Wellness Program Design and Compliance

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Employer-sponsored wellness programs have become increasingly common as employers attempt to control rising health-care costs and improve employees' overall health and productivity. Designing and operating a wellness program requires careful consideration of compliance obligations under a number of different laws including, but not limited to, the Employee Retirement Income Security Act of 1974 (ERISA), the Internal Revenue Code of 1986 (Code), the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Patient Protection and Affordable Care Act of 2010 (ACA), the Genetic Information Nondiscrimination Act of 2009 (GINA), and the Americans with Disabilities Act of 1990 (ADA).

This practice note discusses how to design and operate compliant wellness programs, with a particular focus on HIPAA, ACA, GINA, and ADA requirements. The following topics are specifically addressed in this practice note:

- Characterization of Wellness Programs
- HIPAA Non-discrimination Requirements
- ACA Requirements
- GINA Requirements
- ADA Requirements
- Other Legal Requirements
- Common Pitfalls
- Importance of Periodic Wellness Program Reviews

For related annotated forms, see HIPAA Non-discrimination Notice for Wellness Programs and Wellness Programs Checklist (Design and Implementation).

Characterization of Wellness Programs

The first step in assessing the compliance obligations that apply to a particular wellness program is to determine whether the program is itself a group health plan or is part of a group health plan.

Wellness Programs that Provide Medical Care

An employer-sponsored wellness program is a group health plan if it provides medical care, which is defined as (1) amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body; (2) amounts paid for transportation primarily for and essential to medical care referred to in clause (1); and (3) amounts paid for insurance covering medical care referred to in clauses (1) and (2). Examples of medical care include biometric screenings

(including cholesterol screenings), physical examinations, flu shots, counseling by trained professionals, and other programs that are diagnostic or preventive, or coach individuals regarding specifically identified health risks.

A wellness program that simply promotes good health and a healthy lifestyle likely does not provide medical care. Examples of wellness programs that promote good health and a healthy lifestyle, but which do not provide medical care, include programs that reimburse all or part of the cost for membership in a fitness center, or that provide general educational information about how to maintain a healthy diet and exercise regimen.

An employer that sponsors a wellness program that provides medical care must decide whether to structure the program as a stand-alone group health plan or as part of another group health plan sponsored by the employer, such as the employer's major medical plan. A stand-alone group health plan structure may be warranted if the employer wants to offer the wellness program to all employees, not just employees eligible for the employer's major medical plan. However, structuring the wellness program as a stand-alone group health plan requires the wellness program to comply with all legal requirements applicable to group health plans under ERISA, the Code, COBRA, HIPAA, the ACA, GINA, and the ADA (collectively, the Group Health Plan Mandates) on its own. Structuring the wellness program as part of the employer's major medical plan allows the wellness program to piggyback on the medical plan's compliance with the Group Health Plan Mandates.

Wellness Programs that Are Part of a Group Health Plan

Even if a wellness program does not provide medical care, the program might still have to comply with the Group Health Plan Mandates if it is part of another group health plan. Examples of instances in which a wellness program may be part of another group health plan include the following:

- The group health plan contracts for the wellness program.
- The reward for participating in the wellness program (or the penalty for not participating in it) impacts cost sharing under the group health plan (e.g., reduction in or increase to the employee contribution rate, deductible, co-payment, coinsurance, and/or annual maximum).
- The wellness program is promoted as part of the group health plan.

A wellness program that is part of another group health plan should be able to rely on the group health plan's compliance with the Group Health Plan Mandates as its own compliance with such requirements. However, the employer or plan sponsor must ensure compliance with the legal requirements specifically applicable to wellness programs as described in further detail below.

Wellness Programs that Do Not Provide Medical Care and Are Unrelated to a Group Health Plan

If a wellness program does not provide medical care and is not otherwise part of another group health plan, the program does not have to comply with most of the Group Health Plan Mandates described in this practice note. Rather, the employer or plan sponsor of such a program must ensure that the program complies with generally applicable employment laws such as Title II of GINA, the ADA's general prohibition on discrimination against disabled individuals, the Age Discrimination in Employment Act of 1967, Title VII of the Civil Rights Act of 1964, and the Fair Labor Standards Act of 1938 when providing the program as a general term, condition, or privilege of employment. For example, if a wellness program provides a $50 gift card as a reward for completing a health risk assessment (HRA) or attending a health fair that provides general information, the program is not subject to the Group Health Plan Mandates because it is not providing medical care, does not offer a reward that impacts cost sharing under a group health plan, and is not otherwise part of another group health plan.

HIPAA Non-discrimination Requirements

A wellness program that is itself a group health plan or is part of a group health plan must comply with non-discrimination requirements under HIPAA. The ACA codified existing HIPAA non-discrimination requirements for wellness programs, and federal agencies issued final regulations in 2013 (HIPAA Wellness Program Regulations, 78 Fed. Reg. 33,158 (June 3, 2013) (codified at 26 C.F.R. § 54.9802-1; 29 C.F.R. § 2590.702; 45 C.F.R. § 46.121).

HIPAA generally prohibits a group health plan from discriminating among similarly situated individuals based on their health status (e.g., group health plans generally cannot charge individuals different premiums based on a health factor), but creates an exception to these non-discrimination provisions for certain wellness programs. To qualify for the exception to HIPAA's general non-discrimination provisions, a wellness program that is itself a group health plan or is part of a group health plan must be structured to comply with the applicable requirements of the HIPAA Wellness Program Regulations.

The HIPAA Wellness Program Regulations recognize two broad categories of wellness programs: participation-only programs and health-contingent programs.

Participation-Only Programs

A participation-only program is a program that does not condition eligibility for a reward on the participant's ability to meet a particular health standard. Examples of participation-only programs include completion of an HRA, health education sessions, or health coaching, and participation in a biometric screening without requiring that any particular biometric targets be attained. For a participation-only program to comply with the HIPAA Wellness Program Regulations, participation in the program must be available to all similarly situated individuals regardless of health status.

