



VENABLE



Improving the Health of Your Company's Employee Benefit Plans: Fiduciary, Financial, and Medical Wellness Programs

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Speakers



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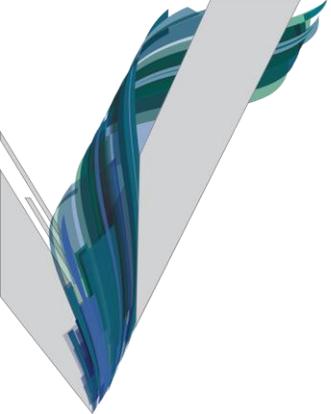
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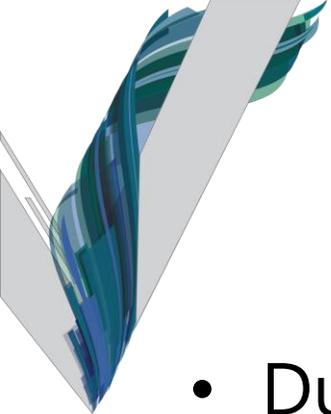
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FIDUCIARY WELLNESS



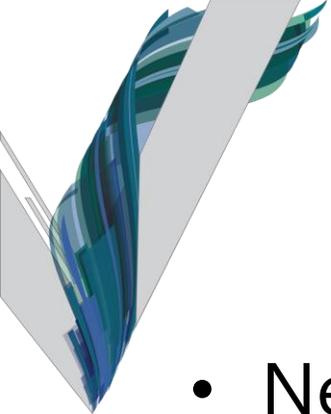
Overview of Fiduciary Duties

- Duty of Loyalty – Act in sole interest of plan participants and beneficiaries for the exclusive purpose of providing benefits
- Duty to Monitor – Monitor service providers and investment managers and pay only “reasonable” plan expenses
- Duty to Follow Plan Terms – Follow terms of plan document in day-to-day operation of the plan
- Duty of Prudence/Care – Carry out duties prudently
- Duty to Diversify – Diversify plan investment options



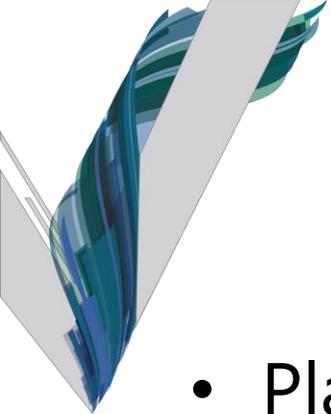
ERISA Duty of Prudence

- Must act with care, skill, prudence, and diligence
- Duty to seek outside expertise if/when necessary
- Primarily relates to investment fund selection, including performance and fees, and plan fees generally
- Focus is on the process
- U.S. Supreme Court held that 401(k) fiduciaries have a continuing duty to monitor funds made available under a plan
- There has been a recent increase in 401(k) investment/fee litigation



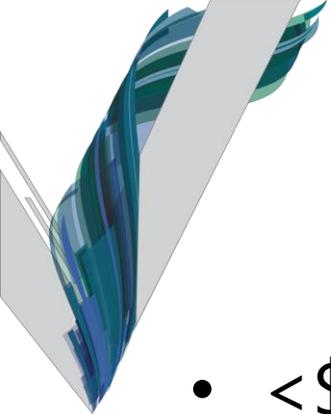
DOL Fiduciary Rule

- New ERISA fiduciary rule expands who is a fiduciary when providing investment advice for a fee to a retirement plan or its participants
 - Key is whether a recommendation is made that can reasonably be viewed as a suggestion to take a course of action or refrain from a particular course of action
 - There must be direct or indirect compensation and an acknowledgment of fiduciary status



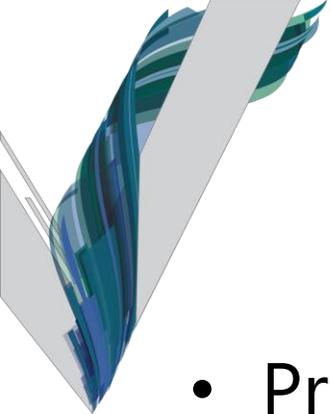
Investment Education versus Investment Advice

- Plan information
- General financial, investment, and retirement information
- Asset allocation model
- Interactive investment materials



