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Workplace Wellness

# Workplace Wellness: Potential Legal Issues Associated with Workplace Wellness Plans

Wellness programs must be carefully structured to comply with both state and federal law as they may raise issues regarding reasonable accommodation, nondiscrimination, confidentiality and protection of off-duty conduct. The Americans with Disabilities Act (ADA), the Health Insurance Portability and Accountability Act (HIPAA), the Genetic Information Nondiscrimination Act (GINA) and state lifestyle discrimination laws will all impact the design of a wellness program. Because of the potential risks of noncompliance, it is important that employers have their legal counsel review their wellness programs before they are rolled out to their employees.

## ADA Compliance

Nothing in the ADA prohibits employers from implementing wellness programs that are geared toward promoting good health and disease prevention. However, the ADA does prohibit covered employers from denying, on the basis of a disability, qualified individuals with a disability an equal opportunity to participate in, or receive benefits under, programs or activities conducted by those employers. Employers must offer reasonable accommodation to employees with known disabilities to allow them to participate. ADA compliance with respect to wellness programs may be difficult to assess because of a lack of clear guidance from the Equal Employment Opportunity Commission (EEOC).

The ADA may impact an employer's wish to provide a premium discount to participants who achieve a particular score on a health risk assessment (HRA). If an individual's score is affected by a disability, ADA compliance issues may arise if reasonable accommodations are not made to allow that individual to participate. On the other hand, assessing a premium surcharge on smokers would most likely not trigger the ADA because nicotine addiction generally does not limit a major life activity. However, it may raise HIPAA nondiscrimination or state law issues, which is why it is necessary to seek advice from your legal counsel.

The ADA also prohibits employers from making medical inquires or requiring medical examinations unless they are job-related and consistent with business necessity. Employers are prohibited from taking any adverse employment action based on an individual's actual or perceived disability. However, according to the EEOC guidelines, an employer may conduct medical examinations and activities that are part of a voluntary wellness and health screening program. Therefore, offering employees the opportunity to voluntarily participate in a blood pressure screening program, for example, will likely not violate the ADA, as long as there is no penalty of any kind for not participating. Any information acquired must be treated as a confidential medical record.

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In addition, the ADA includes a safe harbor exception to many of its requirements, including the restriction on making medical inquiries or requiring medical examinations, for bona fide benefit plans. The exception provides that the ADA does not prohibit or restrict an employer "from establishing, sponsoring, observing, or administering the terms of a bona fide health plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law." This exception may not be used as a way to evade the ADA's requirements.

In April 2011, a Florida federal district court held that an employer's medical wellness program, which contained a penalty for nonparticipation, did not violate the ADA because the program fell under the ADA's safe harbor for bona fide benefit plans. On Aug. 20, 2012, the Eleventh Circuit Court of Appeals upheld the district court's decision (*Seff v. Broward County Florida*). This case is not binding on courts outside of the Eleventh Circuit, which includes Alabama, Florida and Georgia. Also, the court did not address the EEOC's exception for voluntary wellness programs, and it is unclear at this point whether the EEOC agrees with this court ruling.

## HIPAA Nondiscrimination Compliance

HIPAA prohibits using a health factor as a basis of discrimination with regard to either eligibility to enroll or premium contributions under a group health plan. Health factors include health status, physical and mental medical conditions, claims experience, receipt of health care, medical history, genetic information, evidence of insurability and disability. An employer cannot require an individual to pay a higher premium based on any health- related factor. However, HIPAA does not prevent a group health plan or health insurance provider from establishing incentives for participation in health promotion and disease prevention programs – if the rewards are not based on an individual satisfying a standard related to a health factor. As long as these participation-only programs are made available to all similarly situated individuals, they need not meet additional nondiscrimination requirements. Examples of participation-only programs include:

- A program that reimburses all or part of the cost for memberships to a fitness center
- A diagnostic testing program that provides a reward for participation rather than outcome
- A program that encourages preventive care by waiving the copayment or deductible requirement for the costs of, for example, prenatal care or well-baby visits
- A program that reimburses employees for the costs of smoking cessation programs without regard to whether the employee quits smoking
- A program that provides a reward to employees for attending a monthly health education seminar

Wellness programs that condition a reward on an individual satisfying a standard related to a health factor must meet five requirements in order to comply with the nondiscrimination rules:

- The total reward for the plan's wellness programs that require satisfaction of a health-related standard is limited; generally, it must not exceed 20 percent of the cost of employee-only coverage under the plan. If dependents (such as spouses and/or children) may participate in the program, the reward must not exceed 20 percent of the cost of the coverage in which an employee and any dependents are enrolled. (This number will increase to 30 percent effective for plan years beginning on or after January 1, 2014.)
- The program must be reasonably designed to promote health and prevent disease.
- Those individuals who are eligible to participate in the program must be given an opportunity to qualify for the reward at least once per year.
- The reward must be available to all similarly situated individuals. The program must allow a reasonable alternative standard (or waiver of initial standard) for obtaining the reward to any individual for whom it is unreasonably difficult due to a medical condition, or medically inadvisable, to satisfy the initial standard.

