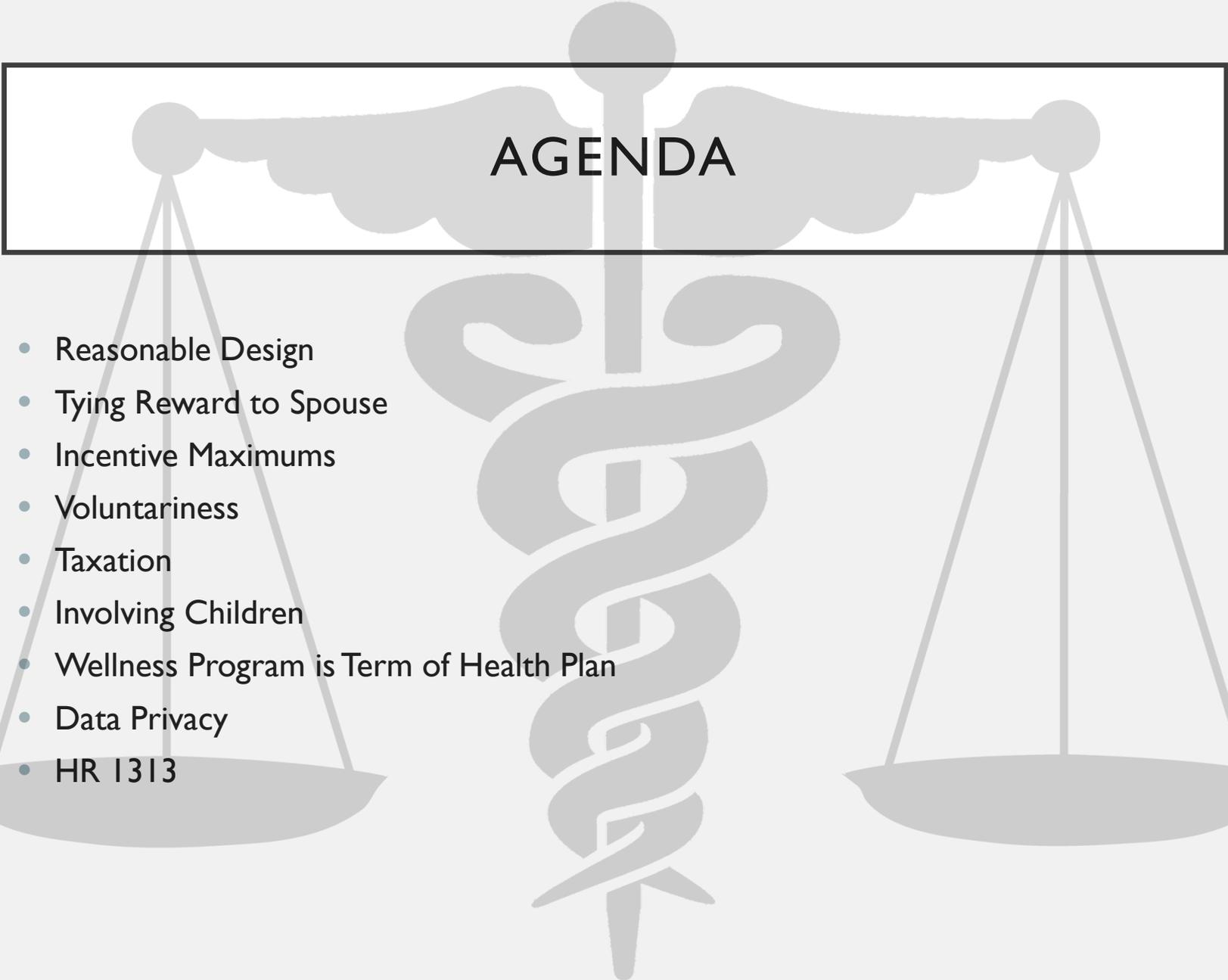


# SOLVING WELLNESS COMPLIANCE PROBLEMS IN A CHANGING LEGAL ENVIRONMENT – PART 2

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Center for Health and Wellness Law, LLC

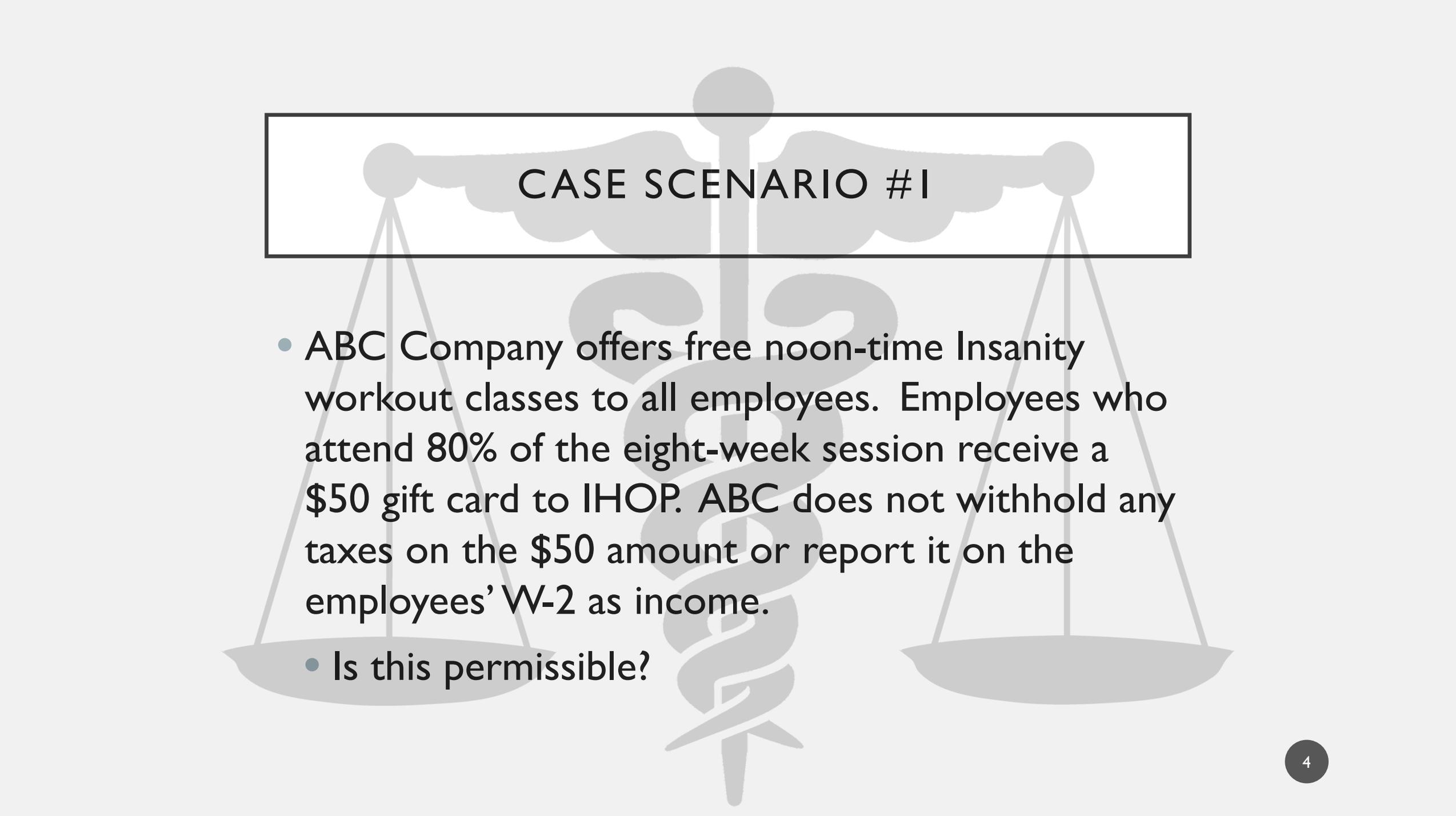


# AGENDA

- Reasonable Design
- Tying Reward to Spouse
- Incentive Maximums
- Voluntariness
- Taxation
- Involving Children
- Wellness Program is Term of Health Plan
- Data Privacy
- HR 1313



