



# American Benefits Council Benefits Briefing

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## **Wellness Programs, EEOC and the ADA (and GINA too!)**

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# Overview

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- Wellness Programs Generally
- Current Regulatory Landscape
- History of EEOC Activity
- Recent EEOC Lawsuits – Flambeau and Orion
- Recent EEOC Lawsuit – Honeywell
- Implications for Employers and Wellness Providers

# Wellness Programs Generally

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- Traditionally subject to regulation under HIPAA
- Congress reiterated strong support by codifying HIPAA regulations in ACA
  - Including increasing permitted reward limit from 20% to 30% (up to 50% for smoking cessation)
- Continued uncertainty re: interplay between HIPAA and other laws

# Current Regulatory Landscape

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## HIPAA

- Prohibits discrimination with regard to eligibility, benefits, or premium discounts based on a health factor
  - Exception for adherence to certain programs of health promotion and disease prevention
- Three categories of wellness programs
  - Participatory, activity-only, outcome-based
- Financial incentives may be offered

# Current Regulatory Landscape

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## ADA

- Limits employer's ability to make disability-related inquiries or require medical examinations
- Two possible exceptions:
  - Voluntary wellness program
    - Enforcement guidelines and discussion letters
    - "neither requires participation nor penalizes employees who do not participate"
  - Bona fide benefit plan exception
    - *Seff v. Broward County*

# Current Regulatory Landscape

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## **GINA – Title I**

- Applies to group health plans and issuers
- Generally prohibits collecting genetic information (including family medical history) for underwriting purposes
  - **Genetic information includes current medical information of family members by affinity (i.e., marriage)**
- Jurisdiction: DOL, HHS, Treasury

# Current Regulatory Landscape

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## **GINA – Title II**

- Applies to employers
- Generally prohibits employers from requesting, requiring, or purchasing genetic information of an individual or family member
  - Exception for collecting genetic information as part of a voluntary wellness program
- Jurisdiction: EEOC
- Firewall exists between Title I and Title II

# History of EEOC Activity

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- **EEOC's historic position regarding wellness programs**
  - Famous Peggy Mastroianni letter from 2009
  - Certain OLC representatives suggested in public comments that financial incentives for spousal HRAs could violate GINA
  - Sporadic regional investigations; apparent reluctance to litigate directly
- **2013 hearing on wellness programs**
  - Statements made at the hearing suggested that Commissioners were sensitive to not having the ADA supplant HIPAA; rather, act as gap-filler
  - Continued concerns around privacy of health information
- **Announced rulemaking projects**
  - February 2015 according to semi-annual regulatory agenda



# EEOC v. Orion Energy Systems, Inc.

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- **Complaint filed Aug. 20, 2014 in the Eastern District of Wisconsin**
- **Alleged Facts**
  - As part of a wellness program, employees were required to (1) complete an HRA; (2) use a Range of Motion Machine in the company's physical fitness room; and (3) undergo blood work and complete a medical history form
  - Company covered 100% of the cost of coverage for employees who participate in the wellness program
  - Employees who decline to participate must pay entire premium cost for coverage plus a \$50 penalty
  - Employee refused to participate and questioned whether the HRA was voluntary and whether medical information was going to remain confidential
- **EEOC Allegations**
  - Wellness program not voluntary because employee was fired for refusing to participate in the wellness program and alleges the program was not voluntary
  - Retaliation against employee because of her good faith objection and decision not to participate in the wellness program
  - Interference, coercion and intimidation against employee for exercising her rights under the ADA not to be subject to unlawful, disability-related inquiries and medical exams

# EEOC v. Flambeau, Inc.

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- **Complaint filed Sept. 30, 2014, Western District of Wisconsin**
- **Alleged Facts**
  - Flambeau sponsored a participatory wellness program - employees were required to complete (1) biometric testing and (2) an HRA
  - Employee was unable to complete the biometric testing and HRA because he was on medical leave and being treated in the hospital
  - After returning from medical leave, he tried to complete the biometric testing and HRA
  - His attempt was rejected and his benefits were terminated
  - He was told that his medical insurance was cancelled because he had not completed the employer's requirements - including the biometric testing and HRA
  - Told he could apply for coverage at COBRA rate
- **EEOC Allegation**
  - EEOC asserts program is not voluntary because employee was subjected to termination of his health insurance and a financial penalty of having to pay the entire premium cost under COBRA to obtain reinstated coverage
  - Employee was told that participation in the program was "mandatory" to be on the company's health insurance
  - Employees were told that they would be subject to disciplinary action for failing to attend the testing

# EEOC v. Honeywell International, Inc.

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- **Filed Oct. 27, 2014, D. Minn.**
- **Allegations**
  - Biometric testing is unlawful medical examination of current employees in violation of ADA
  - Requirement that employees' spouses undergo medical testing or the employee will incur tobacco surcharge violates GINA Title II
- **Motion for Temporary Restraining Order and Preliminary Injunction denied on Nov. 6, 2014 for failure to prove irreparable harm**
  - No decision on the merits regarding the EEOC's ADA and GINA claims

# EEOC v. Honeywell International, Inc.

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## Wellness Program Structure

