

# Employers Considering Wellness Programs Are Advised To Look Before Leaping

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Faced with rising employee health care costs, many employers are considering implementing workplace wellness programs in an effort to reduce medical care costs for both the organization and employees. One potential structure for a wellness program provides an employee with a discount on health care contributions in exchange for the employee's participation in wellness activities or provides such a discount if an employee satisfies a specific health-related goal. Both types of wellness initiatives may contribute to a reduction in health care costs and provide attractive benefits for employees such as smoking cessation programs and health screenings.

Nonetheless, employers contemplating a workplace wellness program are well advised to consider that conditioning a reduction in health care costs on satisfying a health-related goal, such as actual smoking cessation or meeting a certain cholesterol level, may be subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Nondiscrimination Rules and/or federal and state discrimination statutes. In addition, regardless of the structure contemplated, employers should consider requirements for wellness programs that may arise under the HIPAA Privacy Rule (45 C.F.R. §§ 160.164).

## HIPAA Nondiscrimination Rules

An employer may offer employees a health care discount conditioned on *participation* in an employee wellness program without being subject to the HIPAA Nondiscrimination Rules. Wellness initiatives not subject to these Rules include providing a reduction in employee health care contributions to an employee (and his or her enrolled dependents) who participate in a diagnostic testing program or a smoking cessation initiative or who attend health education seminars.

In other circumstances, an employer may offer a discount based on a HIPAA "health factor" (which includes items such as an individual's health status or medical condition), but the program must satisfy the HIPAA Nondiscrimination Rules. Programs based on a health factor include those that provide a reward (such as a discount on health care costs) if an individual obtains a certain body mass index (BMI) or cholesterol level or achieves smoking cessation. Such programs must meet five criteria to be permissible:

1. The program discount (combined with any other discount(s) contingent on a health factor) may not exceed 20 percent of the cost of employee coverage under the employer's health plan or the cost of employee and enrolled dependent coverage (where dependents are also eligible to participate in the wellness program).

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2. The program must be reasonably designed to promote health or prevent disease. The Rules provide little guidance as to how these criteria will be measured. It appears, however, that a program may meet this criteria if it makes the same wellness program benefits available to all employees or makes different benefits available on the basis of a reasonable classification (such as full-time versus part-time status).

3. The program must provide eligible individuals with the opportunity to qualify for the discount at least once per year.

4. The program must offer a reasonable alternative standard (or the ability to waive the standard) to individuals for whom it is medically inadvisable or unreasonably difficult to obtain the goal. For instance, a wellness program that requires an employee to have a certain BMI in order to qualify for a discount may provide the discount to an employee who is not able to obtain this goal but instead walks for 20 minutes three days a week.

5. The program sponsor must publicize the availability of this alternative standard in all program materials that describe the terms of the program.

## Other Potential Pitfalls

In addition to complying with the HIPAA Nondiscrimination Rules, employee wellness programs must also comply with a myriad of federal laws, the most obvious of which are the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.), the Age Discrimination in Employment Act (ADEA) (29 U.S.C. § 621 et seq.) and the Employee Retirement Income Security Act (ERISA) (29 U.S.C. § 1001 et seq.). In addition, employers must adhere to various state-based "lifestyle protection" statutes that protect employees from discrimination as a result of engaging in lawful off-work activities such as smoking.

## ADA Conundrum

As a general matter, the ADA prohibits employment-based discrimination against individuals with disabilities and limits employers' ability to conduct medical inquiries by requiring that such inquiries must be justified by job relatedness and business necessity. A well-crafted wellness program may comply with the ADA as long as: (1) participation in the program is voluntary; (2) the information gathered in conjunction with the program is retained using the ADA confidentiality measures; and (3) the information is not used to discriminate against employees.

Alas, this may be easier said than done. While employers should be able to institute procedures to ensure that information gathered in conjunction with their wellness programs is maintained in accordance with the ADA confidentiality measures and that the information is not used to discriminate against employees, they may have more difficulty with proving that participation is voluntary. The EEOC advises that a well-

ness program is "voluntary" as long as employees are neither required to participate in the program nor penalized for choosing not to participate. However, the courts have not yet tested whether an employee who chooses not to participate in a wellness program and consequently must pay a full health insurance premium is being subjected to a penalty or whether an overly attractive incentive may render a wellness program involuntary.