# TAXATION



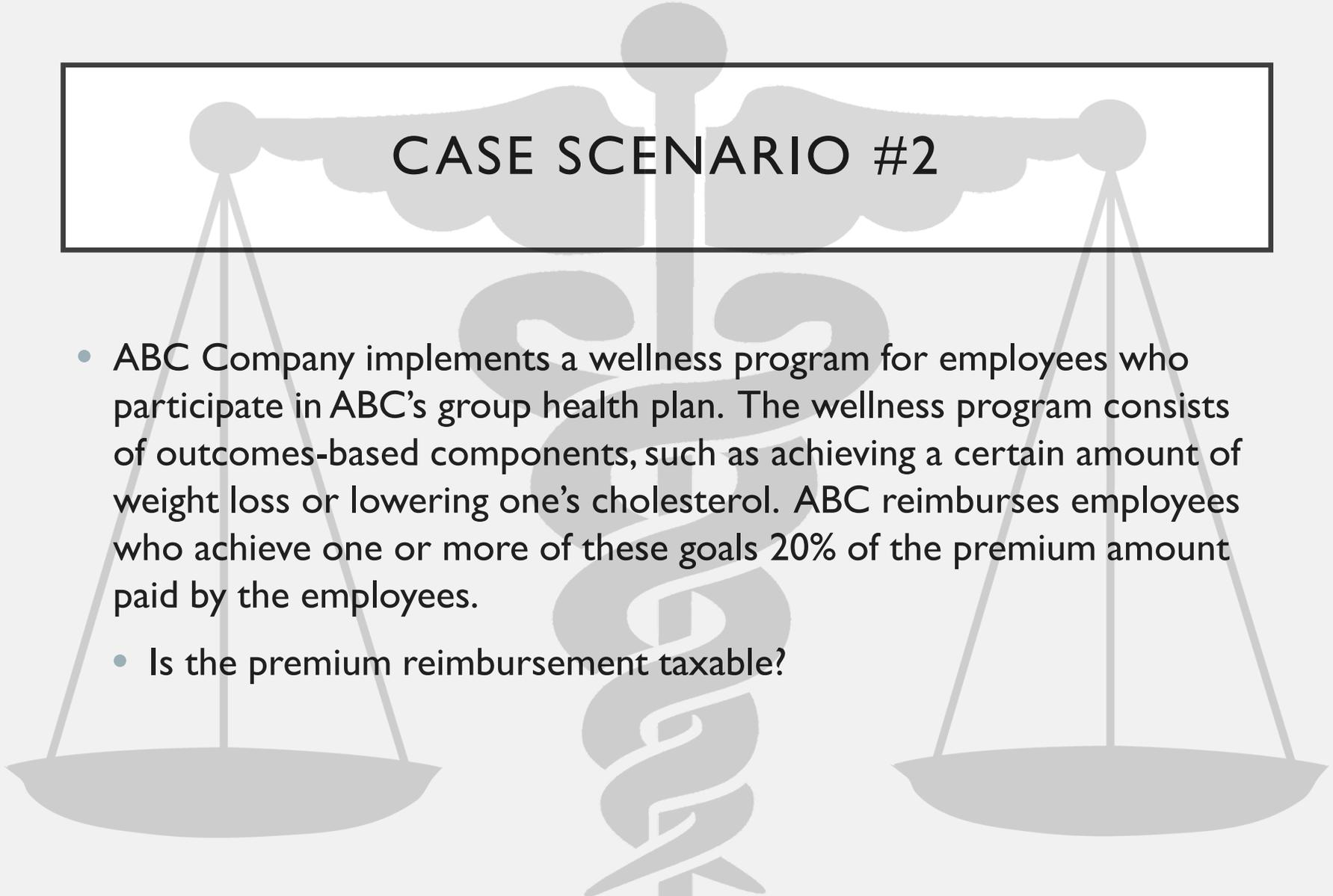
## CASE SCENARIO #1

- ABC Company offers free noon-time Insanity workout classes to all employees. Employees who attend 80% of the eight-week session receive a \$50 gift card to IHOP. ABC does not withhold any taxes on the \$50 amount or report it on the employees' W-2 as income.
- Is this permissible?

# INTERNAL REVENUE CODE

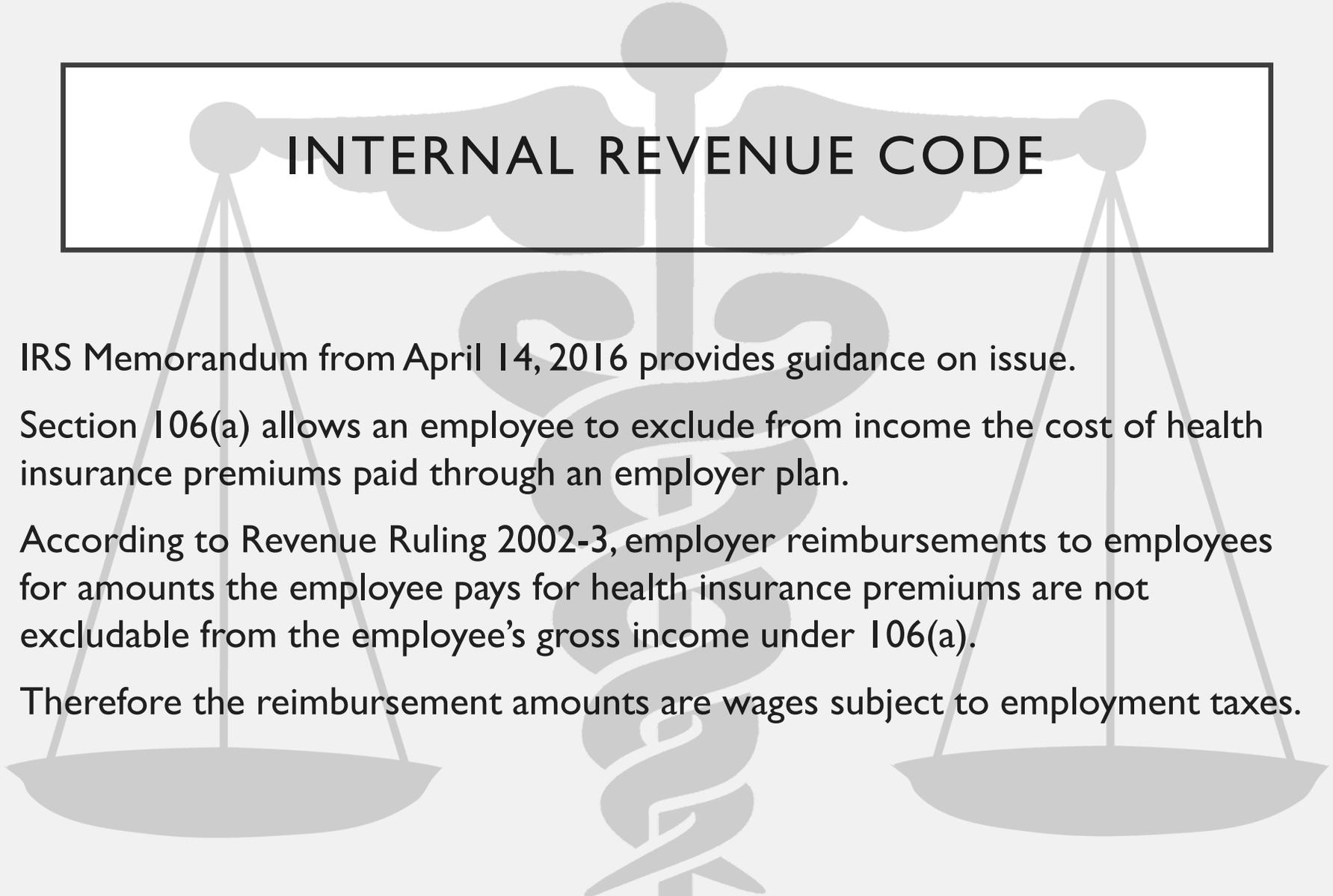
- Excludes from gross income amounts received for “medical care”
- Expenses beneficial to general health or wellbeing not “medical care” expenses
  - E.g. Gym memberships usually taxable
  - On-site athletic facilities not taxable
- De minimus benefits excludable
- Cash or cash equivalent incentives not excludable from gross income





