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The Legal and Regulatory Landscape for Wellness Plans: The Affordable Care Act and Beyond

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The Patient Protection and Affordable Care Act (the ''Act'')[2] generally encourages employers to adopt wellness plans and programs in conjunction with their group health plans. Wellness plan vendors tout these arrangements with promises of reduced health care costs and a happier, healthier, more productive workforce. What gets left out of the promotional literature, however, is any sense of the legal and regulatory environment in which these plans operate. Employers seeking to adopt wellness plans encounter a number of roadblocks and speed traps on the way to destination wellness. In this article, we highlight these legal obstacles and offer some best practices to help employers traveling on the road to compliance.

THE AFFORDABLE CARE ACT'S WELLNESS LANDSCAPE

Title I of the Health Insurance Portability and Accountability Act of 1996 (HIPAA)[3] prohibits health plans from, among other things, charging different premiums to different individuals based on a ''health status-related factor'' such as health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability.[4] An exception to the general rule is provided for certain wellness programs that vary benefits and/or premiums based on a health factor. In 2006, the Departments of Health and Human Services, Labor and Treasury (the ''Departments'') published final regulations implementing the HIPAA nondiscrimination and wellness provisions.[5] These regulations generally divide wellness programs into two types: ''Participatory Wellness Programs,'' which do not require an individual to meet a standard related to a health factor in order to obtain a reward and are not considered discriminatory under HIPAA; and ''Health Contingent Wellness Programs,'' which do require individuals to satisfy a standard related to a health factor in order to obtain a reward and are considered discriminatory under HIPAA unless certain criteria are met, including a cap on the maximum award at 20% of the cost of coverage.[6] These two types of wellness programs are discussed in more detail below.

The Act generally adopts the nondiscrimination and wellness rules established by the 2006 final regula-

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[2] The Patient Protection and Affordable Care Act, P.L. 111-148, as amended by §1003 of the Health Care and Education Reconciliation Act of 2010, P.L. 111-152, and as further amended by the Department of Defense and Full-Year Continuing Appropriations Act, P.L. 112-10.

[3] P.L. 104-191.

[4] ERISA §702.

[5] 71 Fed. Reg. 75014 (12/13/06).

[6] DOL Regs. §2590.702.

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tions.[7] But while the 2006 final regulations specify 20% as the maximum permissible reward for participation in a health contingent wellness program, effective for plan years beginning on or after January 1, 2014, the Act increases the maximum reward to 30% and authorizes the Departments to increase the maximum reward to as much as 50% if the Departments determine that such an increase is appropriate.[8]

On November 26, 2012, the Departments issued a notice of proposed rulemaking.[9] Consistent with both the 2006 final regulations and subsequent subregulatory guidance,[10] the proposed regulations generally divide wellness plans into two categories:

Participatory Wellness Programs. As noted above, these programs do not require participants to attain any sort of health standard in order to achieve an award. In general, participatory programs require limited administration, are not intrusive, and as a result come with less legal risk. Examples of participatory wellness programs are:

- Fitness center reimbursements or discounts;
- Awards for taking a diagnostic test, so long as the award is not varied based on outcome;
- Copayment waivers for well-baby visits;
- Reimbursement for a smoking cessation program, regardless of whether an employee quits smoking;
- An award to employees who attend a monthly health seminar; and
- A program that provides a reward to employees who complete a health risk assessment regarding current health status, without any further action (educational or otherwise) required by the employee with regard to the health issues identified as part of the assessment.[11]

Both the 2006 final regulations and the 2012 proposed regulations provide that Participatory Wellness Programs do not violate HIPAA's nondiscrimination rules where they are made available to all similarly situated individuals.

Health Contingent Wellness Programs. These programs do require that participants attain a health standard in order to receive the award (or avoid a penalty). A key example is a medical plan that charges higher premiums to employees who smoke, are overweight, or have high cholesterol levels. These plans are more administratively onerous and can expose employers to greater risk of legal liability and/or employee dissatisfaction.

