COUNSELOR'S CORNER

Wellness Programs Can Reduce Health Care Costs,

But Can Your Bank Afford the Legal Risks?

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Between 2003 and 2012, the cost of employer-provided health care plans increased 62 percent. In this landscape of rising costs, banks, like many other employers, are turning to creative solutions.

One option is wellness programs, which provide employees with incentives to engage in healthy behaviors. These programs have spread in both size and importance. According to one survey, 68 percent of employers provided employees with wellness programs and 53 percent have extended their programs to cover dependents, such as spouses and children. This is not surprising given the potential benefits. For every dollar spent on wellness programs, medical costs fall by $3.27 and absenteeism costs fall by $2.73.

In spite of these benefits, wellness programs are subject to evolving and expanding regulation and, if not carefully designed, could expose a bank to legal liability. Democrats in Congress have expressed concern that wellness programs could be used to discriminate against the unhealthy, and claimed that the Affordable Care Act ("ACA") bars such "health status discrimination" by group health plans. Indeed, wellness plans are only excluded from the ACA prohibition if they meet certain requirements.

Baseline Requirements for Lawful Wellness Programs

Wellness programs offer employees an incentive to participate in activities that may improve their health. Regulations under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and the ACA are the primary rules governing wellness programs. These regulations permit two kinds of wellness programs: "Participatory" wellness programs and "Standard-Based" wellness programs.

Participatory wellness programs either do not offer an award or offer an award that is contingent merely upon participation. To be legal under the ACA, these programs need only be made available to all similarly situated employees.

Standard-based wellness programs provide benefits to employees that are contingent upon the employee meeting a health status standard, such as a certain blood pressure or body mass index level. Standard-based programs must meet the following five requirements to be legally permissible:

1. The program must be available to all similarly-situated individuals, who must be given a chance at least once each year to qualify;

2. The "reward" cannot exceed 30 percent (20 percent prior to 2014) of the total cost of the employee's health care coverage (or up to 50 percent for incentives related to tobacco cessation programs). This reward may take the form of either a discount (such as a reduction in the employee's health care premiums or deductibles) or a penalty (such as an increase in the premiums of employees who choose not to participate);

3. The program must either provide a "reasonable alternative standard" or a waiver of the health contingent standard for individuals who find it unreasonably difficult (or for whom it would be medically inadvisable) to meet the standard due to a medical condition;

4. The program must notify employees of their ability to seek alternative qualifications of a standard or waiver of a standard; and

5. The program must be reasonably designed to promote health or prevent disease, not be overly burdensome and not be a pretext for discrimination based upon a health condition.

Collection of Employee Health Information

The Americans with Disabilities Act ("ADA") places restrictions on employer collection of medical information during employment. Medical examinations or inquiries about employee health care must be "job-related and consistent with business necessity." Many employers engage third parties to administer their wellness programs to avoid potentially-illegal collection and sharing of information. For example, when participating in a wellness program, an employee may disclose that she has a history of epilepsy. Such diagnoses often carry stigma that may provoke stereotypical and sometimes illegal responses. But a bank that is blissfully ignorant of such health information cannot be held liable for discrimination.

Other Pitfalls

Other laws also affect wellness programs. Any wellness program that discriminates, or has a disparate impact based on age, sex, genetic condition or disability, may run afoul of other federal, state and local anti-discrimination laws. Accordingly, a bank wellness program might violate Title VII if it made distinctions based on gender-specific criteria, such as gender-based weight or body-mass-index standards. Wellness programs could also potentially violate the Fair Labor Standards Act or state wage and hour laws by essentially requiring employees to complete certain tasks under the program but not compensate employees for their time.

The laws governing wellness programs are too complex to fully cover here. Employers that hope to enjoy the benefits of a wellness program are advised to consult with experienced legal counsel to avoid potential legal liability before adopting a wellness program.

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