

# Center for Health and Wellness Law, LLC

March/April 2017 Newsletter  
Center for Health & Wellness Law, LLC

## **PRE-ORDER YOUR RULE THE RULES OF WORKPLACE WELLNESS PROGRAMS BOOK TODAY!**

The long awaited text covering the rules that impact workplace wellness program is almost here. You can pre-order your copy now by downloading an order form [here](#).

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### **Updates on Federal Legislation Affecting the Health and Wellness Industries:**

Passage of the American Health Care Act (AHCA) [screached to a halt](#) last Friday, March 24<sup>th</sup> as the Republican repeal and replace legislation for the Affordable Care Act (ACA). This means that for now, all ACA provisions are still law and should be followed until further notice. This includes, of course the [ACA incentive rules](#) for workplace wellness programs. Indeed, Congress seems to favor the ACA incentive rules over the incentive rules provided under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA), as evidenced with the introduction of [H.R. 1313](#) on March, 3, 2017. H.R. 1313 would essentially eliminate the ADA and GINA requirements with regard to workplace wellness programs. You can read more about the impact of H.R. 1313 [here](#). No further action has been taken on the bill, but the Center for Health and Wellness Law will continue to monitor developments. Check out our website, [www.wellnesslaw.com](http://www.wellnesslaw.com) for updates.

Congress has also proposed some other bills that may impact the U.S. health insurance market, outside of a full repeal and replace effort of the ACA. Some of those bills include:

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**[HR 372 \(Competitive Health Insurance Reform Act of 2017\)](#)**: This bill would amend to the McCarran-Ferguson Act of 1945, which exempted the insurance industry from the antitrust Sherman Act and the Clayton Acts. The amendment declares that nothing in that McCarran-Ferguson Act modifies, impairs, or supersedes the operation of antitrust laws with respect to the business of health insurance.

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**[HR 314 \(Health Care Choice Act of 2017\)](#)**: Otherwise known as the bill that would allow “selling insurance across state lines.” This bill would amend the Public Health Service Act to provide that the laws of a state designated by a health insurer (primary state) apply to individual health insurance coverage offered by that insurer in any state (secondary state) if the coverage, states, and insurer comply with the conditions of this bill. Insurers are exempted from any secondary

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state's laws that would prohibit or regulate the operation of the insurer in that state. The primary state is given sole jurisdiction to enforce its covered laws in any secondary state.

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**[HR 1409 \(Cancer Drug Parity Act of 2017\)](#)**: This bill would amend the Public Health Service Act and require a group health plan -- and a health insurance issuer offering group or individual health insurance coverage that provides benefits with respect to anticancer medications administered by a health care provider -- to provide that any cost sharing for prescribed, patient-administered anticancer medications that are used to kill, slow, or prevent the growth of cancerous cells and that have been approved by the FDA is no less favorable than the cost sharing for anticancer medications that are intravenously administered or injected by a health care provider.

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**[HR 1101 \(Small Business Health Fairness Act of 2017\)](#)**: This bill amends the Employee Retirement Income Security Act of 1974 (ERISA) to provide for the establishment and governance of association health plans (AHPs), which are group health plans sponsored by business associations.

The bill establishes requirements for AHPs relating to certification, sponsors and boards of trustees, participation and coverage, nondiscrimination, contribution rates, and voluntary termination.

AHPs offering benefits that are not health insurance must: (1) establish and maintain sufficient reserves and stop-loss insurance to cover those benefits, and (2) make annual payments to a fund to be used to pay for stop-loss insurance for such AHPs for which there is a reasonable expectation that claims would not be satisfied without such insurance. AHPs that fail to meet these requirements are subject to termination.

The Department of Labor must establish a Solvency Standards Working Group.

States may tax contributions to AHPs, with certain conditions.

The bill preempts state laws that preclude health insurers from: (1) offering health insurance in connection with a certified AHP; or (2) offering health insurance of the same policy type to other employers in the state that are eligible for coverage under AHPs.

The bill establishes criminal penalties for willfully making false representations regarding an AHP.

