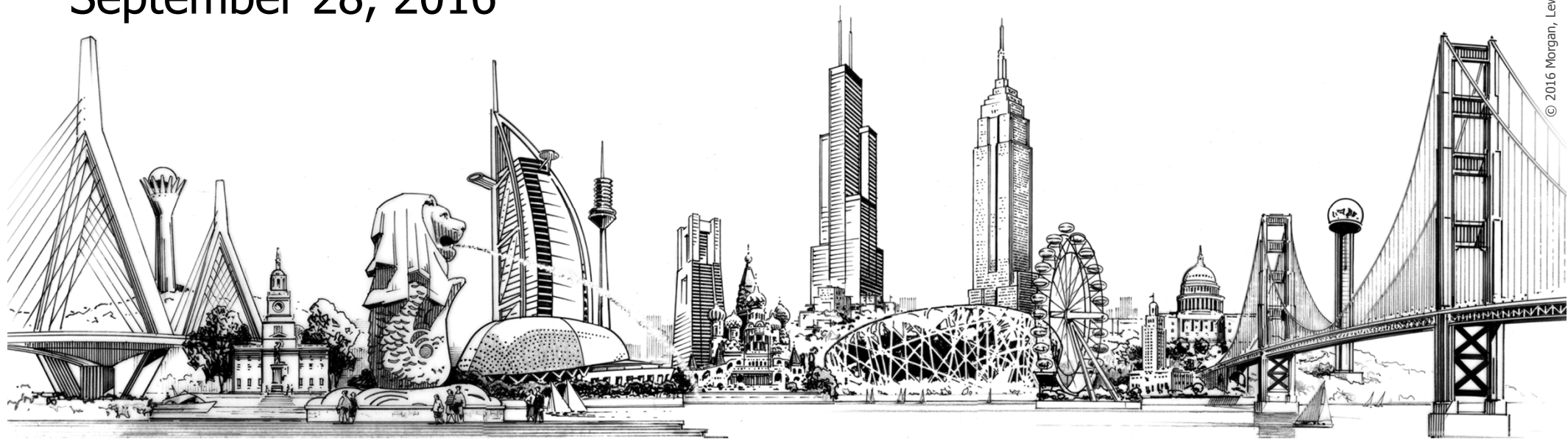


**Morgan Lewis**

# **ACA NONDISCRIMINATION RULE AND EEOC WELLNESS REQUIREMENTS**

Presenters: Andy Anderson and Kimberly Boggs  
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# **ACA NONDISCRIMINATION RULE**

# Nondiscrimination Rule

- Affordable Care Act (ACA) Section 1557:
  - Prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs and activities
  - Final Rule released May 18, 2016
  - Applies, generally, July 18, 2016
    - Exception for notice and nondiscrimination statement requirement until August 16, 2016
    - Exception for printed stocks of communication material
    - Exception for design changes effective plan years beginning on or after Jan. 1, 2017
  - Applies directly to insurers, certain TPAs, and certain self-insured plans that receive Federal financial assistance (FFA)
    - FFA is defined as \$ received from HHS (including Exchange subsidies and retiree drug subsidies)
    - Will focus on large self-insured plans and employers in this material

# Nondiscrimination Rule

- Applies to recipients of FFA from HHS as the Rule “clarifies existing obligations under existing authorities” such as:
  - Title VI of the Civil Rights Act
    - Race, color, national origin
  - Title IX of the Education Amendments of 1972
    - Sex
  - Age Discrimination Act of 1975
    - Age
  - Section 504 of the Rehabilitation Act of 1973
    - Disability
- Employers may dispute the Rule’s interpretation of the “state of the state” regarding the existing obligations
- Unclear how this applies across multiple plans of a single employer
  - Uncertainty heightened by Section 92.208 employer liability rules
- Applies all existing obligations above to every entity directly covered by Section 1557 of the ACA
- HHS notes that ACA provides private right of action and compensatory damages—when nonconformance cannot be corrected by informal means

# Nondiscrimination Rule

- Indirectly applies to any recipient of FFA from any Federal agency
  - Note July 12, 2016 Directors memo to Civil Rights Head of other federal agencies
- Finally, will result in a referral to EEOC (or other applicable agency)—even if there is no FFA—under existing Title VI of the Civil Rights Act, Title IX of the Education Amendments of 1972, Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act of 1973 rules
  - As such, Section 1557 Rule best viewed as the Administration’s interpretation of nondiscrimination across all employers and plans
- Flashpoint is the gender transition benefit rules
- Fits into broader Administration transgender efforts such as the 2016 “Dear Colleague” letter sent to schools about gender identity and Title IX

