

The Best Laid Plans: Don't Let your HR Strategy Violate the Law

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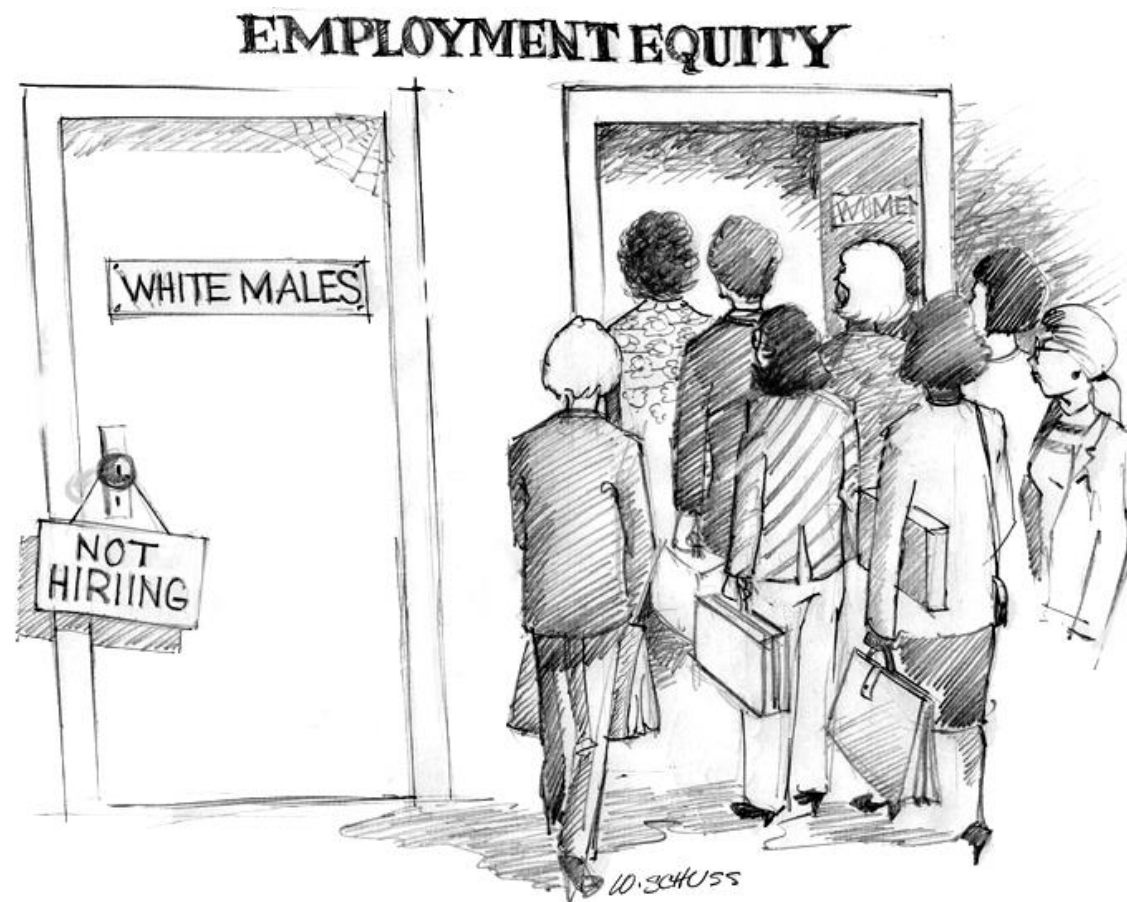
“The Best Laid Plans
of Mice and Men
Often Go Awry”

To a Mouse, On Turning Her Up In Her Nest With The Plough – Robert Burns



- Diversity meets Title VII
- Succession Plans meet the ADEA & Title VII
- Wellness Plans meet ADA, GINA

The Best Laid Plan: Diversity



Title VII of the Civil Rights Act (1964)

- **Prohibits discrimination against protected classes.**
- **Makes it unlawful to deny employment opportunities, training, or career advancement to protected classes.**
- **As amended, prohibits discrimination because of pregnancy, childbirth, or related conditions.**
- **Prohibits sexual harassment.**
- **Prohibits compensation discrimination.**

Several exceptions to the definition of discrimination exist, including:

Work-related requirements

BFOQs

Seniority systems

Unique Issues with Diversity Initiatives

- True Benefit to the Workplace
- Specific, objective diversity goals from outside clients, customers, and public demand
- Rise in discrimination claims
- Rise in Reverse Discrimination Claims
- Balance hiring based on credentials to avoid discrimination while also ensuring it meets the diversity requirements of customers and clients.
- Are you actually discriminating if you choose someone based on their diverse qualification?