With respect to Health Contingent Wellness Programs, however, both the 2006 final regulations and the 2012 proposed regulations mandate that five requirements be met in order for the program to be considered nondiscriminatory:[12]

1. Amount. Under the 2006 final regulations, the reward could not exceed 20% of the total cost of coverage (i.e., accounting for both employee and employer costs) under the plan.[13] Effective January 2, 2014, the maximum reward cannot exceed 50% of the total cost of coverage for programs geared towards reducing tobacco use, and 30% for other programs.[14] It is currently unclear how these limits interact with the Act's employer mandate.[15] Affordability is determined based on the self-only premium for the employer's lowest cost coverage.[16] But if an employee qualifies for a wellness discount, is ''affordability'' determined based on the reduced premium?

2. Reasonable Design. Under both sets of regulations, the program must be reasonably designed to promote health or prevent disease. The 2012 proposed regulations clarify that the ''reasonable design'' determination is based on all of the facts and circumstances. Further, to the extent the initial standard for obtaining a reward is based on the results of a measurement or screening (such as a biometric or risk assessment), the plan must make available to anyone whose results do not meet the standard a different, reasonable means of qualifying for the reward.[17]

3. Frequency. Both sets of regulations require that the program give eligible individuals the opportunity to qualify for the reward at least once a year.[18]

4. Reasonable Alternative Standard. Both sets of regulations provide that the program must offer a ''reasonable alternative standard'' for obtaining the reward, or waiver of the standard, to anyone for whom, for a particular period, the standard is unreasonably difficult due to a medical condition, or medically inadvisable.[19]

The 2012 proposed regulations provide the following additions and clarifications to the ''reasonable alternative standard rule:''

- If the plan determines that the ''reasonable alternative standard'' is the completion of an educational program, the plan must itself make the pro-

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[7] P.L. 111-148, §1201, codified at Public Health Service Act §2705(j).

[8] *Id.*

[9] 77 Fed. Reg. 70620 (11/26/12).

[10] FAQs About Affordable Care Act Implementation Part V and Mental Health Parity Implementation, U.S. Department of Labor, Employee Benefits Security Administration, December 22, 2010.

[11] DOL Regs. §2590.702(f)(1); DOL Prop. Regs. §2590.702(f)(1).

[12] DOL Regs. §2590.702(f)(2); DOL Prop. Regs. §2590.702(f)(3).

[13] DOL Regs. §2590.702(f)(2)(i).

[14] DOL Prop. Regs. §2590.702(f)(3)(ii).

[15] Code §4980H.

[16] *See* Treas. Prop. Regs. §54.4980H-5(e).

[17] DOL Regs. §2590.702(f)(2)(ii); DOL Prop. Regs. §2590.702(f)(3)(iv).

[18] DOL Regs. §2590.702(f)(2)(iii); DOL Prop. Regs. §2590.702(f)(3)(i).

[19] DOL Regs. §2590.702(f)(2)(iv); DOL Prop. Regs. §2590.702(f)(3)(iii).

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gram available (rather than requiring the participant to find the program) and must bear the cost of the program.

- With respect to diet programs, plans must pay for the membership or participation fee, but need not cover the costs of food.
- If the plan's agent recommends a program that a participant's personal physician states is not medically appropriate for the participant, the plan must provide another program that accommodates such physician's recommendations; however, the plan may impose standard cost sharing under the plan for medical items and services furnished pursuant to the physician's recommendations.[20]

Both sets of regulations also provide that the plan is allowed to seek verification, such as a doctor's note, that the standard is unreasonably difficult due to a medical condition, or medically inadvisable. The 2012 proposed regulations add that it would not be reasonable for the plan to seek verification of a claim that is obviously valid.[21]

5. Disclosure. The means of qualifying for the award as well as the ''reasonable alternative standard'' must be disclosed in all plan materials describing the terms of the wellness program. The disclosure rules are similar in both the 2006 final regulations and 2012 proposed regulations, and each regulation offers safe harbor disclosure language.[22]

LEGAL COMPLIANCE BEYOND THE AFFORDABLE CARE ACT

On the whole, everybody wins when wellness programs are designed thoughtfully, implemented carefully, and administered effectively. The winners are less readily identifiable, however, when wellness plans hit unexpected speed bumps, especially on the legal front. Many types of wellness plans and programs trigger a battery of legal obligations, such as the Employee Retirement Income Security Act (ERISA),[23] the Health Insurance Portability and Accountability Act (HIPAA),[24] the continuation coverage requirements under the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA),[25] the Americans with Disabilities Act (ADA),[26] the Genetic Information Nondiscrimination Act of 2008 (GINA),[27] and other federal and state laws prohibiting discrimination.