# Nondiscrimination Rule

- Final Rule Requires:
  - Foreign language taglines (available from HHS)
    - At least 15 in a specific state
      - Only top two for “small sized” publications
    - Unclear how to handle employers who operate in multiple states
      - Nationwide top 15 *happen to be* the first 15 on the HHS tagline site
  - Translation services
    - Up to 150 languages
  - Enhanced accessibility to websites
  - Nondiscrimination notice—“Post?”
    - Contains 7 required elements
    - Short form for “small sized” publications
    - Full form for significant publications and communications (sample provided)
  - Grievance procedure (sample provided)
    - Requires naming Section 1557 Coordinator

# Nondiscrimination Rule

- Final Rule Requires (cont.):
  - Potential design changes to:
    - Prevent impermissible discrimination
    - Prohibit absolute bar on gender transition benefits
      - Does not mandate covering all gender transition benefits
      - Exclusions require application of neutral standards
      - Analysis will also examine whether the same treatment is available to individuals outside of the protected class
      - Example: If hysterectomy generally available, cannot deny to individuals undergoing gender transitions
- Recognizes that TPAs do not control design
  - But TPAs must administer benefits on a nondiscriminatory basis
- HHS will examine whether TPAs are legally separate from issuer receiving FFA

# Nondiscrimination Rule

- Next Steps:
  - Are you, your TPA, or your insurer covered by the final Rule?
    - Remember, enforcement will be broader and referrals made to other agencies if you are not directly regulated
  - Who will comply with the Rule requirements?
  - Does your TPA agreement address the final Rule?
  - If only the TPA and/or insurer are covered, will you need to:
    - Revise 2017 OE material?
    - Distribute/post nondiscrimination notice?
    - Update SPD?
    - Appoint a Section 1557 Coordinator?
    - Create a grievance procedure?
  - What if all 3 entities are covered?



# **EEOC WELLNESS REQUIREMENTS**

# Wellness Requirements – Timeline

- July 1, 2007 – Final Health Insurance Portability and Accountability Act (HIPAA) Wellness Program Rules
- 2009–2013 – EEOC Informal Letters
- January 1, 2014 – Final ACA Wellness Program Rules
- 2014 – EEOC wellness program suits against employers
- April 20, 2015 – Proposed EEOC Wellness Program Rules
- May 16, 2016 – EEOC issues Final Americans With Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA) Wellness Programs Rules

# Wellness Program Requirements – HIPAA/ACA Framework

- EEOC wellness program requirements in addition to HIPAA/ACA rules we all know and love
  - Participatory Programs
    - Reward (if any) not based on satisfying standard related to health factor
  - Health-Contingent Programs
    - Reward based on satisfying standard related to health factor
    - May be activity-only or outcome-based
      - Reasonably designed to promote health or prevent disease
      - Available to all similarly situated individuals
      - Opportunity to qualify once per year
      - May not exceed 30% of total cost of enrolled coverage (COBRA rate)
        - May be single, family, employee +1
        - Increases to 50% if smoking surcharge included
      - Adequate notice of availability or reasonable alternative method

# ADA and GINA Have Always Cast a Shadow

- Complying with HIPAA requirements not enough to steer clear of scrutiny
- ADA enforced by DOL/EEOC
  - ADA generally prohibits employers from requiring medical examinations or making disability-related inquiries
  - Exception for voluntary bona fide benefit plans
  - Until recently, not much guidance on what that meant
  - Informal EEOC letters were consistent that wellness programs must be voluntary but shed little light on how it makes that determination
    - May not require participation or penalize employees who do not participate
- GINA enforced by DOL/EEOC
  - Prohibits discrimination based on genetic information in health plan coverage
    - Request for family medical history

# Recent EEOC Enforcement Actions

- *EEOC v. Orion Energy Systems*
  - Asserted the wellness program required medical examinations and made disability-related inquiries
- *EEOC v. Flambeau, Inc.*
  - Asserted that 0% company contribution toward health insurance for failing to complete a biometric screening/HRA violated the ADA

# EEOC Proposed Wellness Rules

- April 20, 2015
- Hoped to clear up confusion and define “voluntary”
- Amend existing regulations to address the interaction between Title I of the ADA and employer-sponsored group health plan wellness program incentives

# Final EEOC Wellness Rules Issued

- May 16, 2016 – in two components
  - Final regulations governing the treatment of wellness programs under
    - ADA
    - GINA
- Caution: Final rules are not entirely aligned with the ACA updates to the HIPAA wellness rules
- Apply to employer-sponsored wellness programs as of the first day of the first plan year that begins on or after January 1, 2017

