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The Legal Risks Behind Workplace Wellness Programs

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In an effort to stave off steadily increasing health insurance costs, more and more employers are implementing wellness programs to encourage employees to take affirmative steps to improve their health. Wellness programs can run the gamut from simple, purely voluntary participation programs (like offering to pay for gym memberships for employees) to detailed programs that reward or penalize employees monetarily depending on whether or not they participate in the program and whether or not they attain certain health goals. There is well-documented evidence that wellness programs such as preventive health screenings, smoking cessation, and exercise programs can improve employee health, cut health care costs and can also have positive effects on employee productivity.

Employers who use monetary rewards or penalties to encourage employees to participate actively in wellness programs, however, must be aware of the legal constraints. Before implementing a wellness program, employers must consider the requirements of the Health Insurance Portability and Accountability Act ("HIPAA"), the Americans With Disabilities Act ("ADA"), the Genetic Information Non-Discrimination Act ("GINA"), and state law. Unfortunately, this is a relatively complex area of the law in which more detailed guidance is greatly needed from administrative agencies and the courts. On May 8, 2013, the EEOC convened a panel of experts to discuss the state of the law in this area, and the panel echoed this need for more guidance. In the interim, employers should exercise caution in implementing wellness programs and should thoroughly consider the present legal landscape outlined below.

HIPAA Requirements For Wellness Programs

Many employers choose to provide discounted health insurance rates to those employees who participate in a wellness program. HIPAA, however, regulates the extent to which employers can charge different insurance premiums to employees based on health factors, and thus HIPAA limits the ability of employers to charge higher rates to those who choose not to participate in a wellness program or who fail to meet the standards of the program. In order to comply with HIPAA, an employer can offer lower health insurance rates to employees based on their attainment of wellness goals only if:

(1) The reward (i.e., rate reduction) is no more than 20% of the cost of employee-only coverage (this cap is increased to 30% in 2014, and proposed regulations would raise the cap to 50% for programs designed to prevent or reduce tobacco use; also note that the limit can be based on the percentage of the cost of family coverage if the wellness program covers the employee's family members);
(2) The program is reasonably designed to promote health and prevent disease;
(3) Employees have an opportunity to qualify for the award at least once per year;
(4) The program is available to all similarly situated employees, which means that the employer must allow a reasonable alternative standard or waiver for anyone for whom it is unreasonably difficult (or medically inadvisable) due to a medical condition to meet the standard; and
(5) The program must prominently disclose the alternative standard or waiver.

The fourth HIPAA requirement is a common source of problems with employer wellness programs.

In order to get the most out of their wellness programs, some employers require not only participation by employees but also results—e.g., actual cessation of smoking, or lowering of blood pressure or cholesterol. Such results-oriented programs only pass muster under HIPAA if they have a robust waiver program or alternative available for those employees who cannot meet the standard for medical reasons. For instance, if an employer wants to offer lower health insurance rates to non-smokers or former smokers, it must also offer smokers (who may not be able to quit

smoking due to nicotine addiction) an alternative means of obtaining the same lowered rates by, for example, participating in a smoking cessation program. Similarly, if an employer wants to offer lower health insurance rates to employees who reduce their blood pressure or cholesterol, it must allow employees who are medically unable to meet the standard the opportunity to qualify for the lowered rates in some other way (e.g., by participating in a class on the benefits of diet and exercise toward lowering cholesterol). In other words, HIPAA requires that employers offer reduced rates to everyone who makes an attempt in good faith to meet the health standard, even if certain employees cannot attain actual health improvements because of medical reasons (e.g., genetic predisposition to high cholesterol, nicotine addiction, cardiac condition that precludes exercise, etc.).

ADA Issues

Whenever employers wish to differentiate between employees based on a health factor (such as charging employees different health insurance rates based on attainment of health goals), they must always consider the ADA, which expressly prohibits discrimination amongst employees based on disabilities. There are two distinct ways in which the ADA can affect wellness programs.

The ADA contains a safe harbor provision allowing employers to charge different health insurance premiums based on health factors where they can show proof that those health factors cause increased medical costs. In a recent case, *Seff v. Broward County*, the Eleventh Circuit Court of Appeals found that this safe harbor allowed an employer to impose, as part of its wellness program, a penalty on those employees who did not participate in a health screening and disease management coaching program.

Under the safe harbor, employers must be sure to treat all similar conditions in the same way; employers cannot single out particular conditions for higher rates. For instance, if an employer chooses to charge higher rates to those with high blood pressure because high blood pressure can cause significant health risks and associated medical costs, it must also charge higher rates for those with high cholesterol or other conditions that likewise cause increased medical costs. Unfortunately, there is very little guidance available from the EEOC or the courts on how to apply the safe harbor to wellness programs; the *Seff* case is the only reported decision on the issue. This too is another reason for employers to have a robust waiver program to allow all employees to qualify for lower insurance rates. If every employee can qualify for reduced health insurance premiums either by actual attainment of the goals or by simply making a good faith effort to attain the goals within the limits of his or her medical condition, an employer will avoid problems with the ADA because everyone can qualify for the reduced premiums—even those employees with serious disabilities. In fact, in an informal, non-binding opinion letter from January of this year, the EEOC expressly stated that employers need to consider alternative wellness qualification options as a reasonable accommodation for individuals with disabilities that prevent them from otherwise meeting a wellness standard.

