

At Last!

Linking the Proposed ADA Wellness Regulations with Existing Wellness Guidance under the ACA

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Presentation Overview

- Historical EEOC Perspective on Wellness Programs
 - ADA and GINA Considerations
 - *Seff v. Broward County*
 - EEOC District Enforcement Actions, e.g., *EEOC v. Honeywell*
- EEOC's Proposed ADA Wellness Regulations
 - Reasonable Design Requirement
 - Voluntary Requirement
 - Incentives allowed in group health plan context, but subject to limits
 - Confidentiality and Notice Requirements
 - Effort to overturn *Seff v. Broward County* via regulatory guidance
- Comparing the ADA Regulations and Existing ACA Regulations
 - Different scopes of coverage
 - Incentive limits and measurements
- Considerations to Relate to EEOC for Final ADA Regulations

Historical EEOC Perspective on Wellness Programs

- The Equal Employment Opportunity Commission (“EEOC”) is responsible for interpreting and enforcing:
 - the Americans with Disabilities Act (“ADA”); and
 - the employment parts of the Genetic Information Nondiscrimination Act (“GINA”).
- The ADA generally restricts employers from obtaining “medical information” from employees (and applicants) :
 - Such restriction prohibits requiring “medical examinations” or “making disability-related inquiries.”
 - Exception for “voluntary” medical examinations that are part of employee health program.
 - The EEOC has asserted that a wellness program is not “voluntary” if participation is mandatory or employees who do not participate are penalized.

Historical EEOC Perspective on Wellness Programs

- GINA generally prohibits intentional collection of “genetic information” by employers and by health plans unless part of a “voluntary” wellness program.
- The EEOC has asserted that the collection of medical information from an employee’s spouse (such as by questionnaire) is the collection of genetic information.
- As with the ADA, the EEOC has asserted that the use of financial incentives can render a program involuntary for GINA purposes.

Historical EEOC Perspective on Wellness Programs

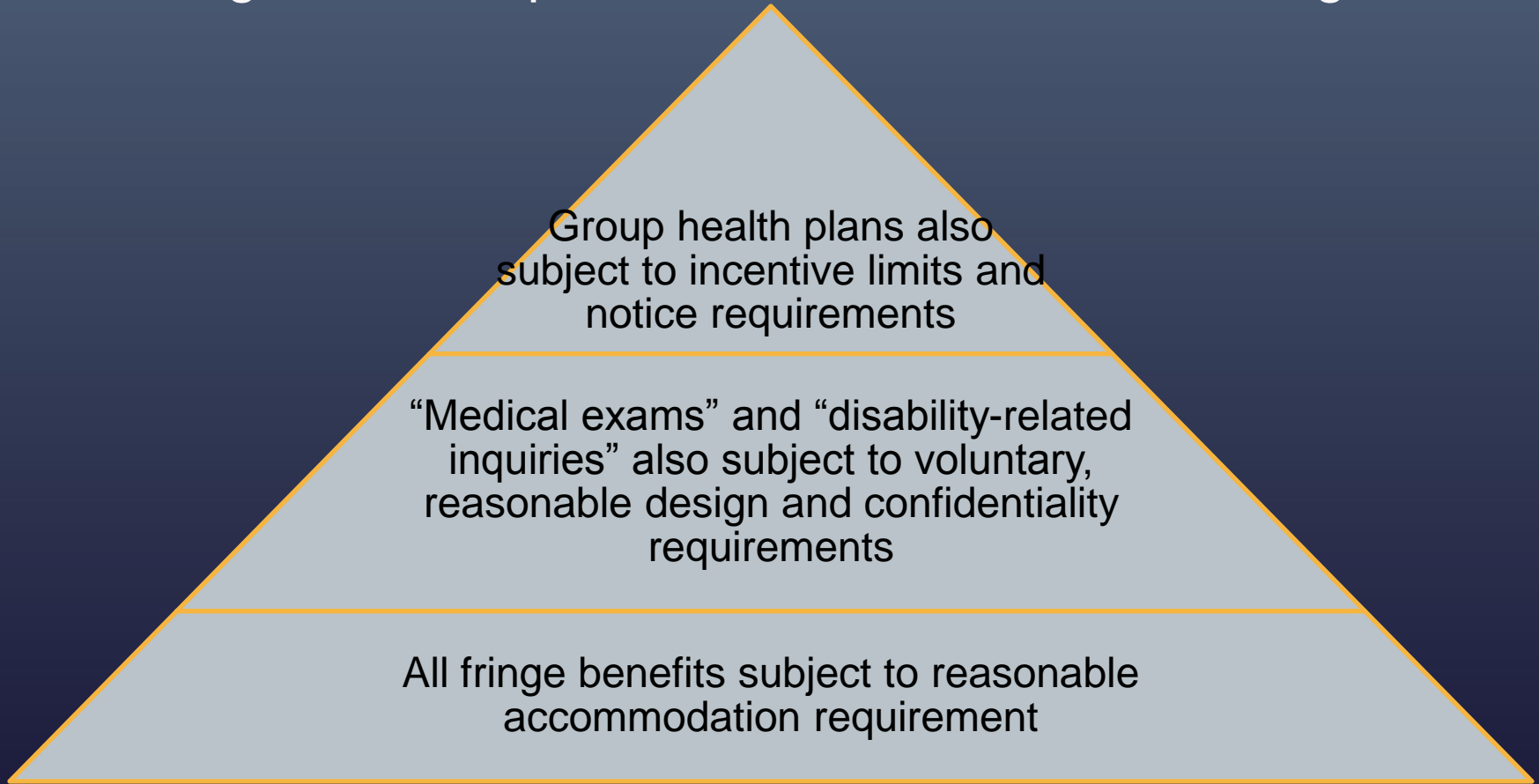
- During Fall 2014, the EEOC's Chicago District Office filed three claims against employers alleging wellness programs violations.
 - In *EEOC v. Honeywell*, the EEOC alleged ADA and GINA violations by a wellness program providing for surcharges and rewards in exchange for participation in biometric testing and cessation of tobacco usage. The *Honeywell* program was in apparent compliance with the Affordable Care Act's ("ACA") wellness regulations.
 - The temporary restraining order request in *Honeywell* was denied by the court.
 - The claims remain subject to administrative enforcement by the EEOC.