ERISA — General

If a wellness plan is subject to ERISA, then the employer sponsoring the plan must meet a number of legal obligations. Among other things, the plan must have a plan document in place, file annual reports under Form 5500, provide employees with a ''summary plan description'' and a ''summary annual report,'' and make a reasonable claims procedure available to plan participants who are denied benefits.

''Employee benefit plans'' subject to ERISA include ''employee pension benefit plans'' and ''employee welfare benefit plans.'' ERISA §3(1) defines ''employee welfare benefit plan'' and ''welfare plan'' as ''any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in [section 302(c) of the Labor Management Relations Act, 1947] (other than pensions on retirement or death, and insurance to provide such pensions).''

Exemptions are narrow and few. On-site recreation and dining facilities, and facilities for the treatment of minor injuries or illnesses or first aid, are generally not considered to be ERISA plans.[28] A program that requires no ''administrative scheme'' and under which the employer ''assumes no responsibility to pay benefits on a regular basis'' would also not be an ERISA plan.[29]

Many wellness benefits are offered in connection with an employer's major medical plan (as, e.g., a premium discount). Given that the underlying medical plan is subject to ERISA, the wellness benefit is also subject to ERISA, but need not separately comply with ERISA. With respect to wellness benefits offered as separate arrangements, however, employers will need to carefully analyze the program and consult with counsel in order to determine whether the benefits are subject to ERISA.

ERISA — Section 7 Group Health Plan Mandates

Assuming that a wellness benefit is subject to ERISA, an employer next must determine whether the

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[20] DOL Prop. Regs. §2590.702(f)(3)(iii).

[21] DOL Regs. §2590.702(f)(2)(iv); DOL Prop. Regs. §2590.702(f)(3)(iii).

[22] DOL Regs. §2590.702(f)(2)(v); DOL Prop. Regs. §2590.702(f)(3)(v).

[23] P.L. 93-406.

[24] P.L. 104-191.

[25] P.L. 99-272.

[26] P.L. 101-336.

[27] P.L. 110-233.

[28] DOL Regs. §2510.3-1(c)(2).

[29] *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S. Ct. 2211 (1989).

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plan is also subject to ERISA Title I, Subtitle B, Section 7. This section sets out a number of requirements and standards that must be met by a group health plan, including the HIPAA nondiscrimination requirements described above as well as a number of the Act's ''insurance market reform'' rules, including coverage of certain dependents through age 26, elimination of annual and lifetime limits, enhanced claims procedures, and summary of benefits coverage requirements.[30]

''Group Health Plan'' is defined for these purposes as an employee welfare benefit plan to the extent that the plan provides medical care, including items and services paid for as medical care, to employees or their dependents (as defined under the terms of the plan) directly or through insurance, reimbursement, or otherwise.[31] ''Medical care'' is defined in ERISA §733(a)(2) to mean amounts paid for (A) the diagnosis, cure, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body, (B) amounts paid for transportation primarily for and essential to medical care referred to in subparagraph A, and (C) amounts paid for insurance covering medical care referred to in subparagraphs A and B.

Certain ''excepted benefits'' are explicitly excluded from these group health plan requirements, including coverage for on-site medical clinics.[32] But these exceptions are narrow and do not explicitly except wellness plans. The lack of a wellness plan exception is not entirely logical and can lead to some bizarre results, such as the requirement that a wellness plan prepare and distribute a summary of benefits and coverage[33] or provide external review of claims.[34] But unless and until an exception is provided, employers will need to carefully consider whether a wellness program is subject to ERISA Title I, Subtitle B, §7 and if so, comply with these rules.

COBRA

Plans subject to COBRA generally are required to provide plan participants with continuation coverage upon a qualifying event such as termination of employment. A plan sponsor must also meet the administrative requirements of COBRA, such as notice and open enrollment requirements.

