PRESENTED BY
MICHAEL KELLY | VICE PRESIDENT

HealthCheck360°
HEALTHCHECK360.COM
866.511.0360

ACA, EEOC, HIPAA, and GINA: Wellness Regulatory Update

MAY 31, 2016

AGENDA

- Some background
- Recent Events
- Comparing Requirements
- What Next?
- Questions & Answers (Hopefully)

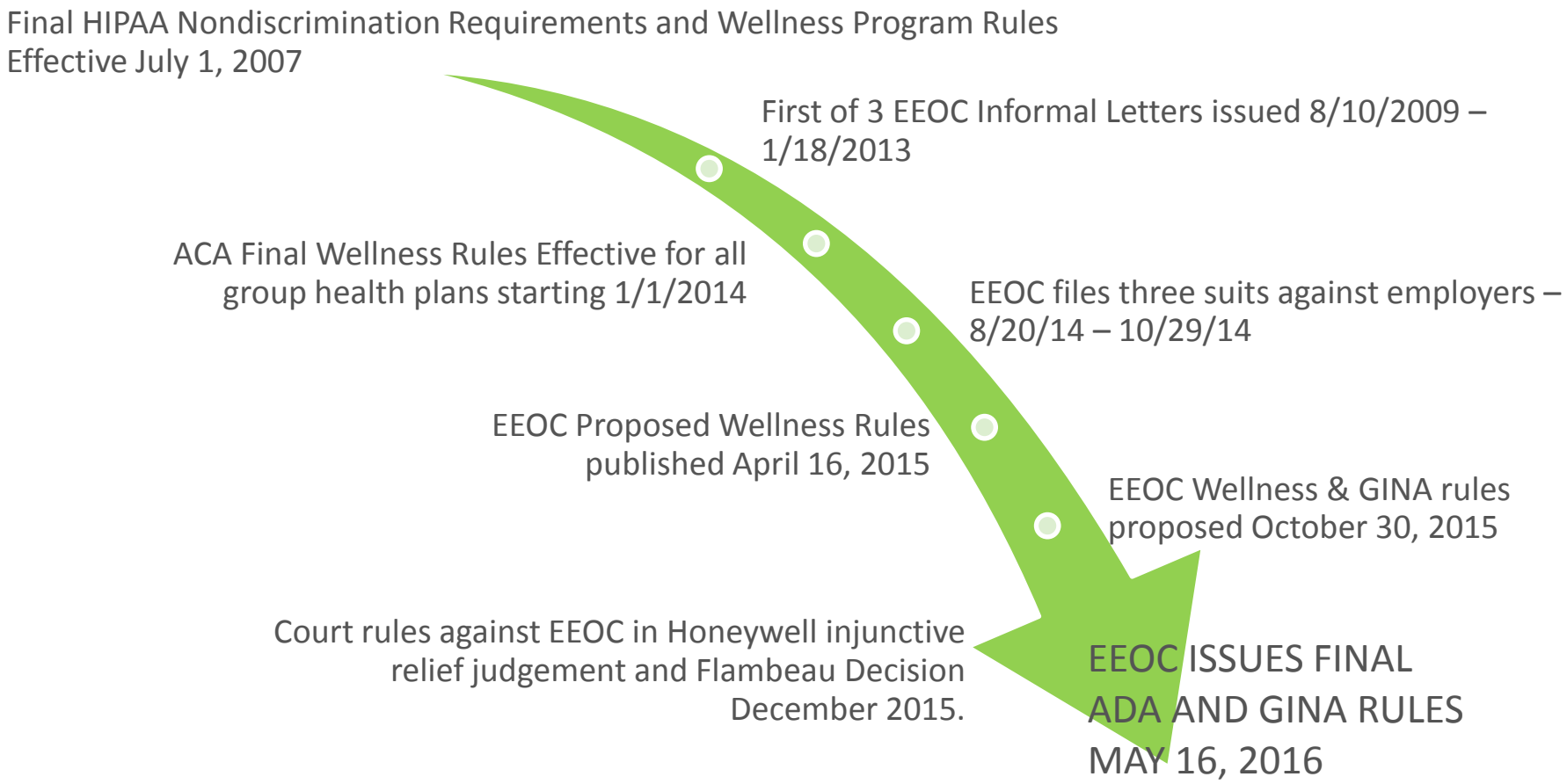
Some Background

How did we get into this mess?

