

# Wellness Programs: The EEOC's Efforts (and Failure) to Regulate

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## Overview

- HIPAA/ACA rules
- EEOC Regulations
- Recent court cases
- Summary

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## HIPAA/ACA

- HIPAA - Health plan may not discriminate on basis of health factor
  - Exception: Health contingent wellness programs may reward/penalize if compliant with regulations
- ACA - Expanded amount of allowable reward/penalty

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## HIPAA/ACA

- Two Types of Programs
  - Participatory - either no reward or reward not based on satisfying a standard related to a health factor
    - Ex: Complete HRQ, education program, reimburse fitness membership
  - Health Contingent
    - Activity Only - perform activity to earn reward
      - Ex: Walking, diet
    - Outcome Based - attain health outcome to earn reward
      - Ex: biometric screening levels, not smoking

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## HIPAA/ACA

- Health Contingent Programs
  - Annual opportunity to qualify
  - 30% max reward (50% if tobacco related)
  - Reasonably designed to promote health
  - Reasonable alternative standard available
  - Provide notice of reasonable alternative standard

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## EEOC

- HIPAA Compliance  $\neq$  ADA Compliance
  - ADA prohibits employer from discriminating against disabled individuals; applies to all wellness programs (not just health plans)
  - ADA also prohibits employers making medical inquiries unless job-related
    - Exception: "voluntary" wellness programs
  - Safe Harbor for bona fide benefit plans; treat individuals differently if justified by increased costs

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## EEOC

- ADA wellness regulations provide that a program is voluntary if:
  - Participation not required
  - Does not deny access to any benefit package option
  - Does not impose greater than 30% penalty/reward
  - No adverse employment action involved
  - Provide required notice
  - Preamble to the final regulations reaffirms EEOC position that Safe Harbor does not apply to employers' wellness programs

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## EEOC Initiated Lawsuits

- *EEOC v. Honeywell International, Inc.*
  - Program gave HSA contribution for participating; surcharges for not participating or being tobacco user
  - Court noted need for clarity to coordinate ACA and ADA
  - Suit voluntarily dismissed

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## EEOC Initiated Lawsuits (cont.)

- *EEOC v. Flambeau, Inc.*
  - Program required HRQ and biometric screening to participate in health plan
  - EEOC argued that only the voluntary test applied to wellness program; not the safe harbor rule
  - Court rejected argument; held wellness requirement was a risk management provision and satisfied safe harbor
  - Affirmed on appeal due to mootness

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## EEOC Initiated Lawsuits (cont.)

- *EEOC v. Orion Energy Systems, Inc.*
  - Program required HRQ and biometric screening to eliminate employee premiums; employee who failed to participate paid entire premium
  - District court agreed with EEOC and rejected use of safe harbor to justify wellness program design but held program was voluntary (under pre-regulation guidance)
  - Claim settled for \$100,000

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## AARP v. EEOC

- AARP sued EEOC alleging that EEOC failed to justify the new wellness rules and the EEOC abused its regulating power
  - Specifically that the EEOC provided no support as to why 30% is the threshold for "voluntary"
- Court agreed and ordered EEOC to revisit its regulations
- Court declined to issue an injunction—rules remain in effect

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## Summary

- Coordinate compliance with ACA and ADA rules
- Use of safe harbor argument in question
- Appropriate reward threshold in question
- Can more aggressive programs pass new "voluntary" standard?

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