A plan is generally subject to COBRA if it provides ''medical care,'' defined in the Code as ''amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.''[35]

The COBRA regulations exempt on-site first aid clinics,[36] and further provide:

> Health care does not include anything that is merely beneficial to the general health of an individual, such as a vacation. Thus, if an employer or employee organization maintains a program that furthers general good health, but the program does not relate to the relief or alleviation of health or medical problems and is generally accessible to and used by employees without regard to their physical condition or state of health, that program is not considered a program that provides health care and so is not a group health plan. For example, if an employer maintains a spa, swimming pool, gymnasium, or other exercise/fitness program or facility that is normally accessible to and used by employees for reasons other than relief of health or medical problems, such a facility does not constitute a program that provides health care and thus is not a group health plan subject to ERISA. In contrast, if an employer maintains a drug or alcohol treatment program or a health clinic, or any other facility or program that is intended to relieve or alleviate a physical condition or health problem, the facility or program is considered to be the provision of health care and is considered a group health plan.[37]

Many wellness benefits indeed purport to diagnose, cure, mitigate, treat, or prevent disease, and would therefore be, at first blush, subject to COBRA. However, wellness benefits that merely ''further general good health'' and do not ''relate to the relief or alleviation of health or medical problems'' and are ''generally accessible to and used by employees without regard to their physical condition or state of health'' may be exempt from COBRA. Employers are urged to consult with counsel in order to determine whether a wellness program is subject to COBRA.

Protecting Employees' Rights to Medical Privacy

Wellness program components that require and/or elicit information about an employee's medical history, such as health risk assessments (blood pressure screening, cholesterol testing, glaucoma testing, and cancer detection screening, measuring waist circumference, etc.), create important responsibilities for employers.

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[30] The Affordable Care Act adds §715(a)(1) to ERISA and §9815(a)(1) into the Tax Code in order to incorporate the provisions of Part A of Title XXVII of the Public Health Service Act (PHSA) into ERISA and the Code.

[31] ERISA §733(a)(1).

[32] ERISA §733(c)(1)(G).

[33] PHSA §2715.

[34] PHSA §2719(b).

[35] Code §213(d).

[36] Treas. Regs. §54.4980B-2, Q&A-1(d).

[37] Treas. Regs. §54.4980B-2, Q&A-1(c).

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The ADA

Generally, the ADA prohibits involuntary medical examinations or disability-related inquiries unless justified by job relatedness and business necessity.[38] As part of an employee wellness program, as an exception, the ADA allows employers to conduct voluntary medical examinations and activities, including obtaining information from voluntary medical histories, as long as any medical information acquired as part of the program is kept confidential and separate from personnel records. But, what makes a wellness program ''voluntary?'' Under guidance from the Equal Employment Opportunity Commission (EEOC), a wellness program is ''voluntary'' when the employer neither requires participation nor penalizes employees who do not participate.[39] To date, the EEOC has not taken a position on whether, and to what extent, the ADA permits an employer to offer financial incentives for employees to participate in wellness programs that include disability-related inquiries (such as questions about current health status asked as part of a health risk assessment) or medical examinations (such as blood pressure and cholesterol screening to determine whether an employee has achieved certain health outcomes).

Employers that do not want to meet this definition of ''voluntary,'' however, may have an alternative means of ADA compliance under an August 2012 decision by the Eleventh Circuit, *Seff v. Broward County*.[40] In that case, the Court found that Broward County's $20-per-pay-period surcharge on health plan premiums for those who did not participate in its wellness program — although it did not meet the ''voluntary'' standard because it imposed a penalty — was legal because the wellness program met the ADA safe harbor for bona fide benefit plans.[41]

GINA

While GINA generally prohibits covered employers from requesting, requiring, or purchasing genetic information, it contains an exception allowing employers to acquire genetic information about an employee or his or her family members when participating in wellness programs on a voluntary basis.[42] The employer must ensure, however, that: (1) the participating employee gives prior voluntary, knowing, and written authorization; (2) any genetic information provided to the employer is in aggregate form only; and (3) the employee is not offered financial inducements to provide genetic information as part of a wellness program.[43]

HIPAA Privacy

The HIPAA Privacy Rule requires appropriate safeguards to protect the privacy of personal health information and sets limits and conditions on the uses and disclosures that may be made of such information without the individual's authorization.[44] If an employer's wellness program qualifies as a ''group health plan'' under ERISA, the employer must comply with HIPAA privacy standards requiring ''adequate separation between the health plan and the employer.'' As a result, any medical information (referred to as ''private health information'') received through the wellness program(s) cannot be shared with the employer, except in summary form pursuant to applicable regulations.[45] The good news is that compliance with HIPAA decreases the possibility that knowledge of an employee's medical condition will be imputed to the employer for purposes of the ADA or analogous statutes.