In determining groups of similarly situated individuals, the following distinctions are permissible:

- Participants and beneficiaries can be treated as two different groups of similarly situated individuals.
- Individuals enrolled in different benefit package options can be treated as different groups of similarly situated individuals.
- Participants can be treated as two or more different groups of similarly situated individuals based on bona fide employment-based classifications consistent with the employer's usual business practice, such as:
    - full-time versus part-time status
    - different geographic locations
    - membership in a collective bargaining unit
    - date of hire
    - length of service
    - current employee versus former employee status
    - different occupations
- Beneficiaries can be treated as two or more different groups of similarly situated individuals if the distinction is based on:
    - a bona fide employment-based classification of the participant through whom the beneficiary is receiving coverage
    - a relationship to the participant (for example, as a spouse or as a dependent child)
    - marital status
    - with respect to children of a participant, age, or student status
    - any other factor that is not a health factor

Participation-only wellness programs can vary from group to group of similarly situated individuals, as long as whatever program is offered to a particular group is available to all of the individuals in that group regardless of health status. For example, the opportunity to earn a reward by completing an HRA could be offered to full-time employees only, but that opportunity would have to be offered to all full-time employees and not just full-time employees who have never been diagnosed with heart disease.

Note that more favorable rules can be established for individuals with adverse health factors than for individuals without such adverse health factors, so it is permissible to discriminate in favor of individuals with an adverse health status. For example, the opportunity to earn a reward by participating in a health coaching session could be offered only to employees who have high blood pressure.

Health-Contingent Programs

A health-contingent program is a program that conditions eligibility for a reward on a participant's ability to meet a standard related to a health factor. There are two types of health-contingent programs under the HIPAA Wellness Program Regulations: (1) activity-only programs and (2) outcome-based programs.

An activity-only program is a program that requires an individual to perform or complete an activity related to a health factor to obtain a reward, but does not require the attainment or maintenance of a specific health outcome. Examples of activity-only programs include walking, diet, and exercise programs. An outcome-based program is a program that requires an individual to attain or maintain a specific health outcome, such as attaining a specific body mass index or cholesterol level.

For either an activity-only or outcome-based health-contingent program to comply with the HIPAA Wellness Program Regulations, it must satisfy the five requirements outlined below. The actions necessary to comply with each of these five requirements may vary depending on whether the health-contingent program is an activity-only program or an outcome-based program.

1. Individuals must have an opportunity to qualify for the reward at least once per year.

2. The sum of the reward(s) for all health-contingent wellness programs with respect to a plan must be no more than 30% of the total cost of coverage (50% in the case of a program to prevent or reduce tobacco use), which is determined in accordance with the following:

- The cost of coverage is the total employer and employee contributions for the group health plan or group health plan option in which the employee and, if applicable, the employee's dependents, are receiving coverage.
- If only the employee can participate in the wellness program, the cost of employee-only coverage is used to determine the total cost of coverage.
- If the employee and dependents can participate in the wellness program, the cost of coverage in which the employee and dependents are enrolled is used to determine the total cost of coverage.

3. The program must be reasonably designed to promote health or prevent disease, which means the program:

- has a reasonable chance of improving health or preventing disease
- is not overly burdensome
- is not a subterfuge for discrimination based on a health factor –and–
- is not highly suspect in the method chosen to promote health or prevent disease

4. The full reward must be available to all similarly situated individuals, as follows:

- For an activity-only program, the reward is available if the program provides a reasonable alternative standard as another means by which to earn the same reward for any individual for whom it is either (1) unreasonably difficult due to a medical condition to satisfy the standard, or (2) medically inadvisable to attempt to satisfy the standard (if reasonable, the program can seek verification from the individual's personal physician that a health factor makes it unreasonably difficult or medically inadvisable for an individual to satisfy, or attempt to satisfy, the particular standard).
- For an outcome-based program, the reward is available if the program provides a reasonable alternative standard as another means by which to earn the same reward, regardless of whether it is unreasonably difficult due to a medical condition or medically inadvisable to attempt to satisfy the standard, and it is never reasonable to seek verification that a health factor makes it unreasonably difficult or medically inadvisable to satisfy, or attempt to satisfy, the particular standard.
- For an alternative standard under either an activity-only program or an outcome-based program to be reasonable, (1) the alternative must have a reasonable time commitment; (2) if the alternative is completion of an educational program, the program must help the individual find the educational program, and cannot charge the individual for the educational program; (3) if the alternative is a diet program, the program is not required to pay for the cost of food but must pay any participation or membership fees; and (4) if an individual's personal physician states that the standard is not medically appropriate, the program must provide a reasonable alternative standard that accommodates the recommendations of the individual's personal physician with regard to medical appropriateness.
- If the reasonable alternative standard is an activity-only program, the alternative also must satisfy the applicable activity-only program rules.
- If the reasonable alternative standard is an outcome-based program, the alternative must satisfy the applicable outcome-based program rules and, if both the initial standard and the alternative standard are outcome-based programs, the alternative cannot be a requirement to meet a different level of the same standard without additional time to comply and the individual must be given the opportunity to comply with recommendations of his or her physician.

5. The program must disclose in all materials describing the terms of the program the availability of a reasonable alternative standard to qualify for the reward (and, if applicable, the possibility of a waiver of the otherwise applicable standard), including contact information for obtaining a reasonable alternative standard and a statement that the recommendations of an individual's personal physician will be accommodated, subject to the following:

- If program materials merely mention that such a program is available, without describing its terms, this disclosure is not required. For example, a summary of benefits and coverage that notes that cost sharing may vary based on participation in a diabetes wellness program, without describing the standards of the program, would not trigger the disclosure. In contrast, a plan disclosure that references a premium differential based on tobacco use is a disclosure describing the terms of a health-contingent wellness program and, therefore, must include this disclosure.
- The following model language can be used to satisfy the disclosure requirement: "Your health plan is committed to helping you achieve your best health. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at [insert contact information] and we will work with you (and, if you wish, with your doctor) to find a wellness program with the same reward that is right for you in light of your health status."

ACA Requirements

In addition to codifying HIPAA's non-discrimination requirements as described above, the ACA included a number of other provisions that either explicitly address wellness or impact wellness programs that are themselves group health plans or that are part of a group health plan. This section of the practice note focuses on the ACA's market reform provisions and the impact of certain wellness program rewards on employer mandate determinations under the ACA.

ACA's Market Reform Provisions

If a wellness program is itself a group health plan, or is part of a group health plan, then it must comply with the ACA's market reform provisions, such as the prohibition on lifetime and annual limits on the dollar value of essential health benefits, 100% first-dollar coverage of preventive health services, the adult child coverage mandate, and the prohibition on rescissions, among others. Technically, a wellness program may be able to avoid some or all of these requirements if it is considered a grandfathered health plan under the ACA, if it is a retiree-only plan, or if it provides only excepted benefits, such as limited-scope dental or vision benefits. However, practically speaking, most wellness programs do not qualify for one of these exceptions.