THE PLAYERS

Health & Human Services, Treasury, Internal Revenue Service	• Health Insurance Portability and Accountability Act (HIPAA) /Affordable Care Act (ACA)
Department of Labor/ Equal Employment Opportunity Commission	• Americans with Disabilities Act (ADA)
Department of Labor/ Equal Employment Opportunity Commission	• The Genetic Information Nondiscrimination Act (GINA)

TIMELINE


Final HIPAA Nondiscrimination Requirements and Wellness Program Rules Effective July 1, 2007
First of 3 EEOC Informal Letters issued 8/10/2009 – 1/18/2013
ACA Final Wellness Rules Effective for all group health plans starting 1/1/2014
EEOC files three suits against employers – 8/20/14 – 10/29/14
EEOC Proposed Wellness Rules published April 16, 2015
EEOC Wellness & GINA rules proposed October 30, 2015
Court rules against EEOC in Honeywell injunctive relief judgement and Flambeau Decision December 2015.
EEOC ISSUES FINAL ADA AND GINA RULES MAY 16, 2016

HIPAA/ ACA BACKGROUND

- **HIPAA nondiscrimination rules prohibit discrimination against individuals based on health status**
  - Exception for benign discrimination in favor of individual with adverse health status
  - Exception if meet HIPAA wellness rules (July 2007)
- **Affordable Care Act codified most of wellness program rules Proposed wellness rules issued 11/26/12**
- **Final rules issued 5/29/13**
- **Effective for all group health plans starting 1/1/2014**

INTENT OF REGULATORS – THE CHALLENGE

- **Stated in preamble –**
  - *…to ensure that the program is reasonably designed to improve health and is not a subterfuge for underwriting or reducing benefits based on health status.*
  - *The intention of the Departments in these final regulations is that, regardless of the type of wellness program, every individual participating in the program should be able to receive the full amount of any reward or incentive, regardless of any health factor.*
- **Clarify the 5 requirements of health contingent wellness programs**
- **However…**

INTENT OF REGULATORS - THE GOOD NEWS

- *These final regulations continue to permit plans and issuers flexibility in designing reasonable alternative standards (including using reasonable alternative standards that are health-contingent).*
- No defined reasonable alternatives as it was viewed to stifle innovation in the wellness space.

THE RULES (HEALTH CONTINGENT PROGRAMS)

- Must give individuals an opportunity to qualify for the FULL reward at least once per year.
- The reward for all health-contingent programs with respect to a given individual may not exceed 30% of total cost of coverage, but if smoking cessation program, can go as high as 50%.
- The program must be reasonably designed to promote health or prevent disease.
- The reward must be available to all similarly situated employees by providing a reasonable alternative standard (RAS).
- Must provide adequate notice of availability of reasonable alternative standard.

ADA RULES

- While the ADA generally prohibits employers from requiring employees to take medical examinations, there is an exception written into the ADA for "bona fide benefit plans" at Section 501(c).
- *Wellness programs that fall within the ADA's safe harbor for bona fide benefits plans need not comply with the requirements regarding medical examinations for employees.*

SEFF V. BROWARD COUNTY

- This safe harbor was used by Broward County, Florida in 2012 to defeat an employee's lawsuit that alleged that the County's wellness plan violated ADA.
- Based on the bona fide plan defense, the suit was thrown out of federal court in summary judgment.
- The federal court judge in the Seff v. Broward County case didn't spend time on whether the Broward County program was voluntary or mandatory, but rather went straight to focusing on the ADA's bona fide benefit plan exemption under ADA Section 501(c).
- Broward County's wellness plan was upheld by two separate courts; both the federal trial court and the 11th Circuit Court of Appeals found the wellness plan to fall within the ADA bona fide benefit plan safe harbor.

