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A collaborative program between the Southwest ADA Center, Great Lakes ADA Center and members of the ADA National Network

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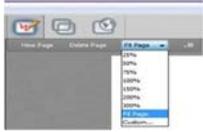
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## Wellness Programs and the ADA:

The Intersection of the ADA and Employer Sponsored Wellness-Programs, Reasonable Accommodations, Medical Inquiries, Business Necessity and Confidentiality

Presented by:  
Diego Demaya, J.D.  
Southwest ADA Center

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"Please complete this form if you would like to receive a 20% discount on your annual HMO premium..."

- Date of birth and Social Security Number
- Height, weight and race
- Do you have diabetes, multiple sclerosis, lupus, cancer, or other permanent medical condition?
- Are you a smoker? For how long?
- Do you take any medications? If so, what are they?
- Do you drink alcoholic beverages? (Please indicate what types) and how often?
- Do you exercise regularly? If so, what kind of exercise?
- Are you planning to have a baby?

Certify the truth of information provided and Have reverse side of this form complete by your primary care doctor. The doctor form includes a request for a copy of your latest full blood work results along with of results for other tests performed inside the last three years. If you do not have access to these results we will cover the cost for the necessary tests. We promise it will all be kept confidential.

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## Presentation Agenda

- About Wellness Programs
- Applicable Laws
- Presently Precarious Legal Landscape
- ADA Legal Issues
- Some Best Practices

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11-18-2015  
Wellness Programs and the ADA:  
The Intersection of the ADA and Employer Sponsored  
Wellness-Programs, Reasonable Accommodations,  
Medical Inquiries, Business Necessity and Confidentiality  
Legal Webinar

## What is a Wellness Program?

- ❑ Comprehensive participatory programs to address social, mental, and physical health of employees
- ❑ Promote health and/or prevent disease by reducing or eliminating sedentary lifestyles -- poor eating habits, tobacco use, or alcohol abuse
- ❑ Reduce or eliminate chronic diseases – diabetes, heart and respiratory conditions
- ❑ Run separately from group health plans (GHPs)

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## Disease Management and Rewards

- ❑ Available at no cost while mostly being voluntary or non-punitive
- ❑ Others may be compulsory and may offer financial rewards or discounts on healthcare premiums
- ❑ Wide array of screening requirements to identify health issues and intervention options
- ❑ Screening activities -- questionnaires on health-related behaviors (e.g., exercise patterns or eating habits) and risk factors (e.g., body weight), or clinical screenings (e.g., medical exams, blood tests).
- ❑ Fitness club memberships, on-site vaccinations, weight loss and smoking cessation programs, wearing mobile biometric monitoring technologies, and counseling

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## Improving Employee Wellness

- ❑ Many believe that wellness programs improve employee productivity, boost morale, and reduce healthcare costs
- ❑ ADP survey - the most commonly cited reason for employers offering wellness programs is improving employee health - 81% of mid-sized companies and 78% of large companies
- ❑ Second most common reason is controlling health care cost - 64% of mid-sized companies and 71% of large companies
- ❑ Yet only one quarter of mid-sized companies and slightly more than one fifth of large companies measure return on investment of wellness programs

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## Critics Challenge Wellness Programs

- Deemed by industry critics to "damage employee morale... and harm corporate reputations."
- Weak data fails to support efficacy of wellness programs
- A demonstrable positive effect is yet to be shown
- Loss of personal privacy and confidentiality through "medical inquiries" and wearable biometric monitoring devices may pose an even greater legal challenge to wellness programs than a lack of proven statistics on their success rate

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## Applicable Law

- 1996 and 2006 Health Insurance Portability and Accountability Act (HIPAA)
- Americans with Disabilities Act (ADA)
- Genetic Information Nondiscrimination Act (GINA)
- ACA and 2013 Regulations
- EEOC 2014 proposed ADA Wellness Program rules

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## 1996 HIPAA Non-Discrimination Rules

- HIPAA prohibited group health plans and health insurance providers from discriminating against individuals in eligibility and continued eligibility for benefits and in individual premium or contribution rates based on eight health factors:
  - Health status;
  - Medical condition (physical and mental illnesses);
  - Claims experience;
  - Receipt of health care;
  - Medical history;
  - Genetic information;
  - Evidence of insurability (including conditions arising out of acts of domestic violence and participation in activities (e.g., motorcycling, snowmobiling, all-terrain vehicle riding, horseback riding, skiing); and
  - Disability. 29 C.F.R. 2590.702

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## 2006 HIPAA Exempts Wellness Programs

- Two types of Wellness Programs: *Participation* and *Outcome*
- To promote health and disease prevention,
- Exempt from the HIPAA nondiscrimination requirements as of 2006
- Reward could not be conditioned on satisfaction of a standard related to a health factor
- Then program complied with the nondiscrimination requirements – as long as participation in the program was open to all similarly situated employees

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## Participation Wellness Programs

