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MEMORANDUM

TO: Al Lewis, Quizzify
FROM: Barbara J. Zabawa, JD, MPH
RE: Legal Advantages of Quizzify Health Risk Assessment
DATE: July 5, 2017

You have asked for my opinion regarding whether Quizzify's health risk assessment (HRA) tool provides any advantages from a legal standpoint compared to a more traditional HRA. Based on my review of Quizzify's sample HRA, I believe that the Quizzify HRA reduces the risk of data privacy and security concerns as the HRA does not collect personal health information from employees. Moreover, with the built-in links and further direction provided by the HRA, the HRA should "promote health and prevent disease," which is a requirement of a wellness program under the American's with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA), and do it across a much wider range of risks and disease prevention opportunities, assuming the full annual complement of questions is taken. (I only reviewed the first set, but this is my working assumption based on the type of questions I reviewed.)

However, because the Quizzify HRA is not collecting personal health information, the ADA and GINA requirements are not even implicated despite the wider range of questions. Thus, one could argue that the Quizzify HRA exceeds the legal requirements while reducing the legal risk for employment-based wellness programs.

Centers for Disease Control Expectations of Traditional HRAs

HRAs should be easy-to-use, and should provide credible information, advice, resources and support that will raise patients' awareness of their individual health issues, promote self-reliance and self-care, prompt active decision-making and increase confidence to manage one's health.ⁱ In addition, HRAs should intentionally create "teachable moments" that may inspire health improvement.ⁱⁱ HRAs are often supplemented with biometric testing and clinical screening to provide biological evidence of health status.ⁱⁱⁱ

According to the CDC, HRAs that serve as the foundation to more intensive and prolonged health promotion and risk reductions interventions are more effective in changing some health behaviors when compared to use of the HRA alone.^{iv} Ideally, HRAs should include these complementary components:



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1. Multiple or serial administrations of HRAs, with feedback provided over time to individuals on their health and risk status (Quizzify provides this over a wide range of topics);
2. Ongoing health education programs provided through pamphlets, books, videos, or interactive computer programs (Quizzify has “learn more” links for every question and extra information and links in a personal health report);
3. Motivational interviewing, counseling, and coaching provided face-to-face or telephonically to support behavior change and risk reduction;
4. Referral to community resources such as fitness facilities, self-help support groups, or neighborhood volunteer programs;
5. Referral to local or national health promotion vendors and services such as smoking quit lines and wellness coaches.^v

The last three questions are beyond Quizzify’s scope but its “learn more” links may be directed there.

A sample HRA from the CDC includes questions such as:

- In the past 7 days, how many days did you exercise?
- How intense was your typical exercise?
- In the last 30 days, have you used tobacco?
- In the past 7 days, on how many days did you drink alcohol?
- On days when you drank alcohol, how often did you have 5 or more alcoholic drinks on one occasion?
- Do you always fasten your seat belt when you are in a car?
- In the past 7 days, how many sugar-sweetened (not diet) beverages did you typically consume each day?
- In the past 2 weeks, how often have you felt down, depressed, or hopeless?
- In the past 2 weeks, how often have you felt nervous, anxious or on edge?
- In the past 7 days, how much pain have you felt?
- Each night, how many hours of sleep do you usually get?
- If your blood pressure was checked within the past year, what was it when it was last checked?
- If diabetic, and you have had your hemoglobin A1c level checked in the past year, what was it the last time you had it checked?
- What is your height without shoes?
- What is your weight?^{vi}

Despite these recommendations for HRAs, the CDC recognizes the inherent limitations of HRAs. It notes that individuals may provide inaccurate information due to recall bias, reticence about reporting socially unacceptable behaviors, or a lack of understanding of health risk



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questions.^{vii} As noted below, reticence for answering some typical questions may be heightened in the employment context, leading to inaccurate and untruthful responses. For example, in the 2016 Koop award-winning program in the Boise School District, only 30% of employees admitted drinking (mostly lightly) vs. the national average of close to 70%, while only 3% of employees admitted smoking, vs. the national average of almost 20%.

Quizzify's HRA

I reviewed ten of the total 500+ questions available on Quizzify's HRA, typically used at the rate of 120/year. Quizzify's HRA offers monthly quizzes to employees covering topics such as mitigating the risks of shingles, tick-borne illness, texting while driving, opioids, diagnostic radiation exposure, hazardous chemicals, adverse drug events, overdiagnosis, best practices in choosing certain health care providers, as well as more typical HRA topics of diet, smoking and exercise. Individuals access these HRAs through a web-based dashboard.

After answering the questions in each quiz, the user is provided a "score" and detailed answers. Answers explain the importance the health topic and provide links for the individual to obtain further information on the topic. Answers also encourage the individual to take the quiz and answers to their doctor to further discuss the issue and how it impacts their own health. I assume that an individual who discusses these issues with their provider could also create a personal action plan to reduce their own risk and improve their health. According to the Quizzify website, Quizzify quizzes aim to improve an individual's health literacy by educating them about health and healthcare.