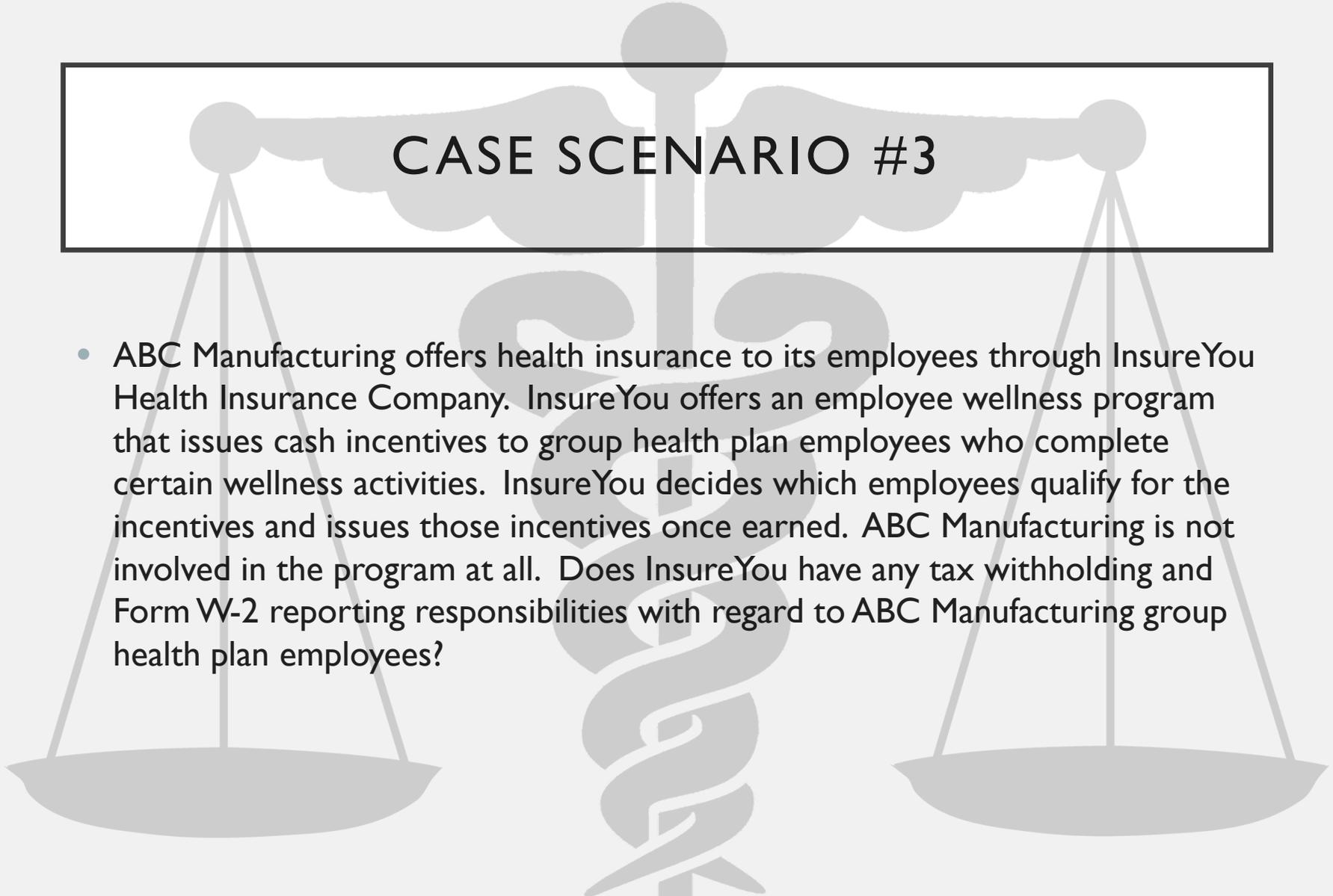
## CASE SCENARIO #2

- ABC Company implements a wellness program for employees who participate in ABC's group health plan. The wellness program consists of outcomes-based components, such as achieving a certain amount of weight loss or lowering one's cholesterol. ABC reimburses employees who achieve one or more of these goals 20% of the premium amount paid by the employees.
  - Is the premium reimbursement taxable?



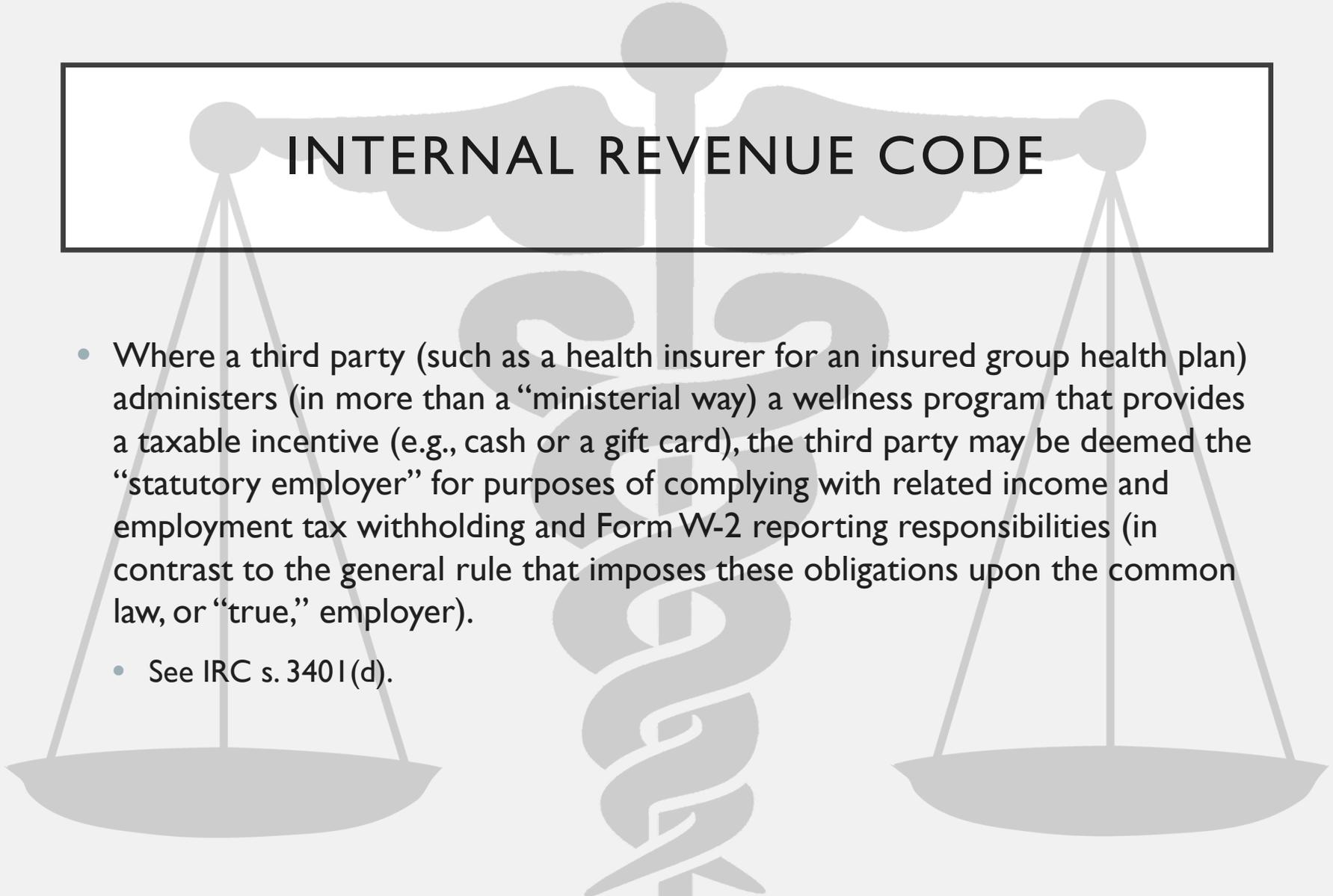
## INTERNAL REVENUE CODE

- IRS Memorandum from April 14, 2016 provides guidance on issue.
- Section 106(a) allows an employee to exclude from income the cost of health insurance premiums paid through an employer plan.
- According to Revenue Ruling 2002-3, employer reimbursements to employees for amounts the employee pays for health insurance premiums are not excludable from the employee's gross income under 106(a).
- Therefore the reimbursement amounts are wages subject to employment taxes.



## CASE SCENARIO #3

- ABC Manufacturing offers health insurance to its employees through InsureYou Health Insurance Company. InsureYou offers an employee wellness program that issues cash incentives to group health plan employees who complete certain wellness activities. InsureYou decides which employees qualify for the incentives and issues those incentives once earned. ABC Manufacturing is not involved in the program at all. Does InsureYou have any tax withholding and Form W-2 reporting responsibilities with regard to ABC Manufacturing group health plan employees?

