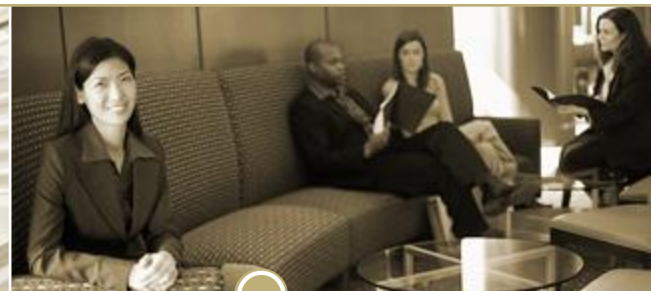




# Coffee Club

Wellness Programs Conflicting  
with ADA & GINA: *Properly structuring your  
programs to avoid EEOC lawsuits*



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# Introduction

Welcome to the AALRR monthly “Coffee Club” Webinar Series. Our series will focus on labor and employment law issues facing California employers and will provide you with a unique understanding and perspective on a variety of interesting and timely topics.

*Join us* the first Tuesday of every month @ 10:00 am for a new and exciting topic.

Today, we will be discussing *Wellness Programs Conflicting with ADA & GINA: Properly structuring your programs to avoid EEOC lawsuits.*

*Next Month, My Unusual Emotional Support Animal – Employer obligations regarding service/emotional support animals.*



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# Meet Jonathan Judge...



**Jonathan Judge** counsels employers in labor law and various employment litigation matters, including wrongful termination, discrimination, wage & hour, harassment, WARN Act, sick leave, and Patient Protection and Affordable Care Act/Healthcare Reform.

He represents employers before the NLRB, DFEH, EEOC, the California Division of Labor Standards Enforcement, and in arbitration. Mr. Judge also advises employers on personnel policies and employee handbooks.

# Agenda

- Wellness Programs
  - ADA Final Rules
  - GINA Final Rules
- Tips for Employers



# 4 Sources of Wellness Program Rules



- HIPAA
- ACA
- **ADA**
- **GINA**

# EEOC Final Regulations

In May 2016, the EEOC issued final regulations under the Americans with Disabilities Act (ADA) and Genetic Information Non-Disclosure Act (GINA)

*The rules are effective January 1, 2017*

# ADA Final Rules

- When a wellness program involves a medical examination and disability related inquiries (ME/DRI), the following rules apply...





# ADA Rule No. 1

1. Employers cannot require employees to participate in ME/DRI or deny coverage under health plan (or under coverage option under plan) for employees who choose not to participate in ME/DRI



# ADA Rule No. 2

## 2. Notice to employee



# ADA Final Rules - Notice

- 1 What information will be collected
- 2 Who will receive it
- 3 How it will be used
- 4 How it will be kept confidential

# ADA Final Rules – Notice *Continued*

- ✓ Notice can be provided via hard copy or email and has to be written so it is reasonably likely to be understood by the employee. This includes disability accommodation such as large text for visually impaired, etc.
- ✓ Can be provided by wellness provider but employer must ensure all employees receive it.
- ✓ EEOC has not set “hard” deadline for notice. Notice must be provided (1) before employee provides any health information, and (2) must allow enough time for employee to decide whether or not to participate.

# ADA Rule No. 3



3. If employer offers single health plan, total of incentives or penalties related to the employee's participation cannot exceed, in aggregate, 30 percent of total cost of employee-only coverage.  
Limit applies whether the program is offered only to health plan enrollees or to enrollees and non-enrollees.

# ADA Rule No. 3 *continued*

3. If employer offers multiple plans or options, limit is 30 percent of total cost of coverage for least expensive plan.  
If incentive is “in kind,” as opposed to cash or incentive described as cash value (such as a premium adjustment under a health plan), employer must assign reasonable value to incentive.



# ADA Rule No. 4

4. Health-related information developed under wellness program may only be shared with employer in aggregate, de-identified terms.

Employer may receive information sufficient to allow it to administer the wellness program (e.g., employer might need to know who qualified for incentive so it can administer changes to premium).



# ADA Rule No. 5

5. Any medical information developed under the wellness program must be maintained in employee's separate medical file, if employer has access to it.





# GINA – Overview

- Restricts employers from requesting genetic information, which includes family medical history.
- States employers may not incentivize employees to provide genetic information (including family medical history).
- While employer may ask employee for family medical history for wellness program, employer cannot offer incentives.



# GINA Rule No. 1

1. Employers cannot ask for information prior to or in connection with employee's enrollment, even if no incentive is offered.

Spouse's health history or status is "family medical history."

Final regulations permit employers to offer incentives to employees in exchange for spouse's participation in health risk assessment, as long as employer meets specific requirements.



# GINA Rule No. 2



2. Employer cannot offer incentive for the spouse's disclosure of genetic information, including family medical history, and the diseases or disorders of the employee's children.

Information can be supplied voluntarily.

# GINA Rule No. 3

3. Employers requesting current or past health status information of spouse must obtain prior, knowing, written, and voluntary authorization from spouse prior to the completion of a health risk assessment.

GINA authorization must be written so it is reasonably likely to be understood by the person providing the information.



# GINA Final Rules - Notice

- 1 What genetic information will be obtained
- 2 How it will be used
- 3 Any restrictions on its disclosure

# GINA Rule No. 4

4. If employer offers single health plan, total of incentives or penalties related to spouse's participation cannot exceed, in aggregate, 30 percent of total cost of employee-only coverage.

Limit applies whether program is offered only to health plan enrollees or to enrollees and non-enrollees.

If employer offers multiple plans, limit is 30 percent of total cost of least expensive plan.



# GINA Rule No. 4 *Continued*



4. If incentive is “in kind,” as opposed to cash or incentive described as cash value (such as a premium adjustment under a health plan), employer must assign a reasonable value to incentive.

The maximum incentive for the spouse is an additional amount that is capped at 30% (same as discussed in the ADA).

# GINA Rule No. 5

5. Genetic information obtained from health risk assessment can only be shared with employer in aggregate, de-identified terms. Identifiable genetic information may be shared only with spouse and medical providers.





# Thank You

For questions or comments, please contact:

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