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## **Frequently Asked Wellness Compliance Question:**

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**Are Health Risk Assessments/Lifestyle Questionnaires permitted to ask questions about alcohol-use? I attended a seminar that stated alcoholism is a medical condition and therefore is not something that can be asked. Can you weigh-in on that?**

Yes, I believe HRAs can ask about alcohol use. Questions about alcohol or substance use are medical exams under the ADA and generally, an employer may not conduct medical exams of employees unless it is job-related and consistent with business necessity. The ADA also provides an exception for conducting medical exams, such as HRAs, through a voluntary wellness program. As long as the employer followed the EEOC rules under the ADA about voluntary wellness programs, such as limiting incentives to 30% of the total cost of self-only coverage, providing notice and not using the information to discriminate against employees, the questions should be permissible.

**Are all wellness programs that collect health information subject to HIPAA privacy standards?**

According to the government, no. The federal Department of Health and Human Services (HHS) issued a [fact sheet](#) on when HIPAA privacy and security rules apply to workplace wellness programs. According to HHS, HIPAA privacy standards apply to workplace wellness programs that are offered as part of a group health plan. They do not apply when an employer offers a wellness program directly and not in connection with a group health plan.

Yet, one could argue that even workplace wellness programs that employers offer directly could be group health plans in and of themselves and therefore subject to HIPAA privacy and security standards.

HIPAA governs three types of “covered entities.” Those are health care providers, health plans (including group health plans) and clearinghouses. A “group health plan” under HIPAA is an employee welfare benefit plan, including insured and self-insured plans, to the extent that the plan provides medical care, including items and services paid for as medical care, to employees or their dependents directly or through insurance, reimbursement, or otherwise, that: 1) has 50 or more participants; or 2) is administered by an entity other than the employer that established and maintains the plan. 45 CFR § 160.103. “Medical care” is defined as amounts paid for (A) diagnosis, cure, mitigation, treatment or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body; (B) amounts paid for transportation primarily for and essential to medical care referred to in (A), and (C) amounts paid for insurance covering medical care referred to in (A) and (B). 42 USC § 300gg-91(a)(2). Because wellness programs that collect health information through health risk assessments or biometric screens, one could argue that such programs qualify as “group health plan” because the health information collection relates to the prevention of disease. The employer is paying for the service, often delivered and managed by a third-party vendor. These typical

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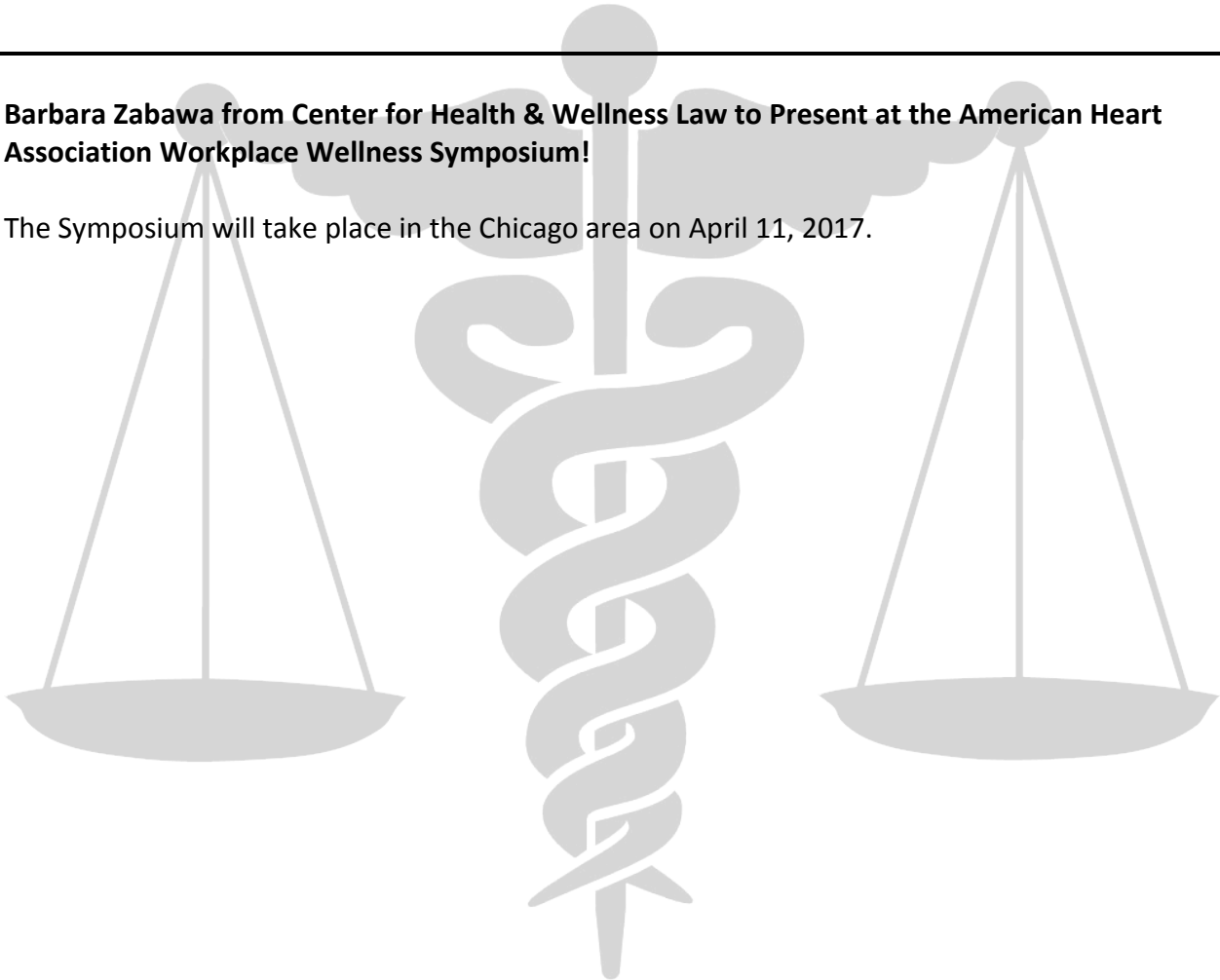
factual circumstances create a situation in which the wellness program constitutes a group health plan, a HIPAA covered entity.

