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The Keys to a Healthy Corporate Wellness Program

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As employers and lawmakers seek creative solutions to rising health-care costs, corporate wellness programs have exploded in popularity. Many employers have embraced corporate wellness programs as a means of controlling health-care costs, promoting a healthier lifestyle, and reducing the productivity losses that result from preventable, chronic health problems in the workforce. While corporate wellness programs can take many different forms, the one constant is that employers must carefully consider a variety of statutes, regulations, and practical issues before implementing a successful wellness program. While employers and employees alike can benefit from a well-designed program, companies should be aware of and address these concerns as a part of the implementation or modification of a corporate wellness program.

What Is a Corporate Wellness Program?

Corporate wellness programs can take many different forms, but the term generally encompasses any workplace activity or policy designed to encourage healthy behavior and improve health outcomes. Health Insurance Portability and Accountability Act (HIPAA) regulations promulgated in 2006 divided the programs into two general categories: participatory wellness programs and health-contingent wellness programs.

Participatory wellness programs either link rewards to a health-related standard or offer no rewards at all. For instance, some employers provide fitness-center reimbursement programs, diagnostic-testing programs (assuming they do not base a reward on test outcomes), reimbursement for participating in smoking-cessation programs (regardless of whether the employee actually quits smoking), or programs that offer rewards for attending a free health education seminar. Most current wellness programs fall into this category.

Health-contingent wellness programs, on the other hand, require participating individuals to meet a health-related standard to obtain a reward. Typically, these programs require participants to achieve or maintain a designated health outcome (such as smoking cessation, attaining biometric benchmarks, or meeting exercise targets).

While both types of wellness programs are available to employers, health-contingent wellness programs create more complicated compliance issues. Not surprisingly, they are also more controversial. During the debate over the passage of the Patient Protection and Affordable Care Act (PPACA), Safeway CEO Steven Burd emerged as one of the most vocal proponents of incentive-based corporate wellness programs. He publically trumpeted the success of Safeway's Healthy Measures program—a health-contingent wellness program that offered reduced premiums to employees who passed tests focused on tobacco usage, healthy weight, blood pressure, and cholesterol levels. In a *Wall Street Journal* op-ed published on June 12, 2009, Burd

suggested, "if the nation had adopted our approach in 2005, the nation's direct health-care bill would be $550 billion less than it is today." As a result of the efforts of Burd and other business leaders, the so-called Safeway Amendment to the PPACA expanded the existing incentive limits for corporate wellness programs.

Safeway is hardly the only large employer to implement such a policy. According to the 2012 RAND Health survey sponsored by the U.S. Department of Labor and the U.S. Department of Health and Human Services, 92 percent of employers with 200 or more employees reported offering some form of wellness program in 2009. In a 2011 Kaiser survey, 65 percent of respondents that offered wellness programs stated that these programs improved employee health, and 53 percent believed that they reduced costs.

CVS Pharmacy recently drew attention for implementing a program requiring its employees to submit their weight, body-fat levels, blood-glucose levels, and other biometric measures to their insurance company. Employees who fail to participate will be charged $50 per month. Despite the outcry from some employees and privacy advocates, the CVS program is substantially similar to Safeway's wellness program. The only meaningful difference is that Safeway encourages participation through a reduced premium, rather than a surcharge. From a purely economic perspective, however, the result is the same: Employees are offered a financial incentive to participate in the programs. Nonetheless, the CVS controversy illustrates the psychological difference between framing an incentive as a reward and framing it as a penalty.

The Patient Protection and Affordable Care Act of 2010

When President Obama signed The Patient Protection and Affordable Care Act of 2010, much of the controversy and attention focused on the individual mandate, health-insurance exchanges, and the provisions governing pre-existing conditions. Lost in the torrent of coverage, however, were some less drastic but nonetheless impactful changes to the laws governing corporate wellness programs.

Compared to some of the more publicized provisions of the PPACA, the changes to the federal laws governing corporate wellness programs are relatively minor. They do, however, create greater incentives for employers considering implementing a wellness program. Though the framework established by the 2006 HIPAA regulations was largely left intact, the PPACA clarifies some of the ambiguities in the HIPAA regulations and expands the maximum allowable awards for health-contingent wellness programs.