Also according to the website, Quizzify quizzes and answers are reviewed by doctors from Harvard Medical School. I assume that the reviewers from Harvard Medical School are professionals with training and expertise in the health topics being reviewed.

An important distinction about Quizzify's HRA from traditional HRAs, such as the CDC example, above, is that the Quizzify HRA does not ask individuals about their personal health measures or habits, in order to avoid both falsified answers and the legal risks of collection PHI described below. The Quizzify quiz questions are more general and relate to issues that pose a threat to any individual's health. These health threats can also increase health costs unnecessarily.

Employee Health Information Collection Increases Legal Risk

When an employer wellness program includes collection of employee health information, such as through a traditional HRA or biometric screen, the program invokes a number of laws. These laws include the ADA, GINA and if the wellness program is part of a group health plan, the Health Insurance Portability and Accountability Act (HIPAA). Indeed, the ADA and GINA wellness incentive rules apply only to wellness programs that collect health information through medical examinations (such as biometric screens) or disability-related inquiries.^{viii}



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The ADA and GINA require employers that collect such information to ensure that the information collection is part of a wellness program that is “reasonably designed to promote health or prevent disease.”^{ix} The ADA rule specifies that a program consisting of a measurement, test, screening, or collection of health-related information without providing results, follow-up information, or advice designed to improve the health of participating employees is not reasonably designed to promote health or prevent disease.^x Thus, employers who use HRAs that do not include sufficient follow-up information risk violating the ADA and possibly GINA (if the employer also screens spouses).

Furthermore, the collection of health information of employees or their family members requires certain privacy protections. For example, under the ADA, employers that collect personal health information of employees through a wellness program must:

- Keep the information in a separate medical file and treat the file as a confidential medical record;
- Ensure the health information is not used for discriminatory purposes;
- Provide employees with a written notice that clearly and understandably explains what medical information the wellness program will obtain, how it will be used, who will receive it and the restrictions on its disclosure.
- Ensure that the information is disclosed to the employer in aggregate terms only, except as necessary to administer the wellness program.
- Avoid requiring employees to agree to the sale, exchange, sharing, transfer or other disclosure of medical information, excepted to the extent permitted by the ADA to carry out specific activities related to the wellness program, as a condition for participating in a wellness program or receiving an incentive.^{xi}

The Equal Employment Opportunity Commission (EEOC), the federal agency that enforces ADA compliance, also strongly suggests that employee wellness programs have data security measures in place and report any breaches of confidentiality to affected employees.^{xii}

Wellness programs that are part of group health plans are also subject to the HIPAA privacy and security rules. The privacy rule requires the group health plan to have safeguards in place to ensure the privacy of “protected health information” (“PHI”) (which would include personal health information gathered by a group health plan wellness program through a traditional HRA and/or biometric screen), sets forth the circumstances under which the group health plan may use or disclose an individual’s PHI, and gives individuals rights with respect to their PHI, including rights to examine and obtain a copy of their health records and to request corrections.^{xiii} The HIPAA security rule requires group health plans to follow national standards to protect individuals’ electronic PHI created, received, used or maintained by the group health plan.^{xiv}



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Thus, collecting personal health information through a wellness program increases the employer's compliance obligations with regard to protecting the privacy and security of that information.

Indeed, as certain cases and studies have shown, privacy concerns by employees can lead to employee complaints about a workplace wellness program as well as a lack of participation. For example, in 2015, when the City of Houston told city workers they would pay more for health insurance premiums unless they participated in the city's wellness program, many employees jumped on board. Through health risk assessment forms, those employees who participated were required to disclose sensitive health and other data to a wellness vendor hired to manage the program. Signing the authorization form granted authorization for the vendor to pass data to third parties and to post personal areas "reviewable to the public." Once the worker unions found out, the city was pressured to change wellness program vendors with stronger privacy policies.^{xv} In another familiar case, faculty at Penn State University objected to a wellness program that imposed a \$100 monthly noncompliance fee on employees who declined to fill out an online questionnaire. The questionnaire asked employees for intimate details about their jobs, marital situation and finances. It also asked female employees whether they planned to become pregnant over the next year. The faculty argued that the questionnaire amounted to an invasion of their privacy.^{xvi}

Finally, according to recent Issue Brief by the Kaiser Family Foundation, in 2016, only 41% of workers at large firms that offered an HRA actually participated in the screening. A commonly cited reason for the low participation rate was concern for the privacy of personal health information. The Issue Brief notes that privacy concerns may increase when employees have conditions that could trigger social stigma and discrimination. These conditions may include mental health disorders, alcohol and substance use disorders, HIV and other sexually transmitted disease, and diabetes. As a result, people with these stigmatized conditions may take drastic measures to guard their privacy.^{xvii}

As already noted above by the CDC, these drastic measures to protect privacy may translate into employees being untruthful in their responses, or, as observed by the Kaiser Family Foundation report, avoiding participation in the HRA altogether. HRAs that ask employees personal health questions also face an increased risk of complaints by employees, as seen in the City of Houston and Penn State situations. Employee complaints may lead to employee lawsuits against the employer.