A wellness program that is structured as a stand-alone group health plan and is subject to the ACA's market reform provisions will likely have a hard time complying with those provisions because wellness programs do not typically provide unlimited essential health benefits or 100% coverage of preventive care, for example. As a result, an employer may be required to structure its wellness program as part of its major medical plan in order to rely on the medical plan's compliance with the ACA's market reform provisions. Failing to comply with these provisions can result in a $100 per day excise tax liability per violation per person, as well as Department of Labor enforcement actions and participant lawsuits.

For more information about the ACA's market reform provisions, see the other practice notes available under Affordable Care Act in the Health and Welfare Plans subtopic.

Impact of Wellness Program Rewards on ACA's Employer Mandate Determinations

Under the ACA's employer mandate, applicable large employers may be subject to a penalty tax for failing to offer full-time employees (and their dependent children) minimum essential coverage that is affordable and provides minimum value. Wellness program incentives (which can be in the form of rewards, discounts, or penalties) may directly impact the cost of coverage (e.g., by lowering or raising the employee's required contribution rate) and/or the value of coverage (e.g., by lowering or raising the deductible or other cost-sharing amounts).

However, for purposes of the affordability and minimum value determinations under the ACA's employer mandate, only incentives relating to tobacco use will be taken into account. Incentives that affect deductibles, copayments, or other cost sharing are treated as earned in determining a plan's minimum value percentage to the extent the incentives relate to tobacco use. Similarly, incentives that affect the employee's contribution rate are treated as earned in determining a plan's affordability to the extent the incentives relate to tobacco use. Wellness program incentives that do not relate to tobacco use are treated as not earned for purposes of these affordability and minimum value determinations.

The following are examples of how wellness program incentives impact affordability and minimum value determinations under the ACA's employer mandate:

Example 1:

An employer sponsors a wellness program as part of its major medical plan that has a $2,000 in-network individual deductible. Employees who do not use tobacco receive a $500 reduction in that deductible, and employees who complete an HRA receive another $100 reduction in that deductible. The plan's minimum value percentage would be determined using $1,500 as the in-network individual deductible amount because the $500 tobacco-related discount is treated as earned, but the $100 HRA-related discount is treated as unearned.

Example 2:

An employer sponsors a wellness program as part of its major medical plan for which the employee-only contribution rate is $250 per month. Employees who do not use tobacco receive a $50 reduction in their monthly contribution rate, and employees who complete an HRA receive another $25 reduction in their monthly contribution rate. The plan's affordability would be determined using $200 as the monthly employee-only contribution rate because the $50 tobacco-related discount is treated as earned, but the $25 HRA-related discount is treated as unearned.

Other ACA Requirements

W-2 Reporting

Employers filing at least 250 W-2 forms must report in Box 12, Code DD, the aggregate cost of applicable employer-

sponsored coverage. The cost of coverage provided under a wellness program must be included in the aggregate reportable cost only if the wellness program is a group health plan and the employer charges a COBRA premium for that coverage. If an employer does not charge a COBRA premium for that coverage, the employer can, but is not required to, include the cost of wellness program coverage in the amount reported on the W-2.

PCORI Fees

For plan or policy years ending before October 1, 2019, employers sponsoring self-insured group health plans must pay Patient-Centered Outcomes Research Institute (PCORI) fees, which are intended to support clinical effectiveness research. PCORI fees apply to a wellness program only if the program provides significant benefits in the nature of medical care or treatment. A wellness program that does not provide such significant benefits is not subject to PCORI fees. Although applicable guidance does not specify when a wellness program benefit would be considered "significant," typical wellness programs that include an HRA, biometric screening, or limited health coaching likely would not be viewed as providing significant benefits in the nature of medical care or treatment, and therefore would not be subject to the PCORI fees.

Reinsurance Contributions

From 2014 through 2016, each state that operates a health insurance exchange was required to establish a temporary reinsurance program for the non-grandfathered plans individual market, to which health insurers and group health plans were required to contribute. However, reinsurance contributions were not required for a wellness program if the program did not provide major medical coverage. Typical wellness programs that include an HRA, biometric screening, or limited health coaching do not rise to the level of major medical coverage and, therefore, were not subject to the reinsurance contribution requirements.

GINA Requirements

Both of GINA's two main titles also can impact wellness program design.

Title I Requirements (Genetic Information Non-discrimination in Health Coverage)

A wellness program must comply with Title I of GINA if it is itself a group health plan or is part of a group health plan. Title I prohibits group health plans from (1) adjusting group premium or contribution rates on the basis of genetic information; (2) requesting or requiring an individual or an individual's family members to undergo genetic testing; and (3) requesting, requiring, or purchasing genetic information for underwriting purposes or prior to or in connection with enrollment. 29 U.S.C. 1182(b)(3), (c), (d); 42 U.S.C. 300gg-1(b)(3), (c), (d); 26 U.S.C. 9802(b)(3), (c), (d).

For these purposes:

- ***Genetic information***, with respect to an individual, means information about (1) the individual's genetic tests, (2) the genetic tests of the individual's family members, and (3) the manifestation of a disease or disorder in the individual's family member (i.e., family medical history). Such information also includes an individual's request for or receipt of genetic services, but does not include information about an individual's sex or age.
- A ***genetic test*** is a specialized test which analyzes human DNA, RNA, chromosomes, proteins, or metabolites, and detects genotypes, mutations, and chromosomal changes, but does not include common biometric tests such as body mass index testing, blood pressure screening, and cholesterol screening.
- The ***manifestation of a disease or disorder*** means that an individual has been or could reasonably be diagnosed with the disease, disorder, or pathological condition by a health-care professional with appropriate training and expertise in the field of medicine involved. A disease, disorder, or pathological condition is not manifested if a diagnosis is based principally on genetic information.
- ***Underwriting purposes***, with respect to a group health plan, means
  - rules for, or determination of, eligibility (including enrollment and continued eligibility) for benefits under the plan or coverage (including changes in deductibles or other cost-sharing mechanisms in return for activities such as completing an HRA or participating in a wellness program);
  - the computation of premium or contribution amounts under the plan or coverage (including discounts, rebates, payments in kind, or other premium differential mechanisms in return for activities such as completing an HRA or participating in a wellness program);
  - the application of any preexisting condition exclusion under the plan or coverage; and
  - other activities related to the creation, renewal, or replacement of a contract of health insurance or health benefits.
- Genetic information is collected ***prior to or in connection with enrollment*** when it is collected prior to the individual's effective date of coverage under the plan.
- A ***family member*** includes not only relatives by

consanguinity (i.e., having a common biological ancestor), but also by affinity (i.e., by adoption or marriage), even though the employee and spouse or an adopted child are not biologically related to one another.

