



# StayWell policy perspective

*What clients should know about HR-1313*



# What's going on?



Legislation recently proposed in the U.S. House of Representatives could impact employer well-being programs, if passed. The bill, called HR-1313, or the “Preserving Employee Wellness Programs Act,” was introduced in March and is in review by House committees. It has not yet been considered by the Senate.

The stated intent of the bill is “to clarify rules related to non-discriminatory wellness programs,” which puts it at the intersection of a number of previously established acts, including the Affordable Care Act (ACA), Genetic Information Nondiscrimination Act (GINA), Americans With Disabilities Act (ADA), and the Health Insurance Portability and Accountability Act (HIPAA). The bill has sparked controversy and commentary in the press by a number of large organizations including the American Heart Association (AHA), AARP, American Diabetes Association, American Academy of Pediatrics, and others.

Much of the controversy centers on what constitutes “genetic information,” how employers may interact with that information, and how employers may use financial incentives in health and well-being programs to try to encourage

employee participation. Supporters say the provisions of HR 1313 would streamline existing regulations and make them more consistent. Detractors suggest this proposed legislation undermines laws that protect employees’ personal medical information, particularly genetic information.

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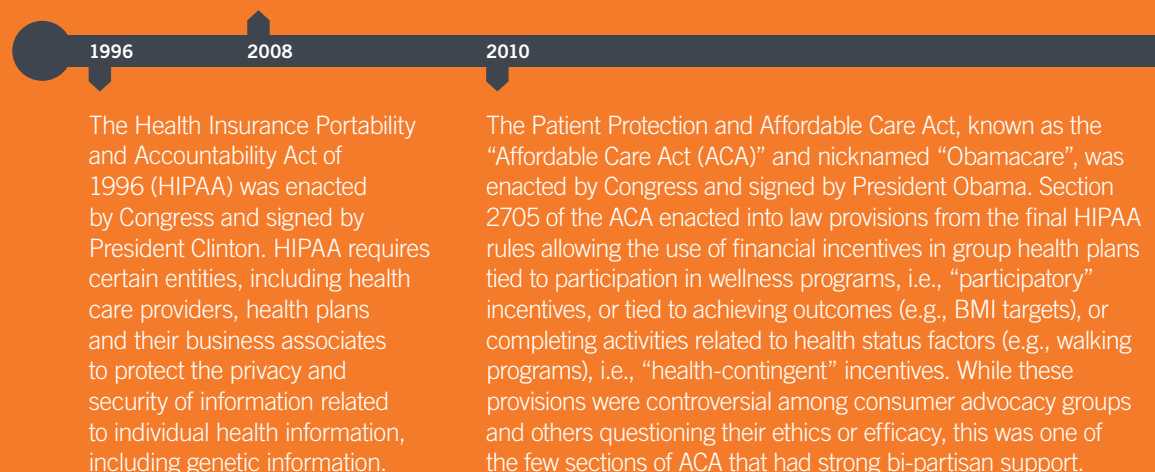
## Much of the controversy centers on what constitutes “genetic information”

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This document provides you with the background you need to understand how we got here, what the bill would do if passed, and the actions StayWell is taking to engage in the process. We encourage you to speak with your legal counsel to understand the potential impact to your specific program.

## How did we get here?

**Several prominent pieces of legislation referenced in HR-1313 restrict the use of medical or genetic information by employers when making hiring decisions or by employer-sponsored group health plans when making eligibility or coverage determinations or when offering incentives in wellness programs. Milestones include:**





# Five things you should know about HR-1313

**StayWell's point of view:** Because employers have struggled to comply with wellness incentive rules due to inconsistencies in the regulations enacted under ACA, HIPAA, ADA and GINA, we support clarification of these rules. We also welcome a legislative attempt to streamline agency enforcement. However, while this legislation appears to address inconsistencies in past legislation, we are concerned it could have unintended consequences as currently written, specifically, a negative impact on employee perceptions of wellness programs and heightened challenges about whether participation is indeed “voluntary” as commonly understood.

