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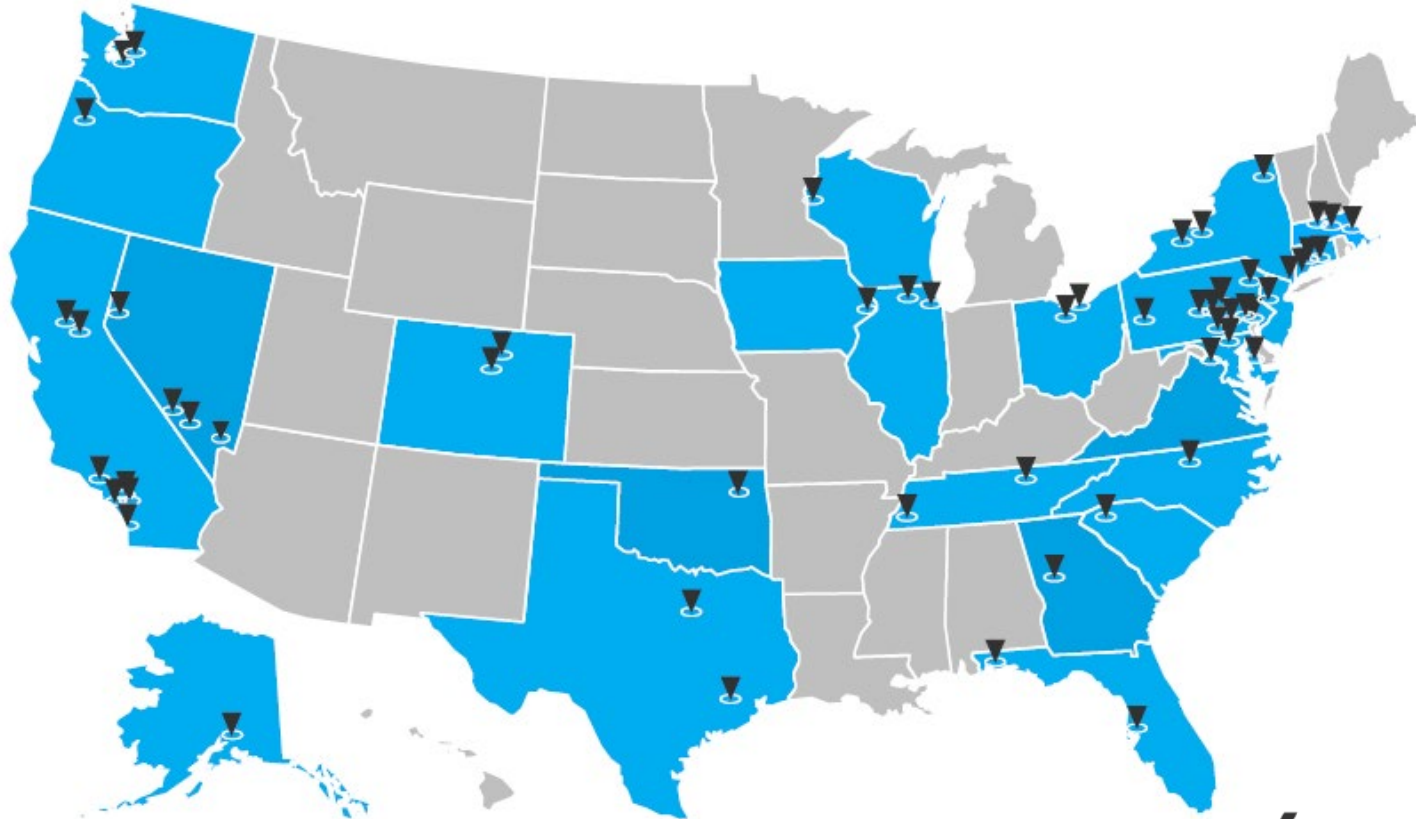
# Proposed Rules Related to Wellness Programs, Recent Laws & Rules Concerning Healthcare Price Transparency