Impact of Fiduciary Rule on Plan Sponsors

- <\$50M in plan assets – adviser and plan sponsor to enter into contract stating that there are no conflicts of interest and including appropriate fees
 - Best Interest Contract Exemption (BICE)
- >\$50M in plan assets – identify fiduciary for advice, ensure new requirements are satisfied, and engage investment committee



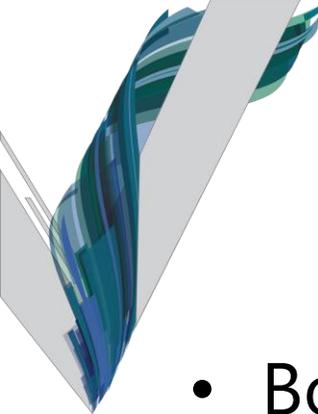
Impact of Fiduciary Rule on Plans

- Primary impact on recordkeepers/TPAs
- Increased sensitivity to avoid inadvertent investment advice
- Limit assistance provided to participants contemplating distributions



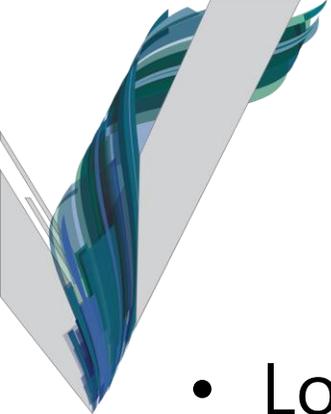
Recent Fiduciary Litigation

- 401(k) litigation
- 403(b) litigation
- Litigation against financial institutions with proprietary products in fund menu



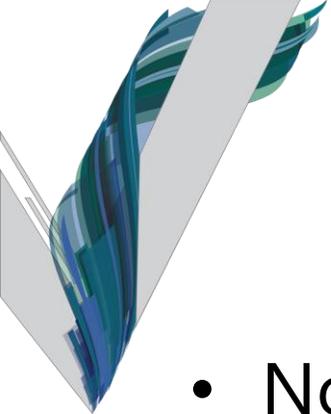
401(k) Litigation – Sample of recent large settlements

- Boeing – \$57M settlement
 - Nine years of litigation
 - Alleged payment of excessive administrative and recordkeeping fees
 - Allegation that corporate banking relationship influenced decision to use recordkeeping services
 - Alleged imprudent offering of technology sector fund
 - Alleged imprudent management of company stock fund
 - Holding excessive cash in a unitized stock fund



401(k) Litigation – Sample of recent large settlements

- Lockheed Martin – \$62M settlement
 - Alleged payment of excessive fees
 - Alleged imprudent management of stable value fund
 - Alleged imprudent management of company stock fund



401(k) Litigation – Sample of recent large settlements

- Novant Health – \$32M settlement
 - Alleged fiduciary breach due to offering retail class shares when institutional class shares were available
 - Alleged payment of excessive fees for recordkeeping and administration



401(k) Litigation – Not all rulings are negative

- Chevron – Last month court granted motion to dismiss – complaint did not include sufficient underlying facts to support breach of fiduciary claims arising from:
 - Use of money market fund instead of stable value fund
 - Use of retail instead of institutional share classes
 - Use of mutual funds instead of lower-cost collective trusts
 - Failure of re-bid administrative services on a regular basis
 - Failure to monitor retirement oversight committee



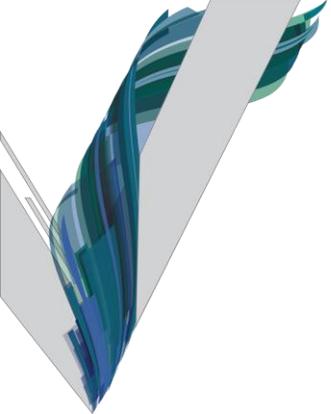
403(b) Litigation

- Many large universities have been sued within past two months
- Allegations include:
 - Failure to leverage the plan’s bargaining power by using multiple recordkeepers, and multiple investment funds within each asset class
 - Selection and retention of underperforming funds
 - Inclusion of far too many funds, resulting in “decision paralysis”
 - Failure to conduct competitive bidding or negotiate fees and revenue sharing

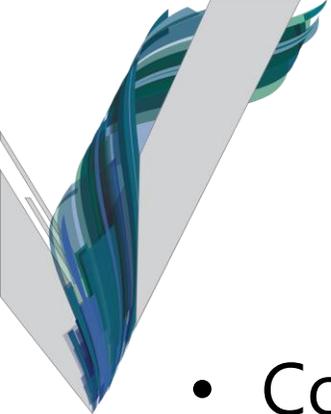


403(b) Litigation (continued)

- Many plan sponsors have legacy investment products with transfer restrictions that have made fiduciary oversight difficult or impossible
 - If legacy investment providers begin to loosen transfer restrictions because of the litigation, plan sponsors should revisit the legacy investment products in their plans and consider whether they should be removed.

