Employers Considering Wellness Programs Are Advised To Look Before Leaping

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WOLFBLOCK

Faced with rising employee health care costs, many employers are considering implementing workplace wellness programs in an effort to reduce medical care costs for both the organization and employees. One potential structure for a wellness program provides an employee with a discount on health care contributions in exchange for the employee’s participation in wellness activities or provides such a discount if an employee satisfies a specific health-related goal. Both types of wellness initiatives may contribute to a reduction in health care costs and provide attractive benefits for employees such as smoking cessation programs and health screenings.

Nonetheless, employers contemplating a workplace wellness program are well advised to consider carefully the impact on reducing in health care costs on satisfying a health-related goal, such as actual smoking cessation or meeting a certain cholesterol level, may be subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Nondiscrimination Rules and/or federal and state discrimination statutes. In addition, regardless of the structure contemplated, employers should consider requirements for wellness programs that may arise under the HIPAA Privacy Rule (45 C.F.R. §§ 160, 164).

HIPAA Nondiscrimination Rules

An employer may offer employees a health care discount conditioned on participation in an employee wellness program without being subject to the HIPAA Nondiscrimination Rules. An employer may also offer employees who participate in a diagnostic testing program or a smoking cessation initiative who belong to the book of states offering a relevant example. Prior to embarking on a wellness initiative, employers are smart to consider what PHI may be received in conjunction with its group health plan. The HIPAA Privacy Rule

HIPAA Nondiscrimination Rules

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2. The program must be reasonably designed to promote health or prevent disease. The Rules provide little guidance as to what constitutes reasonable. It appears, however, that a program may meet this criteria if it makes the same wellness program benefits available to all employees or makes different benefits available on the basis of a reasonable classification (such as full-time versus part-time status).

3. The program must provide eligible individuals with the opportunity to qualify for the discount at least once per year.

4. The program must offer a reasonable alternative standard (or the ability to waive the standard) to individuals for whom it is medically inadvisable or unreasonably difficult to obtain the goal. For instance, a wellness program that requires an employee to have a certain BMI in order to qualify for a discount may provide the discount to an employee who is not able to obtain this goal but instead walks for 20 minutes three days a week.

5. The program sponsor must publicize the availability of this alternative standard in all program materials that describe the terms of the program.

Potential Pitfalls

In addition to complying with the HIPAA Nondiscrimination Rules, employers are required to also comply with a myriad of federal laws, the most obvious of which are the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.), the Age Discrimination in Employment Act (ADEA) (29 U.S.C. §§ 621 et seq.) and the Employee Retirement Income Security Act (ERISA) (29 U.S.C. §§ 1001 et seq.). Despite the ADA and the ADEA, there is no federal law that requires employers to accommodate an employee with a disability in the workplace. Additionally, the ADEA and the ADA both contain a notice provision. Therefore, the ADA and ADEA require employers who have 15 or more employees to make reasonable accommodations for qualified employees with disabilities and limits employers’ ability to conduct medical inquiries by requiring that such inquiries must be justified by job relatedness and business necessity. A well-crafted wellness program may comply with the ADA as long as: (1) participation in the program is voluntary; (2) the information gathered in conjunction with the program is retained using the ADA confidentiality measures; and (3) the information is not used to discriminate against employees.

An ADA Conundrum

As a general matter, the ADA prohibits employment-based discrimination against individuals with disabilities and limits employers’ ability to conduct medical inquiries by requiring that such inquiries must be justified by job relatedness and business necessity. A well-crafted wellness program may comply with the ADA as long as: (1) participation in the program is voluntary; (2) the information gathered in conjunction with the program is retained using the ADA confidentiality measures; and (3) the information is not used to discriminate against employees.

Alas, this may be easier said than done. While employers should be able to institute procedures to ensure that information gathered in conjunction with their wellness programs are maintained in confidence, the ADA confidentiality measures and that the information is not used to discriminate against employees, they may have more difficulty with proving that participation is voluntary. The EEOC advises that a wellness program is “voluntary” as long as employees are neither required to participate nor penalized for choosing not to participate. However, the courts have not yet tested whether an employee who chooses not to participate in a wellness program and consequently must pay a full health insurance premium is being subjected to a penalty or whether an overly attractive incentive may render a wellness program involuntary.

A somewhat blurry line between permissible and impermissible medical inquiries presents another challenge. Thus, while soliciting information about an individual’s physical activity levels in conjunction with a wellness plan’s gym member status, an employer may be deemed to be asking a blocked question under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Nondiscrimination Rules. In addition, regardless of the structure contemplated, employers should consider requirements for wellness programs that may arise under the HIPAA Privacy Rule (45 C.F.R. §§ 160, 164).

HIPAA Privacy Rule

Under the ADEA, an employer may not refuse employment decisions (i.e., to hire, fire or promote) or otherwise discriminate against an employee in any manner deprive an individual of employment opportunities because of that individual’s age. Under the ADA, it is unlawful to discriminate against or in any manner deprive an individual of employment opportunities because of that individual’s disability. As a general matter, the ADA prohibits employment-based discrimination against an individual with a disability who is able to perform the essential functions of a particular job, with reasonable accommodation, if such accommodation does not impose an undue hardship on the employer. Nonetheless, employers contemplating workplace wellness programs must also consider the ADA, the ADEA and state laws. Thus, while HIPAA requires employers to offer an alternative method of participating in the wellness program, it remains unclear whether offering such an alternative would also satisfy the ADA’s interactive process requirements.

ADEA Issue

Under the ADEA, an employer may not refuse employment decisions (i.e., to hire, fire or promote) or otherwise discriminate against an individual who is unable to perform the essential functions of a particular job, with reasonable accommodation, if such accommodation does not impose an undue hardship on the employer. Nonetheless, employers contemplating workplace wellness programs must also consider the ADEA, the ADA and state laws. Thus, while HIPAA requires employers to offer an alternative method of participating in the wellness program, it remains unclear whether offering such an alternative would also satisfy the ADA’s interactive process requirements.

State Law Concerns

Employers may be prohibited from taking adverse employment actions against employees who engage in behavior, which albeit unhealthy, is nonetheless legal under state law. Smoker protection laws that remain on the books of 31 states and the District of Columbia offer a relevant example. While some employers are willing to take drastic measures when faced with escalating health care costs, employers would be well advised to sit tight and wait for additional guidance from the courts. Despite current legal uncertainty, an argument certainly exists that a wellness plan that requires an employee to quit smoking as a condition precedent to receiving a benefit may run afoul of such state laws.

Advisory Board

Although there are many moving legal parts to consider, an employer wellness program may well have the desired impact on your organization’s financial bottom line. If you are going to engage in a wellness initiative, it is key to be aware of the many legal issues that arise when implementing a workplace wellness program. Indeed, there are some important points that, in conjunctive with the advice of legal counsel regarding your specific situation, may help an employer navigate the many laws that impact employee wellness programs.

2. Promote healthy lifestyle changes.
3. Create a plan for you and your employees to participate in a wellness program.

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