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February 25, 2021



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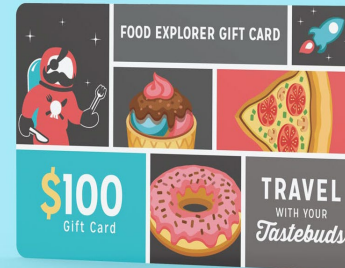
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## UPCOMING

### The Importance of a High Performing Health Plan and Lessons Learned: A CEO's Perspective

March 4<sup>th</sup>, 1 PM – 2 PM EST

**Presenter:** Marilyn Duker, *Brightview Senior Living*

### 2021: What's On Your HR Radar Screen?

March 25<sup>th</sup>, 11 AM – 12 PM EST

**Presenters:** Amy Polefrone, MPA, SPHR, SHRM-SCP, and Donna Miracle, SPHR, *HR Strategy Group*



# Webinars



# Workplace Wellness Programs and Compliance with DOL & EEOC Rules

Silberstein Insurance Group

February 25, 2021

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# Agenda

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## **Wellness Programs under HIPAA and the ACA (DOL Rules)**

- Wellness Program Basics
- Participation-Based Plans
- Health-Contingent Plans

## **EEOC Regulations on Wellness Programs (EEOC Rules)**

- Americans with Disabilities Act (ADA)
- Genetic Information Nondiscrimination Act (GINA)

## **Second Stimulus Bill (CAA, 2021)**

- No Surprises Act

# Wellness Programs: *Background*

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- 1996:** HIPAA adds Part 7 of ERISA to counter certain discriminatory practices by plans and carriers
- 2001:** DOL issues nondiscrimination rules and proposed regulations for wellness programs
- 2006:** DOL issues final rules on nondiscrimination provisions and wellness programs
- 2009:** EEOC issues two informal discussion letters on “voluntary” incentives
- 2010:** ACA codifies the wellness regulations
- 2013:** DOL issues final regulations that increase the 20% cap on rewards to 30% (50% if the wellness program includes tobacco cessation)
- 2016:** EEOC releases final regulations on wellness programs under ADA and GINA
- 2017:** Federal court in Washington, DC vacates EEOC’s wellness regulations effective 1/1/2019
- 2021:** January – EEOC proposes new regulations requiring *de minimis* incentives except for health-contingent wellness programs offered as part of a group health plan
- 2021:** February – EEOC regulations withdrawn as part of President Biden’s Executive Order recalling rules that hadn’t been published in the Federal Register



# HIPAA Nondiscrimination: *General Rules*

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**Individuals cannot be denied eligibility for benefits or charged more for coverage because of any “health factor,” including:**

- Health status
- Medical condition (both physical and mental)
- Claims experience
- Receipt of health care
- Medical history
- Genetic information
- Evidence of insurability
- Disability

# Wellness Programs: *Basics*

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- Wellness programs are designed to promote health and prevent disease, and provide group health plans an exception to HIPAA's nondiscrimination rules
- Examples of common wellness programs include:
  - Blood pressure and cholesterol screenings
  - Smoking cessation programs
  - Weight-loss programs
- A typical disease management program might target individuals who have or are at risk for developing diabetes and make case managers available to them to monitor compliance with medication protocols
- Both wellness and disease management programs are often structured to provide a financial reward for participating

# Wellness Programs: *Basics*

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- Are all employment-based wellness programs subject to the HIPAA nondiscrimination rules?
- **No** – many employers offer a wide range of programs to promote health and prevent disease
  - Some employers provide or subsidize healthier food choices in the employee cafeteria, provide pedometers to encourage employee walking and exercise, pay for gym memberships, or ban smoking on employer facilities and campuses
- A wellness program is subject to ERISA (and therefore the HIPAA nondiscrimination rules) only if it is, or is part of, a group health plan
  - For example, rewards are in the form of premium reductions
- Wellness programs operated as an employment policy may be covered by other Federal or State nondiscrimination laws (like the ADA and GINA), but they are not subject to ERISA