EEOC's Proposed ADA Wellness Regulations

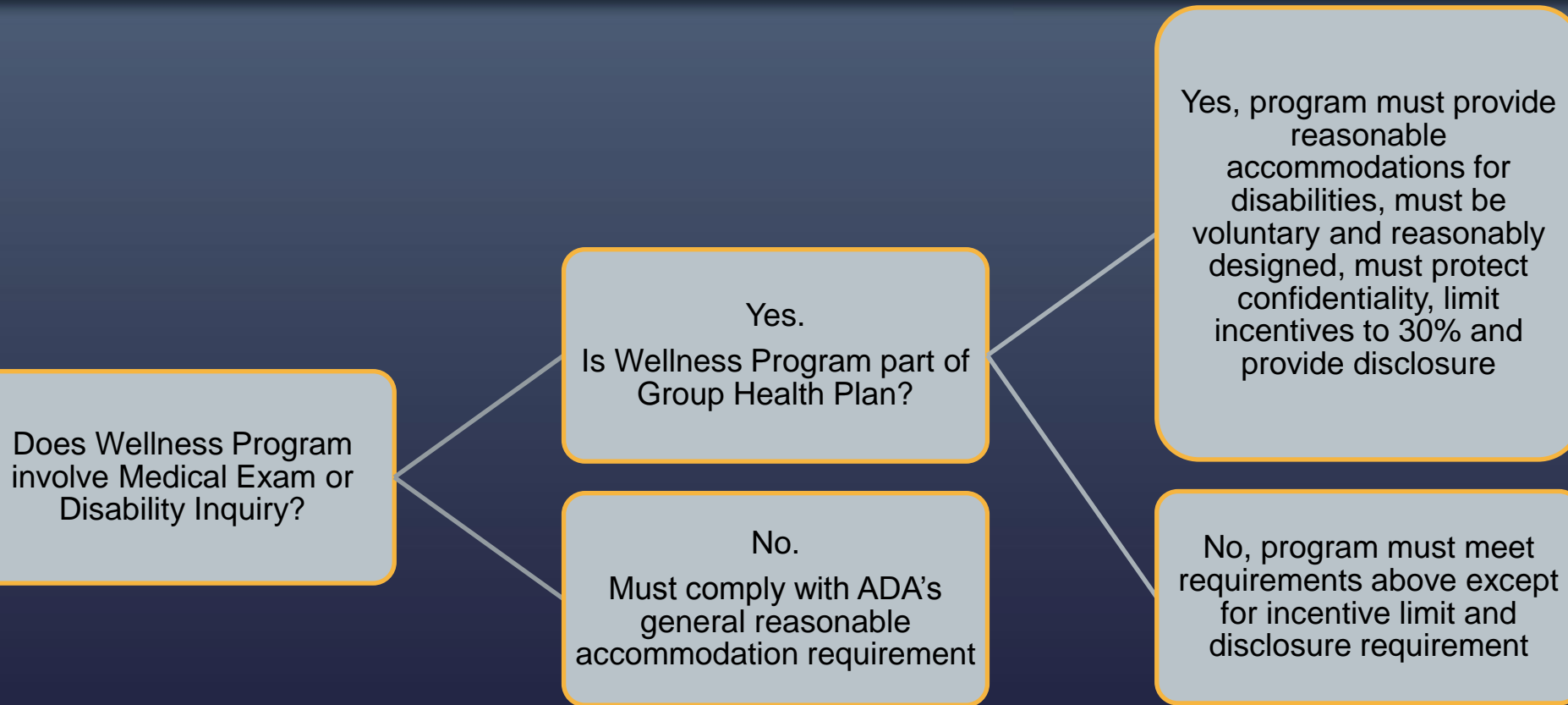
- Proposed regulations issued on April 20, 2015 and generally applicable to all employers with 15 or more employees.
- Compliance with proposed regulations to be treated by EEOC as compliance with the ADA until final regulations are issued.
- In its preamble, the EEOC notes the value of coordinating ADA and ACA regulation of wellness programs, but declines full alignment.
- GINA guidance still forthcoming.

