</b>	<b>N/A</b>

# Wellness Program Incentives – Example 2

Total cost of employee-only coverage = \$6,000/year (\$500/month)

Total cost of employee + spouse coverage = \$14,400/year (\$1,200/month)

Wellness Activity	Incentive	HIPAA	ADA (using vacated limits)	GINA (using vacated limits)
HRA – Employee and spouse HRA including disability inquiries and medical history	\$250 HSA contribution	Participatory only activity; does not count toward HIPAA incentive limit	Includes disability inquiries and medical history; \$250 counts toward incentive limit	Includes spousal health information; \$250 counts toward incentive limit
Biometric – Employee must achieve target biometrics	\$600/year premium discount (\$50/month)	Outcomes-based activity; \$600 counts toward HIPAA incentive limit; RAS applies	Includes medical examination; \$600 counts toward incentive limit	Does not request spousal health information; does not count toward incentive limit
Tobacco – Employee must test tobacco free (cotinine)	\$1,800/year premium discount (\$150/month)	Outcomes-based activity; \$1,800 counts toward HIPAA incentive limit; RAS applies	Includes a medical examination; \$1,800 counts toward incentive limit	Does not request spousal health information; does not count toward incentive limit
<b>Total applicable incentive</b>		<b>\$2,400</b>	<b>\$2,650</b>	<b>\$250</b>
<b>Total incentive permitted</b>		<b>\$3,000 (50% x \$6,000 if excess over \$1,800 used on tobacco incentives)</b>	<b>\$1,800 (30% x \$6,000)</b>	<b>\$1,800 (30% x \$6,000)</b>

# Wellness Program Incentives – Example 3

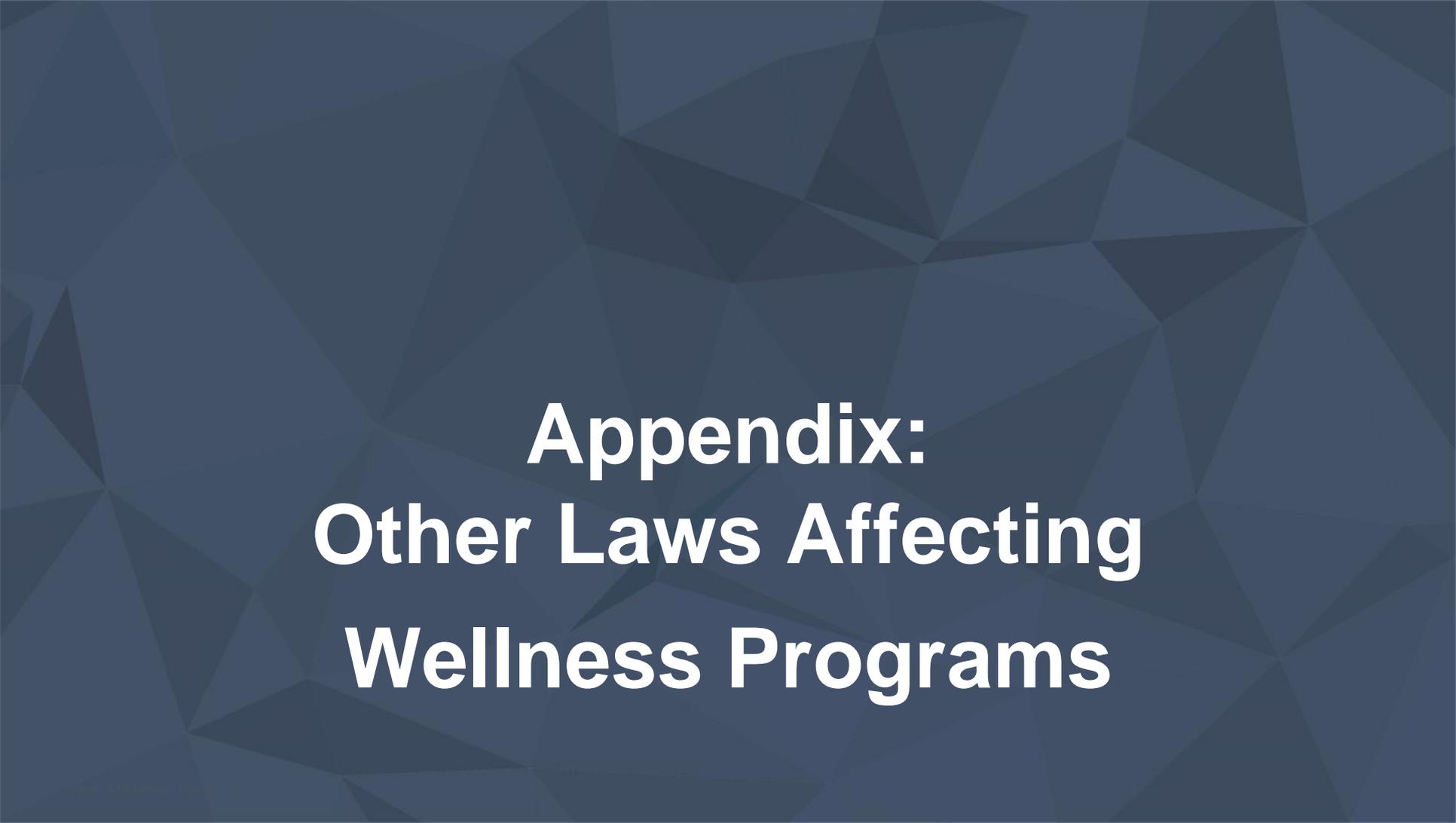
Total cost of employee-only coverage = \$6,000/year (\$500/month)