Applying these definitions, it appears that the following types of wellness programs involve the collection of genetic information as defined under Title I of GINA:

- A wellness program using an HRA for employees that includes family medical history questions
- A wellness program requiring a covered spouse to complete an HRA that includes questions where the answer will provide information about the manifestation of a disease or disorder in the spouse
- A wellness program requiring a covered spouse to complete a biometric screening, the results of which provide information about the manifestation of a disease or disorder in the spouse

Because GINA prohibits the collection of genetic information for underwriting purposes, which includes changing deductibles or other cost-sharing mechanisms, or providing discounts, rebates, payments in kind, or other premium differential mechanisms in return for activities such as completing an HRA or participating in a wellness program, the types of wellness programs highlighted above may give rise to compliance issues under Title I of GINA.

We discuss below approaches that can be taken to mitigate the GINA Title I risk related to these common wellness program designs. Note, however, that no request or acquisition of genetic information about any individual is permitted prior to or in connection with the individual's enrollment under a group health plan.

Title II Requirements (Genetic Information Non-discrimination in Employment)

Title II of GINA applies to employers rather than to group health plans. As a result, an employer must consider Title II's requirements even if its wellness program is not itself a group health plan or part of a group health plan. Title II prohibits employers from discriminating against their employees on the basis of genetic information and, subject to limited exceptions, prohibits employers from requesting, requiring, or purchasing genetic information with respect to an employee or a family member of the employee. 42 U.S.C. §§ 2000ff to 2000ff-11; 29 C.F.R. §§ 1635.1 to 1635.12.

The Equal Employment Opportunity Commission (EEOC) issued final regulations addressing compliance with Title II of GINA on November 9, 2010, and issued updated final regulations on May 17, 2016 addressing the limited circumstances under which an employer may offer an inducement to an employee for the employee's spouse to provide information about the spouse's manifestation of disease or disorder in connection with an employer-sponsored wellness program. 81 Fed. Reg. 31,143 (codified at 29 C.F.R. § 1635.8). The 2016 final regulations became effective on July 18, 2016. The 2010 and 2016 GINA Wellness Program Regulations (GINA Wellness Program Regulations) provided much needed clarity regarding the extent to which inducements could be used as part of a wellness program that includes genetic information. However, the District Court for the District of Columbia created renewed uncertainty for employers regarding compliance with Title II of GINA in December 2017 by vacating the incentive provisions of the GINA Wellness Program Regulations effective as of January 1, 2019. AARP v. EEOC, 292 F. Supp. 3d 238 (D.D.C. 2017), modified by 2018 U.S. Dist. LEXIS 27317 (D.D.C. 2018). The EEOC issued updated final rules formally eliminating the incentive provisions effective as of January 1, 2019. ***83*** Fed. Reg. 65,296 (Dec. 20, 2018) (removing and reserving 29 C.F.R. § 1635.8(b)(2)(iii)). In the absence of EEOC guidance that may be relied upon beginning in 2019, employers are once again in the uncomfortable position of not knowing with certainty whether and to what extent they may offer an inducement to an employee for the employee's spouse to provide information about the spouse's manifestation of disease or disorder in connection with an employer-sponsored wellness program.

The following describes the provisions of the GINA Wellness Program Regulations and the impact of the AARP v. EEOC decision on compliance with Title II of GINA pending issuance of new EEOC guidance.

Acquisition of Genetic Information

Under the GINA Wellness Program Regulations, an employer can request, require, or purchase genetic information about an employee or a family member of the employee if the employer offers health or genetic services, including as part of a voluntary wellness program, and all of the following conditions are satisfied:

- **Reasonable design**. The program services, including any acquisition of genetic information that is part of those services, are reasonably designed to promote health or prevent disease. A program satisfies this requirement if it has a reasonable chance of improving the health of, or preventing disease in, participating individuals, and is not (1) overly burdensome (e.g., an overly long participation requirement), (2) a subterfuge for violating Title II of GINA or other laws prohibiting employment discrimination, or (3)

highly suspect in the method chosen to promote health or prevent disease.

- **Voluntary provision of information**. The provision of genetic information by the individual is voluntary, meaning the employer cannot require the individual to provide genetic information, nor can it penalize those individuals who choose not to provide it.
- **Prior authorization**. The individual provides prior knowing, voluntary, and written authorization, using an authorization form that (1) is written in a manner that is reasonably likely to be understood by the individual, (2) describes the type of genetic information that will be obtained and the general purposes for which it will be used, and (3) describes the restrictions on disclosure of genetic information.
- **Disclosure limitation**. Individually identifiable genetic information is provided only to the individual (or family member if the family member is receiving genetic services) and the licensed health-care professionals or board-certified genetic counselors involved in providing such services, and is not accessible to managers, supervisors, or others who make employment decisions, or to anyone else in the workplace.
- **Use limitation**. Any individually identifiable genetic information is only available for purposes of such services, and is not disclosed to the employer except in aggregate terms that do not disclose the identity of specific individuals.

29 C.F.R. § 1635.8(b)(2).

Inducements for Provision of Genetic Information

Under the GINA Wellness Program Regulations, an employer may not offer any inducement (whether financial or in-kind and whether in the form of a reward or penalty) for individuals to provide genetic information. However, an employer may offer inducements for completion of an HRA that includes questions about family medical history or other genetic information, provided the employer makes it clear that the inducement will be made available whether or not the participant answers questions regarding genetic information.

The vacated provisions of the GINA Wellness Program Regulations had provided that an employer could offer inducements for an employee's spouse to provide information about the spouse's manifestation of a disease or disorder (but not any other genetic information, including the results of the spouse's genetic tests) as part of an HRA (in the form of a questionnaire or a medical examination or both), subject to certain limitations. These limitations were intended to ensure that participation remained voluntary, without the inducement becoming unduly coercive. The District Court for the District of Columbia vacated these provisions, finding that the EEOC failed to provide support for the specified limitations, rendering its interpretation of "voluntary" arbitrary and capricious. See AARP v. EEOC, 267 F. Supp. 3d 14, 36–37 (D.D.C. 2017).

One of the restrictions for voluntary programs in the vacated provisions of the GINA Wellness Program Regulations was that no inducements were permitted to provide genetic information (including information about the manifestation of a disease or disorder) regarding an employee's child (even an adult or adopted child). Employers considering inducements should be mindful of the EEOC's view regarding this issue.