SEFF V. BROWARD COUNTY

- In the Broward case, the Court found that the program was based on underwriting, classifying, or administering risk.
- The district court noted that the program "was designed to develop and administer present and future benefit plans using accepted principles of risk assessment."
- The County used the aggregate data to underwrite and classify risk on a "macroscopic level" in order to create benefit plans and mitigate risks.
- The district court found no "subterfuge" and noted that "the program is enormously beneficial to all employees of Broward County--disabled and non-disabled alike."
- ****Please note that the Seff case was not brought by the EEOC****

EEOC HISTORY DIFFERS

- **Series of informal discussion letters – Consistent theme "If a wellness program is voluntary…"**
- ADA: Voluntary Wellness Programs & Reasonable Accommodation Obligations 1/18/13
- ADA & GINA: Incentives For Workplace Wellness Programs 6/24/11
- ADA: Health Risk Assessments 8/10/2009

2011 INFORMAL LETTER

- *EEOC guidance states that a wellness program is "voluntary" as long as the employer neither requires participation* ***nor penalizes employees who do not participate.*** *See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act (ADA) at Q&A 22 (July 27, 2000),* [*http://www.eeoc.gov/policy/docs/guidance-inquiries.html*](http://www.eeoc.gov/policy/docs/guidance-inquiries.html)*.*
- *As you know, the Commission has not taken a position on whether, and to what extent, Title I of the ADA permits an employer to offer financial incentives for employees to participate in wellness programs that include disability-related inquiries (such as questions about current health status asked as part of a health risk assessment) or medical examinations (such as blood pressure and cholesterol screening to determine whether an employee has achieved certain health outcomes).*

AND THEN… NOTHING

- The EEOC has made no attempt to reconcile the established rules of healthcare reform and their own interpretation.

- *"Employers have been seeking guidance for years from the EEOC regarding how the ADA and GINA apply to wellness programs, and it has failed to provide that guidance,"* Brian Marcotte, president and CEO of the National Business Group on Health, said in an interview with *Business Insurance*.

- Gretchen Young, senior vice president for health policy at the ERISA Industry Committee, said in a statement that the EEOC appeared to be playing by *"a different set of rules, with no forewarning to companies whatsoever."*

Recent Events

The EEOC decides to Act (and poorly)

EEOC SPRINGS TO ACTION

EEOC V. Orion Energy Systems

- Filed on 08/20/2014
- The EEOC contends that Orion's wellness program required medical examinations and made disability-related inquiries.

EEOC V. Flambeau, Inc.

- Filed 10/1/14
- EEOC alleged that when employee Dale Arnold did not complete the biometric testing and health risk assessment, Flambeau *cancelled his medical insurance and shifted responsibility for payment of the entire premium cost to him.*

EEOC v. Honeywell

- Filed 10/29/14
- EEOC claims that Honeywell's incentives violate the ADA because employees are penalized in order to induce them to go through medical examinations that are not job-related or consistent with business necessity.
- Although there is an exception to this rule for "voluntary" health exams, the *EEOC claims that these exams are not voluntary because Honeywell imposes a penalty on employees who decline to participate.*

EEOC PROPOSED RULES

- The U.S. Equal Employment Opportunity Commission (EEOC) has issued a proposed rule to help clear up confusion over using financial incentives in worksite wellness programs.
- The proposal, which the EEOC announced April 16, 2015, would amend regulations implementing the equal employment provisions of the Americans with Disabilities Act (ADA) to address the interaction between Title I of the ADA and financial incentives as part of wellness programs offered through employer group health plans.
- The proposal was published April 20, 2015, in the *Federal Register* with a 60-day public notice and comment period, through June 19, 2015.