Your Plans Should . . .

- Never take actions “because of” protected characteristics
- Promote diversity through recruitment rather than termination
- Ensure all similarly situated employees are subject to the same rules and practices.
- Promote tolerance in the workplace
- Protect privacy concerns
- Take all discrimination complaints seriously and address them consistent with your company’s business practices.

The Best Laid Plan: Succession

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Prima Facie Case of Age Discrimination

- Employee was over the age of 40 at the time of the challenged action
- Adverse employment action was taken
- At the time of the adverse employment action, the employee was meeting the employer's legitimate expectations
- Following the adverse employment action, the employee was replaced by someone of comparable qualifications who is younger.

Age Discrimination in Employment Act (1967)

ADEA prohibits:

Employment discrimination against persons age 40 and over.

Mandatory retirement based on age.

Limiting employee status due to age.

ADEA covers:

Employers with 20 or more employees.

Unions with 25 or more members.

Employment agencies and apprenticeship programs.

ADEA Exceptions

- **Age can be a BFOQ if necessary for the normal operation of the business.**
- **Exceptions can occur when:**

The company has a genuine seniority or benefit plan.

The employer disciplines or fires for good cause.

The employee is a top executive or policy maker.

Succession Planning

- Important part of strategic business planning
- Involves identifying and developing internal employees who have the potential to assume leadership roles in the future



Walking the line...

- Employment decision based on factors correlated with age vs. Mere pre-text for age
- Assuming older employees will retire vs. assuming younger employees present potential longevity for the organization's planning purposes



Can Succession Planning create an inference of discrimination?

- Reasonable inquiries into an employee's retirement plans do not permit an inference of age discrimination
- A company has a legitimate interest in learning its employees' plans for the future, and it would be absurd to deter such inquiries by treating them as evidence of unlawful conduct”
Colosi v. Electri-Flex Co., 965 F.2d 500, 502 (7th Cir. 1992).

Tips for Success...ion 😊 Plans

- Articulate (in writing) plans for employment decisions (before the decision is made)
- If those reasons correlate with age, include non-age reasons
- Do not presume an employee's retirement plans based on age
- Ensure candidates of all ages are considered in the succession plan
- Ask employees at different seniority levels what their long-term goals are
- Avoid referring to age when referencing the employee's future plans
- Avoid using “younger” or “older”
- Focus plans on key positions, not age → transfer knowledge