In light of these statutory requirements for protecting and segregating employees' medical information, prior to instituting a wellness initiative, employers should: (1) anticipate the nature of medical information that it may receive in conjunction with its proposed program; (2) set up appropriate safeguards and segregation strategies to ensure that this information is not impermissibly stored and/or disclosed; and (3) evaluate appropriate means by which such health information may be aggregated so it cannot be linked to individual participants. As an alternative, if an employer anticipates that its wellness program will elicit more medical information than it is comfortable with protecting, a third-party administrator can be engaged to administer the wellness program.

Avoiding Exposure to Discrimination Claims

Applicable statutes also protect employees from discrimination based on their medical conditions and/or genetic information.

On several levels, compliance with anti-discrimination laws poses one of the more significant legal hurdles for wellness programs. In addition to limiting the circumstances in which an employer may require physical exams or answers to questions about employee medical conditions, the ADA prohibits employment discrimination on the basis of disability and requires that employers make reasonable accommodation to the known physical or mental limitations of otherwise qualified individuals with disabilities.[46] Similarly, GINA forbids discrimination, harassment,

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[38] 42 USC §12112(d); EEOC Regs. §§1630.13, 1630.14.

[39] EEOC, *Enforcement Guidance: Disability-related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act*, available at www.eeoc.gov.

[40] 691 F.3d 1221 (11th Cir. 2012).

[41] *Id.* at 1223–24.

[42] 42 USC §2000ff-1.

[43] EEOC Regs. §1635.8(b)(2).

[44] 45 CFR §160.103.

[45] 45 CFR §164.504(f).

[46] 42 USC §12112(a); *see also* 42 USC §12111(2), (5), & (7)

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and/or retaliation on the basis of genetic information when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment.[47] As such, employers must be vigilant in avoiding any perception that the wellness program is being used to ferret out information about employees' medical conditions and genetic information or that such information is being used against the employees in the terms and conditions of their employment.

For example, what if an employee's particular medical condition or genetic information is revealed through his or her participation in a wellness program — perhaps through a doctor's note obtained in seeking a reasonable alternative standard for a Health Contingent Wellness Program — and shortly thereafter his or employment is terminated for job performance? Even if the adverse employment action had no connection to the revealed medical condition, the temporal link between the employer's knowledge of such condition and the termination could certainly pose a challenge for the employer in defending its decision.

In addition, wellness programs may implicate an employer's duty to provide reasonable accommodations under the ADA. Because the ADA prohibits covered employers from denying qualified individuals with disabilities an equal opportunity to participate in, or receive benefits under, programs or activities conducted by those employers, employers should provide reasonable accommodations for employees with disabilities to participate.[48] Also, one can imagine a situation where an employee mistakenly believes that, because he or she revealed a qualifying disability under the wellness program, his or her employer has been put on notice of such disability and, therefore, has a duty to provide a reasonable accommodation.

Employers can avoid such predicaments by: (1) communicating clearly to employees that their medical information will be used only for the purposes of the wellness program; (2) training managers on the legal implications of such wellness programs; and (3) ensuring that any genetic information is only received by the employer in the aggregate, so as not to identify the health status of particular employees.

In addition, other non-discrimination statutes such as the Age Discrimination in Employment Act of 1967 (ADEA),[49] Title VII of the Civil Rights Act of 1964 (Title VII),[50] and various state laws may also be implicated by wellness programs. In particular, employers must be careful to ensure that wellness programs do not have a disparate impact on older workers (such as a requirement that participants meet some physical fitness challenge) and groups protected under Title VII. At a minimum, any health standards in mandatory wellness programs should be adjusted for differences in age and gender. Also, employers should consider whether any program goals are more easily attained by employees of one race or gender than of another.

Finally, as discussed above, employers must ensure that any Health Contingent Wellness Programs do not violate HIPAA's Nondiscrimination Rules, which prohibit discrimination based on health factors. Moreover, the 2006 final regulations clarified that an employer's efforts to comply with HIPAA's Nondiscrimination Rules do not exempt the employer or its wellness program from compliance with other federal or state laws (such as the ADA).[51]

Be Aware of Wage & Hour and Labor Law Concerns

Employers with employees protected by the Fair Labor Standards Act (FLSA),[52] and/or the National Labor Relations Act (NLRA)[53] should heed these laws when designing and administering wellness programs.

