Wellness Programs: Legal Requirements and Risks

If a 'voluntary' wellness program provides some sort of financial incentive for workers to participate in medical examinations or to answer questions related to their medical histories, is it truly voluntary? This is just one of the questions that employers must examine as they create wellness programs for their organizations.

By Patricia F. Weisberg

Tight budgets combined with skyrocketing health care costs have prompted more and more employers to develop companywide “voluntary” wellness programs in hopes of curbing mind-boggling group insurance premiums.

Many of the programs conceived in the U.S. workplace are incentive-based, rewarding employees who participate, follow disease management protocols or choose to live healthy lifestyles. Some programs take the incentive model to a higher level by imposing penalties, such as higher health insurance premiums, upon employees who smoke or refuse to participate in company-sponsored wellness initiatives.

The conundrum is this: In the past, the U.S. Equal Employment Opportunity Commission, under the Americans with Disabilities Act, has defined a voluntary wellness program as one that neither requires employees to participate nor penalizes them for non-participation. So, if a “voluntary” wellness program provides some sort of financial incentive for workers to participate in medical examinations or to answer questions related to their medical histories, is it truly voluntary?

The EEOC and the courts have grappled with this issue for years, while employers continue to pave their own paths toward corporate wellness implementation, including programs offering participation incentives.

A 2008 survey by the ERISA Industry Council, the National Association of Manufacturers and IncentOne reveals that the number of employers using incentives to promote employee wellness rose from 62 percent in 2007 to 71 percent in 2008. It’s a popular option in this economic environment.

But by linking incentives and penalties to corporate wellness, employers do raise their risk of facing numerous challenges, including discrimination claims for alleged violations of a number of health- and employment-related regulations such as the ADA, the new Genetic Information Nondiscrimination Act and the Health Insurance Portability and Accountability Act.

Despite good intentions surrounding corporate wellness programs, employers must carefully navigate the legislative waters in order to develop programs that benefit not only employees, but also the company itself.

What defines ‘wellness’?

Quite simply, no true definition for a “wellness” program exists, at least not in corporate America. The federal government, however, has tried to establish some semblance of one to clear up confusion and maintain a balance between employee privacy and corporate intentions.

The U.S. Departments of Labor and Health and Human Services and the Internal Revenue Service have coined the term “bona fide wellness” to keep in mind the various nondiscrimination

provisions outlined in HIPAA and, to some extent, other legislation related to health care. This phrase has particular importance to employers who want to create an incentive-based, companywide wellness program as part of their ERISA health benefit plans.

A bona fide wellness program would require participants to meet some sort of standard that relates to a health factor, such as blood pressure, cholesterol levels or maintaining a healthy weight. ERISA clearly states that voluntary, "bona fide wellness programs" must offer alternatives for workers who cannot participate in the program as it is initially outlined.

As defined by federal guidelines, such programs must satisfy a number of requirements to comply fully with HIPAA:

• Individual rewards must be limited, with the Labor Department suggesting a limit of 10 to 20 percent of the total cost of employee-only coverage.

• The program must be "reasonably designed" to promote good health and disease prevention and individuals must have the opportunity to qualify for the incentive at least once per year.

• Rewards must be available to all "similarly situated" individuals, and a reasonable alternative standard or waiver must be offered to those who have health factors that would preclude them from participating in the initial standard.

• All materials describing the wellness program and its terms must disclose the availability of a reasonable alternative standard or a waiver.

Additionally, under HIPAA, employers cannot use eight recognized health-status factors to discriminate against workers when determining enrollment eligibility or premium contributions. These are:

- Health status
- Medical condition
- Claims experience
- Receipt of health care
- Medical history
- Evidence of insurance
- Disability
- Genetic information

Genetic discrimination

Implementation of Genetic Information Nondiscrimination Act in November 2009 has placed further onus on employers and may have a chilling effect on wellness programs. This new law prohibits employers from requesting, requiring or purchasing genetic information from employees with very few exceptions.

As a result of GINA, employers now cannot request, require disclosure of, or collect genetic information from employees in connection with an incentive-based wellness program. This includes the use of health risk assessments, which seek genetic information, including family medical history.