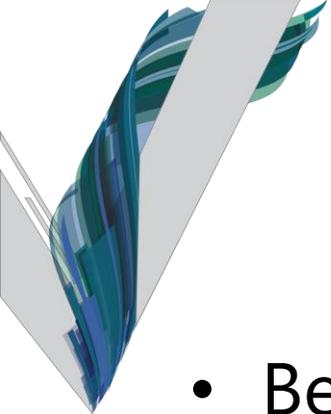


FIDUCIARY BEST PRACTICES



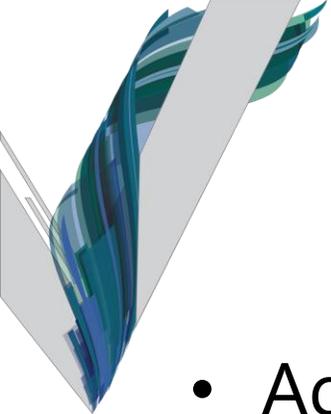
Plan Oversight Committee

- Committee delegated by Board with status of “plan administrator” and oversight authority over plan investments and fees
- Beneficial because it serves to identify employees who serve as fiduciaries (and excludes others)
- Beneficial because it provides a framework for satisfaction of fiduciary duties
- Board retains residual fiduciary responsibility and should have a reporting mechanism in place to monitor Committee



Fiduciary Investment Advisors

- Be sure that your investment advisor has acknowledged fiduciary status
- Section 3(21) co-fiduciary (non-discretionary)
 - Investment fund performance monitoring
 - Share class and other investment-based expense monitoring
 - Benchmarking of plan expenses – investment and recordkeeping
- Section 3(38) investment manager (discretionary)
 - Complete control over fund lineup



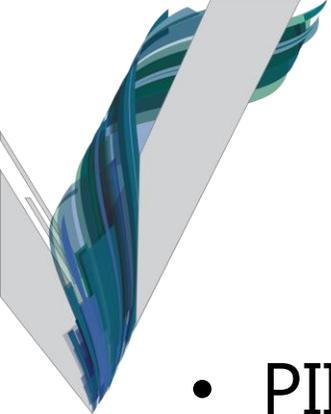
Investment Policy Statement

- Addresses substantive criteria for investment fund monitoring
- Addresses process for investment fund monitoring
- Addresses default investment fund or funds
- Need to ensure that fund performance reports from outside investment advisors align with the investment policy statement criteria



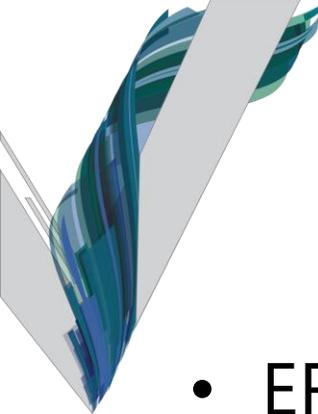
Indemnification and Insurance

- ERISA imposes personal liability for breach of fiduciary duty
- Committee members can be indemnified by the plan sponsor
- The plan sponsor can maintain fiduciary liability insurance covering ERISA claims



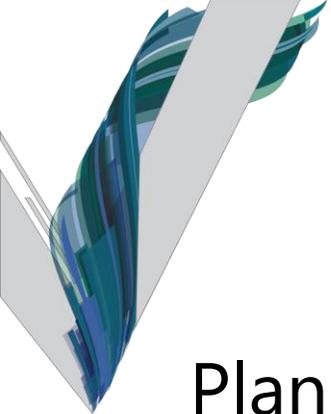
Privacy and Cybersecurity

- PII – Personal Identifiable Information
- PHI – Personal Health Information
- ERISA
- HIPAA/HITECH
- State laws
 - State privacy laws may not be preempted by ERISA
 - Some state privacy laws may be broader than HIPAA



