A group of business professionals in a meeting. A woman in a grey blazer is pointing at a tablet held by another person. A man in a dark suit and tie is visible on the left, and another person is on the right. They are gathered around a table with a tablet, a smartphone, and coffee cups. The background is a bright, modern office space with large windows.

# Employers or Vendors? Who's Legally Responsible for WW Compliance?

By Barbara J. Zabawa, JD, MPH

Wellness Law, LLC



# Legal Help Desk

[welcoa.org/legal-help-desk-intake-form/](http://welcoa.org/legal-help-desk-intake-form/)

The Center for Health and Wellness Law, LLC has partnered with WELCOA to offer this new, member-exclusive legal help desk service.

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# Agenda

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- Information Collection
- Injuries
- Tax
- CCA
- Q&A



# Information Collection

- When wellness program collects employee health information
  - HRAs
  - Biometric Screens
- Laws implicated
  - ADA
  - GINA
  - HIPAA



# Information Collection: The Root of All Problems

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# Information Collection Lawsuits

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EEOC v. Flambeau

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EEOC v. Orion Energy

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EEOC v. Honeywell

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AARP v. EEOC

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Kwesell v. Yale U.

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AARP v. Austin Industries

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Williams v. City of Chicago

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Maness v. Village of Pinehurst

# ADA Highlights

- "Covered entities" can't ask employees "disability-related inquiries" or to undergo "medical exam" unless part of "voluntary" wellness program.
- "Covered entity" = Employer, employment agency, labor organization, or joint labor management committee. 29 CFR s. 1630.2(b).
  - EEOC Enforcement Guidance says wellness program is voluntary as long as employer neither:
    - Requires participation; nor
    - Penalizes employees who do not participate.



## ADA Requirements

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- Programs that collect medical information must provide employees with notice.







# ADA Requirements

- Notice requirement applies even in absence of incentives
- Notice must contain following:
  - Be understandable
  - Describe type of medical information obtained
  - Describe specific purposes for which information will be used
  - Who will receive information
  - Restrictions on disclosure of medical information
  - Methods employer will use to prevent improper disclosure

# ADA Requirements

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- Employers and vendors must protect health information confidentiality



# ADA Requirements

EEOC expects group health plan programs to abide by HIPAA privacy/security rules

- Employer certification requirements for those who administer programs
- Best practice: separate those who handle individually identifiable health information from those who make employment-related decisions
- Use of a third-party vendor may help

# ADA Requirements


- Employers and Vendors should have clear privacy policies and procedures related to medical information:
  - Collection
  - Storage
  - Disclosure
  - Encryption
  - Notice of Breach
- Include employee training





# ADA Requirements

- May not Require Employee to Agree to Sale, Exchange, Sharing, Transfer of Information
- Review vendor agreements to ensure employees do not unwittingly waive confidentiality protections.



# GINA Requirements

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- DOL/DHHS/IRS enforce GINA Title I
- EEOC enforces GINA Title II (employment).



# GINA Title I Requirements

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- Title I generally prohibits group health plans from:
  - Adjusting premium or contribution amounts based on genetic information;
  - Requesting/requiring genetic testing;
  - Requesting/requiring/purchasing genetic information for **underwriting** purposes or in connection with open enrollment.




# GINA Title II Requirements

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- Generally prohibits “covered entities” from collecting genetic information from employees or discriminating against employees or applicants because of genetic information.
- “Covered entity” = employer, employing office, employment agency, labor organization or joint labor-management committee. 29 CFR s. 1635.2



A decorative graphic on the left side of the slide features several white paper cutouts of human figures holding hands in a line. The figures are set against a light green background. The right edge of this graphic is jagged and torn, blending into the white background of the slide.

# GINA Requirements

- “Genetic information” includes:
  - Manifestation of disease or disorder in family members (“family medical history”)
    - Can be discerned from family medical history questions on HRA or biometric screenings of family members
    - “Family” includes **spouses** and **adopted children** and dependents of spouses; as well as biological family.

# GINA Requirements

- Exception for voluntary wellness programs.
  - Individual must provide prior knowing, voluntary and written authorization.
    - Authorization may be electronic;
    - Describes what genetic information will be obtained and the purposes for which it will be obtained;
    - That the individually identifiable information is not accessible to coworkers/supervisors.



# GINA Requirements

- May offer employees incentives to complete HRA that includes questions about family medical history or other genetic information.
  - Must make clear that incentive is available regardless if employee answers FMH questions.

# GINA Requirements

- Authorization must contain several elements, such as:
  - Be easy to understand;
  - Description type of genetic information to be obtained and purpose for which it will be used;
  - Describe restrictions on disclosure of genetic information;
  - Genetic information is collected for purposes of providing health or genetic services;
  - Information only provided to individual and licensed health care professionals involved in providing genetic services and not disclosed to employer except in aggregate terms.

# GINA Requirements

Similar to ADA rules, Employers must maintain medical (genetic) information in separate, confidential files.