- Reimbursement for all or part of cost for memberships in a fitness center
- A diagnostic testing program that provides a reward for participation rather than outcomes
- Encouraging preventive care by waiving the copayment or deductible requirement for the costs of prenatal care or well-woman's physical
- Reimbursing employees for costs of smoking cessation regardless whether employee quits smoking
- A reward to employees for attending a monthly health education seminar

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## Outcome Wellness Programs

1. Total reward for wellness programs must not exceed 20 percent of cost of employee-only coverage under the plan. If dependents participate reward must not exceed 20 percent of the cost of coverage for employee and dependents
2. Must be reasonably designed to promote health and prevent disease
3. Must give individuals eligible to participate opportunity to qualify for the reward at least once per year
4. Reward must be available to all similarly situated individuals – must allow a reasonable alternative standard (or waiver of initial standard) for obtaining the reward to individuals medically unable to participate
5. Must disclose availability of reasonable alternative standard (or possibility of waiver of initial standard)

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## ACA Wellness Programs

- ❑ 2013 regulations amend wellness program provisions in 2006 HIPAA -- effective for plan years beginning on or after January 1, 2014
- ❑ Sets criteria for affirmative defense that a wellness program does not violate ACA nondiscrimination provisions
- ❑ Creates Participatory and Health-Contingent wellness programs

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## ACA Participatory Wellness Programs

- ❑ Are made available without regard to an individual's health status
- ❑ They do not require participants to attain any range of health standard to receive an award
- ❑ Require limited administration, and are typically unintrusive
- ❑ Must remain broadly available to similarly situated individuals
- ❑ Provide incentives for participation in a particular activity (e.g., walking, diet, or exercise) rather than attainment of a specified health goal

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## ACA Health-Contingent Wellness Programs

- ❑ Subdivided into Activity-only and Outcome-based programs
- ❑ Both require participants to achieve a particular outcome to qualify for a reward or avoid a penalty
- ❑ Both are subject to more extensive regulation than participatory programs
- ❑ Reward the individual for achieving a specific health outcome -- e.g., not smoking or achieving a certain result on a biometric screening -- body mass index (BMI), weight, blood pressure, blood sugar, or reaching a lower cholesterol milestone

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## ACA Outcome-based Requirements

- Give eligible employees opportunity to qualify for the reward or avoid the penalty at least once a year
- Provide a reward or absence of a penalty surcharge not in excess of 30% or 50% if the program is designed to prevent or reduce tobacco use -- calculated on the total cost of coverage
- Be reasonably designed to promote health and prevent disease -- cannot be overly burdensome and cannot be used as a subterfuge for discrimination based on a health factor
- Make full reward available to similarly situated individuals -- requires provision of a reasonable alternative standard or waiver of the original standard -- another way to achieve reward if it is unreasonably difficult or medically inadvisable to satisfy the standard
- Disclose availability of alternative standard or possible waiver, in program materials

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## ACA - Achieving outcome-based Goals

- Using a health coach
- Taking a health fitness course
- Adhering to a health improvement action plan or complying with a health care provider's plan of care
- Employers may require participants to wear biometric measurement and tracking devices to measure progress

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## ACA – outcome-based More Rules

- An alternative standard must be provided to employees unable to meet the entry standard
- An education program or activity may be a substitution
- Employer cannot require employee to provide physical verification of a need for an alternative standard under an outcome-based wellness program
- If personal physician states that a standard is not medically appropriate the plan or issuer must provide reasonable alternative standard consistent with doctor recommendations

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## The Precarious Legal Landscape Now

- ❑ EEOC Issues Proposed Rule on Application of the ADA to Employer Wellness Programs – 4/16/2015
- ❑ Questions and Answers about EEOC's Notice of Proposed Rulemaking on Employer Wellness Programs
- ❑ Fact Sheet for Small Business: The EEOC's Notice of Proposed Rulemaking on the Americans with Disabilities Act and Employee Wellness Programs
- ❑ US DOL, IRS & HHS issued FAQs ABOUT ACA IMPLEMENTATION (PART XXV) addressing other aspects of the standards employer wellness programs must meet
- ❑ HHS also posted HIPAA Privacy and Security and Workplace Wellness Programs indicating how the HIPAA privacy rules apply to workplace wellness programs

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## ADA Medical Inquiries

- ❑ Title I of the ADA generally restricts employers from obtaining medical information from employees but allows medical examinations of employees and inquiries about their health if they are part of a "voluntary" employee health program
- ❑ Wellness Programs typically require disclosure of "fitness" or biometric data
- ❑ Wellness programs often involve disability-related inquiries and medical examinations
- ❑ **General Rule:** Disability-related inquiries and medical examinations must be job-related and consistent with business necessity.
- ❑ Employer must have a reasonable belief based on objective evidence that either an employee's ability to perform an essential job function will be impaired by a medical condition; or an employee will pose a direct threat due to a medical condition
- ❑ EEOC broadly construes a "medical examination" to include a "procedure or test that seeks information about an individual's physical or mental impairments or health" like an HRA?

