

COMPLIANCE CLASSROOM NOTES

In Summary: All about that ADA

What is the ADA?

- Name: Americans with Disabilities Act
- Purpose: Protects qualified employees from discrimination
- Application:
 - Employers with 15 or more employees
 - Disability determination is broadly construed in favor of individuals

What is a disability?

- physical or mental impairment that substantially limits one or more major life activities;
- A record of such an impairment; or
- The individual is regarded as having such an impairment

What's permitted?

- Employers *may* make disability-based distinctions in employee benefits plans based on
 - Actuarial principles; or
 - Reasonably anticipated experience

What's a Health-Related Distinction in a Benefit Plan?

- Disability-based if it singles out:
 - A disability
 - Ex. Plan covers all physical and mental disorders *except* depression.
 - A discrete group of disabilities; or
 - Ex. Plan caps coverage for cancer treatments at \$1 million but caps treatment *for all other* physical conditions at \$20 million.
 - Disability in general
 - Ex. Employer (ER) requires Employee (EE) who can't work due to physical or mental disorder to retire on disability retirement, *even if they also are eligible* to retire under ER's service retirement plan.

What's NOT a Health-Related Distinction in a Benefit Plan?

- NOT disability-based if it:
 - Is a "broad distinction" applicable to many dissimilar conditions; and
 - Constrains everyone
 - Ex. MRIs performed for many different conditions whether one does or does not have a disability.

What happens if the ER makes a disability-based distinction?

- The must justify it
- Demonstrate that the plan:
 - Is *bona fide*
 - The plan must exist & pay benefits; and
 - Plan terms must be accurately communicated to eligible employees
 - Is not a subterfuge to evade ADA purposes
 - Refers to disability-based disparate treatment in a benefit plan

Legitimacy of Data

- Disparate treatment is justified by legitimate actuarial data; or
- By actual or reasonably anticipated experience; and
- Conditions with comparable data are treated similarly
- ER may NOT rely on outdated data or data based on myths, fears, stereotypes, or assumptions about the disability at issue

Additional Justifications for Disparate Treatment:

- Is *necessary* to maintain the solvency of the plan
- Is necessary to *avoid unacceptable changes* in the coverage of, or the premiums for, a benefit plan
- A treatment provides *no* medical benefit

ADA & Wellness Programs

- Prohibits employers from
 - Requiring EEs to submit to physical exams; and
 - asking health-related questions...
 - ...UNLESS it's a voluntary * EE health program

***THE BIG ISSUE:**
To what extent are incentives/penalties connected with these programs **VOLUNTARY?**

NOTE: Rule...

- Applies ONLY to programs asking EEs disability-related questions or undergoing medical exams
- Limits the incentive level: based on the average cost of the coverage under a given plan

Including wellness programs that are offered...

- Only to EE enrolled in an ER sponsored GHP
- To all EE regardless of whether they are enrolled in such a plan; or
- As a benefit of employment by ERs that do not have a health plan

Excepted wellness programs...

- No disability-related inquiries or medical exams
- Provide only general health and educational information

***NOTE:**
The ADA applies regardless of whether the wellness program is also a health plan!

Three Prongs Must be Evaluated

- 1.) Voluntary Participation & Incentives
- 2.) Confidentiality
- 3.) Reasonable Program Design

Voluntary Participation & Incentives

- ER may not require EE to
 - Participate, deny access for nonparticipation limit coverage under its health plans, take any other adverse action; or
 - Retaliate, interfere with, coerce, intimidate, or threaten an employee who does not participate or fails to achieve certain health outcomes; AND
- ER must provide a notice

Confidentiality

- ER may obtain info (that doesn't disclose identity of specific individuals) necessary to administer the plan
- ER may not require an employee to
 - Agree to the sale, exchange, sharing transfer, or other disclosure of medical info; OR
 - waive confidentiality protections available under the ADA as a condition for participating in or receiving a program incentive

Reasonable Program Design

- "Reasonably designed to promote health or prevent disease."

GOOD IDEA

- ✓ Asking employees to complete an HRA and/or undergo a biometric screening
- ✓ Use of aggregate HRA data by an employer to design and offer health programs aimed at specific conditions

BAD IDEA

- ✗ To obtain a reward, the program:
 - ✗ Imposes an overly burdensome amount of time for participation,
 - ✗ Requires unreasonably intrusive procedures; or
 - ✗ Places significant costs related to medical examinations on employees
- ✗ Program exists mainly
 - ✗ To shift costs from CE to targeted EEs based on health; or
 - ✗ To give ER information to estimate future health care costs

*NOTE:

Several cases have challenged the incentive rule and reasonable design elements!