Essentially, a company cannot offer a lower deductible, premium or contribution amount to participants who complete a health risk assessment that includes the disclosure of genetic information, or who otherwise participate in a wellness program that seeks genetic information. This is one of the most difficult challenges employers face in light of the recent increasing number of wellness programs that offer rewards to participants who complete a health risk assessment.

The interim final regulations, however, do offer some guidance on how to collect genetic information without violating the law. For example, the regulations allow an employer to offer two separate health risk assessments: one that's tied to an incentive and does not seek genetic information, and a second that is not tied to the incentive but does seek voluntary disclosure of genetic information.

Family medical history actually can play an important role in wellness programs. Genetic information, when collected and used properly, can help employers gear a company's wellness objectives to best suit the needs of its employee population. For example, if a company has a number of women on staff with a family history of breast cancer, perhaps the employer could offer incentives, such as paid time off, to help women get regular mammograms or even bring a mobile mammography center to the office. It's just one example of how sharing genetic information can be helpful and not harmful.

It's a sticky situation regardless, and employers will need to carefully review and evaluate any programs, including health risk assessments that seek genetic information, in connection to their wellness initiatives, so they don't unwittingly violate new GINA regulations, as well ADA and HIPAA restrictions.

ADA challenges

The ADA has had a longstanding and definite impact on how companies develop and implement corporate wellness initiatives. Nothing in the law prohibits employers from enacting programs designed to promote health and wellness. But the law does prohibit employment-based discrimination against individuals with disabilities. It does this by severely limiting what employers can ask about workers' medical conditions through its "medical inquiries and examinations" provisions. These limits apply to both disabled and non-disabled individuals. Such questioning must be job related and consistent with "business necessity."

However, under the ADA, employers are permitted to conduct "voluntary" medical examinations as part of an employee health program, including obtaining "voluntary" medical histories. Such information gathered in relation to a wellness program must be done in compliance with ADA confidentiality provisions and cannot be used in any discriminatory manner.

The EEOC has generally taken the position that voluntary wellness programs (with some exceptions) do not violate the ADA. But in March 2009 the EEOC stated in an informal opinion letter that a health risk assessment done as a "prerequisite for obtaining health insurance coverage" does violate the ADA.

What's more, if such an assessment could be considered part of a wellness program, it wouldn't be considered voluntary. Workers choosing not to participate in the assessment would be denied a benefit. This denial would count as a penalty for those workers refusing to participate. Unfortunately, the EEOC has not issued much specific guidance about what it considers "voluntary," so interpretation remains under constant discussion.

Changes to the ADA that went into effect in January 2009, known as the ADA Amendments Act, further expand the law's coverage and protections to include a much broader group of individuals. And while medical inquiries apply to both disabled and non-disabled individuals, this puts even more responsibility on employers to prove the necessity of decisions in relation to disabled workers, in the hiring process and in such things as corporate wellness initiatives.

Such responsibility includes clearly defining "reasonable accommodation" for employees who are unable to participate in any aspect of a wellness program as a result of disabilities, as outlined by the revised ADA, HIPAA, GINA and other regulations. Employers must discuss options with the workers in question and work together to develop favorable and appropriate alternatives.

Careful navigation

There's no doubt that corporate wellness programs offer advantages to both employers and employees. For employees, the promise of a healthier lifestyle often is incentive enough to participate. For employers, such programs have been documented in helping to reduce absenteeism, improve employee morale and satisfaction with work and, in some cases, reduce group health insurance premiums.

Employers need to remember that various legal restrictions on such programs will require them to carefully craft their wellness initiatives to avoid discrimination charges and legal challenges. Planning any type of wellness program at a companywide level must be supported with in-depth understanding of the array of federal regulations governing employee privacy and health.

Consider consulting knowledgeable experts who understand these ever-changing laws, and the implications of developing and administering corporate wellness programs. Carefully planned, bona fide wellness programs can yield significant benefits and budget reductions in a costly health care environment. Ill-conceived ones could land an employer in court.

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