GINA prohibits disclosure of genetic information except in limited circumstances:

- To employee
- Court order
- Government officials to ensure GINA compliance

# GINA Requirements

- Similar to ADA, EEOC urges employers to adopt best practices for protecting confidentiality:
  - Adopt strong privacy policies
  - Train individuals who handle sensitive information
  - Encrypt electronic files
  - Notify employees of breach

# Who is Responsible for ADA/GINA/HIPAA Compliance?

- ADA, GINA and HIPAA apply to “covered entities.”
- ADA/GINA “covered entities” are employers.
- Neither ADA nor GINA statutes allow for “contributions” from other parties when violations occur.
- HIPAA covered entities are “group health plans” or “healthcare providers.”



# Maness v. Village of Pinehurst v. SiteMed

- Village contracted with SiteMed to provide health and wellness exams for members of the Village Police Dept.
- SiteMed provided a form to the Village, which the Village then provided to employees to complete as part of the biometric screen.
- SiteMed contractually agreed to comply with all “applicable federal, state and local regulations pertinent to the service being provided.”
- Village relied on SiteMed’s expertise and had no role in developing any part of the form.
- Contract had a “hold harmless” provision.





# Maness v. Village of Pinehurst v. SiteMed

- Supervisor told police officer employees that HRA/biometric screen were mandatory
- SiteMed created and organized the HRA/biometric screen event
- Todd Maness refused to participate; was fired from job
- Sued employer for ADA and GINA violations
- Employer sued SiteMed for contributing to the violation (service contract required SiteMed to be in compliance with all state/federal wellness laws and to indemnify Village for any claims).

# Maness v. V. of Pinehurst v. SiteMed

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- Previous case law already found ADA did not allow contributions from other parties for ADA violations (*Bowers v. NCAA*, 346 F.3d 402, 433 (3d Cir. 2003)).
- Maness court concluded GINA also does not allow for contribution from another party for employer's violation.
- What about contractual indemnification provision?

# Maness v. V. of Pinehurst v. SiteMed

- ADA and GINA pre-empt employer's ability to contractually insulate itself from liability for discrimination.
  - "GINA, like the ADA and the FHA, is a statute whose principal purpose is regulatory. It provides a comprehensive scheme which is similar to ADA, the ADEA, Title VII, and other federal statutes implemented to prevent employment discrimination on impermissible grounds. And, as noted, supra, this is a nondelegable duty." Maness Op. and Order, at 10.



Maness v.  
Village of  
Pinehurst v.  
SiteMed

- Court dismissed Village's lawsuit against vendor.
- Employer fully responsible for complying with federal wellness laws (ADA and GINA).
- Can't contractually offload compliance to vendor
- Parties settled for undisclosed amount

# Injuries - Who is Responsible?

- Unlike with federal anti-discrimination laws, employers can seek indemnification from vendors for injuries.
  - *See e.g., Sherry v. Wal-Mart Stores*, 67 A.D.3d 992 (N.Y. App. Div. 2009)
    - Customer was injured by Coca-Cola display
    - Wal-Mart and Coca-Cola had contract that indemnified Wal-Mart for any injuries to any person or damage to any property, even if Wal-Mart's own negligence caused the injuries.
    - New York Court of Appeals found the indemnification provision in the contract to absolved Wal-Mart of responsibility for the customer's injury, even though Wal-Mart admitted that its employees did not check the safety of the Coca-Cola display.

# Injuries – Who's Responsible?

- Lesson learned from Wal-Mart case:
- It may be possible for employers to avoid responsibility for any injury, whether emotional or physical, caused to employees through a WW program.
- Indemnification clause in any vendor contract should be clearly written.

# Tax Withholding Responsibility

- Where a third party (such as a health insurer for an insured group health plan) administers (in more than a “ministerial way) a wellness program that provides a taxable incentive (e.g., cash or a gift card), the third party may be deemed the “statutory employer” for purposes of complying with related income and employment tax withholding and Form W-2 reporting responsibilities (in contrast to the general rule that imposes these obligations upon the common law, or “true,” employer).
  - See IRC s. 3401(d).

# Consolidated Appropriations Act 2021 (CCA)

- Brought major changes to health benefit plans, including GHP wellness programs
- Broker/Consultant Disclosure Requirements
  - Brokers/consultants who provide wellness program services (or contract with third-party vendors for such services) must disclose to plan fiduciary:
    - Amounts received from plan sponsor directly
    - Amounts broker/consultant receives from other sources in connection with services provided to plan



# CCA

- Applies to persons who provide “brokerage services” or “consulting services” to GHPs who reasonably expect to receive \$1,000 or more in direct or indirect compensation.
  - Includes wellness design and management services. See DOL Field Assistance Bulletin, note 3 (12/30/21).
- Must disclose direct and indirect compensation in advance of entering into contract or arrangement with plan fiduciary.
  - Payments from wellness vendors to brokers = indirect compensation
  - Can include payments for referrals, advice or recommendations
- Goal is to enhance fee transparency
- Failure to make disclosure requires plan sponsor to terminate contract with “covered service provider.” ERISA s. 408(b)(2)(B)(viii)(IV).




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# Q&A

The following Q&A session does NOT constitute legal advice and should not be used as such. It is for educational purposes only.

WELCOA Members should retain legal counsel to obtain definitive answers.

# Questions?

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