- The plan must disclose the availability of a reasonable alternative standard or the possibility of a waiver of the initial standard in all materials describing the terms of the program.

HIPAA's nondiscrimination rules may affect an employer's ability to provide a premium differential between smokers and nonsmokers. Medical evidence suggests that smoking may be related to a health factor. Therefore, for a group health plan to maintain a premium differential between smokers and nonsmokers and not be considered discriminatory, the plan's nonsmoking program would need to meet the five requirements for wellness programs that require satisfaction of a standard related to a health factor.

Group programs that reward individuals who participate in voluntary testing for early detection of health problems and do not use the test results to determine whether an individual receives a reward or to determine the amount of an individual's reward are permissible under HIPAA's nondiscrimination rules. Those programs are not subject to the five requirements for wellness programs that require satisfaction of a standard related to a health factor.

## GINA Compliance

GINA restricts an employer's ability to incentivize employees to provide genetic information, such as family medical history, in connection with a wellness program. "Genetic information" is broadly defined under GINA to include information about an individual's genetic tests, genetic tests for the individual's family members and family medical history. Title I of GINA prohibits group health plans and health insurance issuers from collecting genetic information for underwriting purposes or in connection with enrollment. Final regulations under Title I of GINA provide that "underwriting purposes" includes changing cost-sharing measures or providing rebates, discounts or other premium differentials in exchange for activities such as completing a health risk assessment (HRA) or participating in a wellness program.

Under the final regulations, wellness programs offered under group health plans that utilize HRAs requesting genetic information violate GINA if any reward or incentive is provided for completing the HRA. For example, a group health plan violates GINA if it provides a premium reduction to enrollees who complete an HRA that contains questions about family medical history. However, if the health plan does not offer a premium reduction or other reward for completing the HRA, the health plan does not violate GINA. Health plans can also avoid GINA violations by removing all questions regarding genetic information from HRAs.

Wellness programs that are not part of group health plans are subject to Title II of GINA, which prohibits employment discrimination on the basis of genetic information. Title II of GINA generally prohibits an employer from requesting, requiring or purchasing an employee's or family member's genetic information. However, as an exception, employers may request genetic information if they offer health or genetic services, including such services offered as part of a voluntary wellness program, and the following conditions are satisfied:

- The employee provides the genetic information voluntarily, which means the employee is not required to provide the information and is not penalized if he or she decides not to provide the information;
- The employee provides knowing, voluntary and written authorization;
- The genetic information is only provided to the individual (or the family member) receiving genetic services and the health care professionals or counselors providing the services; and
- The genetic information is only available for the purposes of the services and is not disclosed to the employer except in aggregate terms.

Final EEOC regulations provide that an employer does not violate Title II of GINA when the employer offers financial incentives to employees for completing HRAs with questions about family medical history, provided the employer

makes clear that the incentives are available regardless of whether the employees complete the questions about family medical history.

As another example, the final regulations provide that an employer may offer financial incentives to participate in a disease management program to employees who have provided certain genetic information without violating Title II of GINA, provided the employer also offers the incentives to individuals who did not provide genetic information but whose current health conditions and/or lifestyle choices put them at increased risk of developing a condition.

### Other Federal Laws

Other federal laws, such as COBRA, ERISA, the Age Discrimination in Employment Act (ADEA) and the Internal Revenue Code (IRC), may also affect wellness plans. Employers subject to collective bargaining agreements should check those agreements to see if a wellness program falls under any provision that they have agreed to negotiate. Also, many states have "lifestyle discrimination" laws that protect employees from being discriminated against for engaging in lawful activities away from work during non-work time. It is important to check with your legal counsel to see if your state has enacted any of these types of laws.

Employers should also keep in mind the HIPAA Privacy Rule when it comes to protected health information (PHI). Among other things, PHI received in conjunction with a wellness program may include reports of biometric tests. Employers should make sure that their treatment of PHI is consistent with the Privacy Rule's requirements or takes steps such as de-identifying the information so that it cannot be linked to an individual.

Wellness programs clearly have benefits to both employees and employers. However, these advantages do not come without potential legal risks, which is why it is necessary to have your legal counsel review your program before implementing it.