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## How About This Idea?

- ❑ Your group health premiums are steadily rising, what if we start using cool technology to help get our workforce in shape? We get all employees to bring those cool wearable tracking gizmos. We can fold those into our BYOD program, offer a device subsidy, and then have our employees report their stats and progress in some kind of fitness competition, with cool stuff as motivating rewards?
- ❑ Premium costs down, flab down, fitness up, profits up... what could possibly go wrong?...



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## ADA Wellness Program Exception

- ❑ Wellness programs tend to be implemented without regard to type of inquiries made
  - ❑ Hence wellness programs fail the "job-related and business necessity" test
- ❑ ADA includes a wellness program exception that allows employers to conduct medical examinations that are part of a wellness program so long as employees are free to decline; e.g., participation is voluntary

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## ADA – Voluntary Wellness Program Rule

- ❑ Exception applies only if employer neither requires participation nor penalizes employees who decline to participate
- ❑ Gathered information must be maintained consistent with ADA confidentiality and medical records requirements and may not be used to discriminate against an employee
- ❑ HIPAA confidentiality rules will likely become applicable as well because WP is part of GHP, is administered by employer, or a third party

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## ADA Possible Violation Scenarios

- ❑ Employer imposes bi-weekly \$20 surcharge on any employee who did not complete a health risk assessment (HRA)
- ❑ Employees who do not complete HRA lose their employer contributions toward health insurance premiums
- ❑ One employee who failed, due to hospitalization, to attend an all-employee meeting at which testing was administered as part of a wellness program and who then did not receive testing equipment and forms sent to his home, alleged that he was told that his health insurance coverage was terminated
- ❑ An employer required all employees to participate in an HRA as a condition of receiving health insurance, and imposed a bi-weekly surcharge of \$20 on any employee (up to \$40 for an employee and a spouse) that could be avoided only if the employee and/or the spouse (1) met three out of five health outcomes related to blood pressure, cholesterol levels, blood glucose levels, and waist circumference; OR (2) agreed to participate in at least one program designed to reduce specified health risk factors

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## Some Best Practices

- Do not collect health-related information not essential to the objective of the wellness program
- Maintain health-related information collected from participation separate from the employee's personnel file
- Do not allow supervisors or decision-makers access to employees' health-related information
- Review policies and procedures to ensure only individuals with a need-to-know basis have access to health-related information
- Do not consider health-related information in making employment decisions
- Distribute notice that clearly states participation in the wellness program is purely voluntary and provide information on the use and collection of the employee's data from the program
- Do not disclose health-related information to third parties, unless allowed by applicable law

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## Effect of PPACA on ADA and GINA Considerations

- ACA did not enact any changes to ADA or GINA regarding wellness programs.
- ACA supports the continued use and expansion of wellness programs
- April 20, 2015, EEOC issued a notice of proposed rulemaking (NPRM) on how Title I of the Americans with Disabilities Act (ADA) applies to employer wellness programs that are part of a group health plan
- EEOC NPRM proposes changes both to the text of the ADA regulations and to interpretive guidance explaining the regulations that will be published along with the final rule

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## EEOC NPRM BITS

- WP is considered consistent with the ADA when it is reasonably designed to promote health or prevent disease
- WP must not be overly burdensome, a subterfuge for violating the ADA or other laws prohibiting employment discrimination, or highly suspect in the method chosen to promote health or prevent disease
- Asking employees to complete a HRA or have a biometric screening for purpose of alerting to health risks (such as having high cholesterol or elevated blood pressure) is reasonably designed to promote health or prevent disease
- Collecting and using aggregate information from employee HRAs to design and offer programs aimed at specific conditions prevalent in the workplace (such as diabetes or hypertension) also would meet this standard
- But asking employees to provide medical information on a HRA without feedback about risk factors or without using aggregate information to design programs or treat specific conditions would not be designed to promote health

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## EEOC – WP is Voluntary When:

- ❑ Does not require employees to participate;
- ❑ Does not deny access to health coverage or limit coverage under its health plans for non-participation
- ❑ Does not take any other adverse action or retaliate against, interfere with, coerce, intimidate, or threaten employees – e.g., by threatening to discipline employee who does not participate or who fails to achieve certain health outcomes
- ❑ If WP is part of a GHP employer must provide a notice clearly explaining what medical information will be obtained, how it will be used, who will receive it, and the restrictions on disclosure

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## ADA Reasonable Accommodations

- ❑ Employers must provide reasonable accommodations that allow employees with disabilities to participate in wellness programs and obtain any offered incentives
- ❑ For example, if attending a nutrition class is part of a wellness program, an employer must provide a sign language interpreter, absent undue hardship, to enable an employee who is deaf to participate in the class

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## Questions?



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**Next ADA Legal Webinar Session**

January 20, 2015

Topic and Speaker: TBD



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