

## Take a Close Look at Your Wellness Program

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[April A. Goff](#)

About 70% of employers offer wellness programs, according to *The Wall Street Journal*. Of those, 64% offer incentives for participation, including cash, gift cards or group health plan premium discounts. Open enrollment season may be the prime time to take a close look at what your company is doing with respect to wellness programs. In addition to increasing the health of employees (and thereby limiting medical costs), there are other positive, though less tangible, returns, which include better workforce morale and lower absenteeism.

Most wellness programs offer some mix of the following options:

- Risk identification tools such as detailed health risk assessments and biometric screenings for body mass index, blood pressure and cholesterol levels
- Behavior modification programs including group or personalized health coaching, tobacco cessation, weight loss/management, nutrition and diet, exercise and workplace competitions/contests
- Educational programs such as employer-sponsored health fairs and seminars and online health and dietary resources
- Changes at the workplace that encourage healthier living such as providing different food options in the cafeteria and vending machines and reconfiguring workspaces to encourage employees to walk more or take the stairs

Wellness programs may be run in-house or through third-party vendors. Regardless of the structure, the programs are unlikely to provide a return on your investment unless they are effectively communicated to employees and become a part of your company's culture. There are many statutory schemes that overlap when it comes to wellness programs, and we encourage you to consult with counsel on this issue.

### **A Boost from Health Care Reform**

The Patient Protection and Affordable Care Act (PPACA), commonly referred to as health care reform, encourages employers to develop wellness programs. One of its most notable provisions is mandated coverage of certain preventive services for non-grandfathered group health plans. Under these rules, required preventive services must be provided to participants without co-payments or deductibles. This overlaps with the benefits offered by many traditional wellness programs. PPACA also increases the maximum incentives employers may offer those who meet certain targets in wellness programs from 20% up to 30% in 2014. PPACA also sets aside \$200 million in grants over five years for small companies to start wellness programs.

If you intend for your group health plan to be grandfathered under health care reform, we caution that you carefully review whether changes to your wellness incentives may jeopardize that status. Changes that cause an increase in employee cost or significantly reduce benefits may cause your plan to lose grandfathered status. For example, if your plan previously imposed a 10% tobacco-use surcharge on participants, and you increase that penalty to 20%, the change would cause your plan to lose grandfathered status. Also, if your wellness program bases a reward on the satisfaction of a standard related to a health factor, your program must meet additional requirements.

## **GINA**

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits plans and insurers from requesting or requiring that an individual undergo a "genetic test" prior to or in connection with enrollment in a group health plan. Most biometric screening used in conjunction with a wellness program does not fall within the term, as defined.

GINA also prohibits a group health plan sponsor from requesting an individual's "genetic information" in connection with or prior to enrollment in the plan. "Genetic information" includes the results of genetic tests, but also may be any information regarding the "manifestation of a disease or disorder in an individual's family members." In plain terms, that means the plan can't ask any questions about a family's health history, such as whether anyone has diabetes, heart disease or certain cancers.

If your wellness program uses biometric screening or a health risk assessment, we should discuss whether additional steps are necessary to ensure compliance with the law. Additionally, if you administer your own wellness program, we should discuss the additional safeguards necessary under GINA.

Employers who offer financial incentives to encourage higher employee participation may inadvertently run afoul of the Americans with Disabilities Act (ADA) if participation is not deemed to be "voluntary." Proposed regulations state that a wellness program is voluntary as long as an employer does not require participation and does not penalize nonparticipating employees. The Equal Employment Opportunity Commission (EEOC) has requested comments regarding this issue, but has not yet issued final regulations. We caution that the EEOC issued two informal discussion letters on the topic last year that discourage the use of monetary incentives. With creative structuring, however, you can still provide participants with incentives to participate.

## **Conclusion**

To ensure that your wellness program is legally compliant and is reaching your specific goals, please consult with legal counsel. Any of the Employee Benefits attorneys at Warner Norcross & Judd will be happy to assist you in developing a strategic plan, including structuring or revamping programs, developing effective communications and monitoring progress.