An employer may offer financial inducements to encourage individuals who have voluntarily provided genetic information (e.g., family medical history) that indicates that they are at increased risk of acquiring a health condition in the future to participate in disease management programs or other programs that promote healthy lifestyles, and/or to meet particular health goals as part of a health or genetic service. However, to comply with the GINA Wellness Program Regulations, these programs must also be offered to individuals with current health conditions and/or to individuals whose lifestyle choices put them at increased risk of developing a condition.

In no case may an employer condition participation in a wellness program on, or provide any inducement in exchange for, an agreement permitting the sale, exchange, sharing, transfer, or other disclosure of genetic information (other than transfers to health care professionals or genetic counselors providing genetic services or to the individual or family member). In addition, an employer cannot deny access to health insurance or any package of health insurance benefits to an employee or eligible family member, or retaliate against an employee, due to a spouse's refusal to provide information about his or her manifestation of disease or disorder to a wellness program.

Wellness Program Designs to Mitigate GINA Risk

To avoid GINA non-compliance, an employer can consider the following wellness program designs, particularly if it intends to include spouses in an HRA or biometric screening component of the program:

No genetic information program. Don't request or require any genetic information (including family medical history) from participants.

Programs involving genetic information - GINA Title I Compliance. For a wellness program that is a group health

plan or is part of a group health plan and thus is subject to Title I of GINA, no inducement can be offered for the collection of genetic information. The following wellness program designs are options to consider that comply with Title I of GINA:

- Make the provision of any genetic information purely voluntary, and do not impose a penalty or prevent or inhibit participation based on a refusal to provide genetic information.
- Either (1) don't provide an inducement to the employee (and don't vary the level of inducement provided to the employee) based on whether the employee completes an HRA with family medical history questions or (2) provide an inducement only for completion of that portion of an HRA that does not cover family medical history or otherwise request genetic information, and make completion of the genetic information questions optional.
    - If an inducement is offered for completing an HRA that contains genetic information questions, bifurcate the HRA and make sure it's clear that any medical history questions are entirely optional such that the inducement that's provided is not dependent on whether those medical history questions are answered or not.

Programs involving genetic information - GINA Title II Compliance: A wellness program that is not a group health plan and is not part of a group health plan is only subject to Title II of GINA. Based on the developments described above and pending the issuance of further EEOC guidance, as of 2019 it is once again unclear whether and to what extent employers may offer an inducement to an employee for the employee's spouse to provide information about the spouse's manifestation of disease or disorder in connection with an employer-sponsored wellness program. As a result, until further EEOC guidance is issued, the only wellness program designs that will definitively comply with Title II of GINA are ones that do not offer any inducement for the collection of genetic information, similar to the wellness program designs described with respect to GINA Title I compliance above. These types of wellness programs can still include biometric screening and HRA features that employees and spouses are encouraged to complete, but no rewards or penalties would be associated with whether the employee or spouse completes an HRA or biometric screening involving genetic information. Employers that provide only modest inducements in connection with wellness programs involving genetic information will be subject to incremental risk under the GINA Wellness Program Regulations, but may still be compliant with Title II of GINA.

ADA Requirements

Title I of the ADA has two primary requirements that an employer should consider when designing its wellness program, whether or not the wellness program is itself a group health plan or part of a group health plan: (1) the program must not be discriminatory with respect to disability, and (2) medical examinations and inquiries generally must be voluntary. 42 U.S.C. 12112(a), (d).

The EEOC issued final regulations on wellness programs under the ADA on May 17, 2016 (ADA Wellness Program Regulations). 81 Fed. Reg. 31,126 (codified at 29 C.F.R. § 1630.14(d)). The ADA Wellness Program Regulations became effective on July 18, 2016 and provided much needed clarity regarding how wellness programs should be designed to ensure compliance with the ADA. However, the District Court for the District of Columbia created renewed uncertainty for employers regarding compliance with the ADA in December 2017 by vacating the incentive provisions of the ADA Wellness Program Regulations effective as of January 1, 2019. AARP v. EEOC, 292 F. Supp. 3d 238 (D.D.C. 2017), modified by 2018 U.S. Dist. LEXIS 27317 (D.D.C. 2018). The EEOC issued updated final rules formally eliminating the incentive provisions effective as of January 1, 2019. 83 Fed. Reg. 65,296 (Dec. 20, 2018) (removing and reserving 29 C.F.R. § 1630.14(d)(3)).

The following describes the provisions of the ADA Wellness Program Regulations and the impact of the *AARP v. EEOC* decision on compliance with the ADA pending the issuance of further EEOC guidance.

Prohibition of Discrimination Against Disabled Individuals

An employer cannot discriminate against a qualified employee on the basis of disability with regards to the terms, conditions, and privileges of employment. When designing and administering a wellness program, which is a privilege of employment, an employer should ensure that qualified employees with disabilities will have equal access to the program's benefits and will not have to satisfy greater obligations to obtain equal benefits under the program.

Reasonable accommodations must be provided, absent undue hardship, to enable employees with disabilities to earn whatever financial incentive an employer offers as part of its wellness program. Providing a reasonable alternative standard and notice to employees of the availability of a reasonable alternative under HIPAA and the ACA as part of a health-contingent program would likely fulfill an employer's obligation to provide a reasonable accommodation under

the ADA. However, reasonable accommodation under the ADA is also required for a participation-only program even though HIPAA does not require participation-only programs to offer a reasonable alternative standard. The ADA Wellness Program Regulations provide the following examples:

- An employer that offers employees a financial incentive to attend a nutrition class, regardless of whether they reach a healthy weight as a result, would have to provide a sign language interpreter so that an employee who is deaf and who needs an interpreter to understand the information communicated in the class could earn the incentive, as long as providing the interpreter would not result in undue hardship to the employer.
- An employer would, absent undue hardship, have to provide written materials that are part of a wellness program in an alternate format, such as in large print or on computer disk, for someone with a vision impairment.
- An employer that offers a reward for completing a biometric screening that includes a blood draw would, absent undue hardship, have to provide an alternative test (or certification requirement) so that an employee with a disability that makes drawing blood dangerous can participate and earn the incentive.

Medical Examinations and Inquiries Must Be Voluntary

The ADA generally prohibits an employer from requiring medical examinations or making medical inquiries, unless such examination or inquiry is job-related and consistent with business necessity or is voluntary and part of an employee health program.