In November 2012, the governing agencies published proposed rules for the PPACA's wellness-program provisions. The proposed rules retain the distinction between "participatory wellness programs" and "health-contingent wellness programs." Participatory wellness programs are permissible as long as they are available to all similarly situated individuals. Health-contingent wellness programs, on the other hand, must satisfy five requirements.

First, eligible individuals must have the opportunity to qualify for the reward at least once per year. The once-per-year requirement is a bright-line standard that had previously been established in the 2006 HIPAA regulations.

Second, the maximum reward offered to participants may not exceed 30 percent of the total cost of coverage. For programs designed to prevent or reduce tobacco use, the maximum reward may not exceed 50 percent. Under the 2006 regulations, the maximum reward was capped at 20 percent of the total cost of coverage. The PPACA granted the agencies responsible for enforcement the power to set the maximum reward as high as 50 percent, but the proposed rules settled on a less dramatic increase. It is possible, however, that the final regulations or future revisions could set a higher reward up to 50 percent for all health-contingent wellness programs. It's worth noting that few currently existing health-contingent wellness programs approach the pre-PPACA 20 percent limit on rewards. In fact, the typical range of rewards is 3 to 11 percent. Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 77 Fed. Reg. 70619 (proposed Nov. 26, 2012). Consequently, increasing the reward percentage cap is not likely to have a dramatic short-term impact on most plans.

Third, the reward must be available to all similarly situated individuals. For any individuals for whom it is unreasonably difficult or for whom it is medically inadvisable to attempt to satisfy the otherwise applicable standard, the employer must either provide a reasonable alternative standard or waive the otherwise applicable standard. The reasonable alternative standard need not be established in advance of an individual's specific request for one; rather, it should be based on the facts and circumstances of each case.

Fourth, the programs must be reasonably designed to promote health or prevent disease, not be overly burdensome, not be a subterfuge for discrimination based on a health factor, and not be highly suspect in the method chosen to promote health or prevent disease. The proposed regulations suggest that a "plan is not reasonably designed unless it makes available to all individuals who do not meet the standard based on the measurement, test, or screening a different, reasonable means of qualifying for the reward."

Fifth, all plan materials describing the terms of a health-contingent wellness program must disclose the availability of other means of qualifying for the reward or the possibility of a waiver of the otherwise applicable standard. The proposed regulations provide sample language that can be used to satisfy this requirement.

> **Response to the proposed rules.** Unsurprisingly, the proposed rules elicited a litany of comments from both sides of the aisle. The U.S. Chamber of Commerce criticized the proposed rules as undermining the purpose of health-contingent wellness programs by requiring employers to provide reasonable, alternative standards based on the individual facts and circumstances of each case. In a January 25, 2013 letter to the Department of Labor, the Chamber argued, "Wellness programs should not be required to coddle apathetic participants and the Proposed Rule's pursuit of an 'everybody wins' approach will thwart the very motivation that a rewards based program is designed to create." Additionally, the Chamber encouraged rulemakers to increase the maximum reward to 50 percent for all eligible plan participants.

In contrast, a group of Congressional Democrats expressed concern that open-ended health-contingent wellness programs could give rise to the precise sort of discrimination and abuses that the PPACA was enacted to eliminate from the insurance market. In the alternative, they proposed that health-contingent wellness programs be limited to tobacco cessation.

Additional Statutory Issues

Though the PPACA wellness-program provisions will affect the landscape of wellness programs, the majority of statutory schemes that apply to wellness programs have been around for a long time, and those considerations remain unchanged. Here are some of the statutes that employers should consider:

Americans with Disabilities Act (ADA). The ADA prohibits discrimination based on disability or perceived disability. If health-contingent wellness programs tie rewards to achieving outcomes such as reducing obesity, high blood pressure, or diabetes, then there is at least a technical risk of violating the ADA's disability-discrimination prohibition.

Any medical records acquired through a wellness program should be kept confidential and separate from an employee's personnel file.