# EEOC Wellness Program Requirements

- Must be reasonably designed to promote health or prevent disease
  - Reasonable chance
  - Not overly burdensome
  - Not a subterfuge for violation of the ADA or other laws
  - Not highly suspect in the method chosen
- What is a “voluntary” wellness program?
  - Does not require employee participation
  - Does not deny or limit health coverage based on nonparticipation
  - Does not take adverse action against, retaliate against, or interfere with nonparticipating employees
  - Provides employees with adequate notice
  - Does not exceed 30% of the cost of self-only coverage
  - Must provide “reasonable accommodation”
- Expand ADA confidentiality requirements



# EEOC Wellness Program Requirements

- **Reminder:** Medical examination and inquiry
  - Biometric screenings, health risk assessment, annual physical
- Does not deny or limit health coverage based on nonparticipation
  - May not limit access to health plan to only those who participate
  - May not limit access to one or more health benefit options under the plan to only those who participate
    - e.g., only those who complete a biometric screening are eligible to enroll in the “premium” zero-deductible PPO plan
- Provides employees with adequate notice
  - what information will be collected, who will receive it, how it will be used, and how it will be kept confidential
  - Template language issued June 16, 2016  
<https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm>

# EEOC Wellness Program Requirements

- Does not exceed 30% of the cost of self-only coverage for enrolled health plan option (if part of health plan)
  - No distinction between participatory/health-contingent activities
  - Applies to any components of the wellness program that are medical examinations and inquiries
  - This limit is different from the HIPAA wellness program incentive limit (adjusted by the ACA)

HIPAA/ACA	EEOC
Participatory wellness activities: No limit	30% of total cost of self-only coverage for enrolled health plan option
Health-contingent wellness activities:  30% of total cost of enrolled coverage or 50% of total cost of enrolled coverage if a smoking surcharge/ non-smoker incentive is included	Applies to participatory and health-contingent wellness program activities if they involve a medical examination or inquiry

# GINA Wellness Program Requirements

- GINA restricts collection and disclosure of employee genetic information
  - May not offer a financial incentive for providing genetic information of employees or family members
  - Health risk assessments have been problematic
    - Is asking for spouse medical information “genetic information”?
- May provide an incentive for a spouse to provide his or her own health information as part of a wellness program
- If the program collects information about current or past health status, incentive may not exceed 30% of self-only coverage for enrolled health plan option
- Obtain authorization from the spouse

# Wellness Program – Next Steps

- If your wellness program includes a voluntary medical examination or disability-related inquiry
  - New wellness program notice
  - Confirm compliance with 30% of single employee cost
  - Be aware that reasonable accommodations may need to be made
  - Probably already complying with confidentiality if subject to HIPAA
- If your wellness program includes an HRA for the employee's spouse
  - May ask for health information but not genetic information
  - Obtain authorization

# Biography



Leader of Morgan Lewis’s health and welfare task force, Andy R. Anderson is often recognized for his work in counseling clients on employer, individual, and insurer issues created by the Affordable Care Act, and regulatory compliance issues in relation to the Internal Revenue Code, ERISA, COBRA, HIPAA, and Mental Health Parity. Tax-exempt organizations and Fortune 500 companies turn to Andy for handling their benefit plans, and legal review surrounding welfare benefit plans, government self-correction programs, cafeteria plans, and VEBAs.

## **Andy R. Anderson**

Chicago

T +1.312.324.1177

F +1.312.324.1001

[andy.anderson](mailto:andy.anderson@morganlewis.com)

[@morganlewis.com](mailto:andy.anderson@morganlewis.com)

A fellow of the American College of Employee Benefits Counsel, Andy is particularly interested in ensuring that his clients’ health and welfare plans are properly and efficiently administrated. His interdisciplinary approach to designing and implementing funding arrangements—negotiating contract and service agreements with insurers, third-party administrators, prescription benefit managers, and other third-party providers—on behalf of his clients allows them to navigate the challenges that often arise with plan implementation.

# Biography



## **Kimberly J. Boggs**

Chicago

T +1.312.324.1758

F +1.312.324.1001

[kimberly.boggs](mailto:kimberly.boggs@morganlewis.com)

[@morganlewis.com](mailto:kimberly.boggs@morganlewis.com)

Kimberly J. Boggs focuses her work on tax and ERISA matters related to employee benefit plans and arrangements. Her current primary focus is on welfare benefits plans, and she regularly conducts comprehensive reviews of welfare benefit plans for compliance with operational and form requirements of the Internal Revenue Code, Affordable Care Act (ACA), ERISA, COBRA, and HIPAA.