The ADA Wellness Program Regulations clarified that a program that simply promotes a healthier lifestyle but does not ask any disability-related questions or require medical examinations (e.g., a smoking cessation program that is available to anyone who smokes and only asks participants to disclose how much they smoke) is not subject to these ADA prohibitions. However, a wellness program that includes a biometric screening and/or disability-related inquiries must be designed to comply with the ADA Wellness Program Regulations' voluntary health program exception described below to comply with the ADA (even if it is a participation-only program).

Voluntary Employee Health Program Exception

Under the ADA Wellness Program Regulations, an employer may conduct voluntary medical examinations and inquiries as part of an employee health program (such as medical screening for high blood pressure, weight control, and cancer detection), provided that:

- Participation in the program is voluntary (as described further below)
- Information obtained is maintained according to the confidentiality requirements of the ADA (including under 29 C.F.R. § 1630.14(d)(4)) –and–
- This information is not used to discriminate against an employee

Such an employee health program (which may be offered in connection with a wellness program) must be reasonably designed to promote health or prevent disease, taking into account all the relevant facts and circumstances. This rule is similar to the standard for health-contingent wellness programs and the reasonable design criterion under GINA described above and generally means that the program:

- Has a reasonable chance of improving the health of, or preventing disease in, participating employees
- Is not overly burdensome
- Is not a subterfuge for violating the ADA or other laws prohibiting employment discrimination –and–
- Is not highly suspect in the method chosen to promote health or prevent disease

The ADA Wellness Program Regulations provide examples of programs that would and would not meet this requirement. Specifically, collecting medical information through an HRA without providing employees follow-up information or advice, such as providing feedback about risk factors or using aggregate information to design programs or treat any specific conditions, would not be reasonably designed to promote health. A program also is not reasonably designed if it exists mainly to shift costs from the employer to targeted employees based on their health.

However, conducting an HRA and/or a biometric screening of employees for the purpose of alerting them to health risks of which they may have been unaware would meet this requirement, as would the use of aggregate information from employee HRAs by an employer to design and offer health programs aimed at specific conditions that are prevalent in the workplace. An employer might conclude from aggregate information, for example, that a significant number of its employees have diabetes or high blood pressure and might design specific programs that would enable employees to treat or manage these conditions.

Under the ADA Wellness Program Regulations, participation in a wellness program (or other employee health program) is considered voluntary for this purpose if the employer:

- Does not require employees to participate
- Does not deny coverage under any of its group health plans or particular benefits packages within a group health

plan for non-participation or limit the extent of benefits (except pursuant to allowed incentives) for employees who do not participate

- Does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees –and–
- Provides employees with a notice written in a manner that is reasonably likely to be understood that describes the type of medical information that will be obtained and the specific purposes for which it will be used along with the applicable restrictions on disclosure, the parties with whom it will be shared, and the methods to ensure that medical information is not improperly disclosed (see the EEOC website for a sample notice).

Participation Incentives

The extent to which an employer may provide incentives for wellness program participation without jeopardizing its voluntary status is uncertain. The vacated provisions of the ADA Wellness Program Regulations had provided that an employer could offer limited incentives (whether financial or in-kind) to promote an employee's participation in a wellness program that includes disability-related inquiries or medical examinations . The incentive limitations were intended to ensure that participation remained voluntary, without the inducement becoming unduly coercive. The District Court for the District of Columbia vacated the incentive limitations, finding that the EEOC failed to provide support for the specified limitations, rendering its interpretation of "voluntary" arbitrary and capricious. See AARP v. EEOC, 267 F. Supp. 3d 14, 36–37 (D.D.C. 2017). Absent this rule, employers that provide only modest inducements in connection with wellness programs involving disability-related inquiries or medical examinations will be subject to incremental risk under the ADA Wellness Program Regulations, but may still be compliant with the ADA.

Other Design Considerations

An employer cannot require an employee to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information (except to the extent permitted by the ADA Wellness Program Regulations to carry out specific activities related to the wellness program), or to waive any confidentiality protections in this part as a condition for participating in a wellness program or for earning any incentive the employer offers in connection with such a program.

Medical information obtained by wellness programs subject to the ADA Wellness Program Regulations may only be disclosed to employers in aggregate form. Where a wellness program is part of a group health plan and is required to comply with HIPAA, its obligation to comply with this requirement generally may be satisfied through the group health plan's compliance with the HIPAA Privacy Rule.

Note that a smoking cessation program that merely asks employees whether they use tobacco (or whether they ceased using tobacco upon completion of the program) is not an employee health program that includes disability-related inquiries or medical examinations. As such, the vacated incentive limitations in the ADA Wellness Program Regulations would not have applied to such a program. Rather, only the HIPAA/ACA non-discrimination cap would apply, so an employer would be permitted to offer incentives as high as 50% of the cost of employee coverage for such a program. However, a tobacco-related program that tests for the presence of nicotine or tobacco would be an employee health program that includes disability-related inquiries or medical examinations. As a result, absent the vacated incentive limitations employers that provide only modest inducements in connection with these types of tobacco-related programs will be subject to incremental risk under the ADA Wellness Program Regulations, but may still comply with the ADA.

Bona Fide Benefit Plan Safe Harbor and ADA Compliance

The ADA also includes a safe harbor exception to these ADA requirements that permits insurers or other benefit plan administrators (including employers) to establish or administer benefit plans that are based on underwriting risks. The Eleventh Circuit affirmed a district court's finding, Seff v. Broward County, 778 F. Supp. 2d 1370 (S.D. Fla. 2011), aff'd 691 F.3d 1221 (11th Cir. 2012), which held that a wellness program that imposed a penalty for nonparticipation was part of the employer's bona fide benefit plan and thus able to take advantage of this safe harbor. However, the EEOC disagrees with this decision and does not believe that the ADA's safe harbor provision is applicable to an employer's decision to offer rewards or impose penalties in connection with wellness programs that include disability-related inquiries or medical examinations. Rather, the EEOC's position is that the voluntary employee benefit plan exception discussed above, codified at 42 U.S.C. 12112(d)(4)(B), is the ADA's clear safe harbor for wellness programs and that reading the insurance safe harbor as exempting these programs from the ADA prohibitions would render that statute superfluous. In light of the EEOC's continued opposition to the outcome in *Seff* and similar cases, an employer that implements a wellness program in reliance on the bona fide benefit plan safe harbor will need to weigh the risks of an EEOC challenge. The EEOC has been active in this area, as noted in the following section.