HONEYWELL CASE RESOLUTION

- On October 27, 2014, the EEOC brought suit against Honeywell International, Inc. in a Minnesota federal court, requesting a temporary restraining order enjoining the company from continuing to operate its wellness program.
- The district court denied the EEOC's request for injunctive relief on the grounds that the EEOC had not shown a threat of irreparable harm.
- The case was later voluntarily dismissed.

https://www.littler.com/publication-press/publication/wellness-program-awakens-district-court-rejects-eeoc-challenge

FLAMBEAU JUDGEMENT

- The *Flambeau* court rejected the EEOC's arguments that the *Seff* decision was wrongly decided and should not be followed.
- Court rejected the EEOC's argument that a different exception under the ADA — the voluntary "employee health program" exception involving voluntary tests and inquiries that are part of employee health programs — would be "rendered irrelevant" by applying the ADA safe harbor to the company's wellness program.
- Court was not persuaded by the EEOC's position in its proposed rule (published on April 20, 2015), reported here, that the ADA safe harbor was not the proper basis for finding wellness program incentives permissible.
- It is notable that even though the health plan at issue in *Seff* was fully-insured the Court relied on it to apply the ADA safe harbor on bona fide benefit plans in this case where the plan was self-insured by the employer.

SOME LESSONS FROM FLAMBEAU

- Wellness Program Requirement has to be a Term of an Employer's Benefit Plan
- Employees Must Receive Adequate Notice of Any Wellness Program Requirement
- The Wellness Program Requirement Must be Based on Underwriting Risks, Classifying Risks, or Administering Such Risks
- The Wellness Program Must Not be Mandatory

EEOC FINAL RULES

- On May 16, 2016, the Equal Employment Opportunity Commission (EEOC) issued final regulations governing the treatment of wellness programs under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).
- The final rules, which closely track earlier proposals with some modifications, **are not, however, entirely aligned with the ACA regulations**.
- The differences between the EEOC's rules and the ACA regulations make the task of designing compliant wellness programs more complex.
- The new notice and rules regarding financial inducements **will apply to employer-sponsored wellness programs as of the first day of the first plan year that begins on or after January 1, 2017.**

Comparison of Regulations

This is where things start to matter (and get really boring)

COMPARISON

HIPAA/ Affordable Care Act

ADA/EEOC

GINA

COVERED EMPLOYEES OR PROGRAMS

HIPAA/ACA

- Wellness plans that relate to group health plans. Wellness plans are divided into two separate categories for compliance purposes:
  - **Participatory Wellness Plans:** Do not require individuals to meet health-related standards in order to obtain rewards or do not offer rewards at all. Also, these programs generally do not require individuals to complete physical activities.
  - **Health-contingent Wellness Plans:** Require individuals to satisfy standards related to health factors in order to obtain rewards

ADA (EEOC)

- Wellness programs sponsored by employers with **15 or more employees**
- All wellness programs sponsored by covered employers are prohibited from discriminating against disabled individuals.
- Additional compliance rules apply to wellness programs that include questions about employees' health or medical examinations.

GINA (EEOC)

- GINA prohibits discrimination based on genetic information in health plan coverage (Title I) and employment (Title II).
  - Title I applies to wellness programs offered under group health plans
  - Title II applies to employers with **15 or more employees**
- GINA's restrictions apply to wellness programs that request genetic information—for example, family health history.

REASONABLE DESIGN

HIPAA/ACA	ADA (EEOC)	GINA (EEOC)
• **Participatory Wellness Plans:** No reasonable design requirement • **Health-contingent Wellness Plans:** Must be reasonably designed to promote health or prevent disease	• Must be reasonably designed to promote health or prevent disease	• Must be reasonably designed to promote health or prevent disease

FREQUENCY OF REWARD

HIPAA/ACA	ADA (EEOC)	GINA (EEOC)
• **Participatory Wellness Plans:** No requirement • **Health-contingent Wellness Plans:** Must provide eligible individuals with chance to qualify **at least once per year**	• No requirement	• No requirement • Cannot offer reward for an employee or plan participant to provide his or her own genetic information (including family medical history) as part of a wellness program • Can provide a reward for a spouse to provide his or her own health information (not the spouse's own genetic information) as part of a wellness program

VOLUNTARY

HIPAA/ACA	ADA (EEOC)	GINA (EEOC)