EEOC's Proposed ADA Wellness Regulations

- ADA regulations impose three levels of wellness regulation.



Decision Tree Depiction of the ADA Regulations



Existing Definitions Implicated by the ADA Wellness Regulations

- The EEOC defines a “medical examination” as a “procedure or test that seeks information about an individual’s physical or mental impairments or health.”
- Under the ADA, a “disability” is generally a physical or mental impairment that substantially limits one or more major life activities.
- The EEOC defines a “disability-related” inquiry as one that “is likely to elicit information about a disability.”

EEOC's Proposed ADA Wellness Regulations

- Wellness programs involving a “medical exam” or “disability-related inquiry” must:
 1. Be Voluntary;
 2. Be Reasonably Designed; and
 3. Protect Confidentiality.

EEOC's Proposed ADA Wellness Regulations

- The ADA requires wellness programs to be voluntary.
“Voluntary” means that the employer/covered entity:
 - Does not require employees to participate;
 - Does not deny coverage under any group health plan or particular benefits package within a group health plan for non-participation or limit the extent of such coverage; and
 - Does not take any adverse employment action or retaliate against, interfere with, or coerce, intimidate, or threaten employees.

EEOC's Proposed ADA Wellness Regulations

- The ADA requires wellness programs to be **reasonably designed to promote health/prevent disease**.
“Reasonably designed” means that the program:
 - Has a reasonable chance of improving health/preventing disease;
 - Is not overly burdensome;
 - Is not a subterfuge for discrimination; and
 - Is not highly suspect in the method chosen.
- The EEOC's interpretive guidance for the regulations and a companion FAQ from the Departments of Treasury, Labor and Health & Human Services both require the wellness program to provide a “takeaway” benefiting participants, not just collect data from participants.
 - Alerting participants of health risks identified in tests or designing interventions to address participants' health risks would satisfy this requirement.

EEOC's Proposed ADA Wellness Regulations

- The ADA requires wellness programs to **protect confidentiality**. “Protecting confidentiality” means that the entity collecting medical/disability-related information:
 - Must maintain all data in a confidential manner;
 - May not use data to discriminate in employment terms (including benefits);
 - May only provide data to an employer’s general operations in an aggregated manner, without identification of specific individuals (except as required for health plan administration);
 - Must also comply with any additional Health Insurance Portability and Accountability Act (“HIPAA”) data privacy and data security requirements that may apply.
- The EEOC’s interpretive guidance suggests that an employer must consider whether it is appropriate to retain vendors responsible for confidentiality breaches.