Additionally, Title I of the ADA restricts the conditions under which an employer may make disability-related inquiries or ask an employee to undergo a medical examination. *See* 42 U.S.C. § 12112(d); 29 C.F.R. §§1630.13, 1630.14. Disability-related inquiries are permitted, however, as part of a voluntary wellness program.

A wellness program will only qualify as "voluntary" if the employer neither requires participation nor penalizes employees who decline to participate. EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations. This definition is complicated by the fact that the EEOC has not yet taken a position on whether a reward amounts to a requirement to participate or whether withholding a reward constitutes a penalty.

The limited number of cases that address wellness programs in an ADA context fail to clarify this ambiguity. A recent 11th Circuit decision held that a $20 surcharge levied against employees who declined to participate in a wellness program fell within the ADA's safe-harbor provision, which exempts certain insurance plans from the ADA's general prohibitions. *Seff v. Broward County, Fla.*, 691 F.3d 1221 (11th Cir. 2012). Consequently, the court declined to reach the question of whether the surcharge eliminated the voluntariness of the wellness program. In the Western District of Pennsylvania, the district court rejected an employer's argument that its policy of subjecting probationary employees to random drug and alcohol tests was part of a voluntary wellness program because the testing policy had been included in a collective-bargaining agreement. *EEOC v. U.S. Steel Corp.*, 2013 WL 625315 (W.D. Pa. Feb. 20, 2013).

Neither of these cases provides meaningful reassurance to cautious employers. The fact remains that a surcharge, such as the one imposed by the CVS plan, can plausibly be interpreted as a penalty for declining to participate. Until there is further clarification on this issue, employers need to consider ADA-related issues carefully in implementing and maintaining wellness programs.

Genetic Information Nondiscrimination Act (GINA). GINA prohibits employers from requesting or requiring genetic information of an employee or an employee's family member. The statute carves out an exception for wellness programs, as long as the program is: (1) voluntary; (2) conditioned on written authorization; and (3) contains strict privacy protections. Employers should be aware of these general requirements.

Age Discrimination in Employment Act (ADEA) / Title VII of the Civil Rights Act of 1964. The ADEA and Title VII prohibit discrimination in all terms of conditions of employment, including health benefits. Though the issue remains unresolved, many wellness programs would qualify as a health benefit. Consequently, any wellness program that has a disparate impact on a protected class of employees could give rise to liability under these statutes. For instance, if a reward is conditioned upon passing a physical-fitness test that disfavors older employees, it may constitute a disparate impact in violation of the ADEA. Before instituting a health-contingent wellness program, employers should consider whether the standards imposed are likely to have a disparate impact on any protected class. Compliance with the similarly-situated-employee requirement of the PPACA will help to avoid potential disparate-impact issues.

Protected health information. HIPAA, the ADA, and GINA require employers to maintain the confidentiality of their employee's protected health information (PHI). To preserve the confidentiality of this information, employers should develop appropriate policies and procedures. By segregating PHI from employment files or, better yet, having the wellness-program provider maintain the records, employers can avoid the appearance that improper access to PHI motivated an employment decision.

State Laws

In addition, 29 states and the District of Columbia prohibit employers from restricting their employees' use of tobacco off the employer's premises during non-working hours. In California, Colorado, New York, Illinois, and North Carolina, this prohibition extends beyond tobacco to any lawful products. While the scope of these laws varies from state to state, employers should investigate whether an applicable state statute may affect tobacco-cessation programs or similar components of otherwise lawful wellness programs.

Employment Retirement Income Security Act (ERISA). Wellness programs may be subject to a variety of requirements under ERISA. Though this issue is beyond the scope of this article, employers should consult an employment-benefits attorney to assure compliance with ERISA.

Conclusion

The jury is still out on the cost savings and health outcomes achieved by corporate wellness programs. Nonetheless, the widespread adoption of these programs by large employers suggests that, at a minimum, many sophisticated employers believe that wellness programs can reap benefits for a company and its employees. To the extent that a well-constructed wellness program can encourage employees to make healthier choices, the economic incentives may be further bolstered by a moral imperative to improve the health and quality of life of a workforce. Notwithstanding these benefits, if an employer chooses to implement and/or maintain a wellness program, it should be mindful of the above concerns.

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