

# HEALTH PLAN UPDATE

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**American Health Care Act of 2017  
Better Care Reconciliation Act of 2017  
Wellness Plans  
Mental Health Parity Act**

**AL HOLIFIELD TINA HALEY**

Holifield Janich Rachal & Associates, PLLC  
11907 Kingston Pike, Suite 201  
Knoxville, TN 37934

[aholifield@holifieldlaw.com](mailto:aholifield@holifieldlaw.com)  
[thaley@holifieldlaw.com](mailto:thaley@holifieldlaw.com)

Phone (865) 566-0115  
Fax (865) 566-0119

# Better Care Reconciliation Act of 2017 (BCRA)

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- Individual mandate eliminated;
- Employer mandate eliminated;
- Pre-Existing Conditions – AHCA – 30% premium surcharge if an individual had a 63 or more day coverage gap during a 12 month period;
- Over the Counter – could be paid without a prescription;
- W-2 reporting – unchanged, still need to file 1094s and 1095s

# Better Care Reconciliation Act of 2017 (BCRA)

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- BCRA – if an individual has a 63 or more day gap in coverage there would be a six month waiting period for coverage to take effect.;
- Cadillac tax delayed until 2026;
- Health Flexible Spending Accounts – no statutory limit;
- Health Savings Accounts – limits would increase to \$6,650 for single Coverage; \$13,300 for family;

# Better Care Reconciliation Act of 2017 (BCRA)

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- Metal level plans would be eliminated;
- Repeal of premium assistance tax credits and go to an age-based program;

| Age             | Annual Credit Amount |
|-----------------|----------------------|
| Under Age 30    | \$2,000              |
| Age 30-39       | \$2,500              |
| Age 40-49       | \$3,000              |
| Age 50-59       | \$3,500              |
| Age 60 or older | \$4,000              |

# Wellness Plans: What Laws Apply?

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- 1) HIPAA - prohibits discrimination based on the adverse health factors; exception for wellness plans
- 2) ACA – amended HIPAA and extended nondiscrimination provisions to individual market
- 3) ADA - prohibits discrimination against a qualified individual with a disability in any aspect of employment
- 4) GINA - protects job applicants and current/former employees from employment discrimination based on genetic information.

# Wellness Plans: Who Has Them?

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According to 2014 survey –

- 51% of firms with 200 workers or more offer incentives for employees to complete health risk assessments
- 36% of firms with more than 200 workers use financial incentives tied to health objectives like weight loss and smoking cessation
- 18% of firms use financial incentives tied to health objectives like weight loss and smoking cessation

A 2015 survey shows 70% of U.S. employers offer a general wellness program (up from 58% in 2008).

# Wellness Plans

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## Types of Wellness Plans:

- ❖ Participatory
- ❖ Health-Contingent
  - Activity-Only
  - Outcome-Based

# Participatory Wellness Plan

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A program that either does not provide a reward or does not include any conditions for obtaining a reward that are based on an individual satisfying a standard that is related to a health factor

Must be made available to all similarly situated individuals regardless of health status

## Examples:

- Filling out a health risk assessment or having a diagnostic test performed
- Attending a monthly, no-cost health education seminar
- Program that reimburses employees for all or part of the cost of membership in a fitness center



# Health-Contingent Wellness Plan

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A program that requires an individual to satisfy a standard related to a health factor to obtain a reward (or requires an individual to undertake more than a similarly situated individual based on a health factor in order to obtain the same reward)

## Five requirements:

- Opportunity to Qualify
- Size of Reward
- Reasonable Design
- Uniform Availability
- Notice of Alternative Standard

# Health-Contingent Wellness Plan

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Two types:

- Activity-only
- Outcome-based



# Activity-Only Wellness Plan

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A type of health-contingent wellness program that requires an individual to perform or complete an activity related to a health factor in order to obtain a reward but does not require the individual to attain or maintain a specific health outcome

- Examples:
  - Walking
  - Diet
  - Exercise programs

# Outcome-Based Wellness Plan

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A type of health-contingent wellness program that requires an individual to attain or maintain a specific health outcome in order to obtain a reward

## Examples:

- Not smoking
- Attaining certain results on biometric screenings

# HIPAA & ACA

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- 1996 – HIPAA enacted; prohibits discrimination by group health plans in eligibility, benefits or premiums based on a health factor
  - Exception for premium discounts, rebates or modification to cost-sharing based on participation in a wellness plan
- 2006 – HIPAA final regulations issued implementing nondiscrimination and wellness provisions

# HIPAA & ACA

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- 2010 – ACA amended HIPAA nondiscrimination provisions
- June 3, 2013 - final regulations issued jointly by Department of Treasury, Department of Labor, and Health and Human Services
- Regulations apply to plan years beginning on or after January 1, 2014