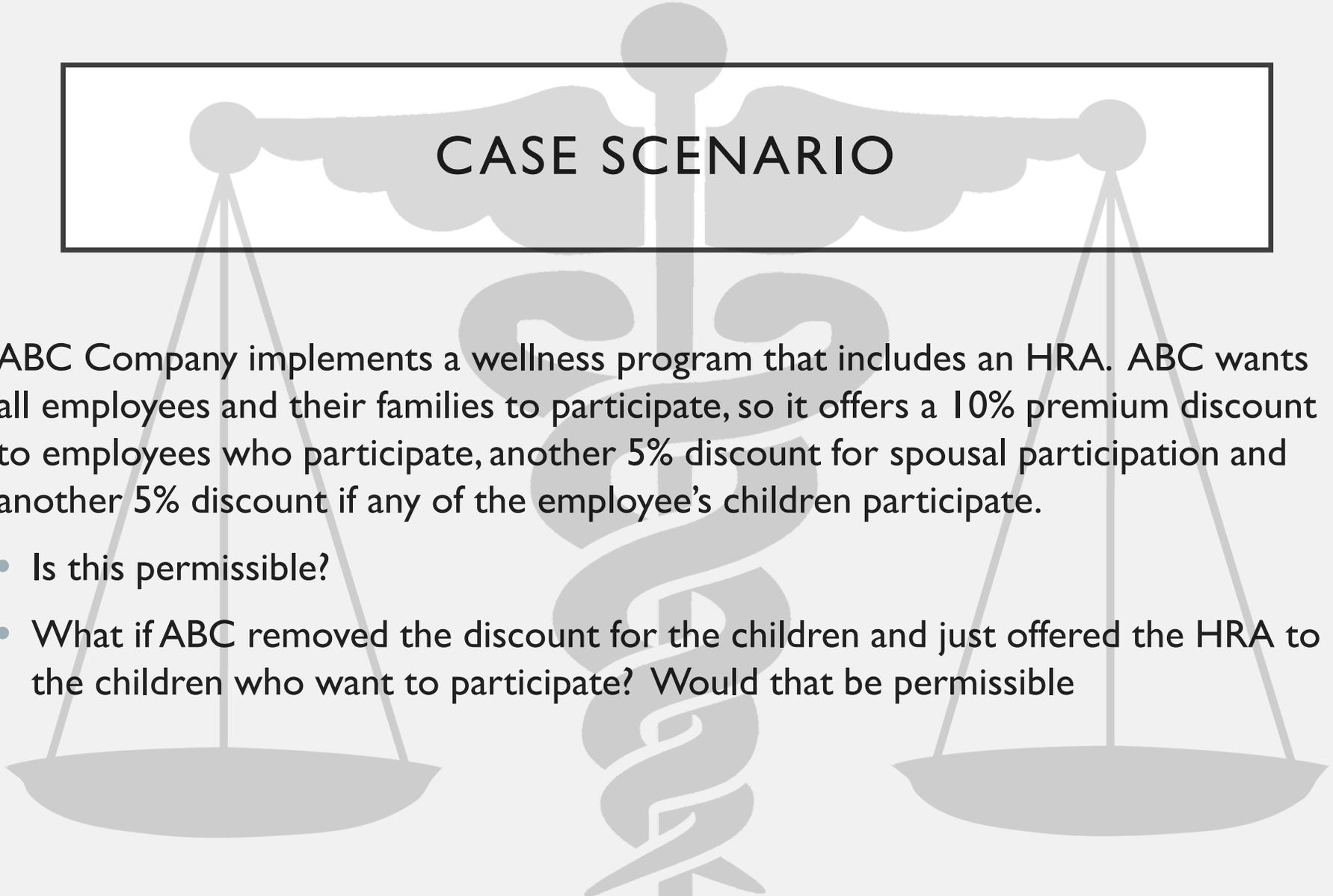


## INTERNAL REVENUE CODE

- Where a third party (such as a health insurer for an insured group health plan) administers (in more than a “ministerial way) a wellness program that provides a taxable incentive (e.g., cash or a gift card), the third party may be deemed the “statutory employer” for purposes of complying with related income and employment tax withholding and Form W-2 reporting responsibilities (in contrast to the general rule that imposes these obligations upon the common law, or “true,” employer).
  - See IRC s. 3401(d).

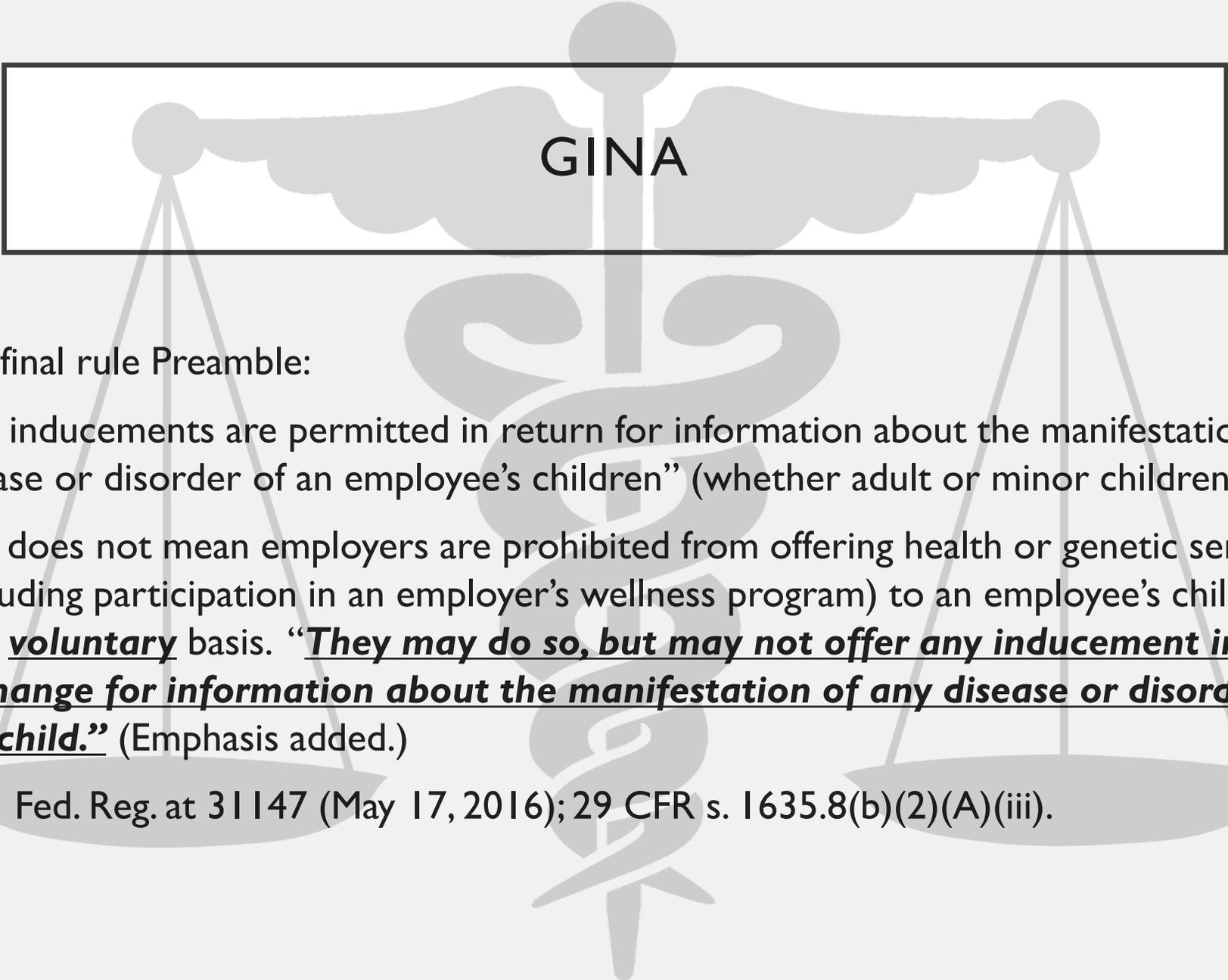
The background is a solid orange color. In the center, there is a large, faint, light-colored graphic of a caduceus (a staff with two snakes entwined around it and wings at the top) and a pair of scales of justice. The scales are positioned on either side of the caduceus. A white rectangular box with a black border is centered horizontally and vertically, containing the text "INVOLVING DEPENDENTS" in black, uppercase, sans-serif font.