Privacy and Cybersecurity

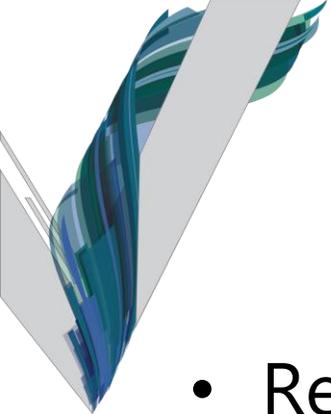
- ERISA Fiduciary Duties
 - Duty of Loyalty
 - Must act solely in the interest of participants and beneficiaries
 - Duty of Care
 - Must follow reasonable standard of care in protecting participant personal and plan information
 - Plan sponsors must implement stringent measures to ensure compliance with industry practice
 - Personal Liability
 - Penalties for Breach of Fiduciary Duty



Privacy and Cybersecurity: Action Items

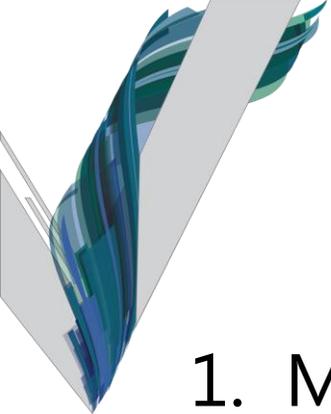
Plan sponsors need to protect participant assets and participant information

- Contract terms with service providers may not provide sufficient protection for data security and privacy issues
 - Demand notice of breach and create reporting protocol
 - Allocate liability in event of breach
 - Understand location and time frames related to data storage



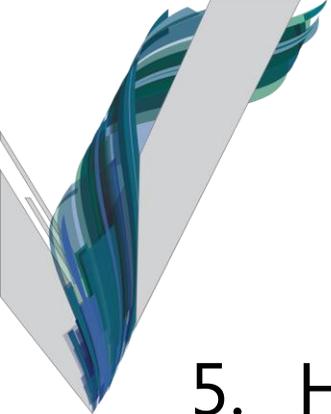
Privacy and Cybersecurity: Action Items

- Review internal security measures and work with IT/Infosec to evaluate service provider security protocol
- Review fiduciary liability policy for coverage or consider cybersecurity insurance
- Train plan participants and beneficiaries to protect passwords and documents with PII to avoid cybertheft
- Develop breach response plan
 - Call Venable to help in evaluating notice requirements under state and federal law



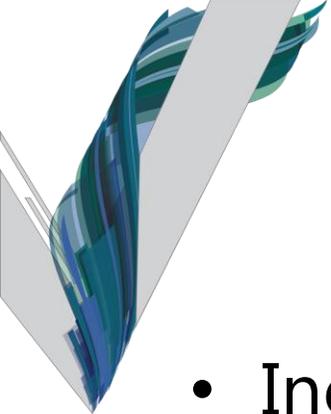
Takeaways

1. Maintain fiduciary liability insurance. Mounting a defense, even if successful, will be costly.
2. Understand the plan's fee structure, including how any revenue sharing amounts flow.
3. Keep abreast of the competitive landscape for recordkeeping services and ensure that the plan is not overpaying (directly or through revenue sharing).
4. Negotiate for "excess" revenue sharing to be rebated to an "ERISA budget account" or consider "fee leveling" so that some participants are not subsidizing others.



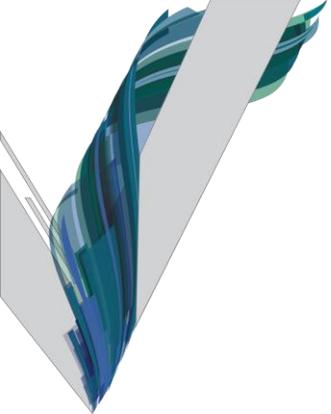
Takeaways (continued)

5. Have an orderly process for evaluating investment fund performance, and document the process.
6. Avoid unnecessary duplication of funds. Each asset class should have, at most, one passively managed and one actively managed option.
7. Be deliberate in your choice of cash equivalent options (stable value, money market fund, bank deposit).
8. Negotiate protection for cybersecurity threat or theft.

