



Workplace Wellness: Potential Legal Issues Associated with Workplace Wellness Plans

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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)¹, the Health Insurance Portability and Accountability Act (HIPAA)² 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 counsel review their wellness programs before they are rolled out to their employees.

Nothing in the ADA prohibits employers from implementing wellness programs that are geared toward promoting good health and disease prevention. The ADA, however, prohibits 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. 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 inquiries 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 guidelines³, 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.

HIPAA prohibits using a health factor (health status, physical and mental medical conditions, claims experience, receipt of health care, medical history, genetic information, evidence of insurability or disability) as a basis of discrimination with regard to either eligibility to enroll or premium contributions under a group health plan. Therefore, an employer cannot require an individual to pay a higher premium based on any health-status 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 are:

- 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 co-payment 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; and
- 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:

1. The total reward for the plan's wellness programs that require satisfaction of a standard related to a health factor 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. (increase to 30% effective for plan years beginning on or after January 1, 2014);
2. The program must be reasonably designed to promote health and prevent disease.
3. 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.
4. 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.
5. The plan must disclose in all materials describing the terms of the program the availability of a reasonable alternative standard or the possibility of a waiver of the initial standard.

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 the amount of an individual's reward are permitted under HIPAA's nondiscrimination provisions. Those programs are not subject to the five requirements for wellness programs that require satisfaction of a standard related to a health factor.

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 their advantages. 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 rolling it out. Despite these risks, a well-designed wellness program can result in benefits to both employees and employers.

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¹ 42 U.S.C. §§ 12101 and 12112.

² ERISA §§ 702(a) and (b)

³ Equal Employment Opportunity Commission, "Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees, at Q. 22 (2000).