Despite this plausible argument that HIPAA privacy and security rules could apply to all wellness programs that collect employee health information, wellness providers may still rely on HHS's position that HIPAA only applies if the program is offered in conjunction with a group health plan. For further guidance on this issue, contact the Center for Health and Wellness Law, LLC.

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**Barbara Zabawa from Center for Health & Wellness Law to Present at the American Heart Association Workplace Wellness Symposium!**

The Symposium will take place in the Chicago area on April 11, 2017.



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**American Heart Association**  
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**Tuesday, April 11, 2017 | 8am-4pm**  
Hyatt Regency O'Hare  
9300 Bryn Mawr Ave., Rosemont, IL 60018

REGISTER

**Heart.org/WorksiteWellnessChicago**  
Continuing Education Credits Available (pending approval)

QUESTIONS

**312.476.6643 | Laura.Coulton@Heart.org**

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**Register Now for the 2017 WELCOA Summit and Pre-Conference, August 28-30<sup>th</sup> in Omaha, NE!**

Barbara Zabawa, JD, MPH from the Center for Health and Wellness Law, LLC will be conducting a pre-conference session on Wellness Compliance. See the full agenda and information on how to register, [here](#).

# Center for Health and Wellness Law, LLC

## **Are You a WELCOA Member? Sign Up for My Monthly Legal Update Webinars Starting January 2017!**

The Center for Health and Wellness Law, LLC has teamed up with WELCOA to offer WELCOA members monthly legal update webinars. Each month the webinars will explore a different wellness compliance issue, leaving plenty of time for questions and answers to wellness compliance questions from attendees. Don't miss this great opportunity to stay on top of wellness compliance issues! You can learn more and register [here](#).

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**Interested in receiving a full day of workplace wellness compliance training?** UW-Milwaukee's Continuing Education program is offering a full-day of workplace wellness compliance training on Saturday, May 6, 2017. You can learn more [here](#).

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## **Attending the National Wellness Conference 2017 in St. Paul?**

Barbara Zabawa will be presenting on Data Privacy and Security in Workplace Wellness. To learn more and register, click [here](#).

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## **Barbara Zabawa now teaching at University of Wisconsin-Milwaukee!**

In addition to continuing to serve clients through the Center for Health and Wellness Law, LLC, Barbara Zabawa will also bring legal knowledge to health and wellness professionals through teaching several courses in the UW-Milwaukee College of Health Sciences, Health Informatics and Administration program. She will teach courses in both the Master's in Health Administration program as well as the undergraduate health administration program. You can learn more about each of these programs [here](#).