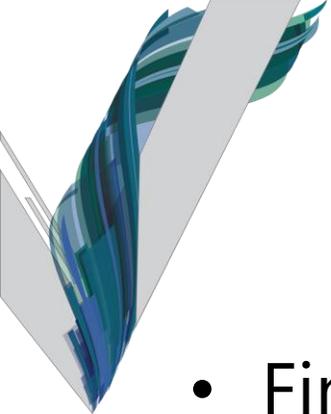


Other Issues

- Increase in DOL and IRS Audits
- DOL Defined Benefit Plan Project
 - Need to locate lost participants and make required minimum distributions
 - Proposed PBGC program provides option for transfer of participants in terminated 401k plans to PBGC

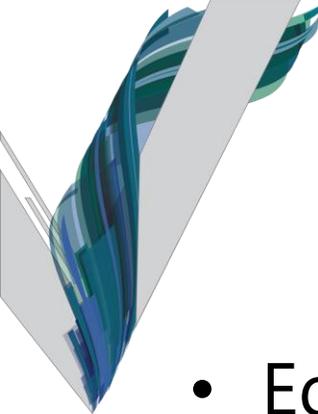


FINANCIAL WELLNESS



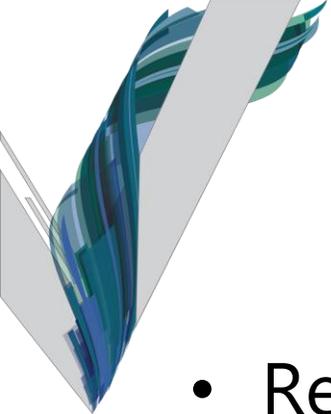
Financial Wellness: Background

- Financial wellness centers around education and tools designed to assist employees in managing their employer-sponsored benefits and their other assets
 - Financial planning – Budgeting/savings/investments
 - Preparing for lifetime retirement income
 - Incorporating social security and other savings
 - Facilitating college expenses planning or paying off student loans



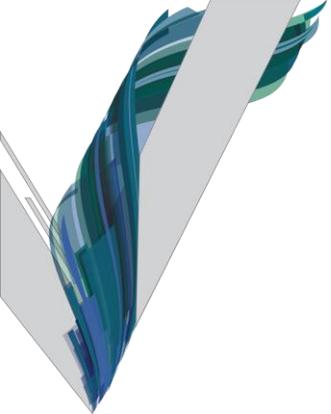
Financial Wellness: Issues to Consider

- Education versus investment advice
 - Fiduciary exposure
- Payment of wellness program expenses
- Potential tax consequences
 - Imputed income

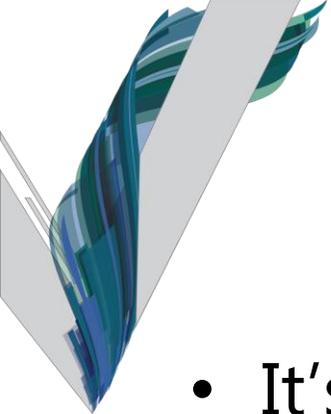


Financial Wellness: Products

- Retirement plan advice
 - Personal or guided
- Student loan assistance/repayment
 - Loan refinancing
 - Matching payments

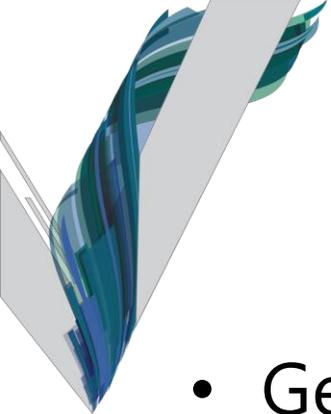


MEDICAL WELLNESS PROGRAMS



Medical Wellness Programs

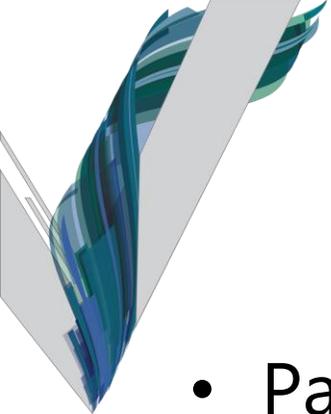
- It's not just HIPAA's Nondiscrimination Rules anymore
- But also the ADA's final rules published May 17
- And GINA's final rules issued the same day
- Plus Honeywell Intern'l, Flambeau, and Orion Energy
- And, potentially, the Preserving Employee Wellness Program Act (H.R.1189 and S. 620)