Our subject matter experts have reviewed the proposed bill and identified the top-five things we think employers need to know about HR 1313:

**1** It appears to remove limitations imposed by the EEOC under the ADA and GINA regulations.

**2** It assumes that existing legislation already strikes an “appropriate balance” among employees, health care providers and wellness plan sponsors to protect the privacy and confidentiality of participant/spouse information in wellness programs. It also assumes that wellness programs are a means to reduce the burden of chronic illness, improve health and limit the growth of health care costs.

**3** It preserves the “bona fide benefit plan” safe harbor in the ADA that allows employers to use incentives as specified by the rules to encourage screening and health assessment participation without violating the ADA's prohibition on non-voluntary medical examinations and disability-related inquiries.

A significant challenge for employers interested in incentives centered on interpreting certain provisions of the ACA and its implementation rules. One area of confusion, for example, was what constituted a “reasonably designed wellness program,” which is required by the Act when implementing health-contingent incentives. StayWell took a leadership role in collaboration with HERO, American Heart Association, American Cancer Society, ACOEM and other key stakeholders to issue guidance regarding reasonably designed wellness programs within this context. A second area of employer confusion centered on inconsistencies between the ACA rules and other legislation, particularly conflicting wellness incentive rules in ADA and GINA.

HR-1313 is introduced. Its stated intent is to “continue Congress's strong tradition of protecting and preserving employee workplace wellness programs,” including preserving employers' right to provide inducements to encourage participation.

2010 to 2016

May, 2016

2017

The U.S. Equal Employment Opportunity Commission (EEOC) issued updated regulations under ADA and GINA to address inconsistencies with ACA rules. ADA regulations are designed to provide guidance on whether wellness programs are “voluntary” if employers offer incentives to employees to participate in those programs and ask employees to answer disability-related questions or undergo medical examinations. The EEOC's regulations under Title II of GINA clarified that an employer may offer an incentive (in the form of a reward or penalty subject to specified size limits) to an employee whose spouse receives health or genetic services offered by the employer — including as part of a wellness program — and provides information about his or her current or past health status (for example, in a health assessment), and also clarified that an employer can request information about the current or past health status of an employee's spouse who completes a health assessment on a voluntary basis as long as the employer follows GINA rules about requesting genetic information, such as obtaining a prior, knowing, written, and voluntary authorization from the spouse and employee.

# Five things you should know about HR-1313 CONTINUED



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**It extends the rights of employers to offer incentives to employees not enrolled in an employer-sponsored group health plan**, which is a limitation of the ACA legislation for employers with many employees not enrolled in their group health plan. This provision of the bill would help employers be more confident they are not violating the law by offering the same incentive amounts (in different forms) to all employees regardless of whether they're enrolled in the employer's group health plan.

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**It allows employers to collect information about an employee's family health history and genetic information as part of a wellness program (e.g., in a health assessment) and offer incentives without violating GINA.** Many employees may feel pressured to participate by the size of incentives permitted under the bill's definition of voluntary participation, which may heighten concerns about employee privacy, particularly given sensitivities about genetic testing versus traditional screening measures. Genetic testing is a newly emerging area with limited research support and regulatory oversight. Because it often identifies health risks that cannot be modified, some argue genetic testing may discourage high-risk individuals from making lifestyle changes to reduce the risks they can control.

## StayWell actions

StayWell is a longtime, active member of the Health Enhancement Research Organization (HERO), a national non-profit dedicated to identifying and sharing best practices in the field of workplace health and well-being.<sup>1</sup> Through our work with HERO, we participate in the HERO Policy Committee, which includes a diverse membership of health associations, benefit consulting firms, wellness vendors and large employers and is actively monitoring HR 1313.

The HERO Policy Committee is meeting regularly to address issues related to this bill and to take timely, unified action. Committee steps include:

- Writing to key members of Congress to thank them for their attempt to clarify existing rules, offer assistance in refining the bill, and inform them that HERO plans to continue studying these issues and providing expert guidance.
- Educating key members of Congress on the broader issues raised by the bill.
- Considering a new guidance paper that builds on our earlier guidance on "reasonably designed wellness programs" and addresses the potential impact of HR-1313 in an impartial, evidence-based manner.