• No requirement
• *HIPAA's rules for wellness plans are intended to ensure that every participant can receive the full amount of any reward or incentive, regardless of any health factor.
	• Participation in programs that include disability-related inquiries or medical exams must be voluntary. Employers cannot:
	  • Require employees to participate;
	  • Deny health insurance or reduce health benefits for not participating; or
	  • Take adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten employees to get them to participate or achieve certain health outcomes
		• Employees and plan participants can provide family medical history voluntarily under wellness programs (that is, individuals cannot be required to provide information and cannot be penalized for not providing it)
		• Under Title II, an employee (or his or her spouse) must provide prior, knowing, voluntary and written authorization for the collection of genetic information
		• Cannot require employees (or employees' spouses or dependents) to agree to the sale, or waive the confidentiality, of their genetic information as a condition for receiving incentives or for participating in wellness programs

LIMIT ON INCENTIVES

HIPAA/ACA

- **Participatory Wellness Plans:** No limit on incentives
- **Health-contingent Wellness Plans:** Incentives cannot exceed **30 percent** of the cost of coverage (**50 percent** for programs that are designed to prevent or reduce tobacco use).
- Reward limit is based on the total cost of employee-only coverage. But if dependents may participate in the wellness programs, rewards can be based on total cost of coverage in which employees and any dependents are enrolled.

ADA (EEOC)

- Incentive limits apply to wellness plans that include disability-related inquiries or medical exams.
- For wellness programs that are part of group health plans, employers may offer limited incentives for employees to participate in the programs or to achieve certain health outcomes. Incentives cannot exceed **30 percent** of the total cost of employee-only coverage.
- If an employee and spouse participate in the program, the employee's portion of the reward would be limited to 30% of the cost of employee-only coverage. The difference between 30% of the applicable coverage and that number could be used for the spouse incentives.
- Incentive limit applies to both participatory and health-contingent wellness plans.

GINA (EEOC)

- Cannot offer incentives for employees or plan participants to provide their own genetic information (including family medical history) as part of wellness plans
- Can provide an incentive for a spouse to provide his or her own health information (not the spouse's own genetic information) as part of a wellness plan
- Under the rule, the total incentive for an employee and spouse to participate in a wellness program that is part of a group health plan and that collects information about current or past health status may not exceed **30 percent** of the total cost of the plan in which the employee and any dependents are enrolled.

LIMIT ON INCENTIVES (CONT)

HIPAA/ACA	ADA (EEOC)	GINA (EEOC)
	• According to EEOC, a smoking cessation program that merely asks whether an employee uses tobacco is not a disability-related inquiry. Thus, the EEOC would allow an employer to offer incentives as high as 50 percent of the cost of employee coverage for that smoking cessation program, consistent with HIPAA's requirements. • However, an incentive tied to a biometric screening or medical examination that tests for the presence of tobacco would be limited to 30 percent.	

SOME MORE DETAIL

Employee Only

- 30% of the total cost of self-only coverage (including both the employee's and employer's contribution) of the group health plan in which the employee is enrolled when participation in the wellness program is limited to employees enrolled in the plan;
- 30% of the total cost of self-only coverage under the covered entity's group health plan, where the covered entity offers only one group health plan and participation in a wellness program is offered to all employees regardless of whether they are enrolled in the plan;
- 30% of the total cost of the lowest cost self-only coverage under a major medical group health plan where the covered entity offers more than one group health plan but participation in the wellness program is offered to employees whether or not they are enrolled in a particular plan;
- 30% of the cost of self-only coverage under the second lowest cost Silver Plan for a 40-year-old nonsmoker on the state or federal health care Exchange in the location that the covered entity identifies as its principal place of business if the covered entity does not offer a group health plan or group health insurance coverage.
- https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm

Employee and Spouse

- If a wellness program is open only to employees and family members in a particular group health plan, then the maximum inducement for the employee's spouse to provide information about current or past health status is **30 percent of the total cost of self-only coverage** under the group health plan in which the employee and family members are enrolled.
- If an employer provides more than one group health plan and enrollment in a particular plan is not required to participate in the wellness program, the maximum inducement is 30 percent of the lowest cost major medical self-only plan the employer offers.
- If the employer does not offer a group health plan, then the maximum inducement for the spouse to provide health information is 30 percent of the total cost to a 40-year-old non-smoker purchasing coverage under the second lowest cost Silver Plan available through the state or federal Exchange in the location that the employer has identified as its principal place of business.
- Note that all of the inducement limits are exactly the same as the limits on incentives available to employees under the Americans with Disabilities Act (ADA), as described in the final rule on the ADA and Wellness Programs published at the same time as the GINA final rule.
- https://www.eeoc.gov/laws/regulations/qanda-gina-wellness-final-rule.cfm