Quizzify's HRA Minimizes Legal Risks While Meeting Many of the CDC Guidelines for HRAs

Because Quizzify's HRA does not ask personal health questions, employee concerns about privacy should be mitigated. Quizzify's HRA merely asks employees to answer general questions about health and health care without asking them personal questions about their health



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status and habits. Moreover, Quizzify's HRA falls outside the ambit of the ADA, GINA and HIPAA rules discussed above because the HRA does not collect personal health information.

Despite a reduced risk of noncompliance with ADA, GINA and HIPAA, the Quizzify HRA appears to meet many of the recommendations by the CDC for HRA success. According to the CDC, HRAs should be easy-to-use, and should provide credible information, advice, resources and support that will raise patients' awareness of their individual health issues, promote self-reliance and self-care, prompt active decision-making and increase confidence to manage one's health. Upon review of a sample Quizzify quiz, it appears easy-to-use and aims to improve the user's health literacy. This aim promotes self-reliance and self-care, as well as improves an individual's decision-making ability and confidence. Because Quizzify's quiz questions are reviewed by Harvard Medical School experts, the answers and follow-up information provided to the user is likely credible.

In addition, the CDC states that HRAs should intentionally create "teachable moments" that may inspire health improvement. It appears that Quizzify's series of quizzes and answers provide numerous teachable moments on a wide range of health and health care topics by explaining to the user why his or her answers are either wrong or correct.

Quizzify's HRA also appears to meet the CDC's recommendation that the HRA is administered multiple times or in a serial administration, with feedback. Under the Quizzify tool, users will take a quiz each month over a year, covering different health and healthcare topics. Feedback of a user's answers is immediate through the online portal, and users are encouraged to see their doctor for further discussion of the various topics covered in the quiz. Encouraging physician visits and providing links to other resources also provides recommended referrals and follow-up that supports behavior change and risk reduction. The Quizzify HRA also provides ongoing education through providing links to additional information on the various topics covered by the quiz. Employer clients who use the Quizzify HRA may pair the HRA with a biometric screen to identify an individual's personal health risks, but such pairing may invoke privacy concerns and the accompanying compliance issues under the ADA, GINA and HIPAA, discussed above.

It is also important to note that Quizzify's built-in answers, resource links and recommendations may satisfy the ADA and GINA requirements that a wellness program be reasonably designed to promote health or prevent disease. Although Quizzify's HRA is not required to comply with these ADA and GINA requirements because it is not collecting personal health information, the fact that the HRA offers credible information and guidance in response to the quiz questions seems to satisfy the EEOC expectation that HRAs provide results, follow-up information and advice.

In sum, from a legal risk perspective, the Quizzify HRA seems to offer some advantages over traditional HRAs by steering away from asking employees personal health questions but still offering them teachable moments that can reduce health risk and promote health.



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I hope this information is helpful. Please let me know if you have further questions.

ⁱ Id. at 15

ⁱⁱ Id.

ⁱⁱⁱ Id.

^{iv} Id. at 16.

^v Id. at 16-17.

^{vi} Id. at Appendix.

^{vii} Id. at 16.

^{viii} Zabawa, B. and Eickhoff-Shemek, J., Rule the Rules of Workplace Wellness Programs, at 69 (ABA 2017); 81 Fed. Reg. at 31126 (May 17, 2016); 81 Fed. Reg. at 31146 (May 17, 2016). It should be noted that the GINA incentive rules apply only to wellness programs that screen an employee's spouse. 29 CFR § 1635.8(b)(2)(iii).

^{ix} 29 CFR § 1630.14(d)(1); 29 CFR § 1635.8(b)(2)(i)(A).

^x 29 CFR § 1630.14(d)(1).

^{xi} 29 CFR § 1630.14.

^{xii} 81 Fed. Reg. at 31142 (May 17, 2016). s

^{xiii} 45 CFR pt. 160, subpts A and E of pt 164.

^{xiv} Zabawa, B. and Eickhoff-Shemek, J., Rule the Rules of Workplace Wellness Programs, at 283 (ABA 2017);

^{xv} Jay Hancock, Workplace wellness programs put employee privacy at risk, Kaiser Health News, reproduced at CNN.com (Oct. 2, 2015),

<http://www.cnn.com/2015/09/28/health/workplace-wellness-privacy-risk-exclusive>.

^{xvi} Natasha Singer, Health Plan Penalty Ends at Penn State, NYT (Sept. 18, 2013), available at <http://www.nytimes.com/2013/09/19/business/after-uproar-penn-state-suspends-penalty-fee-in-wellness-plan.html>.

^{xvii} Karen Pollitz and Matthew Rae, Changing Rules for Workplace Wellness Programs: Implications for Sensitive Health Conditions, Kaiser Family Foundation Issue Brief, at 5 (April 2017), available at <http://files.kff.org/attachment/Issue-Brief-Changing-Rules-for-Workplace-Wellness-Programs>.