<sup>1</sup> Guidance for a reasonably designed employer-sponsored wellness program using outcomes-based incentives: Consensus statement of the Health Enhancement Research Organization (HERO), American College of Occupational & Environmental Medicine (ACOEM), American Cancer Society and American Cancer Society Action Network, American Diabetes Association, and American Heart Association. *Journal of Occupational and Environmental Medicine*. 2012;54(7):889-896.

# Where can you learn more?



Below we highlight sample media coverage related to HR 1313, also referred to as “the Foxx bill.” Coverage to date has focused primarily on the potential privacy concerns related to the proposed legislation

## Major dailies

- <http://fortune.com/2017/03/10/genetic-testing-workplace-wellness-bill/>
- <http://www.cnbc.com/2017/03/10/employers-could-demand-genetic-testing-under-congressional-bill.html>
- <https://www.statnews.com/2017/03/13/price-employers-genetic-information/>
- <http://www.nbcnews.com/health/health-care/nobody-s-business-5-things-know-about-genetic-testing-bill-n733416>
- <http://www.theverge.com/2017/3/20/14880400/politics-law-bioethics-genetic-privacy-discrimination-gina-workplace-wellness>
- <https://www.theatlantic.com/science/archive/2017/03/the-gops-new-bill-is-a-disaster-for-genetics-research/519645/>

- [https://www.washingtonpost.com/news/to-your-health/wp/2017/03/11/employees-who-decline-genetic-testing-could-face-penalties-under-proposed-bill/?utm\\_term=.3b2be682cc80](https://www.washingtonpost.com/news/to-your-health/wp/2017/03/11/employees-who-decline-genetic-testing-could-face-penalties-under-proposed-bill/?utm_term=.3b2be682cc80)
- <http://www.chicagotribune.com/business/columnists/ct-workplace-wellness-program-employers-genetic-information-hiltzik-20170315-story.html>

## HR/Benefits

- <https://www.benefitnews.com/news/new-bill-would-allow-employers-to-force-genetic-testing-on-workers>
- <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/would-law-require-genetic-testing.aspx>
- <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/health-benefit-legislation-beyond-aca.aspx>

- <http://www.workforce.com/2017/03/20/new-wellness-bill-gets-flack-for-genetic-privacy-concerns/>
- <http://www.benefitspro.com/2017/03/13/bill-seeks-compulsory-genetic-testing-of-employees>

## Blogs

- <http://www.healthfreedoms.org/new-bill-would-require-vaccines-as-requirement-and-genetic-testing-for-employment-hr-1313/>
- <https://blogs.bcm.edu/2017/03/17/hr1313-future-genetic-privacy/>
- <https://ucommblog.com/section/national-politics/how-youll-lose-coverage-trumpcare-hr-1313>
- <https://theysaidwhat.net/blog/>

## Questions?

We will communicate with you again as the bill progresses. We encourage you to seek the advice of your legal or policy expert to understand how HR-1313 may impact your specific program.

### About StayWell

StayWell, a subsidiary of Merck & Co., Inc., Kenilworth, NJ, USA (“Merck”), is a health engagement company that helps its clients engage and educate people to improve health and business results. StayWell brings decades of experience working across the health care industry to design solutions that address its clients’ evolving needs. We fuse expertise in the science of behavior change with an integrated portfolio of solutions and robust content assets to effectively motivate people to make positive health care decisions. StayWell programs have received numerous top industry honors, including the C. Everett Koop National Health Award and the Web Health Award for health engagement programs. StayWell also has received URAC and NCQA accreditation for several of its programs. StayWell is headquartered in Yardley, Pennsylvania, and also has major locations in Salt Lake City, Utah, and St. Paul, Minnesota. To learn more, contact us at [engage@staywell.com](mailto:engage@staywell.com).



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