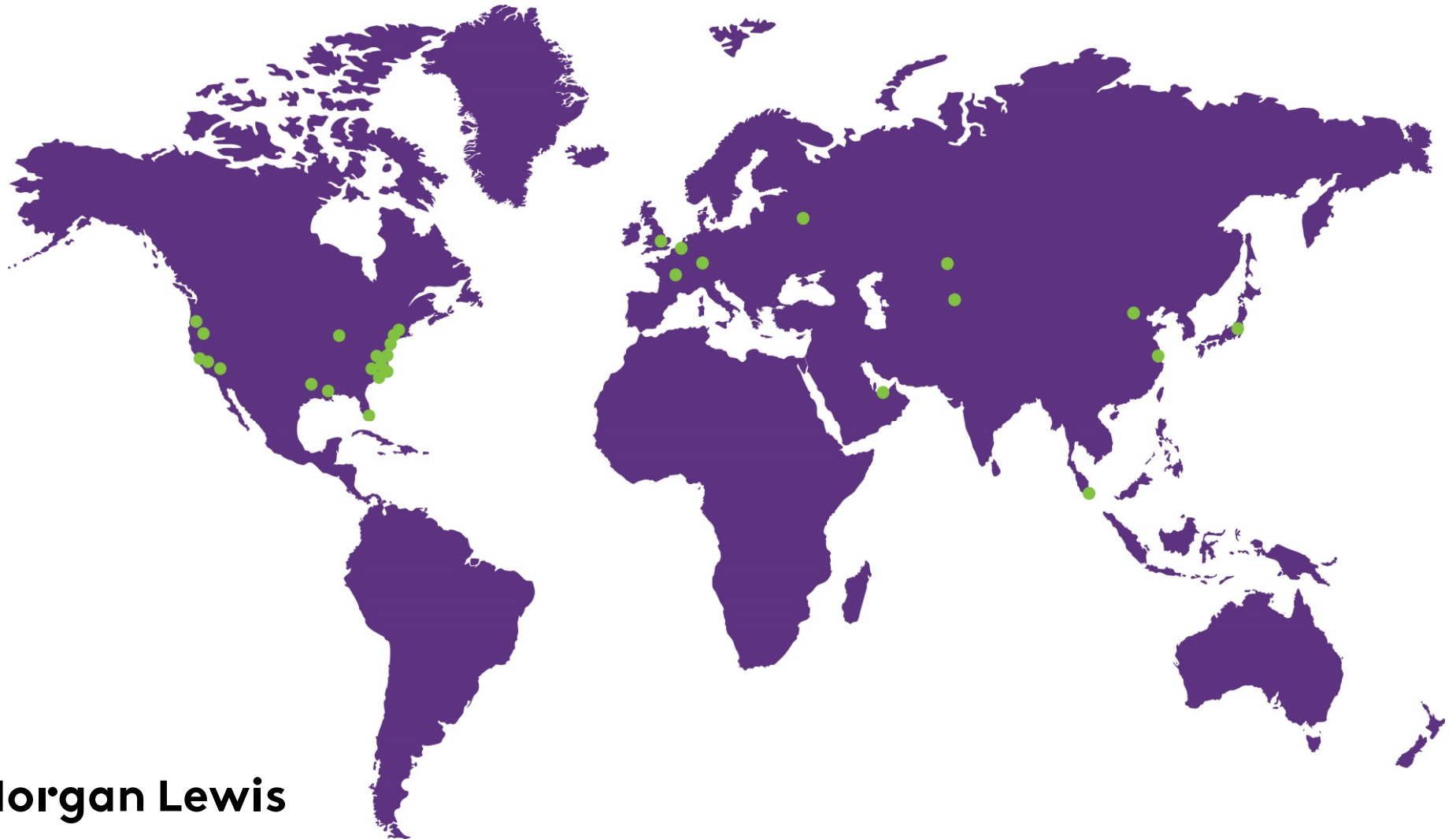
Kimberly drafts and amends welfare benefit plans to conform to changes in the law; assists clients with complex changes in status election change and COBRA coverage issues; and drafts and reviews open enrollment materials and summary plan descriptions. She advises plan sponsors of employer-sponsored group health plans on all aspects of compliance with the ACA, including the individual and employer-shared responsibility penalties, summaries of benefits and coverage, and employer reporting requirements.

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