The Best Laid Plan: Employee Wellness Programs

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Wellness Overview

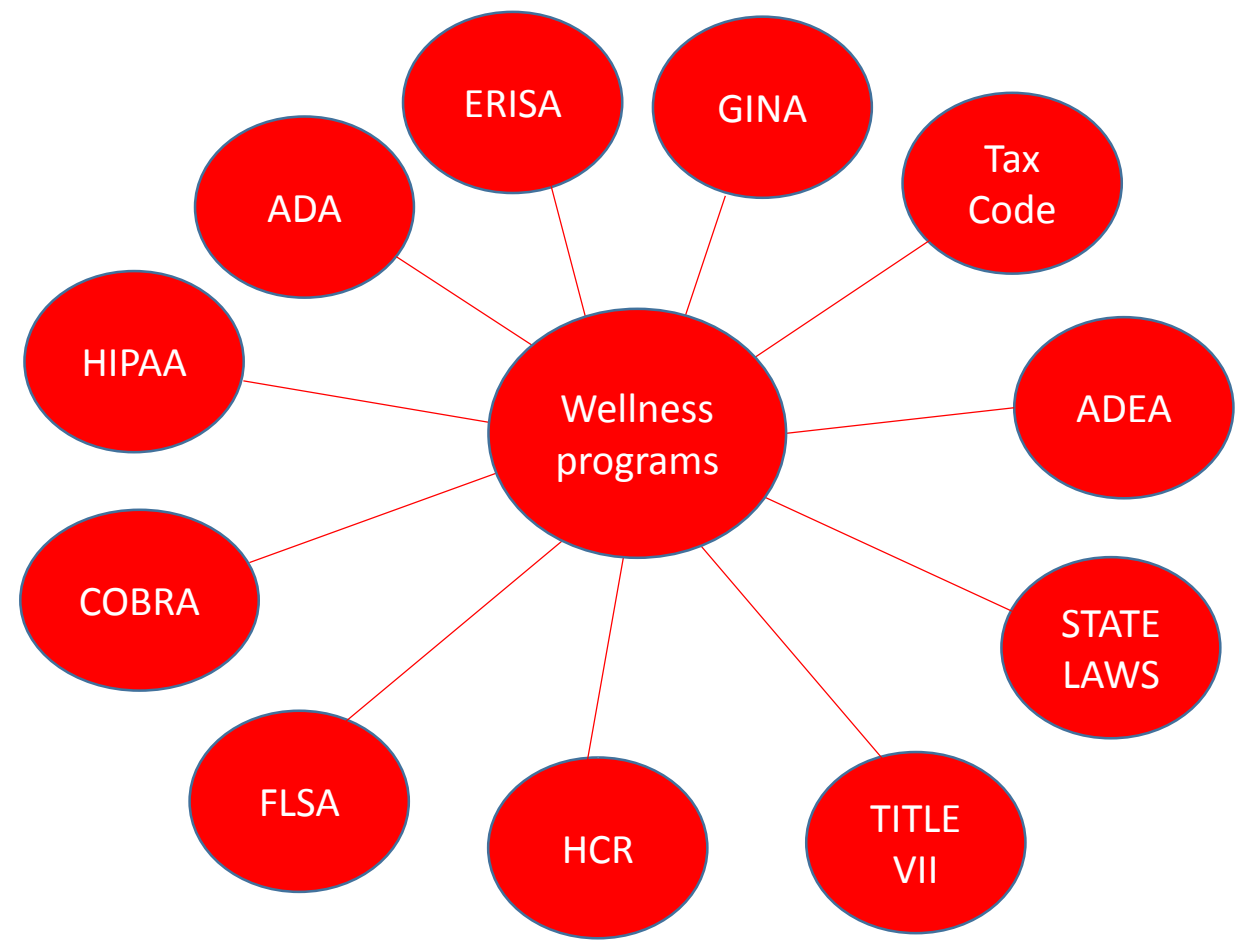
Wellness programs can take many forms

- Limited or comprehensive
- Covering employees, spouses, other family members
- Standalone program or part of larger GHP

Common goal is to promote health and lower health plan costs by using tools such as—

- Health education and healthy lifestyle promotion
- Health-related communications
- Health risk assessments
- Disease prevention and management
- Wide range of rewards or penalties

Multiple Compliance Concerns



Americans with Disabilities Act (ADA)

- Prohibits discrimination by employers on basis of disability in regard to terms, conditions and privileges of employment.
 - Discrimination includes:
 - Requiring **medical examinations**; and
 - Making inquiries as to whether employee has disability unless such exam or inquiry is:
 - Job-related and consistent with business necessity
- Must provide **equal opportunity** for disabled employees to participate in programs and offer reasonable accommodations.

Americans with Disabilities Act (ADA)

- Final Regulations Issued in May of 2016
- Effective July 18, 2016
- Employers must comply for plan years beginning on or after January 1, 2017
- Addresses primary concerns of EEOC:
 - Employer's use of disability-related inquiries
 - Incentives rendering "voluntary" program involuntary

Final Rules: ADA

- Primary Requirements for Voluntary Exception:
 - Voluntary
 - 30% incentive limits (*no increases for tobacco/dependents*)
 - Applies to participatory programs
 - Employee notice regarding medical information collection
 - Reasonably designed to promote health
 - Privacy/security protections with regard to wellness information

“VOLUNTARY”