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A second way in which the ADA can impact wellness programs is with respect to the ADA's medical inquiry rules. In order to monitor whether or not employees have attained wellness-related goals, employers often must inquire into the health status of their employees. The ADA, however, prohibits employers from making medical inquiries of employees except where such inquiries are "job-related and consistent with business necessity." The EEOC takes the position that medical inquiries as part of purely voluntary wellness programs do not run afoul of the ADA's medical inquiries prohibition. However, the EEOC has not provided definitive guidance regarding the extent to which medical inquiries would be allowable under a wellness program that, while "voluntary" in a technical sense, rewards those employees who participate and thus makes participation less than an absolutely voluntary choice. The EEOC's Enforcement Guidance on Disability-Related Medical Inquiries and Medical Examinations states that a wellness program is "'voluntary' as long as an employer neither requires participation nor penalizes employees who do not participate." The EEOC, however, has not taken a position as to whether an incentive or reward offered to employees who participate in a wellness program can be viewed as a penalty on those who do not participate.

Many employers choose to have a third-party administrator handle all wellness-related medical inquiries in an effort to insulate themselves from direct contact with an employee's medical information. Although this step is certainly a better practice than having the employer conduct medical inquiries directly, it is unclear whether this step altogether avoids liability under the ADA with respect to medical inquiries. In one sense,

if an employer never sees any medical information regarding an employee because it is handled exclusively by a third-party administrator, the employer is not itself making any direct medical inquiries. On the other hand, it is conceivable that a court could find that because a third-party administrator is merely acting on behalf of the employer, it is simply an arm of the employer for purposes of ADA liability.

GINA Issues

GINA prohibits employers from discriminating based on an employee's genetic information. In conjunction with this prohibition on genetic discrimination, GINA prohibits employers from inquiring into the genetic history of employees. Health screenings or other questionnaires related to wellness programs could potentially involve inquiries into an employee's family medical history. Employers should ensure that any medical inquiries that are conducted as part of their wellness programs do not impermissibly request genetic information in violation of GINA.

State Law Issues

Many states have laws that prohibit discrimination based on an employee's use of lawful products (e.g., tobacco) or lawful activities conducted outside of work (which could include such things as eating unhealthy foods or other relatively unhealthy lifestyle choices). By penalizing those who engage in certain behaviors, employers may violate these state laws. The good news here, however, is that it is likely that many of these state laws are preempted by ERISA, the federal law that governs employer benefit programs, including employer-provided health insurance. Moreover, some state use of lawful products/lawful conduct discrimination laws specifically allow employers to charge differing health insurance premiums based on health risk factors. Nevertheless, it is important that employers consider this issue carefully before implementing a wellness program with monetary penalties or incentives.

Another state law issue to consider relates to liability for employee injuries at an employer's gym or as part of an employer's exercise program. Employers who provide opportunities for fitness or exercise activities on their premises or through structured employer-sponsored programs off-site should obtain waivers from employees that acknowledge the risks associated with exercise and that waive any liability against the employer for any injuries that may occur during exercise. These waivers are similar to what an individual would sign upon starting a private gym membership. Although the enforceability of such waivers can depend on state law, they are generally enforceable if properly drafted.

Conclusion

Although there are many positive reasons to implement a wellness program, it is important for employers to do so in a way that avoids causing legal liability. Even if an employer utilizes a third-party administrator to run its wellness program, the employer itself will ultimately be liable in the event that the program violates HIPAA, the ADA, or other applicable law, and thus the employer needs to be fully satisfied that the program is legally compliant in all respects. Although more clarity is needed from administrative agencies and the courts regarding the contours of a lawful wellness program, it is definitely better at this point to structure such programs using rewards or incentives for participation— as opposed to penalties for non-participation—and to ensure that all employees, including those with disabilities, have an opportunity to obtain the reward/incentive through alternative means besides actual attainment of a wellness standard.

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About the Author

Kevin D. Kelly is a Partner in Locke Lord's Labor & Employment practice group. Mr. Kelly helps clients solve labor and employment law problems with practical, cost-effective solutions. He is an experienced litigator who has defended clients in a variety of actions, including discrimination and retaliation claims under Title VII, the Illinois Human Rights Act, and the Age Discrimination in Employment Act (ADEA); discrimination and failure to accommodate claims under the Americans with Disabilities Act (ADA) and claims for alleged violation of the Family and Medical Leave Act (FMLA); claims involving allegations of sexual and racial harassment in violation of state and federal law; class action wage and hour claims under the Fair Labor Standards Act (FLSA) and state law; class action claims under the Workers Adjustment and Retraining Notification (WARN) Act; and claims for defamation, breach of contract, and intentional infliction of emotional distress.

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