

Gavel to Gavel: Guidelines for wellness programs

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By Lauren Hanna

At the conclusion of *The Wall Street Journal's* 2011 CEO Council meeting, the CEO Council members listed its collective list of top priorities. High on the list of priorities for this year is for members to create workplace wellness programs for issues such as obesity, smoking, and disease prevention — emphasizing activity. Such wellness programs have risen in popularity over the past few years as employers have discovered that healthier employees are often more productive employees. Recent empirical studies agree, showing that the return on investment on corporate employee wellness programs can be as high as \$3 for every \$1 spent.



With so many potential benefits for both employers and employees, are there any potential legal pitfalls when an employer offers incentives (including monetary rewards) to its employees for participating in a wellness program?

Generally, the Americans with Disabilities Act restricts the ability of employers to elicit medical information from its employees and prohibits discrimination against people with disabilities. However, eliciting medical information is permitted as part of a voluntary wellness program. Equal Employment Opportunity Commission guidance and the Department of Labor have issued guidelines regarding what is necessary for an employee's participation to be considered truly voluntary. Any information regarding employees' medical history and current medical status elicited as a component to a voluntary wellness program must be maintained confidentially and apart from an employee's personal record.

Does offering incentives to employees cause corporate wellness programs to lose their voluntary status under the ADA?

In a recent discussion letter issued by Peggy Mastroianni, legal counsel for the EEOC, the commission indicated its general approval of wellness incentives, as long as certain steps are taken to ensure that a program complies with the ADA and the Genetic Information Nondiscrimination Act, or GINA.

The EEOC discussion letter said that an employer may ask for family/medical history (considered genetic information under GINA) in connection with a voluntary wellness program that offers wellness incentives if the employee completes a voluntary written authorization allowing the disclosure of such information.

It is critical to note that an employee's answers regarding his or her medical history may never be used by an employer as the basis for any adverse employment action taken against the employee.

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