Under the FLSA, employers do not have to compensate non-exempt employees for time spent in connection with a wellness program if: (1) attendance is outside of the employee's regular working hours; (2) attendance is voluntary; (3) the activity is not directly related to the employee's job; and (4) the employee does not perform any actual work during such attendance.[54] To avoid disputes over whether attendance at such activities is required, employers should be sure to clearly communicate to employees that attendance and participation are voluntary. Employers should also be cognizant of the danger of wellness program penalties being interpreted as unlawful deductions from wages.

Those employers with union employees know that ''wages, hours, and other terms and conditions of employment'' are mandatory subjects of collective bargaining under the NLRA.[55] These employers may overlook, however, the possibility that their wellness programs may mandate bargaining if they fall under a provision of the applicable collective bargaining agreement (such as health insurance premiums) and/or amount to a term or condition of employment.

(defining ''covered entity,'' ''employer,'' and ''person,'' respectively).

[47] 42 USC §2000ff-1(a)(1).

[48] In a January 18, 2003 informal discussion letter, EEOC Legal Counsel Peggy Mastroianni wrote ''[i]f a wellness program is voluntary and an employer requires participants to meet certain health outcomes or to engage in certain activities in order to remain in the program or to earn rewards, it must provide reasonable accommodations, absent undue hardship, to those individuals who are unable to meet the outcomes or engage in specific activities due to disability,'' citing 42 USC §12112(b)(5)(A), EEOC Regs. §1630.9(a), and EEOC Regs. §1630.2(o)(1)(iii). Although this letter did not constitute an official opinion of the EEOC, employers are certainly advised to heed its guidance.

[49] P.L. 90-202.

[50] P.L. 88-352.

[51] DOL Regs. §2590.702(h).

[52] P.L. 75-718.

[53] P.L. 74-198.

[54] 29 CFR §785.27.

[55] 29 USC §158(d).

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State Laws Also Pose Challenges to Wellness Programs

Employers should also be aware of state laws prohibiting discrimination, which often afford greater protection to employees than their federal law equivalents. For example, many states have laws protecting the off-duty conduct of employees, such as smoking and tobacco use. In addition, states have their own laws governing wage and hour issues and employee privacy that should be taken into account.

Consumer Driven Health Care

More and more employers are considering high deductible health plans (HDHPs), coupled with health savings accounts (HSAs), as a lower-cost way to provide health insurance to employees. But an employee cannot make or receive tax-free HSA contributions if he or she is covered under any plan other than an HDHP plan.[56] Will participation in an employer's wellness program render an employee ineligible for HSA contributions?

Generally, no. The IRS has stated that an individual will remain HSA eligible if he or she participates in arrangements that ''do not provide significant benefits in the nature of medical care'' including certain disease management and wellness programs.[57] So long as the employer's wellness programs meet certain IRS requirements, HSA eligibility remains secure.

W-2 Reporting

The Affordable Care Act requires that employers report the cost of employer-sponsored group health coverage on Form W-2. Must the cost of a wellness program be included in this cost? The IRS has stated that coverage provided under a wellness program should be reported only if: (1) it is subject to COBRA; and (2) the employer charges a premium for the COBRA coverage.[58]

IS WELLNESS WORTH IT?

Wellness plans promise much: reduced health care costs and a happier, healthier, more productive workforce. But do they deliver? Is the potential payoff worth wading through this legal shark tank?

Recently, RAND Health analyzed 33 peer reviewed publications reviewing wellness programs and found that workplace wellness programs appear to positively impact diet, exercise, smoking, alcohol use and certain physiologic markers as well as reduce health care costs.[59] However, RAND Health could not determine ''whether and to what degree the intensity of a wellness program influences its impact.''[60] Further, the authors noted that, of the thousands of wellness programs currently in operation in the United States, very few had undergone any sort of rigorous evaluation, and that studies with better results were more likely to be published.[61]

Similarly, in a recent study published in *Health Affairs*, the authors found mixed evidence that health care costs were higher for employees with health conditions than for those without, and little evidence that financial incentives are apt to change behavior in working-age individuals.[62]

While we do not purport to perform a RAND- or Health Affairs-caliber meta-analysis here, from these studies we surmise that the jury is still out as far as health improvement and cost savings are concerned. And even if there were a solid empirical case for improved health and reduced health care costs, employers should not lose sight of the administrative costs involved with implementing and maintaining such a program (such as personnel time, vendor fees, legal review, paperwork, and employee communications).