# INVOLVING DEPENDENTS



## CASE SCENARIO

- ABC Company implements a wellness program that includes an HRA. ABC wants all employees and their families to participate, so it offers a 10% premium discount to employees who participate, another 5% discount for spousal participation and another 5% discount if any of the employee's children participate.
  - Is this permissible?
  - What if ABC removed the discount for the children and just offered the HRA to the children who want to participate? Would that be permissible

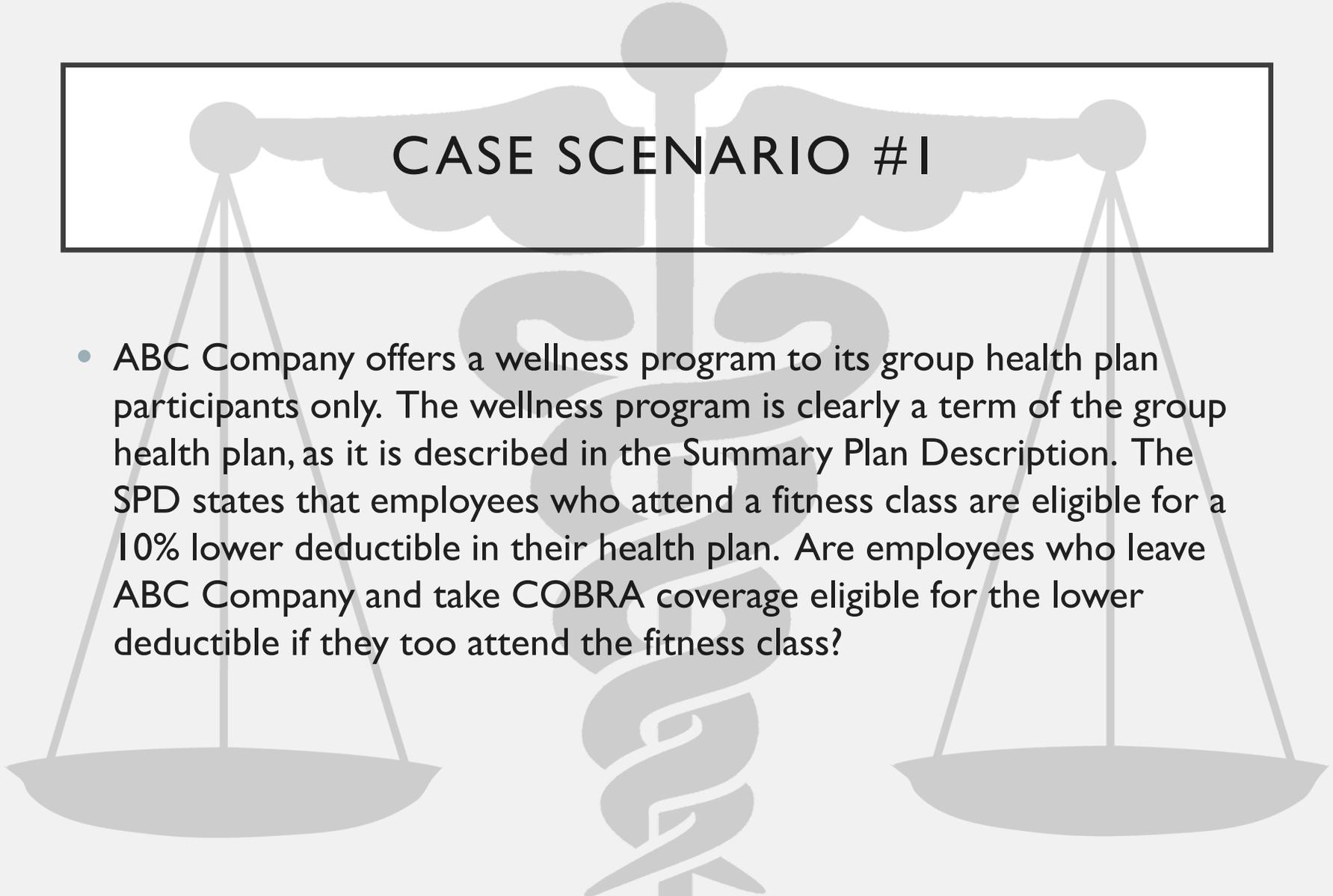


## GINA

- GINA final rule Preamble:
  - “No inducements are permitted in return for information about the manifestation of disease or disorder of an employee’s children” (whether adult or minor children).
  - This does not mean employers are prohibited from offering health or genetic services (including participation in an employer’s wellness program) to an employee’s children on a **voluntary** basis. “**They may do so, but may not offer any inducement in exchange for information about the manifestation of any disease or disorder in the child.**” (Emphasis added.)
  - 81 Fed. Reg. at 31147 (May 17, 2016); 29 CFR s. 1635.8(b)(2)(A)(iii).

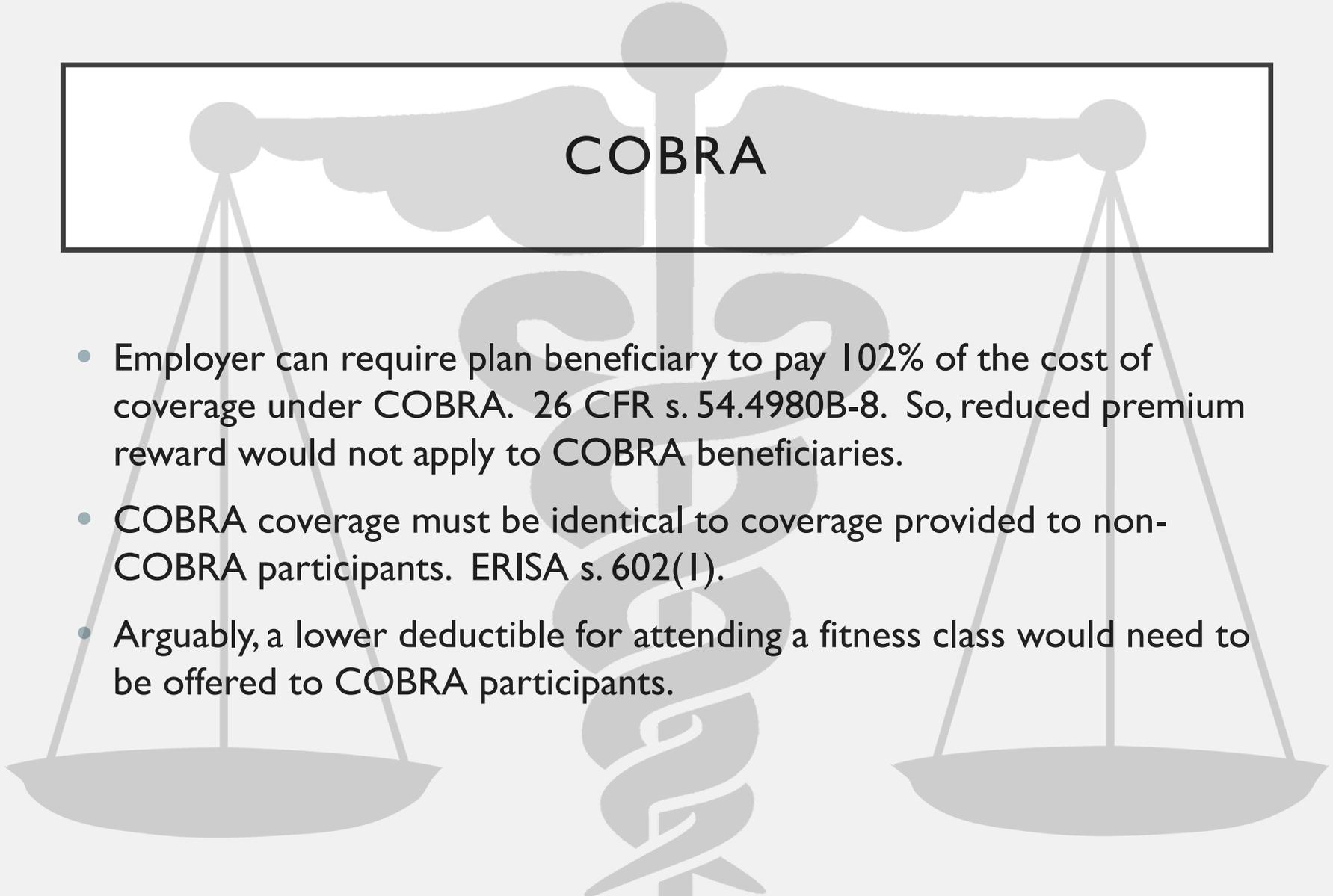


# GROUP HEALTH PLAN ISSUES



## CASE SCENARIO #1

- ABC Company offers a wellness program to its group health plan participants only. The wellness program is clearly a term of the group health plan, as it is described in the Summary Plan Description. The SPD states that employees who attend a fitness class are eligible for a 10% lower deductible in their health plan. Are employees who leave ABC Company and take COBRA coverage eligible for the lower deductible if they too attend the fitness class?