- No requirement to participate
- No denial of coverage in a benefit option for non-participation (i.e. no “gatekeeper design”)
- No adverse employment action or retaliation against, interference with, coercion, intimidation, or threatening of employees

Final Rules: ADA

- Incentive limits
 - 30% of total cost of self-only coverage under GHP, if employer requires enrollment in that GHP
 - If employer offers only 1 GHP, but employees need not enroll: 30% of cost of self-only coverage under the GHP
 - If employer offers more than 1 GHP but does not require enrollment in a particular plan: 30% of employer's lowest-cost self-only comprehensive medical coverage
 - If employer does not offer any GHP: 30% of the total cost to a 40-year old non-smoker purchasing self-only coverage under the second-lowest-cost "silver" plan on the Exchange in same location as employer's principal place of business.
- All limits are based on self-only coverage even if spouses participate

Final Rules: ADA

- **“Reasonably designed to promote health or prevent disease”**
 - Should provide follow-up after collecting medical information
 - Not just about collecting information
 - Not just about shifting costs from employers to employee based on health
 - Not used by the employer to predict future costs



Notice requirement

- Notice must clearly explain—
 - What medical information will be obtained
 - How it will be used
 - Who will receive it
 - Restrictions on disclosure
- Model notice on EEOC website
- Notice requirement applies whether or not wellness program is offered through a GHP

Confidentiality requirement

- Employer may only receive medical information in aggregate form except as needed for administration of a health plan.
 - Comply with HIPAA privacy requirements/separate those who handle individually identifiable health information from those who make employment related decisions/use TPA
 - Minimum necessary for administration
- Employee may not be required to agree to sale, exchange, sharing, transfer, or other disclosure of medical information except to extent permitted to carry out specific activities related to wellness programs.
- Employer may not require employee to waive ADA's confidentiality protection as condition for participating in wellness program or receiving incentive

Genetic Information Nondiscrimination Act (GINA)

- Prohibits discrimination by GHPs, insurers, and employers due to individual's "genetic information"
 - Title I restricts collection and use of genetic information by GHPs and insurers
 - *Enforced by DOL, IRS, and HHS*
 - Title II prohibits employment discrimination based on genetic information
 - *Enforced by EEOC*

Genetic Information Nondiscrimination Act (GINA)

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

GINA – Title I

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

GINA – Title II

- Title II generally prohibits **employers** from discriminating against employees or applicants because of genetic information
- Exception for voluntary wellness program.
- Final Regulations issued May 2016
- Generally effective July 18, 2016
- Employers must comply January 1, 2017

GINA: Final Rules

- Wellness program must be—
 - Reasonably designed to promote health or prevent disease
 - Must include follow up based on information collected
 - Voluntary
 - No penalties for withholding genetic information
 - No incentives for providing genetic information
 - Incentives for HRA completion including request for genetic information of employee must be available whether or not employee provides that information
 - Authorized
 - Individual must give voluntary, knowing, and written authorization after proper notice, before providing genetic information
 - Notice must describe information that will be obtained, general purposes for which it will be used, and disclosure restrictions
 - Similar to notice requirements in ADA regulations (although ADA regulations do not require prior written authorization)

GINA: Final Rules

- Confidentiality requirement
 - Individually identifiable information must be kept confidential (similar to ADA restrictions)
- Incentives for family members
 - Medical history of spouse or other family member is employee's genetic information
 - Offering incentives in return for a spouse providing health information would seem to violate GINA
 - Final GINA regulations provide a compromise and allow incentives for spouses under Title II, but not Title I

GINA: Final Rules

- Final regulations: Employer may offer incentive in return for spouse's information if—
 - Part of wellness program providing health or genetic services
 - Questions ask only about spouse's past or current health status ("manifestation of disease and disorder")
 - No family medical history or genetic test results
 - No health or genetic information about employee's children (including adult or adopted)
- Maximum incentive does not exceed 30% of total cost of self-only coverage for each of the employee and spouse
 - Total combined incentive cannot exceed twice the amount of 30% of the cost of self-only coverage
 - Calculation method differs based on whether employee is enrolled in employer's GHP (same calculation method as ADA)



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