Total cost of employee + spouse coverage = \$14,400/year (\$1,200/month)

Wellness Activity	Incentive	HIPAA	ADA (using vacated limits)	GINA (using vacated limits)
HRA and Biometric – Employee HRA with disability inquiries and medical history & biometric testing; biometric results do not matter	Eligible to enroll in richer PPO plan option with \$1,500 AV increase over base PPO plan option	Participatory only activity; does not count toward HIPAA incentive limit	Cannot comply with the ADA; disability inquiries and medical examinations may not be required as a gateway for better plan options	Does not request spousal health information; does not count toward incentive limit
Tobacco – Employee must test tobacco free (cotinine)	\$1,200/year premium discount (\$100/month)	Outcomes-based activity; \$1,200 counts toward HIPAA incentive limit; RAS applies	Does not include a medical examination or disability inquiry; does not count toward incentive limit	Does not request spousal health information; does not count toward incentive limit
<b>Total applicable incentive</b>		<b>\$1,200</b>	<b>\$0 (But note: Wellness program not compliant)</b>	<b>N/A</b>
<b>Total incentive permitted</b>		<b>\$3,000 (50% x \$6,000 if excess over \$1,800 used on tobacco incentives)</b>	<b>\$1,800 (30% x \$6,000)</b>	<b>N/A</b>

# Questions?





**Appendix:  
Other Laws Affecting  
Wellness Programs**

# ERISA and HIPAA Portability

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- Many wellness programs are integrated into existing ERISA-covered welfare plans
- Standalone wellness programs may also be considered “welfare plans” for ERISA purposes:
  - A plan, fund, or program,
  - providing an enumerated welfare benefit (e.g. medical benefits),
  - to an identifiable class(es) of participants or beneficiaries, and
  - requiring ongoing administration.
- ERISA’s reporting and disclosure rules will apply (i.e. plan document, summary plan description, and Form 5500 filing requirements)
- An integrated wellness program may satisfy compliance requirements by piggybacking onto the core group health plan
- Standalone wellness programs may qualify as HIPAA-excepted benefits avoiding certain mandates under ERISA, the ACA, etc.

# COBRA

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- Common practice for employers to overlook whether COBRA applies to a wellness program
- A wellness program that provides medical benefits will generally be considered a group health plan subject to COBRA
- May automatically be elected if integrated with another group health plan and COBRA elected for that plan
- If offered on a standalone and/or separately elected basis, few COBRA qualifying beneficiaries will elect to pay for continuation coverage for a wellness program
- If the cost of incentives are included in the applicable COBRA premium (including for an integrated wellness program), the incentives should be provided for completed wellness program activities

# Data Privacy

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- Individually identifiable health information collected or created in connection with a wellness program that is part of a group health plan or is a standalone group health plan is protected health information (PHI) under HIPAA's Privacy and Security Rules
  - Genetic information covered by GINA is PHI
- Even if HIPAA does not apply, confidentiality obligations under the ADA, GINA, or state data privacy laws may apply

# Title VII of the Civil Rights Act

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- Title VII prohibits employers from discriminating against employees on the basis of race, color, sex, national origin, or religion
- This extends to group health coverage offered by an employer
- In theory, a wellness program standard that disproportionately impacts a Title VII protected class raises the potential for a Title VII claim
  - For example, a wellness program that disproportionately results in higher premiums for Latinos than for other covered employees and dependents participating in the same group health plan
- The use of a benign, participatory only type alternative standard for qualifying for an incentive should mitigate or preclude potential Title VII issues
- We are not aware of any history or pattern of Title VII enforcement against wellness programs

# Age Discrimination in Employment Act (ADEA)

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- The ADEA prohibits employers from discriminating against employees who are 40 years of age or older with regard to employment and benefits
  - For example, a wellness program that penalizes employees based on the existence of certain health factors may disproportionately impact older individuals who are more likely to manifest those risk factors
- The use of a benign, participatory only type alternative standard for qualifying for an incentive should mitigate or preclude potential ADEA issues
- We are not aware of any history or pattern of ADEA enforcement against wellness programs

# Pregnancy Discrimination Act (PDA)

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- The PDA prohibits employers from discriminating against women on the basis of pregnancy
- This extends to group health coverage offered by an employer and prohibits discrimination for eligibility, cost sharing, and the terms and conditions of coverage
- The use of a benign, participatory only type alternative standard for qualifying for an incentive should mitigate or preclude potential PDA issues
- We are not aware of any history or pattern of PDA enforcement against wellness programs

# State Lawful Activities Protection Laws

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- Many states have laws protecting an employee's lawful activities conducted off the employer's premises and during nonworking hours
  - Most of these are smoker protection laws that prevent employers from discriminating against employees who use tobacco products after work hours and off the premises
  - A few states have broader lifestyle protection laws that prevent employers from discriminating for any lawful activity with very limited exceptions (e.g. see California Labor Code Sections 96(k) & 98.6)
- ERISA will preempt a state lawful activities protection law from being applied against a wellness program that is an ERISA-covered welfare plan
- We are not aware of any history or pattern of state lawful activities protection law enforcement against wellness programs