# Wellness Programs: *Subject to HIPAA*

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- When a wellness program is, or is part of, a group health plan, it will fall into one of three categories under final DOL regulations:
  - Participation-based
  - Health-contingent (activity-only)
  - Health-contingent (outcome-based)

# Wellness Programs: *Participation-Based*

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- **Participation-based** programs do not condition a reward upon satisfaction of a standard related to a health factor
  
- They are **NOT** subject to any additional requirements (other than that they must be offered to all similarly situated employees):
  - Program that reimburses costs of fitness center membership
  - Diagnostic testing program that provides reward for participation
  - Program that encourages preventive care through waiver of co-payment/deductible for certain activities
  - Program that reimburses employees for the costs of smoking cessation programs without regard to whether employees quit
  - Program that provides reward for attending monthly health education seminar
  - Completion of an HRA without any further action (educational or otherwise) required by employees as a result of issues identified by the HRA

# Wellness Programs: *Health-Contingent*

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- Health-contingent wellness programs require an individual to:
  - satisfy a standard related to a health factor to obtain a reward; or
  - require an individual with a health factor to undertake more than an individual without a health factor to obtain the same reward
  
- A health-contingent wellness program may be an **activity-only** wellness program or an **outcome-based** wellness program
  
- Health-contingent wellness programs must satisfy the following:
  1. Participants must have opportunity to qualify at least once per year
  2. Reward must not exceed **30%** of cost of single coverage (or family coverage, if dependents may participate in the program)
    - **50%** for tobacco use prevention or reduction programs
  3. Be reasonably designed to promote health or prevent disease
  4. Reward must be available to all similarly situated individuals
  5. Availability of a reasonable alternative standard must be disclosed

# Wellness Programs: *Activity-Only*

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- An **activity-only** wellness program is a type of health-contingent wellness program that requires an individual to perform or complete an activity related to a health factor in order to obtain a reward but does not require the individual to attain or maintain a specific health outcome
- Examples include walking, diet, or exercise programs, which some individuals may be unable to participate in or complete (or have difficulty participating in or completing) due to a health factor, such as severe asthma, pregnancy, or a recent surgery
- Could also include receiving a vaccine

# Reasonable Alternative Standard

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When is an activity-only wellness program available to all similarly situated individuals?

- When it allows a “reasonable alternative standard” (or waiver of otherwise applicable standard) to qualify for the reward, if:
  - It is unreasonably difficult for an individual to satisfy the applicable standard because of a medical condition, or
  - It is medically inadvisable for an individual to attempt to satisfy the standard
- An **activity-only** wellness program may seek verification from the individual’s physician that a health factor makes it unreasonably difficult or medically inadvisable for the individual to satisfy or attempt to satisfy the standard, **if it is reasonable to do so**



# Wellness Programs: *Outcome-Based*

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An outcome-based wellness program is a type of health-contingent wellness program that requires an individual to attain a specific outcome (such as not smoking or attaining certain results on biometric screenings) to obtain a reward

- For example, a biometric screening tests for high cholesterol, high blood pressure, abnormal BMI, or high glucose level
- Plan rewards those within a normal or healthy range for these medical conditions or risk factors, while those who are “at risk” must take additional steps (such as meeting with a health coach, taking a health or fitness course, adhering to a health improvement action plan, complying with a walking or exercise program, or complying with a health care provider's plan of care) to obtain the same reward

# Reasonable Alternative Standard

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- When is an **outcome-based** wellness program available to all similarly situated individuals?
  - When it allows a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual who does not meet the initial standard based on the measurement, test, or screening
- An **outcome-based** wellness program **may not seek verification** from the individual’s physician that a health factor makes it unreasonably difficult or medically inadvisable for the individual to satisfy or attempt to satisfy the applicable standard **as a condition of providing a reasonable alternative standard**
  - It may seek verification that an **activity-based** alternative standard is unreasonably difficult or medically inadvisable, if it is reasonable to do so