EEOC Enforcement Actions

In the fall of 2014, the EEOC filed three lawsuits against three employers, alleging that their wellness programs violated the ADA and GINA:

- **EEOC v. Orion Energy Systems**. Employees who declined to participate in the employer's wellness program, which included mandatory medical exams, were required to pay full premium for group health plan coverage (otherwise 100% employer-paid) and one employee was dismissed after complaining about the program. 2015 U.S. Dist. LEXIS 153216 (E.D. Wis. Nov. 12, 2015).
- **EEOC v. Flambeau, Inc.** Employees who declined to participate in the employer's wellness program were required to pay full premium for group health plan coverage (otherwise 75% employer paid) and were subject to unspecified disciplinary action. The district court granted the employer's motion for summary judgment, finding the program was permitted under the bona fide benefit plan safe harbor discussed above. 131 F. Supp. 3d 849 (W.D. Wis. Dec. 30, 2015).
- **EEOC v. Honeywell Int'l Inc.** The EEOC sought a preliminary injunction to enjoin the employer from imposing certain financial penalties on employees who declined to participate in its wellness program. The court denied the motion for lack of irreparable harm. 2014 U.S. Dist. LEXIS 157945 (D. Minn. Nov. 6, 2014).

Although the first two cases involved severe penalties equal to the full cost of coverage and even termination of employment, the third case involved a more typical design that complies with HIPAA's non-discrimination requirements. These enforcement actions alarmed many employers that had been careful to design wellness programs in compliance with HIPAA's non-discrimination requirements. Now that the ADA and 2016 GINA Wellness Program Regulations have been vacated, it would not be surprising to see additional EEOC enforcement actions.

AARP v. EEOC

In August 2016, AARP filed a lawsuit in the U.S. District Court for the District of Columbia challenging the ADA Wellness Program Regulations under the Administrative Procedure Act. AARP claimed that permitting incentives of up to 30% of the cost of self-only coverage is inconsistent with the "voluntary" requirements of the ADA, and that the EEOC failed to adequately explain and support its adoption of the 30% incentive level. In August 2017, the court ruled that the EEOC had not provided a reasoned explanation for its interpretation of the "voluntary" requirement, and that the ADA Wellness Program Regulations were therefore arbitrary and capricious. In that ruling, the court remanded the ADA Wellness Program Regulations back to the EEOC for reconsideration. However, in an effort to avoid widespread disruption and confusion among employers sponsoring wellness programs and their employees, the court did not vacate the ADA Wellness Program Regulations at that time.

AARP then asked the court to reconsider its decision not to vacate the ADA Wellness Program Regulations, and the EEOC provided a status report to the court indicating that new proposed regulations would not be issued until August 2018, would not be finalized until October 2019 and would not be effective until 2021. In response to the AARP's request for reconsideration and in light of the EEOC's anticipated timeline, the court issued another ruling in late December 2017 vacating the ADA Wellness Program Regulations effective January 1, 2019.

Under the court's most recent ruling in *AARP v. EEOC*, the ADA Wellness Program Regulations, summarized above, became null and void on January 1, 2019. In the absence of EEOC guidance that may be relied upon as of 2019, employers are once again in the uncomfortable position of not knowing with certainty whether and to what extent they can use incentives as part of a wellness program that involves medical examinations and disability-related inquiries.

Coextensive Statutory Regimes

Federal agencies have consistently indicated that compliance with one set of legal requirements, such as the HIPAA non-discrimination requirements described above, does not guarantee that a wellness program complies with other legal requirements, such as the ADA's voluntariness requirement. For example, even if a program and associated reward comply with HIPAA and GINA, the program and associated reward do not automatically comply with the ADA as well. Rather, the program and associated reward must comply with all applicable rulemaking.

Other Legal Requirements

In addition to the HIPAA non-discrimination, ACA, GINA, and ADA legal requirements discussed above, a wellness program that is itself a group health plan or part of a group health plan must comply with other legal requirements, such as ERISA, COBRA, and HIPAA privacy and security requirements. The need to comply with these additional legal requirements may be another reason for an employer to structure its wellness program as part of its major medical plan, which should already have compliance mechanisms in place for these requirements. If a wellness program provides a reward to incentivize participation, the employer also will need to determine the tax treatment of that reward under the Code.

ERISA

A wellness program that is itself a group health plan or part of a group health plan must comply with ERISA. Some of the primary compliance obligations under ERISA include having a written plan document, distributing a summary plan description and summaries of material modifications to participants, filing a Form 5500 if there are more than 100 participants in the plan, and following specific claims and appeals procedure requirements.

A wellness program that is part of a group health plan can simply be folded into the health plan's compliance with these requirements. A stand-alone wellness program will need to determine how to comply with these requirements in its own right.

For more information on obligations relating to ERISA benefit plans, see ERISA Fiduciary Duties and Disclosure Rules for SPDs, Participant-Directed Plans, Employer Securities, and Blackout Notices.

COBRA

COBRA continuation coverage must be offered as part of a wellness program that is itself a group health plan or part of a group health plan. If the wellness program is a stand-alone plan, the COBRA election notice provided to qualified beneficiaries at the time of a COBRA qualifying event should list the wellness program as coverage that can be continued under COBRA, together with any COBRA premium the employer decides to charge for such coverage. An actuary may need to be engaged to determine the fair market value of coverage under the program on which to base any COBRA premium charged.

If the wellness program is part of the employer's group health plan, the COBRA election notice does not need to list the program separately. Rather, a COBRA qualified beneficiary's election of COBRA coverage with respect to the group health plan should automatically provide continued coverage under the wellness program as well.

A general rule under COBRA is that a COBRA qualified beneficiary should be treated the same as a similarly situated active employee covered under the plan. However, identical treatment for wellness program purposes may not be required in certain circumstances:

- If the wellness program includes an on-site biometric screening, the on-site location of the screening probably does *not* need to be offered to COBRA qualified beneficiaries, as long as they could receive the same screening at another, reasonably accessible location.
- If the wellness program provides a reward in the form of reduced employee contribution rates, that reward probably does *not* need to be offered in COBRA to reduce the required COBRA premium because an employer can charge up to 102% of a plan's full cost rate in COBRA (in other words, a COBRA qualified beneficiary does not have to be treated the same as a similarly situated active employee when it comes to the cost that's charged for coverage).
- Similarly, if the wellness program provides a reward in the form of health savings account (HSA) contributions, cash, cash equivalent, or other non-group health plan–related form, the reward probably does *not* need to be offered in COBRA. HSAs are not typically ERISA plans and thus not subject to COBRA, and other non-group health plan–related rewards also are not subject to COBRA.
- If the wellness program provides a reward in the form of a health reimbursement arrangement or health flexible spending account contribution, or reduced cost sharing under the medical plan (i.e., lower deductible, co-payment, or coinsurance), the reward probably *does* need to be offered in COBRA. Health reimbursement arrangements and health flexible spending accounts are group health plans subject to COBRA, and the cost-sharing features under a medical plan should be consistent between similarly situated active employees and COBRA qualified beneficiaries.