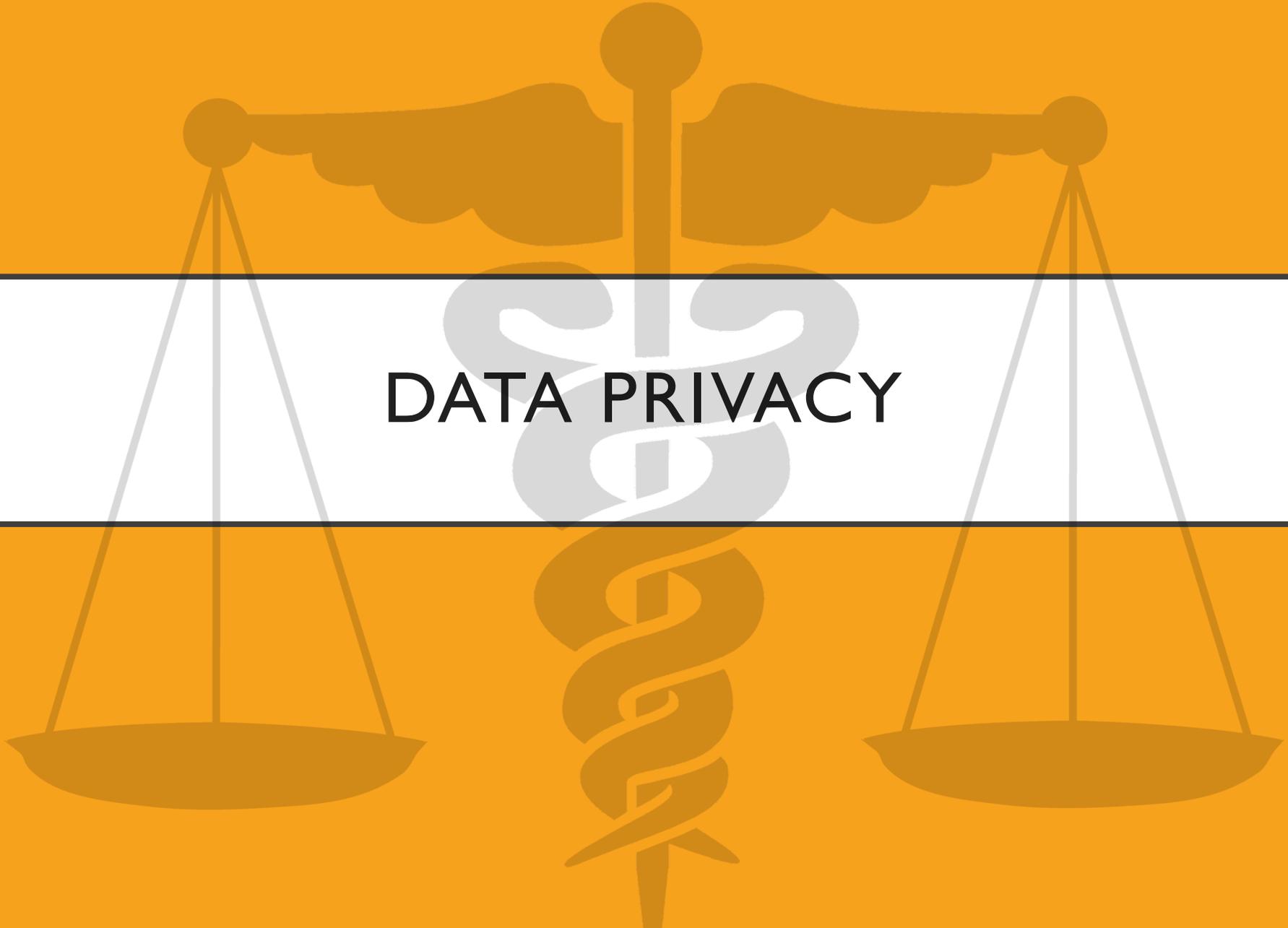
## COBRA

- Employer can require plan beneficiary to pay 102% of the cost of coverage under COBRA. 26 CFR s. 54.4980B-8. So, reduced premium reward would not apply to COBRA beneficiaries.
- COBRA coverage must be identical to coverage provided to non-COBRA participants. ERISA s. 602(1).
- Arguably, a lower deductible for attending a fitness class would need to be offered to COBRA participants.



## CASE SCENARIO #2

- ABC Company wants to implement a wellness program for all of its employees. However, it also hopes to reduce its overall spending on health care over time. So, it would like to offer financial incentives to employees who participate in ABC's group health plan, but allow all employees to participate in the program.
- Can ABC limit financial incentives to group health plan participants only?



# DATA PRIVACY

## CASE SCENARIO #1

- Terry, employee of ABC Company agrees to provide health status information to earn an incentive through the employer wellness program. Terry logs onto an online portal sponsored by a wellness vendor to provide the information. The portal contains the following privacy statement:
  - We will not share your PHI with any third party, including your employer. We have strict security controls in place to ensure that the information you provide is kept private and secure.
  - Is this privacy statement sufficient under the ADA or GINA?

# ADA RULES

- May not Require Employee to Agree to Sale, Exchange, Sharing, Transfer of Information
- Review vendor agreements to ensure employees do not unwittingly waive confidentiality protections.

# ADA RULES

- Programs that collect medical information must provide employees with notice.



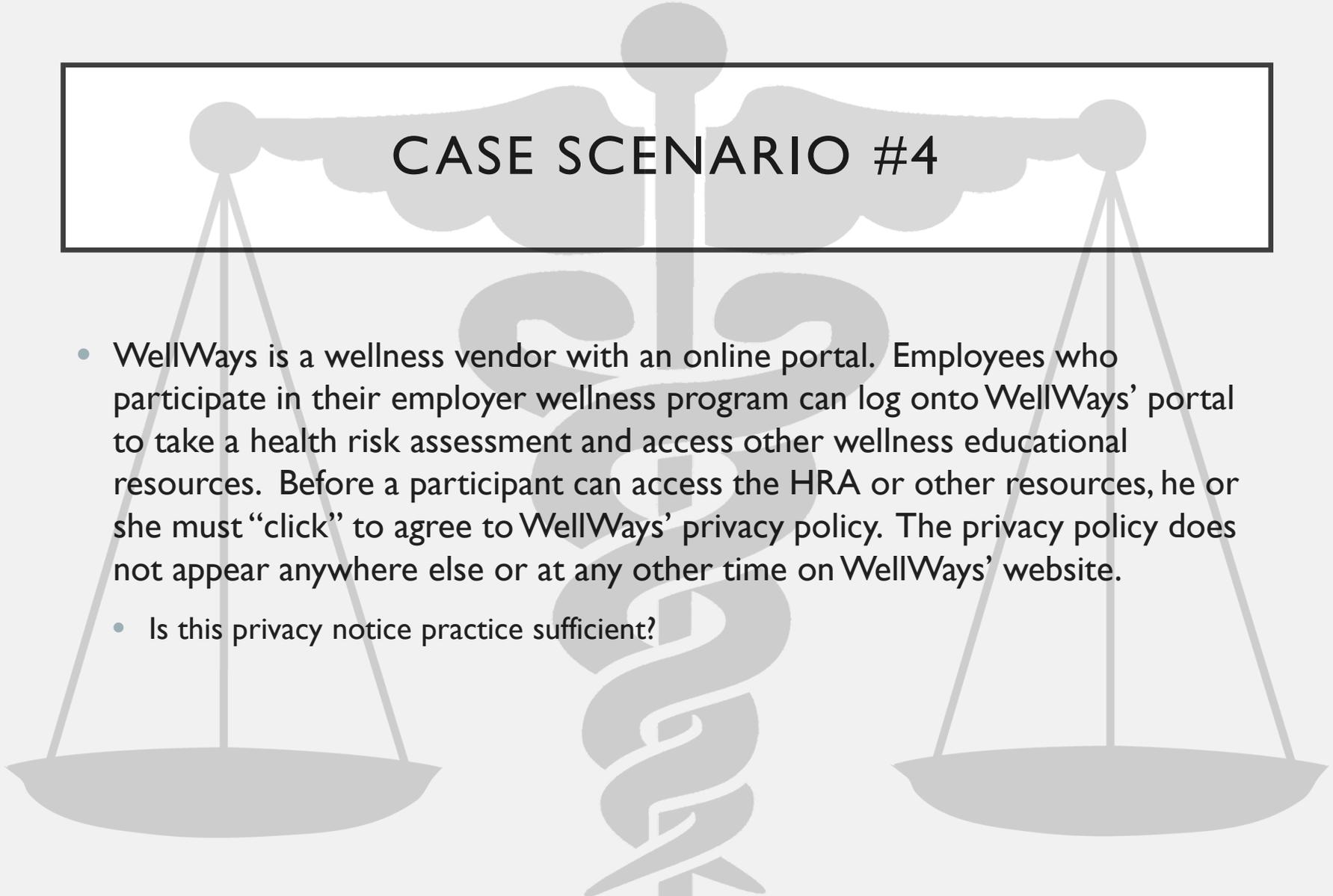
# ADA RULES

- Notice requirement applies even in absence of incentives
- Notice must contain following:
  - Be understandable
  - Describe type of medical information obtained
  - Describe specific purposes for which information will be used
  - Who will receive information
  - Restrictions on disclosure of medical information
  - Methods employer will use to prevent improper disclosure (**including whether the program complies with HIPAA privacy and security rules**).