Existing HIPAA/ACA Definition Implicated by the ADA Wellness Regulations

- The ADA regulations impose heightened requirements on any wellness program that is part of or provided by a “group health plan” or insurer offering health insurance for a group health plan.
- A “group health plan” is defined for HIPAA purposes as a plan or program that is maintained for employees and/or their beneficiaries and provides medical care.
 - Group health plans can be fully insured or self-insured.
 - “Excepted benefits”, including Employee Assistance Programs not providing significant medical care, are excluded from the group health plan definition.
 - Wellness programs can intentionally be integrated into a group health plan in order to benefit from ERISA preemption.

EEOC's Proposed ADA Wellness Regulations

- Wellness programs involving a medical exam or disability-related inquiry and included in a group health plan must:
 1. Be Voluntary;
 2. Be Reasonably Designed;
 3. Protect Confidentiality;
 4. Limit Financial Incentives; and
 5. Provide Disclosure.

EEOC's Proposed ADA Wellness Regulations

- The ADA requires wellness programs to limit incentives, if included in a group health plan.
 - Financial incentives for all such wellness programs cannot exceed 30% of the total cost of employee-only group health plan coverage.
 - Financial incentives can be structured as either rewards or penalties.
 - Financial incentives for wellness programs not part of or provided by a group health plan are not subjected to limits in the proposed regulations.

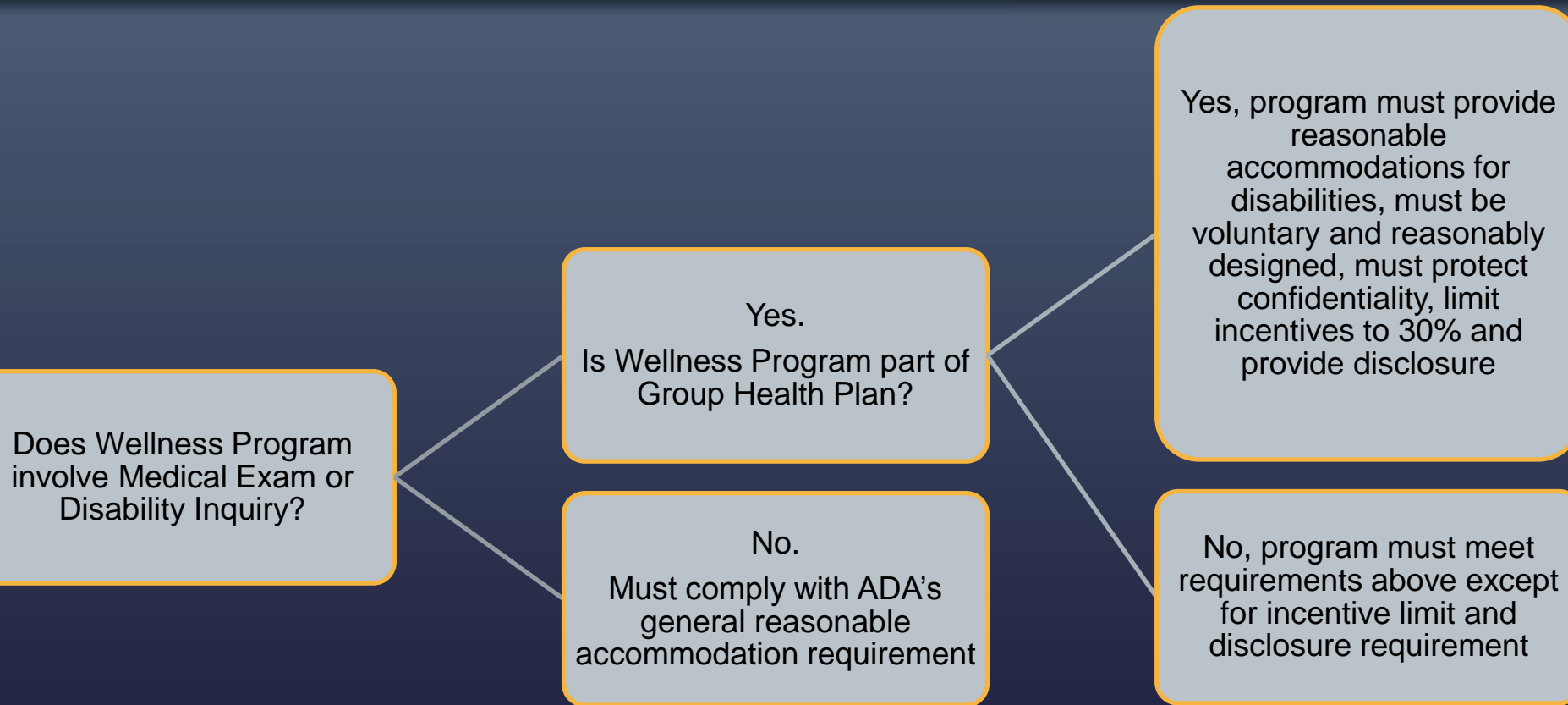
EEOC's Proposed ADA Wellness Regulations