# Health-Contingent Wellness Plan: Requirements

|                        | Activity-Only<br>Wellness Programs   | Outcome-Based<br>Wellness Programs   |
|------------------------|--|--|
| Opportunity to Qualify | At least once per year   | At least once per year   |
| Size of the Reward     | 30% of the cost of coverage  | 30% of the cost of coverage, plus additional 20% for non-tobacco use   |
| Reasonable Design      | <ul style="list-style-type: none"> <li>- Must not be overly burdensome or a subterfuge for discrimination</li> <li>- Must offer a reasonable alternative standard to qualify for the reward to <b>every</b> individual who does not meet the initial standard</li> </ul> | <ul style="list-style-type: none"> <li>- Must not be overly burdensome or a subterfuge for discrimination</li> <li>- Must offer a reasonable alternative standard to qualify for the reward to <b>every</b> individual who does not meet the initial standard</li> </ul> |

# Health-Contingent Wellness Plan: Requirements

|                                | <b>Activity-Only<br/>Wellness Programs</b>  | <b>Outcome-Based<br/>Wellness Programs</b>  |
|--------------------------------|---|---|
| Uniform Availability           | Alternative to qualify for full reward (or waiver of standard) must be offered if activity would be medically inadvisable or unreasonable due to a medical condition.   | Alternative to qualify for full reward (or waiver of standard) must be offered to individuals who do not meet the initial standard.   |
| Notice of Alternative Standard | <ul style="list-style-type: none"> <li>- Must provide notice of availability of alternative standard in <b>all</b> materials describing the program.</li> <li>-Notice must include contact info and statement that recommendations from individual's physician will be accommodated.</li> </ul> | <ul style="list-style-type: none"> <li>-Must provide notice of availability of alternative standard in <b>all</b> materials describing the program <b>and</b> in disclosures that individual did not satisfy initial outcome-based standard.</li> <li>-Notice must include contact info and statement that recommendations from individual's physician will be accommodated.</li> </ul> |



# Genetic Information Nondiscrimination Act (GINA)

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- Makes it an unlawful practice for an employer to request, require, or purchase genetic information with respect to an employee or a family member of the employee
- Exception where health or genetic services are offered by the employer, including such services offered as part of a wellness program

# Americans with Disabilities Act (ADA)

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- Wellness programs must comply with certain sections of the ADA
- ADA “safe harbor” provision:
  - allows insurers and plan sponsors to use information about risks posed by certain health conditions to make decisions about insurability and the cost of insurance
  - does not apply to wellness plans

# Americans with Disabilities Act (ADA)

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## *Exams and inquiries:*

- *Prohibited examinations and inquiries* - may not require a medical examination or make inquiries as to whether an employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job related and consistent with business necessity.
- *Acceptable examinations and inquiries* - may conduct voluntary medical examinations, including voluntary medical histories, as part of employee health program available to employees; may make inquiries into the ability of employee to perform job-related functions.

# Americans with Disabilities Act (ADA)

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## *Retaliation and coercion:*

- Retaliation – may not discriminate against any individual because such individual has opposed any act or practice made unlawful by ADA or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the ADA.
- Interference, coercion, or intimidation – may not coerce, intimidate, threaten, or interfere with any individual in the exercise of, or aiding or encouraging any other individual in the exercise of, any right granted or protected by the ADA.

# EEOC

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- ❖ EEOC is federal agency responsible for enforcement of the ADA and GINA and issuing regulations
- ❖ In May, 2016 EEOC issued final regulations under the ADA and GINA, effective as of the first day of the first plan year that begins on or after January 1, 2017

# EEOC ADA Regulations:

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## Wellness program requirements:

- must be reasonably designed to promote health or prevent disease and must be voluntary
- must have “a reasonable chance of improving the health of, or preventing disease
- must not be overly burdensome, a subterfuge for violating the ADA or other laws prohibiting employment discrimination, or highly suspect in the method chosen to promote health or prevent disease

# EEOC ADA Regulations:

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The wellness program must be **voluntary**:

- cannot require employee participation
- cannot deny coverage under group health plan or particular benefits package for an employee not participating in the wellness program
- cannot take adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten employees who do not participate in the wellness program
- only permitted to receive medical information as part of the wellness program in aggregate form that does not disclose, and is not reasonably likely to disclose, the identity of specific individuals

# EEOC ADA Regulations:

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Employers must provide participants with a **confidentiality notice** containing the following information:

- Clear explanation of what medical information will be obtained
- How the obtained medical information will be used
- Who will receive the medical information
- Restrictions on disclosure of the obtained medical information
- Methods the employer will use to prevent improper disclosure of the medical information



# EEOC ADA Regulations:

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## Limits on Financial Incentives:

- One group health plan, participation in wellness program offered only to employees that are enrolled in the plan - 30% of the total cost of self-only coverage (including both employee's and employer's contribution)
- One group health plan, participation in a wellness program offered to all employees - 30% of the total cost of self-only coverage

# EEOC ADA Regulations:

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- More than one group health plan, participation in wellness program offered to all employees - 30% of the total cost of the lowest cost self-only coverage under a major medical group health plan
- No group health plan - 30% of the cost of self-only coverage under the second lowest cost Silver Plan for a 40-year-old nonsmoker on the state or federal health care Exchange in the location of principal place of business
- Program designed to prevent/reduce tobacco use that does not include a medical examination - up to 50% of the cost of coverage

# EEOC GINA Regulations:

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## Limits on financial incentives:

- Incentives cannot be offered in exchange for health information about employees' spouses or children
  - Exception: employers may seek health information from family member who is receiving health or genetic services offered by the employer
- Employers may offer health or genetic services (i.e. participation in a wellness program) to employee's children on a voluntary basis, but cannot offer any inducement in exchange for information about a disease or disorder in the child

# EEOC GINA Regulations:

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Financial incentives for spouse to provide information about health status:

- Program open only to employees/family members in group health plan - 30% of the total cost of self-only coverage under group health plan
- More than one group health plan, enrollment in plan not required to participate in wellness program - 30% of lowest cost major medical self-only plan the employer offers

# EEOC GINA Regulations:

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- No group health plan - 30% of total cost to a 40-year-old non-smoker purchasing coverage under the second lowest cost Silver Plan available through the state or federal exchange in the principal place of business.

# Mental Health Parity and Addiction Equity Act (MHPAEA):

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- ❖ Originally enacted in 1996 as the “Mental Health Parity Act”
- ❖ Amended in 2008 – Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act
- ❖ Prohibits certain group health plans that provide mental health or substance use disorder benefits from imposing less favorable benefit limitations than those imposed on medical/surgical benefits.

# Mental Health Parity and Addiction Equity Act (MHPAEA):

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- ❖ Applies to “large” group health plans (employers with more than 50 employees)
- ❖ Applies to both insured and self-funded health plans
- ❖ Does not require coverage mental health or substance use disorder benefits (“MH/SUD”)
  - “Small” group health plans (employers with 1–50 employees) not directly subject to MHPAEA
  - ACA requires coverage of MH/SUD services (essential health benefit applicable to non-grandfathered individual and small group plans).
  - Must comply with MHPAEA requirements

# Mental Health Parity and Addiction Equity Act (MHPAEA):

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- ❖ “Substantially all/predominant test” – financial requirements (deductibles, co-payments) and treatment limitations (number of visits or days of coverage) must be no more restrictive than the predominant financial requirements or treatment limitations that apply to substantially all medical/surgical benefits
- ❖ No separate cost-sharing or treatment limitations
- ❖ If health plan provides out-of-network coverage for medical/surgical benefits, out-of-network coverage must also be provided for MH/SUD benefits



# Mental Health Parity and Addiction Equity Act (MHPAEA):

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## Exceptions:

- ❖ Self-insured non-Federal governmental plans with less than 50 employees
- ❖ Self-insured small private employers with 50 or less employees
- ❖ Plans exempt based on “increased cost” (2% in first year, 1% thereafter); annual determination
- ❖ Large, self-funded non-Federal governmental plans that opt-out

# Mental Health Parity and Addiction Equity Act (MHPAEA):

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- ❖ Final regulations issued in November 2013, effective for plans years beginning on or after July 1, 2014
  
- ❖ “Substantially all/predominant test” –
  - must be applied to separately to six classifications:
    - In-patient in-network
    - In-patient out-of-network
    - Outpatient in-network
    - Outpatient out-of-network
    - Emergency
    - Prescription drug

# Mental Health Parity and Addiction Equity Act (MHPAEA):

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- ❖ All cumulative financial requirements in a classification (including deductibles and out-of-pocket limits) must combine both medical/surgical and MH/SUD benefits
  - Includes examples of permissible and impermissible cumulative financial requirements
  
- ❖ Procedures or factors used to apply non-quantitative treatment limitations (i.e. medical management, step therapy, pre-authorization) to MH/SUD benefits must be comparable to and applied no more stringently than those used in applying the limitation to medical/surgical benefits
  - Applies to all plan standards that limit the scope or duration of benefits (i.e., geographic limits, facility-type limits, network adequacy)