In some cases, employers who are struggling to determine whether the administrative and legal hassles are worth it may seek relief in the form of government assistance. Massachusetts, for example, established a wellness tax credit program effective January 1, 2013, intended to provide small businesses with the opportunity to implement wellness programs.[63] Ohio has established a workplace wellness grant program.[64] The Act promises the establishment of a grant program whereby employers with fewer than 100 employees working 25 hours per week and no workplace wellness program as of March 23, 2010 may receive funding to set up workplace wellness programs.[65]

BEST PRACTICES

Against this legal backdrop, employers interested in implementing wellness programs need to think about their specific goals for having such programs and assess how ambitious they want to be in accomplishing such goals. In addition to making sure the legal bases are covered, employers should not lose sight of the morale and culture issues at play. If a wellness program is received kindly by the workforce, the employer will be better insulated from legal complications or disputes. On the other hand, even if a program is legally airtight, an overly invasive and poorly

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[56] Code §223(c)(1).

[57] Notice 2004-50, 2004-32 I.R.B. 196.

[58] Notice 2012-9, 2012-4 I.R.B. 315.

[59] Mattke, Schyner, and Van Buren, *A Review of the U.S. Workplace Wellness Market*, Feb. 2012. This report can be found at http://www.dol.gov/ebsa/pdf/workplacewellnessmarketreview2012.pdf.

[60] *Id.*

[61] *Id.*

[62] Horwitz, Kelly, and DiNardo, ''Wellness Incentives in the Workplace: Cost Savings Through Cost-Shifting to Unhealthy Workers,'' *Health Affairs*, Mar. 2013.

[63] Mass. G.L. Ch. 62, sec. 6N and Mass. G.L. Ch. 63, sec. 38FF, established as part of the Act Improving the Quality of Healthcare and Reducing Costs through Increased Transparency, Efficiency and Innovation, S. 2400 (Aug. 6, 2012).

[64] OAC 4123-17-56.1.

[65] Act §10408.

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communicated program could easily alienate valuable employees. To that end, employers should consider the following guidelines when designing and implementing their wellness programs:

- **Be goal-oriented:** Carefully consider and decide the program's goals, keeping in mind the workforce's continuum of health status/risk and collective temperament. Evaluate the resources necessary to run the program and the methods by which goal achievement will be assessed (such as analysis of aggregate data) and improved upon. Track these goals and make sure that particular subsets of employees are not being under-rewarded, over-penalized, or otherwise disparately impacted.
- **Go slowly:** Employers should avoid being over-ambitious about a wellness program's scale and impact. One way to do so is to start small and gradually build and implement the program. Especially with Health Contingent Wellness Programs, be sure that the planning and implementation stages are not rushed.
- **Get managers on board:** Encourage the participation of company leaders and managers — they will be the best ambassadors for the program. Be sure to train managers on the legal implications of these wellness programs, especially with regard to privacy and discrimination laws.
- **Focus on the carrots:** In communications to employees, frame the wellness program in a positive and encouraging light. Focus on promoting wellness rather than health outcomes, and emphasize the benefits of participation.
- **Watch out for the sticks:** If a wellness program involves penalties — actual or perceived — be sure that employees are fully informed about the program's requirements and alternatives. Also, carrots can turn into sticks if the benefit is so lucrative that an employee feels like not achieving it will effectively be a penalty.
- **Respect employees' privacy concerns:** Be clear up-front that the employees' health information will be kept confidential and set up strict procedures by which this confidentiality will be maintained. Employers can opt to have a third party run the wellness program, which lessens the employer's burden and decreases the risk of the perception that any employment decisions were based on an employee's private medical information.
- **Listen to feedback:** Encourage and solicit feedback from participants and non-participants, and be open to making changes.
- **Consult with counsel:** Review your wellness program design with your attorneys to make sure that all legal requirements are addressed.
- **Assess often:** Periodically review your programs and monitor vendors for efficiency and results. Keep an eye on empirical research to determine which types of programs are likely to have the best results.

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