Medical Wellness Programs

HIPAA Nondiscrimination Rules

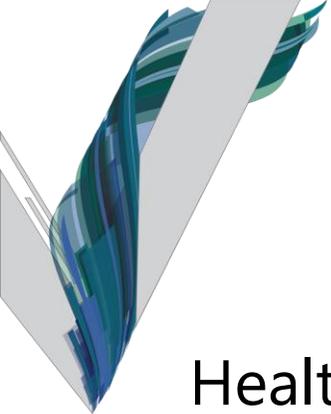
- General Rule: Group health plans cannot discriminate with regard to eligibility, premiums, or contributions based on health factors
- Health Factors:
 - health status
 - medical history
 - medical condition
 - genetic information
 - claims experience
 - evidence of insurability
 - disability
 - receipt of healthcare
- Exception: nondiscriminatory wellness programs
 - May be participatory or health contingent



Medical Wellness Programs

HIPAA's Nondiscrimination Rules

- Participatory
 - Do not condition reward on ability to meet a health standard
 - Available to all similarly situated individuals
 - No limit on the size of the reward
 - **BUT NOTE**: The ADA's limit may apply!
 - Examples:
 - Reimbursement of costs for smoking-cessation program
 - Reward for completing a Health Risk Assessment (HRA)



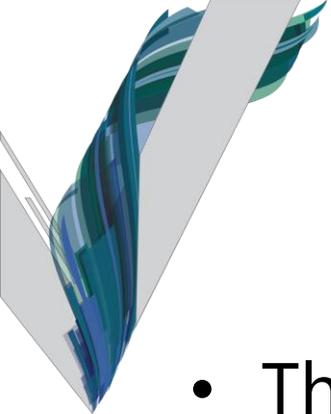
Medical Wellness Programs

HIPAA's Nondiscrimination Rules

Health Contingent

If a reward is based on satisfying a standard related to a health factor, then:

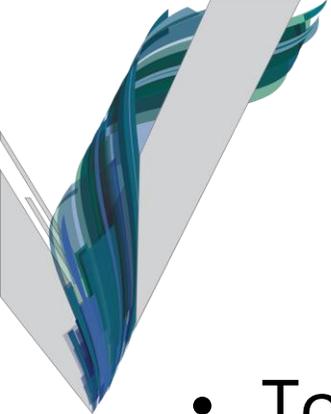
- Must provide an opportunity to qualify for the reward once a year
- Reward cannot exceed 30% of total cost of coverage (tobacco – 50%)
 - Employees – Based only on single coverage
 - Dependents too – Based on dependent coverage
- Program must be reasonably designed to promote health/prevent disease
- Reasonable alternative standard must be offered
 - Activity Based – Available for any individual for whom it is unreasonably difficult because of a medical condition, or medically inadvisable to attempt, to satisfy the standard
 - Outcome Based – Must be available to all, regardless of medical status
- Notice of Availability



Medical Wellness Programs

The ADA

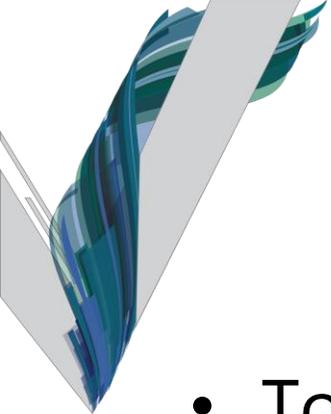
- The ADA prohibits discrimination against individuals on the basis of disability with regard to employment compensation and terms, conditions, and privileges of employment
- General Rule: Employer must not make disability-related inquiries or require medical exams
- Exception: Voluntary wellness programs



Medical Wellness Programs

The ADA

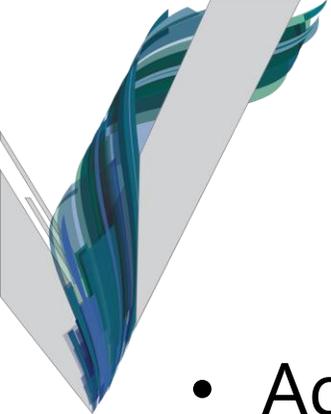
- To be a “wellness program,” the arrangement must:
 - Have a reasonable chance of improving health or preventing disease
 - Not be overly burdensome (require an unreasonable investment of time, involve unreasonably intrusive procedures, or place significant costs on employees for medical exams)
 - Not be a ploy for violating the ADA
 - Not be “highly suspect” in the method chosen
 - Not exist mainly to shift costs to targeted employees based on their health
 - Not be used by the employer only to predict its future healthcare costs