- The ADA requires wellness programs to provide **disclosure**, if included in a group health plan.
 - Disclosure must describe the medical information that is being obtained from the employee and the purpose for which it will be used.
 - Disclosure must explain the privacy restrictions applicable to the data, the parties with which it will be shared and the methods for securing the data.
 - Disclosure must describe whether HIPAA is applicable and the privacy restrictions and protocols applicable due to HIPAA coverage.

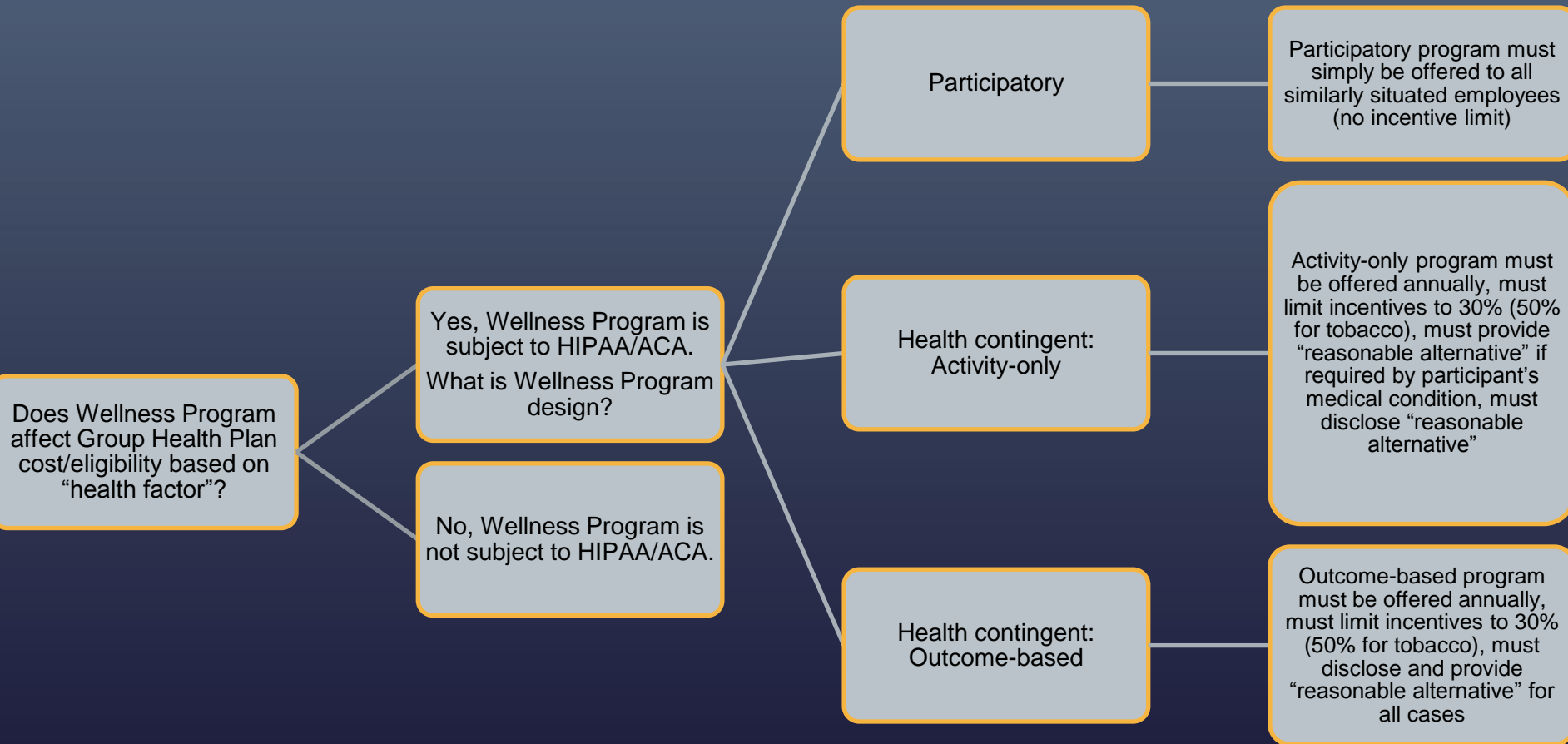
Interpretation of the ADA's "Bona Fide Benefit Plan" Safe Harbor

