



Workplace Wellness:

Potential Legal Issues Associated with Workplace Wellness Plans

Wellness issues important to you – brought to you by the insurance specialists at Hickok & Boardman Employee Benefits Group.

Wellness programs must be carefully structured to comply with both state and federal law as they may raise issues regarding reasonable accommodation, privacy, confidentiality, and protection of off-duty conduct. Because of these potential risks, it is important that employers have their legal counsel review their wellness program before it is rolled out to their employees.

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.

Nothing in the ADA prohibits employers from implementing wellness programs that are geared at promoting good health and disease prevention. The ADA, however, prohibits covered employers from denying, on the basis of a disability, qualified individuals with disabilities an equal opportunity to participate in, or receive benefits under, programs or activities conducted by those employers. Employers must offer a reasonable accommodation to an employee with a known disability to allow them to participate.

For example, providing a premium discount to participants who achieve a particular score on a health risk assessment, where such scores are affected by an individual with disabilities, may likely have ADA implications without reasonable accommodations being 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, but it may raise HIPAA issues depending on your state which is why it is so important to consult with 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 Equal Employment Opportunity Commission (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 discounts or rebates or modifying otherwise applicable co-payments or deductibles in return for adherence to programs of health promotion and disease prevention if none of the conditions for obtaining a reward under a wellness program are based on an individual satisfying a standard related to health factor, or if no reward is offered, the program complies with the nondiscrimination requirements (assuming participation in the program is made available to all similarly situated individuals).⁴ Examples are:

- A program that reimburses all or part of the cost for memberships in 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.
- 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 described in the final rules 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 dependants (such as spouses and/or dependent 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.
2. The program must be reasonably designed to promote health and prevent disease.
3. The program must give individuals eligible to participate the 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 unreasonable 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.

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 allowed under HIPAA nondiscrimination provisions without being subject to the five requirements for wellness programs that do require satisfaction of a standard related to a health factor.

Can your plan 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.

In addition to the ADA and HIPAA, COBRA, ERISA, The Age Discrimination in Employment Act (ADEA), and the Internal Revenue Code (IRC), also may affect your wellness plans. Employers subject to collective bargaining agreements should check those agreements also 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.

Wellness programs clearly have their advantages. However, these advantages do not come without potential legal risks which is why it is so important 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.

Workplace Wellness: Understanding the Legal Issues Associated with Workplace Wellness Plans is provided to Hickok & Boardman Employee Benefits Group clients for informational purposes only and should not be construed as legal advice. Readers should contact legal counsel for legal advice.

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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).

⁴ The wellness program rules are generally effective for the plan year starting on or after July 1, 2007, but may be relied on now.