Medical Wellness Programs

The ADA

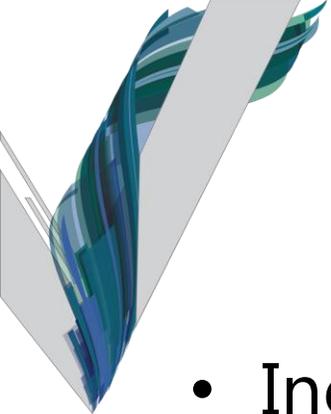
- To be “voluntary,” the wellness program must not:
 - Require employees to participate
 - Deny coverage under the health plan to non-participating employees
 - Limit benefits for non-participating employees
 - Take any adverse employment action against non-participating employees



Medical Wellness Programs

The ADA

- Adds a new notice requirement
- The notice must:
 - Be understandable
 - Describe:
 - Medical information to be collected
 - How medical information will be used
 - Restrictions on disclosure of employee's medical information
 - Parties who will receive it
 - Methods used to ensure the information is not improperly disclosed



Medical Wellness Programs

The ADA

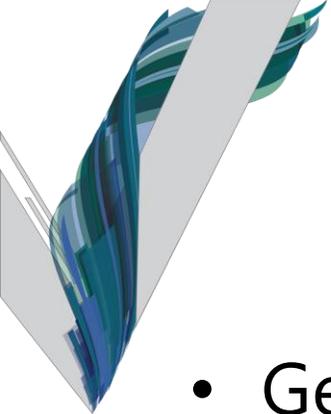
- Incentives
 - Rules apply whether reward is financial or otherwise
 - Limited to 30% of the total cost of single coverage under the group health plan in which the individual is enrolled
 - Other rules apply if enrollment in the group health plan is not a condition for participation in the wellness program
- A special note on smoking cessation program
 - If simply asks if employee uses tobacco, then not subject to the 30% cap
 - If a biometric screening, the 30% limit applies



Medical Wellness Programs

The ADA

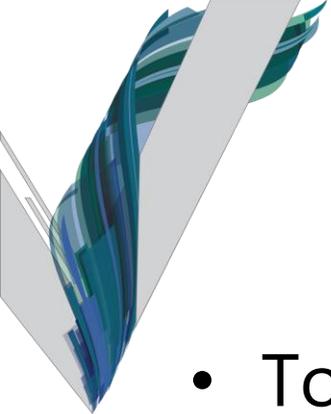
- Confidentiality
 - Information must be collected and maintained on separate forms and in separate medical files, and treated as confidential medical records, except:
 - Supervisors and managers may be informed of any necessary restrictions or accommodations needed by an employee
 - First aid and safety personnel may be informed if the disability might require emergency treatment
 - Government officials investigating compliance can receive relevant information
 - Unless the disclosure is for one of the three exceptions, any medical information about an individual can be shared only if it is aggregated and not reasonably likely to disclose the identities of any employees
 - Information cannot be used for any purpose inconsistent with the voluntariness regulations
 - If part of group health plan, HIPAA's Privacy Rule applies



Medical Wellness Programs

GINA

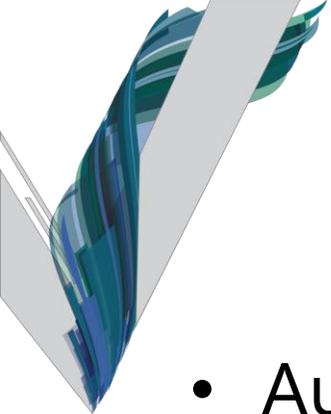
- General Rule: Employers must not request, require, or purchase genetic information
- Exception: Voluntary wellness program