# ADA RULES

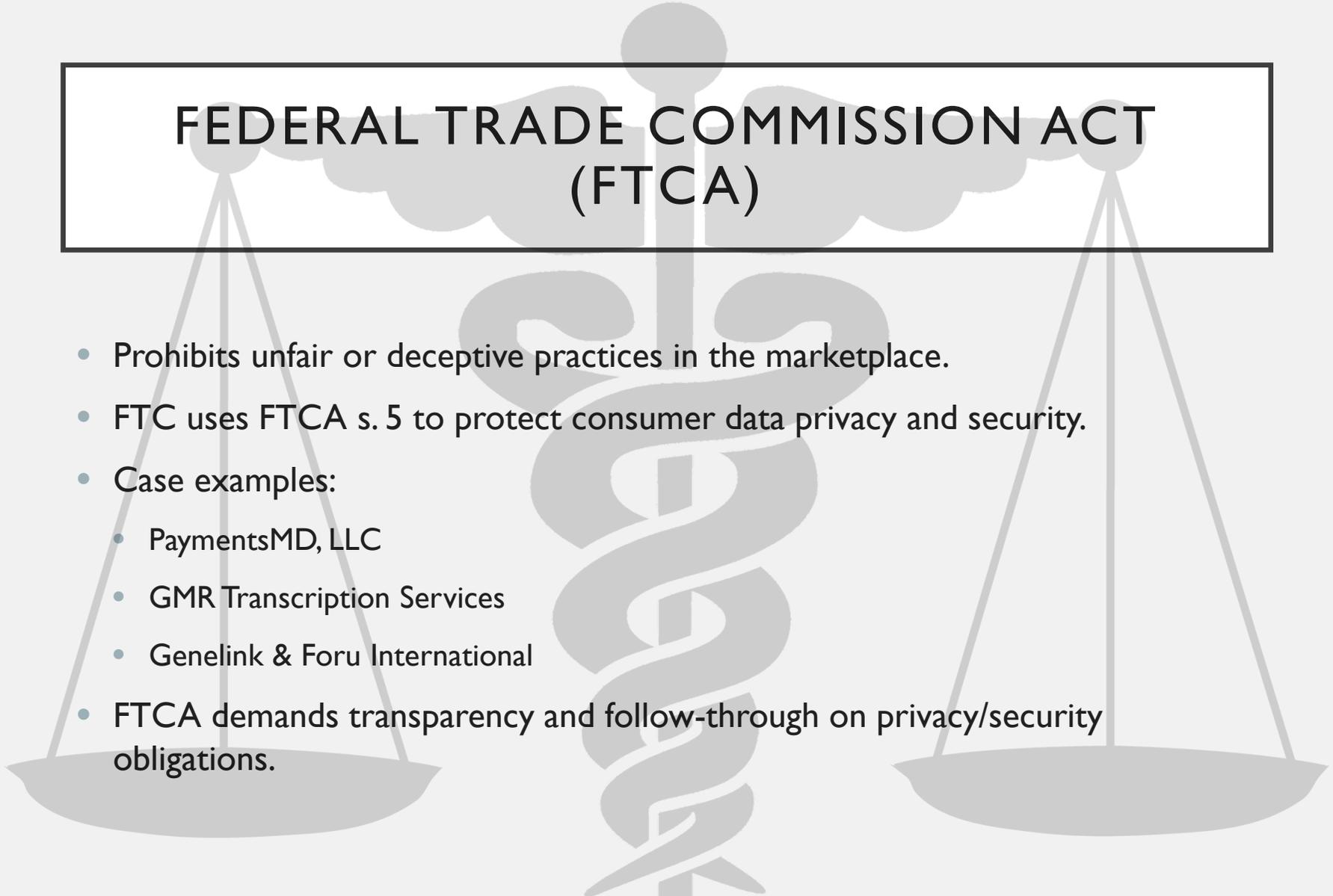
- Employers and Vendors should have clear privacy policies and procedures related to medical information:
  - Collection
  - Storage
  - Disclosure
  - Encryption
  - Notice of Breach
- Include employee training





## CASE SCENARIO #4

- WellWays is a wellness vendor with an online portal. Employees who participate in their employer wellness program can log onto WellWays' portal to take a health risk assessment and access other wellness educational resources. Before a participant can access the HRA or other resources, he or she must "click" to agree to WellWays' privacy policy. The privacy policy does not appear anywhere else or at any other time on WellWays' website.
  - Is this privacy notice practice sufficient?



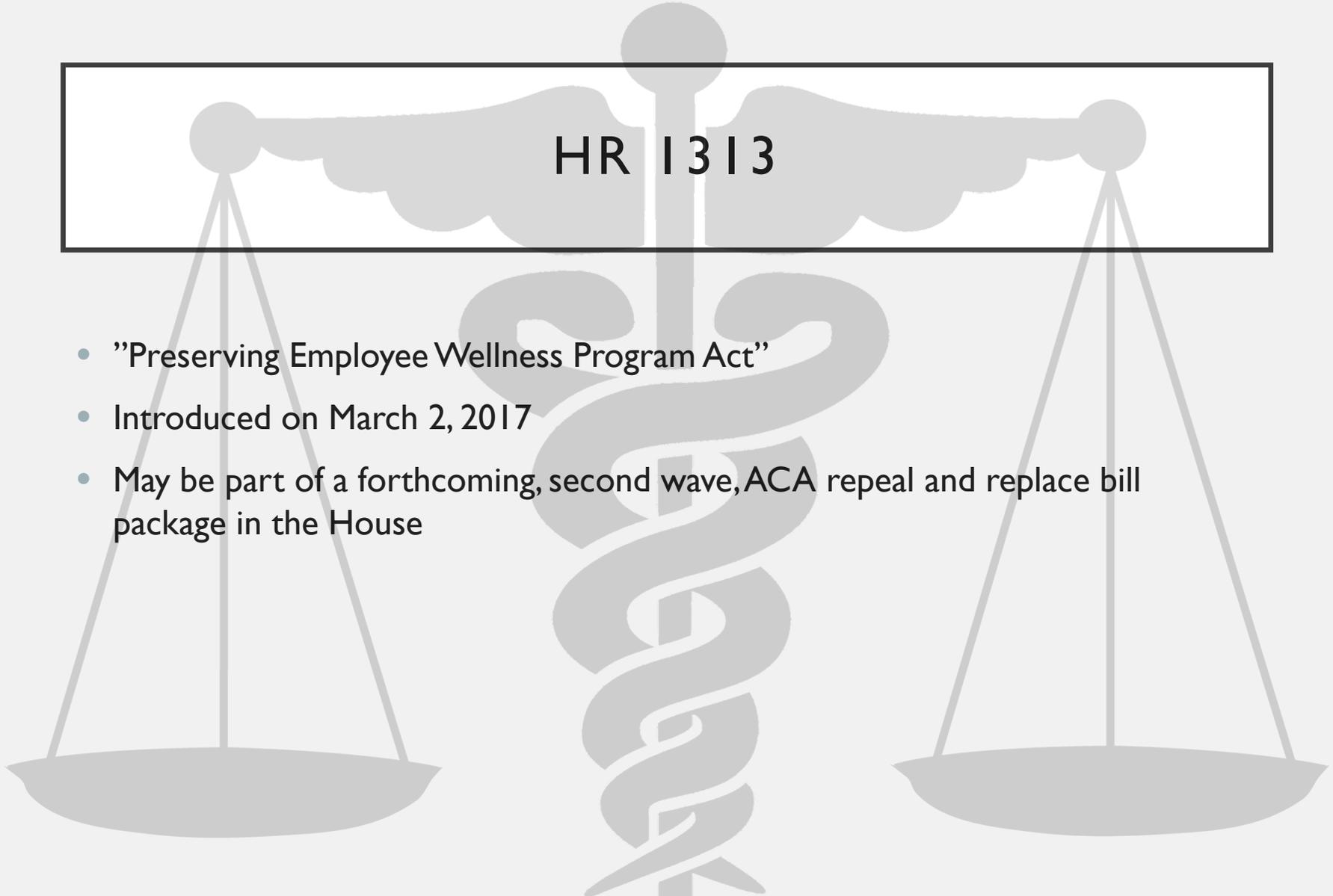
# FEDERAL TRADE COMMISSION ACT (FTCA)

- Prohibits unfair or deceptive practices in the marketplace.
- FTC uses FTCA s. 5 to protect consumer data privacy and security.
- Case examples:
  - PaymentsMD, LLC
  - GMR Transcription Services
  - Genelink & Foru International
- FTCA demands transparency and follow-through on privacy/security obligations.