For more information about COBRA's requirements, see COBRA Compliance and Enforcement.

HIPAA Privacy and Security

A wellness program that is itself a group health plan or part of a group health plan must comply with HIPAA's privacy and security requirements as a covered entity under HIPAA. Some of the primary compliance obligations under HIPAA's privacy and security rules include having business associate agreements in place with the third-party service providers, providing participants with a privacy notice, maintaining and following a policies and procedures document, and notifying individuals of breaches of unsecured protected health information.

A wellness program that is part of a group health plan can simply be folded into and included in the group health plan's compliance with these requirements. A stand-alone wellness program will need to determine how it will comply with these requirements in its own right.

For more information on HIPAA's privacy and security requirements, see HIPAA Privacy, Security, Breach Notification, and Other Administrative Simplification Rules.

The Code

Generally, anything of value provided from an employer to an employee, including a wellness program incentive, is included in the employee's taxable income. However, in some cases an employer may be able to design wellness program rewards that are not taxable to the employee. According to the Code:

- Cash and cash equivalents (e.g., gift cards) are always taxable to the employee, no matter the amount, including when provided directly to the employee's spouse.
- Items such as water bottles, T-shirts, etc. are generally considered non-taxable de minimis fringe benefits under Code section 132. For more information on this topic, see Fringe Benefit Rules (IRC § 132).
- Reduced employee medical plan contributions, deductibles, co-payments, and coinsurance amounts, as well as employer contributions to health reimbursement arrangements, health savings accounts, and health flexible spending accounts, are not taxable under Code sections 105 and 106.

Common Pitfalls

Some common pitfalls in designing and administering compliant wellness programs include the following:

- Failing to recognize when a wellness program is providing medical care, and thus must comply with applicable group health plan requirements
- Offering a reward (or penalty) that exceeds the applicable limits under the HIPAA non-discrimination rules
- Requiring an individual to show that it is unreasonably difficult due to a medical condition or medically inadvisable to satisfy an outcome-based, health-contingent standard (such as non-tobacco user status) in order to access a reasonable alternative standard (as applicable under the HIPAA Wellness Program Regulations or the ADA)
- Requiring an individual to find and pay for his or her own educational program as a reasonable alternative standard
- Refusing to entertain the recommendation of an individual's physician in designing a reasonable alternative standard for the individual
- Failing to include in materials that describe the program notification that a reasonable alternative standard is available for health-contingent aspects of the program
- Structuring a wellness program that is a group health plan as a stand-alone plan without carefully planning how that stand-alone plan will comply with all applicable legal requirements
- Providing a reward or penalty based on whether an employee's spouse completes an HRA that includes medical history questions in a manner inconsistent with GINA
- Requiring a biometric screening as a condition of medical plan enrollment or imposing a penalty so large as to call into question the voluntary nature of the screening under the EEOC's ADA guidance
- Not having a summary plan description for a stand-alone wellness program that is a group health plan, or failing to include information in a medical plan's SPD about any wellness program that is part of that plan
- Failing to offer COBRA with respect to a wellness program that is itself a group health plan or is part of a group health plan
- Not having a HIPAA business associate agreement in place with third-party service providers for the wellness program when required if the program is itself a group health plan or is part of a group health plan
- Failing to tax a cash or other taxable reward that is not eligible for exclusion from employees' income under the Code

Importance of Periodic Wellness Program Reviews

Given the complexities and evolving landscape of legal compliance obligations and available guidance, it is extremely important to thoroughly analyze existing and proposed wellness program designs to ensure compliance with all applicable requirements and to mitigate against lawsuit and other enforcement action risks.

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Emily D. Zimmer is a partner in the Charlotte, NC office of Troutman Sanders where Emily counsels clients on a wide range of employee benefit and executive compensation issues, including issues related to corporate mergers and acquisitions. She routinely advises on the design, implementation and administration of qualified and non-qualified retirement plans and welfare benefit programs, including wellness programs, health care accounts such as HRAs, Health FSAs and HSAs, adoption reimbursement programs and educational assistance programs. Emily also provides compliance advice, including with reporting and disclosure requirements, ACA compliance obligations, COBRA benefit continuation rights, and HIPAA portability, nondiscrimination, privacy and security issues.

Emily assists clients across diverse industries with a particular emphasis on financial services, energy, higher education and health care. Her work with higher education institutions has included assisting clients with unique issues presented under the ACA's employer mandate, including with respect to student employees. Emily also helps clients in the health care industry navigate complex benefit plan issues arising due to the client's status as both an employer and a provider, including unique provider/plan contracting and fiduciary duty issues and HIPAA privacy and security considerations given HIPAA's impacts on both the client and the client's group health plans as different types of covered entities.

Lynne Wakefield, Partner, Troutman Sanders LLP

Lynne Wakefield regularly assists clients with issues relating to employer-sponsored health and welfare benefits, including the design, implementation and administration of group health plans, cafeteria plans, health savings accounts (HSAs), health reimbursement arrangements (HRAs), wellness programs and retiree medical and private exchange coverage. She also provides compliance advice, including with ERISA reporting and disclosure requirements, ACA compliance obligations, COBRA continuation coverage rights, HIPAA portability, nondiscrimination, privacy and security requirements and Internal Revenue Code qualification issues.

Lynne also regularly advises clients on qualified retirement plan issues, including the design, implementation and administration of 401(k), profit sharing and traditional pension and cash balance plans, compliance with applicable ERISA and Internal Revenue Code requirements and correction of qualified plan defects and related submissions under the Internal Revenue Service and Department of Labor voluntary correction programs.

Lynne assists clients with employee benefit plan governance, including committee structures and charters. She provides fiduciary training and best practices, negotiates vendor contracts and services agreements, responds to participant claims and appeals and assists with benefits issues in plan litigation. She also conducts full-scale benefit plan audits to identify compliance gaps under the myriad of laws impacting employee benefit plans and assists with benefits issues in mergers and acquisitions, including benefits due diligence and post-transaction benefits integration.