- The ADA includes a statutory safe harbor providing that the prohibitions on medical exams and inquiries do not restrict employers from maintaining a "bona fide benefit plan." The EEOC has not released applicable regulations.
- In *Seff v. Broward County* (2012), the 11th Circuit Court of Appeals upheld a \$20/paycheck penalty for failure to participate in a biometric screening program pursuant to the ADA's benefit plan safe harbor.
- The EEOC interprets the statute's bona fide benefit plan safe harbor as not covering wellness programs (whether integrated into a group health plan or not).

Decision Tree Depiction of the ADA Regulations



Decision Tree Depiction of the ACA Regulations



Comparing the ADA Regulations & ACA Regulations

- The ADA and ACA identify different threshold questions for determining applicability.
- The ACA addresses all wellness programs that affect the employee cost of group health plan coverage, but provides minimal regulation of “participatory” wellness programs.
- The ADA regulations principally address wellness programs with medical exams or disability-related inquiries, regardless of participatory/contingent status.

Comparing the ADA Regulations & ACA Regulations

- Certain programs may be subject to incentive limits under the ADA, but not the ACA.
- Comparing regulation of a Health Risk Assessment with a 75% premium reward offered in a group health plan.

ACA Analysis	ADA Analysis
<p>Does program involve an activity or measurement related to a health factor? <i>No</i></p> <p><u>Compliant.</u> Since there is no activity or measurement other than completing questionnaire, no limit on incentives.</p>	<p>Does program involve a medical exam or disability-related inquiry? <i>Yes</i> Is program part of a group health plan? <i>Yes</i></p> <p><u>Violative.</u> Since program is a medical exam included in a group health plan, incentives are limited to 30% of cost.</p>

Comparing the ADA Regulations & ACA Regulations

- Certain programs may be subject to incentive limits under the ADA, but not the ACA.
- Comparing ADA and ACA regulation of a self-certified tobacco cessation program with a 75% premium reward offered in a group health plan.

ACA Analysis	ADA Analysis
<p>Does program involve an activity or measurement related to a health factor? Yes</p> <p><u>Violative</u>. Since program requires achievement related to health factor, incentives are limited to 50% of cost.</p>	<p>Does program involve a medical exam or disability-related inquiry? No</p> <p><u>Compliant</u>. Since program relies on self-certification as opposed to a medical exam, no limit on incentives.</p>

Comparing the ADA Regulations & ACA Regulations

- ADA regulations decline to authorize additional 20% incentive (for 50% total) for tobacco cessation programs.
- ACA regulations both enable 50% incentives for tobacco cessation & allow crediting of such incentives for ACA “Pay or Play” affordability testing purposes.

Comparing the ADA Regulations & ACA Regulations

- ADA regulations define 30% incentive limit in relation to “employee-only” total cost of coverage.
- ACA regulations define incentive limits in terms of coverage level applicable to employees and family members eligible for wellness program:
 - 30% of employee-only coverage if only employee eligible
 - 30% of family coverage if family members eligible as well

Items for the Final ADA Regulations

- The ERISA Industry Committee is preparing a comment letter to the EEOC addressing the proposed regulations. Topics may include:
 - Limit of 30% on tobacco cessation programs;
 - Extension of 30% limit to “participatory” wellness programs;
 - Defining 30% limit based on employee-only total cost of coverage;
 - Requiring wellness programs to provide assistance/advice in addition to testing results;
 - Costliness and utility of privacy disclosures for wellness programs included in a group health plan;
 - Avoiding new requirement that voluntariness be measured in relation to ACA “pay or play” affordability analysis;
 - Avoiding new requirement that participants certify that participation in wellness program is knowing and voluntary; and
 - Unintended ERISA preemption consequences of limiting wellness incentives based on integration into ERISA group health plans.

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