# Wellness Programs: *EEOC Regulations*

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- In 2016, the EEOC released final regulations under the ADA and GINA
  - Rules generally allowed a 30% incentive for participation in wellness
  - ADA rules cover an employer’s requests for health information on employees; GINA rules cover requests for health information on family members
- Regulations were effective starting in 2017, and apply to all workplace wellness programs, even if they don’t require participation in a particular health plan
  - 30% limits established under these regulations were vacated starting in 2019
  - In 2021, EEOC issued proposed regulations requiring “*de minimis*” incentives except for health contingent wellness programs that are part of a group health plan; however, these proposed regulations have been withdrawn

# Wellness Programs: *EEOC Regulations*

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## Tobacco Cessation Programs

- Tobacco cessation programs that do not request any medical information from employees are not covered by the ADA
- For example, a wellness program that merely asks employees whether or not they use tobacco (or whether they ceased using tobacco by the end of the program) is not a wellness program that asks disability-related questions
  - Would be covered by the DOL's 50% limit for outcome-based programs
  - If the program includes a medical exam or inquiry, such as biometric screening or cotinine testing, then it will be subject to the ADA

# Wellness Programs: *EEOC Regulations*

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## **HRAs and Biometric Screening**

- Wellness is an important component of the ACA; however, someone neglected to tell the EEOC
- Under DOL rules, employers may require employees to complete an HRA and biometric screening in order to be eligible to enroll in benefits, as long as the results are not used to delay or deny eligibility
- EEOC rules specifically prohibit an employer from denying access to the plan or a particular benefit option if an employee or spouse declines to participate in a wellness program that includes a medical exam or inquiry

# EEOC and the Courts

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## *Seff v. Broward County, FL (2012)*, and *EEOC v. Flambeau Inc. (2017)*

- Courts in *Seff* and *Flambeau* held that the ADA’s “insurance safe harbor” provision applies to wellness programs
- EEOC believed both cases were wrongly decided
- EEOC rejected the idea that the safe harbor could apply to employer wellness programs, since employers are not using information in a manner required by the safe harbor
  - 2016 final rules explicitly state that the safe harbor provision does not apply to wellness programs even if they are part of an employer’s health plan

# EEOC and the Courts

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## *EEOC v. Orion Energy Systems (2016)*

- Employees had to complete HRA and use Range of Motion machine
- Employee refused to participate and was required to pay 100% cost of medical coverage
  - If employee had participated, employer would have paid 100% of premium of coverage
  - Employee was later terminated
- Court agreed with the EEOC that the ADA's safe harbor did not apply to Orion's wellness program, but concluded that it was still voluntary

# EEOC and the Courts

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## *AARP v. EEOC (2017)*

- Federal court vacates EEOC’s 30% incentive limits effective in 2019
  - Court found that the EEOC failed to substantiate how the 30% limits ensured the plan remained “voluntary” as required under ADA & GINA
- June 2020 – EEOC announced its intent to propose rules that will limit incentives for participatory programs to a “*de minimis*” amount, but extend “insurance safe harbor” provision to health-contingent programs
- January 2021 – EEOC issues notice of proposed rulemaking on wellness programs under the ADA and GINA consistent with its June 2020 announcement
- February 2021 – Proposed rules withdrawn



# EEOC and the Courts

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## *Kwesell, Turecek, and Schwartz, et. al., v. Yale University*

- Class action filed July 16, 2019, brought by individual employees of Yale U. along with the AARP Foundation
- Alleges that Yale's wellness program requires approximately 5,000 union employees and their spouses to submit to medical tests and to allow release of their insurance claims data to wellness vendors
  - Employees who don't participate are penalized \$1,300 per year (\$25/paycheck)
  - Is it voluntary, or voluntary in theory?
  - The lawsuit is still pending

# EEOC Proposed Rules ( *Withdrawn* )

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## ADA:

- The proposed rules apply the ADA’s insurance “safe harbor” to health contingent wellness programs offered as part of, or qualified as, an employer-sponsored group health plan
  - The plans must follow the HIPAA nondiscrimination rules (i.e., they are subject to the 30% or 50% (for tobacco cessation program) limits)
- Health contingent wellness programs offered to all employees, regardless of their participation in the employer’s health plan, or participatory programs are subject to the new ADA regulations and limited to providing *de minimis* incentives to participants
  - *De minimis* is not defined, but examples include providing a water bottle or gift card of modest value
  - Per the EEOC, a \$50/month premiums reduction for completing a health risk assessment or paid airline tickets is not *de minimis*

# EEOC Proposed Rules ( *Withdrawn* )

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## ADA:

- Whether the program is offered as offered as part of, or qualified as, an employer-sponsored group health plan is determined by 4 factors:
  - The program is only offered to employees who are enrolled in an employer-sponsored health plan;
  - Any incentive offered is tied to cost-sharing or premium reductions (or increases) under the group health plan;
  - The program is offered by a vendor that has contracted with the group health plan or issuer; and
  - The program is a term of coverage under the group health plan

# Second Stimulus Package – CAA, 2021

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## ***No Surprises Act (eff. plan years beginning in 2022)***

- Protects from surprise medical bills – applies to all individual and group health plans, including grandfathered and self-insured plans
- Participants pay the in-network cost-sharing amount for:
  - out-of-network (OON) emergency care;
  - certain ancillary services provided by OON providers at network facilities; and
  - out-of-network care provided at network facilities without the participant’s informed consent
- It also requires that the in-network cost-sharing payments for OON surprise bills apply toward the in-network deductible
- Similar protections apply re: surprise air ambulance medical bills

# Second Stimulus Package – CAA, 2021

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## ***No Surprises Act (eff. plan years beginning in 2022)***

- Provides for a 30-day open negotiation period for providers and plans to settle out-of-network claims
- If the parties are unable to reach a negotiated agreement, they may access a binding arbitration process – referred to as Independent Dispute Resolution (IDR) – in which one offer prevails
- Providers may batch similar services in one proceeding when claims are from the same issuer/payer
- The IDR process will be administered by independent, unbiased entities with no affiliation to providers or issuers/payers

# Second Stimulus Package – CAA, 2021

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## *No Surprises Act (eff. plan years beginning in 2022)*

- IDR will consider factors including:
  - The median in-network rate, alongside relevant information brought by either party;
  - information requested by the reviewer;
  - factors such as the provider’s training and experience, patient acuity and the complexity of furnishing the item or service,
  - in the case of a provider that is a facility, the teaching status, case mix and scope of services of the facility, whether there was any effort to join the network, prior contracted rates, and other items
    - Similar factors are considered for air ambulance, including location of pickup and other extenuating circumstances

# Second Stimulus Package – CAA, 2021

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## ***No Surprises Act (eff. plan years beginning in 2022)***

- Following IDR, the party that initiated the IDR may not take the same party to IDR for the same item or service for 90 days, in order to encourage settlement of similar claims, but all claims that occur during that 90-day period may still be eligible for IDR upon completion of the 90-day period
- Plan ID cards will need to include the in-network and out-of-network deductibles and the in-network and out-of-network OOP limits, as well as a telephone number and website to provide consumer assistance information, such as information related to in-network hospitals and urgent care facilities

# Second Stimulus Package – CAA, 2021

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## ***No Surprises Act (eff. plan years beginning in 2022)***

- Plans must provide an Advance Explanation of Benefits for scheduled services to give participants transparency into which treating providers are in-network and which are not, and the expected cost
- The Advance EOB will include:
  - the contracted rate for the item or service (if in-network) or information on how to find in-network providers (if out-of-network);
  - an estimate of what the plan will pay;
  - an estimate of the participant’s cost-sharing and the extent to which the deductible or OOP has been satisfied; and
  - information on medical management requirements and other disclaimers





## Questions?

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