Medical Wellness Programs

GINA

- To be a “wellness program,” the arrangement must:
 - Have a reasonable chance of improving health or preventing disease
 - Not be overly burdensome (in terms of time, unreasonably intrusive procedures, or significant costs to employees for medical exams)
 - Not be a ploy for violating Title II of GINA
 - Not be “highly suspect” in the method chosen
 - Not impose a penalty or disadvantage because a spouse’s manifestation of a disease or disorder prevents the spouse from participating or achieving a certain outcome
 - Not be used by the employer only to predict its future healthcare costs
 - Must obtain authorization



Medical Wellness Programs

GINA

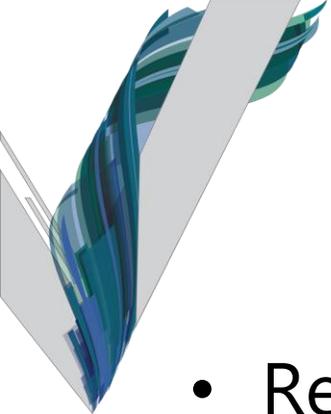
- Authorization must:
 - Be prior, knowing, voluntary, and written
 - May be electronic
 - Be understandable to the individual
 - Describe the type of genetic information that will be obtained
 - Describe the purposes of obtaining the genetic information
 - Describe the restrictions on disclosure of genetic information



Medical Wellness Programs

GINA

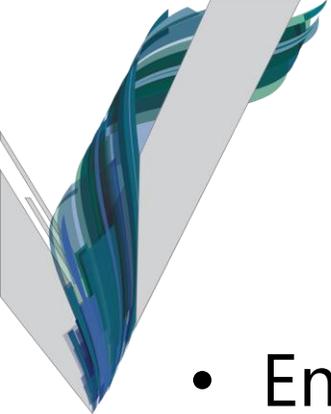
- Must obtain authorization from employee when:
 - Employee completes HRA questions regarding the employee's genetic information, including family medical history, regardless of any reward
 - Exception – Employee need not provide an authorization when there is a reward for spouse completing HRA questions regarding the spouse's manifestation of a disease or disorder
- Must obtain authorization from spouse when:
 - Spouse completes HRA questions regarding the spouse's genetic information, including family history and spouse's own manifestation of disease or disorder, regardless of any reward



Medical Wellness Programs

GINA

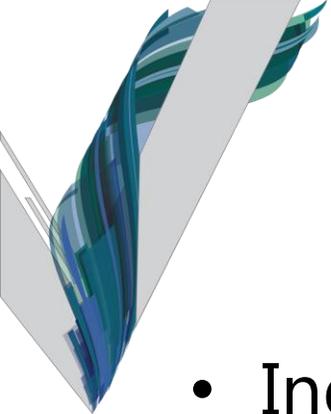
- Reward – Generally
 - Rules apply whether reward is financial or otherwise
 - Limited to 30% of the total cost of self-only coverage under the group health plan in which the individual is enrolled
 - Employee and spouse separately eligible for the 30%
 - Other rules apply if enrollment in the group health plan is not a condition for participation in the wellness program



Medical Wellness Programs

GINA

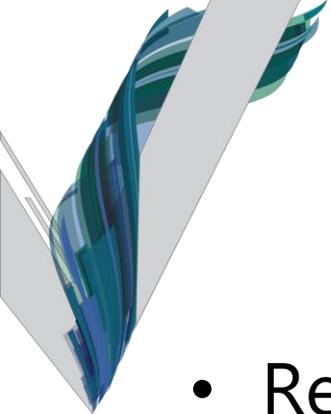
- Employee reward
 - May offer reward for HRA that includes questions about genetic information (including family history and genetic tests) if it is clear that the reward is available even if the employee does not answer questions regarding genetic information
- Spouse's reward
 - May condition a reward to an employee upon spouse providing information about the spouse's manifestation of a disease or disorder
 - Must not offer rewards in exchange for the spouse providing the spouse's other genetic information, including spouse's own genetic tests and family medical history



Medical Wellness Programs

GINA

- Individually identifiable genetic information may be provided only:
 - To the individual
 - To the licensed healthcare professionals providing the services
 - Pursuant to HIPAA's privacy rule for plan administration
 - If it is aggregated information that does not disclose the identity of specific individuals



Medical Wellness Programs

Next Steps

- Review program – Especially in light of new EEOC Regulations
- Review rewards to ensure they are consistent with caps
- Add ADA Notice for January 2017, as necessary
- Obtain GINA authorizations, as necessary
- Monitor future developments

Questions?