UNIFORM AVAILABILITY

HIPAA/ACA	ADA (EEOC)	GINA (EEOC)
• **Participatory Wellness Plans:** Must be available to all similarly situated individuals • **Health-contingent Wellness Plans:** Must make the full rewards available to all similarly situated individuals	• No requirement (but see the reasonable accommodation requirement on next slide)	• No requirement

REASONABLE ACCOMMODATION

HIPAA/ACA	ADA (EEOC)	GINA (EEOC)

• **Participatory Wellness Plans:** No requirement
• **Health-contingent Wellness Plans:**
  • The full reward under a health-contingent wellness program must be available to all similarly situated individuals.
  • To meet this requirement, all health-contingent wellness programs must provide a reasonable alternative standard (or waiver of the otherwise applicable standard) in certain circumstances.
	• Employers must provide reasonable accommodations that enable employees with disabilities to fully participate and earn any rewards or avoid any penalties offered as part of the programs.	• No requirement

NOTICE

HIPAA/ACA

- **Participatory Wellness Plans:** No requirement
- **Health-contingent Wellness Plans:** Must disclose the availability of a reasonable alternative standard to qualify for the reward (and, if applicable, the possibility of waiver of the otherwise applicable standard) in all plan materials describing the terms of a health-contingent wellness program. For outcome-based wellness programs, this notice must also be included in any disclosure that an individual did not satisfy an initial outcome-based standard.

ADA (EEOC)

- For wellness programs that are part of group health plans, employers ***must provide employees with a notice that describes what medical information will be collected, who will receive it, how the information will be used and how it will be kept confidential.***

GINA (EEOC)

- Must obtain employee authorization when a wellness program requests genetic information (family medical history).
- Authorization form must be written in an understandable way, must describe the type of genetic information that will be obtained and the general purposes for which it will be used, and it must describe the restrictions on disclosure of genetic information.

What's Next?

What should Employer's Change?

POTENTIAL IMPACT

- 88 percent of employers with 500 workers or more offer some sort of wellness plan, according to a 2014 national survey by the benefits consultant Mercer.
- Of those, 42 percent offer employees incentives to undergo screening, and 23 percent tie incentives to actual results, such as reaching or making progress toward blood pressure or BMI targets.
- Most programs' incentive structures do not extend pass the 30% threshold, so there doesn't seem to be a huge concern from an incentive design point of view.
- Significant administration and reporting concerns from EEOC that do not exist today.

OBAMA ADMINISTRATION CHANGING POSITION OR ROGUE OFFICE?

- Unknown but some speculation suggests that the Chicago EEOC office was operating independently from broader Administration policy.
- The Chicago office filed ALL three separate lawsuits in the last year on wellness plans, but no other EEOC office has joined the effort.
- Several business groups and CEO's have spoken out directly about the EEOC actions.
- In March 2015, Rep. John Kline (R-MN) and Senator Lamar Alexander (R-TN) introduced legislation, the "Preserving Employee Wellness Programs Act."

STAY THE COURSE

- **Employers should make sure that their wellness programs are fully compliance with the existing wellness regulations under the affordable care act and the new ADA/GINA requirements**
- Employers should be aware that the EEOC is not likely to reverse its position on wellness programs because of the Flambeau decision.
- The agency has staked out its position and can be expected to continue to pursue wellness programs that do not fit the EEOC's concept of an ADA-compliant program.
- Employers that currently maintain or are contemplating starting a wellness program as part of their group health plan should monitor this situation closely and stay tuned for further legal developments.
- Wellness programs and benefit design must be compliant with all rules following plan renewal date following 1/1/17.

Questions

Most answers will be "I don't know," "Remains unclear," and "make sure you vote."