- Employees and spouses who participate in the high deductible health plan are eligible to participate in the *optional* high deductible health plan's wellness program
- Includes biometric screening performed at/by wellness provider (no charge) or by an individual's personal physician
  - Biometric testing screens: blood pressure, HDL, cholesterol, glucose, height, weight and BMI, nicotine or cotinine
- Wellness provider transmits the data to an independent health management company
- Honeywell receives aggregate data but is not informed of individual employee test results
- Employees unable to participate due to illness or pregnancy may obtain a waiver

# EEOC v. Honeywell International, Inc.

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## Financial Incentives

- Premium Surcharge
  - Employees who choose not to participate are charged a \$500 surcharge that will be applied to their 2015 medical plan costs
- HSA Contributions
  - Employees who participate in the wellness program qualify for a company-sponsored HSA with contributions from Honeywell that range up to \$1500 depending on the employee's annual base wage and type of coverage
- Tobacco Surcharge (potential \$2k for employee + spouse)
  - \$1000 "tobacco surcharge" for employee tobacco use
  - \$1000 "tobacco surcharge" if employee's spouse is a tobacco user
  - Tobacco users can avoid surcharge in three ways -
    - Enroll in tobacco cessation program - at no cost
    - Provide biometric screening report showing that they in fact do not use tobacco
    - Work with a Health Advocate to establish not a tobacco user

# EEOC v. Honeywell International, Inc.

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- **What is the EEOC alleging?**
  - **ADA: Honeywell's biometric testing is an unlawful medical examination in violation of Section 102(d)(5) of the ADA**
    - Honeywell biometric testing is not intended to determine whether the employees can perform the essential functions of their jobs or pose a threat to the health or safety of themselves or others
    - Honeywell imposes a penalty upon employees to make them participate in the biometric testing; therefore it is not voluntary

# EEOC v. Honeywell International, Inc.

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- **What is Honeywell's response?**
  - Honeywell's wellness program is lawful under the ADA "bona fide benefit plan" safe harbor provision
    - Wellness program is part of a bona fide benefit plan
    - Wellness program is a term of the group health plan
    - Wellness program results are used to identify and assess health risks, to provide employees and their spouses with resources to manage and reduce risks and ultimately to reduce claims costs. Results of biometric screening are used by an actuarial firm during its annual underwriting process
  - The wellness program comports with the ADA's voluntary wellness program provisions
    - The financial surcharges are within the parameters set by the ACA and are not "too high"
    - The EEOC cannot rely on its own *informal guidance* for the proposition that the penalty destroys voluntariness - enforcement guidance is not entitled to deference and should be rejected

# EEOC v. Honeywell International, Inc.

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- **What is the EEOC alleging?**
  - **GINA: Honeywell is offering an inducement to its employees to acquire genetic information in violation of GINA**
    - As noted, the definition of “family member” under GINA includes persons who are or become related to an individual through marriage, birth, adoption, or placement for adoption and fourth-degree relatives, and therefore, includes “*spouses*”
    - Makes no distinction between requesting spousal information for spouses who are *participating* in the Honeywell plan



# EEOC v. Honeywell International, Inc.

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- **What is Honeywell's response?**
  - GINA Title I applies to Honeywell's wellness program because it is part of a bona fide group health plan
  - EEOC's jurisdiction is limited to Title II of GINA so EEOC has no jurisdiction
  - Even if Title II of GINA applies, Title II of GINA has an express exception that permits employers to request and acquire genetic information in connection with a voluntary wellness program
    - I.e., asserting that a distinction should be made under GINA for spousal information where the spouse is participating in the program

# EEOC v. Honeywell International, Inc.

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- **Verdict**

- Motion for Temporary Restraining Order and Preliminary Injunction **Denied** - Factors for a preliminary injunction are not met
  1. Threat of Irreparable Harm: Threat of harm was “wholly speculative” and does not justify injunctive relief
  2. Balance of Harms: Balance of harm weighs in favor of Honeywell
    - If an injunction freezing the surcharges is ordered now, Honeywell employees who opt out of the biometric screening may ultimately have to pay the surcharge if Honeywell prevails on the merits
    - On the other hand, if the EEOC prevails on the merits, Honeywell employees who were wrongfully assessed a surcharge based on their decision to forego the biometric screening can be made whole by a refund
  3. Uncertainty surrounding the legal questions at issue prevents the last two factors (likelihood of success on the merits and evaluation of public interest at stake) from weighing heavily in favor of either party

## EEOC v. Honeywell International, Inc.

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“[G]reat uncertainty persists in regard to how the ACA, ADA and other federal statutes such as GINA are intended to interact....[r]ecent lawsuits filed by the EEOC ...signal the necessity for clarity in the law so that corporations are able to design lawful wellness programs...”

# What Should Employers Be Thinking About?

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- Structure wellness programs to comply within the HIPAA wellness rules
- Structure wellness programs within the group health plan and use information for underwriting and classifying risks to preserve a “bona fide safe harbor” argument under the ADA
- Consider designing spousal HRAs to shore up possible defenses and avoid practices that could give rise to GINA violations
- Only share aggregated de-identified PHI with an employer plan sponsor
- Think practically regarding litigation risk management

# Questions?

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