A somewhat blurry line between permissible and impermissible medical inquiries presents another challenge. Thus, while soliciting information about an individual's physical activity levels in conjunction with a wellness plan's gym membership should not run afoul of the ADA, inquiring about an employee's cholesterol level or BMI may well cross the line.

The ADA's mandate that employees with known disabilities must be reasonably accommodated raises additional issues. The ADA requires that an employer and an employee must engage in an interactive process when determining a reasonable accommodation. While HIPAA also requires employers to offer an alternative method of participating in the wellness program, it remains unclear whether offering such an alternative would also satisfy the ADA interactive process requirements.

## ADEA Issue

Under the ADEA, an employer may not make employment decisions (i.e., to hire, fire or promote) or otherwise discriminate against or in any manner deprive an individual of employment opportunities because of such individual's age. Although untested in the courts, employers should be aware that there is a conceivable argument that a wellness plan may have a disparate impact on older employees and, thus, violate the ADEA. For example, older employees who are required to achieve certain health-based thresholds (i.e., cholesterol level below 200 or BMI within an acceptable range) in order to receive the benefit under the wellness program may be able to advance a disparate impact theory based on the notion that older employees may not be able to achieve those milestones due to age.

## State Law Concerns

Employers may be prohibited from taking adverse employment actions against employees who engage in behavior, which albeit unhealthy, is nonetheless legal under state law. Smoker protection laws that remain on the books of 31 states and the District of Columbia offer a relevant example. While some employers are willing to take drastic measures when faced with escalating health care costs, employees would be well advised to sit tight and wait for additional guidance from the courts. Despite current legal uncertainty, an argument certainly exists that a wellness plan that requires an employee to quit smoking as a condition precedent to receiving a benefit may run afoul of such state laws.

## Additional Federal Law Hurdles: ERISA And HIPAA Privacy Considerations

ERISA may present an additional challenge in designing a wellness program. Many wellness programs offered in conjunction with employee benefit plans are governed by ERISA, which prohibits employers from interfering with the attainment of rights to which the employee may become entitled under the employer's plan.

It follows that an employee who is foreclosed from obtaining a benefit under an employer's wellness program may have a cause of action for interference with benefits under ERISA. In a case pending before the U.S. District Court for the District of Massachusetts (*Rodriguez v. E.G. Systems, Inc. d/b/a/ Scotts Lawn Service, C.A. 07-10104-GAO*), employee Rodriguez was terminated (and allegedly deprived of his right to benefits under the Scotts ERISA health plan) because he tested positive for nicotine in violation of Scotts' anti-nicotine policy. He alleged that his termination violated ERISA and state privacy laws because he smoked cigarettes only in private, off-duty and away from his workplace. While the outcome of Rodriguez' case is far from certain, it illustrates just how real the risk of litigation involving wellness initiatives may be.

## HIPAA Privacy Rule

Moreover, regardless of how an employee wellness program is structured, employers are wise to consider that program administration may involve receipt of "protected health information" (PHI) under the HIPAA Privacy Rule. An employer that has gone to great lengths to minimize receipt of PHI in regard to administration of its group health plan may now be in receipt of information that links an individual to his or her health information. Examples of PHI received in conjunction with a wellness program may include reports of cholesterol or other scores for named employees received in conjunction with diagnostic testing results. Thus, prior to embarking on a wellness initiative, employers are smart to consider what PHI may be received in conjunction with its proposed program and ways in which this PHI may be altered so that health information cannot be linked to a certain individual, or in the alternative, how PHI may be handled by a third-party administrator.

## Bottom Line

Although there are many moving legal parts to consider, an employee wellness program may well have the desired impact on your organization's financial bottom line. Advance planning, however, is key to mastering these legal considerations. Here are some important points that, in conjunction with the advice of legal counsel regarding an employer's specific situation, may help an employer navigate the many laws that impact employee wellness programs:

- Promote healthier life styles without requiring definite outcomes. Instead of penalizing employees who smoke by charging higher premiums, reimburse employees for participating in smoking cessation programs.

- If employees are asked to fill out a questionnaire in connection with participating in a wellness program, avoid questions that are likely to elicit information about a disability. Focus instead on questions designed to ascertain an employee's general attitude toward a healthy lifestyle.

- Make sure that all similarly situated employees are able to participate in your wellness program by offering reasonable alternatives to those who may not be able to participate in the program as it was originally designed.

- Limit receipt of HIPAA PHI. An employer may wish to retain a third-party administrator to develop and implement a wellness program suitable for the needs of its specific organization.

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