## WHAT DOES THIS MEAN FOR WELLNESS PROGRAMS?

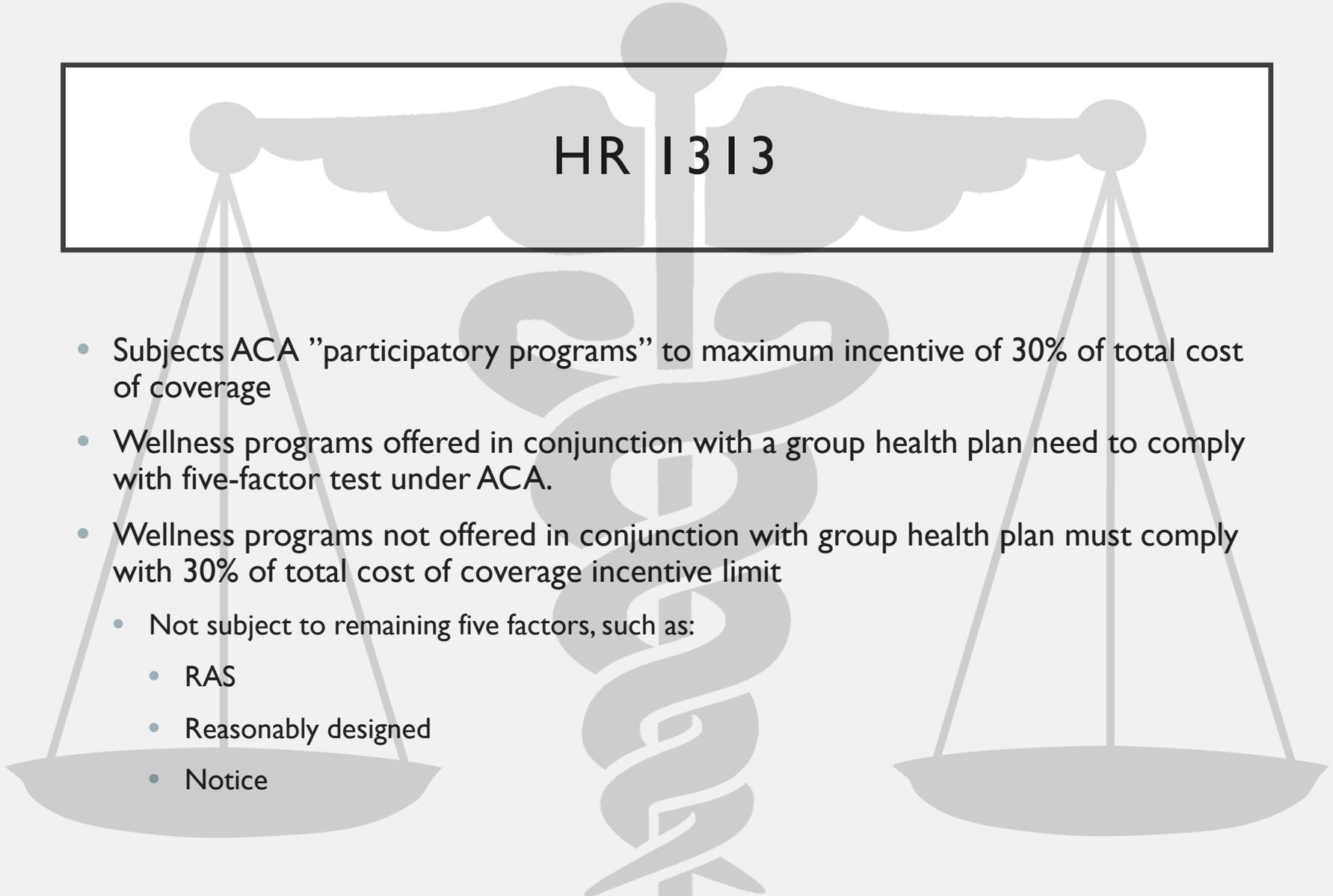
- Time for a compliance audit!





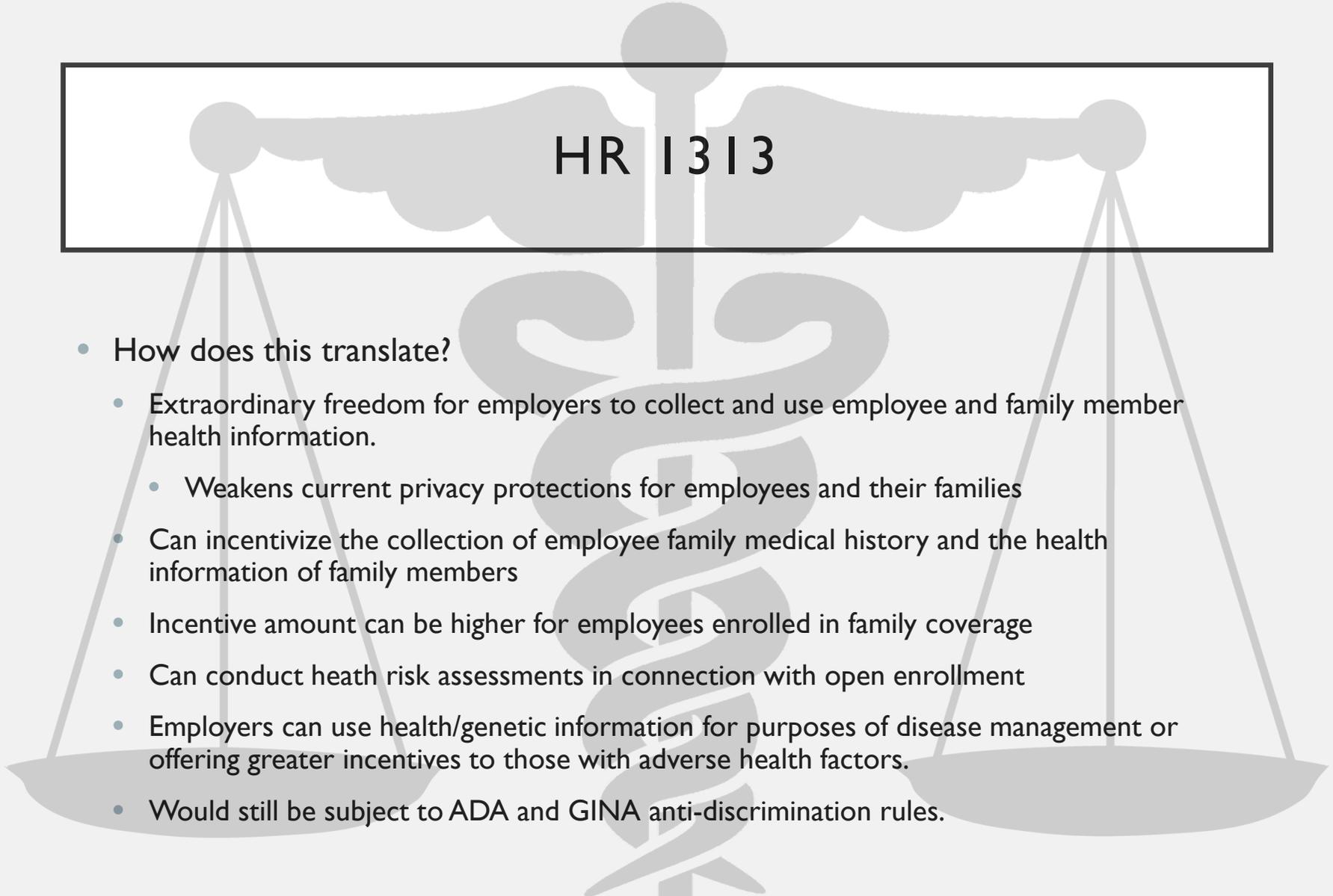
## HR 1313

- "Preserving Employee Wellness Program Act"
- Introduced on March 2, 2017
- May be part of a forthcoming, second wave, ACA repeal and replace bill package in the House



## HR 1313

- Subjects ACA "participatory programs" to maximum incentive of 30% of total cost of coverage
- Wellness programs offered in conjunction with a group health plan need to comply with five-factor test under ACA.
- Wellness programs not offered in conjunction with group health plan must comply with 30% of total cost of coverage incentive limit
  - Not subject to remaining five factors, such as:
    - RAS
    - Reasonably designed
    - Notice



## HR 1313

- How does this translate?
  - Extraordinary freedom for employers to collect and use employee and family member health information.
    - Weakens current privacy protections for employees and their families
  - Can incentivize the collection of employee family medical history and the health information of family members
  - Incentive amount can be higher for employees enrolled in family coverage
  - Can conduct health risk assessments in connection with open enrollment
  - Employers can use health/genetic information for purposes of disease management or offering greater incentives to those with adverse health factors.
  - Would still be subject to ADA and GINA anti-discrimination rules.

# QUESTIONS?

- For more information, contact:  
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