Compliance & Your Wellness Program

Wellworks For You

www.wellworksforyou.com
800-425-4657
New weapon in the battle against rising healthcare costs

- Lower health insurance premiums
- Fewer medical claims
- Reduce absenteeism
- Increase productivity

Employers can no longer afford for employees to make unhealthy choices.

What does the law say?
WHAT DOES THE LAW SAY?

- Federal and State laws raise concerns for employers interested in developing wellness programs.

- BUT, it can be done legally!
The Legal Landscape

WELLNESS PROGRAM

ERISA
ADEA
IRS
NLRA
MEDICAL INFO
NON DISCRIMINATION
HIPAA
GINA
Federal Legal Risks

- HIPAA
  - Nondiscrimination
  - Administrative Simplification - Privacy/Security
- Americans with Disabilities Act (ADA)
- Genetic Information Nondiscrimination Act (GINA)
- ERISA
  - § 510 (Retaliation/Interference)
  - Preemption
- Internal Revenue Code
- Title VII
- NLRA
State Legal Risks

- Disability Discrimination
- Lifestyle Discrimination
- Workers’ Compensation Laws
- Data Privacy and Security
  - Statutory privacy and security
  - Common law privacy
Under HIPAA, group health insurance plans may offer premium discounts or rebates, or modify co-payments or deductibles, in return for “adherence to programs of health promotion and disease prevention” or “bona fide wellness programs.”
HIPAA Non-Discrimination

- Final HIPAA non-discrimination regulations issued December 13, 2006, codified in the health care reform law, effective 2014

- Goal is to eliminate discrimination on the basis of health factor while permitting limited incentives to promote health and prevent disease

- Not all programs are covered. Covered wellness programs are those that condition receipt of reward on satisfaction of standard related to a health factor

- To be lawful, covered wellness programs must meet certain requirements
Questions to Ask Yourself to Determine Whether Your Program is Subject to the HIPAA Nondiscrimination Regulations

- Is the wellness program a group health plan or part of a group health plan?
- Does the program offer a financial incentive?
- Does the incentive depend on the participant’s health status?

Answering YES to these questions means the program is subject to HIPAA nondiscrimination regulations.
Programs Not Subject to HIPAA Wellness Rules

- Reimburses cost for membership in a fitness center
- Reward for participation in diagnostic testing regardless of outcomes
- Waiver of co-payment or deductible for the costs of preventive care (e.g., prenatal care or well-baby visits)
- Reimburses costs of smoking cessation programs regardless of outcomes
- Reward for attending monthly health education seminar
Five HIPAA Requirements for Covered Wellness Programs

- Limitations on the size of the reward
- Reasonably designed to promote good health or prevent disease
- Opportunity to qualify at least once a year.
- Reward must be available to all similarly situated individuals
  - provide a reasonable alternative standard or waiver for individuals for whom is unreasonably difficult to meet the standard due to a medical condition, or for whom it is medically inadvisable to attempt to meet the standard
- All plan materials describing the program must disclose the existence of a reasonable alternative standard or possibility of a waiver

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No more than 20% of cost of:
- Employee-only coverage; or
- The cost of the coverage categories in which the employee and any dependents are enrolled if dependents allowed to participate in the program.

Under PPACA, the 20% limitation increases to 30% in 2014, with DOL/HHS/IRS having the option to increase to as high as 50%.

Examples:
- Annual premium (ER+EE portion) for employee-only coverage is $3,600 and the annual premium (ER+EE portion) for family coverage is $9,000, the annual reward for participating in the wellness program could not exceed $720 (20% of $3,600).
- If any class of dependents is allowed to participate in the program and the employee is enrolled in family coverage, the plan could offer the employee a reward of up to $1,800 (20% of $9,000).
Reasonable Alternative Requirement

- Must give individuals opportunity to meet a reasonable alternative standard (or waive standard) if,
  - due to a medical condition, it is unreasonably difficult for individual to meet the wellness program standard, or
  - it is medically inadvisable to attempt to meet the standard
- Multiple attempts/alternatives contemplated
- Plan sponsor may seek verification from individual’s physician
Other Requirements

- Must give individuals opportunity to qualify for the reward at least once per year.
- Reasonably designed to promote good health or prevent disease.
  - Has a reasonable chance of improving the health of or preventing disease in the participating individuals;
  - Is not overly burdensome;
  - Is not a subterfuge for discriminating based on a health factor; and
  - Is not highly suspect in the method chosen to promote or prevent disease.
- Plan materials must disclose the existence of the reasonable available standard.
HIPAA Privacy and Security

- Reasonable Safeguards
- ARRA/HITECH Changes
  - Breach notification
  - Business Associates
  - Enforcement
“Benign” Discrimination Exception

- The HIPAA nondiscrimination regulations permit discrimination *in favor* of an individual based in a health factor. The program may offer a reward to individuals based on an adverse health factor.

- *For example:* a plan may grant participants who have diabetes a waiver of the plan’s annual deductible if they attend educational classes and follow their doctor’s recommendations regarding exercise and medication.

- This exception is *not* available if the plan requires diabetics to meet a standard related to a health factor in order to get a reward (e.g., the plan cannot require the individual to maintain a certain body mass index).
HIPAA regulations state:

*Compliance with HIPAA is not determinative of compliance with any other provisions of ERISA (including COBRA) or any other State of Federal law, such as the Americans with Disabilities.*
If a program’s reward is contingent upon satisfying a health-related standard, the following requirements must be satisfied:
1. The total individual reward must be limited;
2. The program must be reasonably designed to promote good health or prevent disease;
3. The reward must be available to all similarly situated individuals and provide a “reasonable alternative standard”; and
4. Plan materials must disclose availability of a reasonable alternative standard.
GINA BASICS

- To address concerns of the general public about whether they may be at risk of losing access to health coverage or employment if insurers or employers have their genetic information.

- To prohibit discrimination based on genetic information and restricting acquisition and disclosure of such information, so that the general public would not fear adverse employment- or health coverage-related consequences for having a genetic test or participating in research studies that examine genetic information.

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Definition of “Genetic Information”

- Includes information about an individual’s genetic tests and the genetic tests of an individual's family members, as well as information about any disease, disorder, or condition of an individual’s family members (i.e. an individual’s family medical history).

- Family medical history is included in the definition of genetic information because it is often used to determine whether someone has an increased risk of getting a disease, disorder, or condition in the future.
Prohibits discrimination based on genetic information in group health plans and health insurance issuers

Effective for plan years beginning after May 21, 2009, and enforced by Departments of Labor, Treasury and Health and Human Services. Final Title I Regulations issued and apply to group health plans and health insurance issuers for plan years beginning on and after December 7, 2009

Key provisions: HRAs offered by group health plans may not provide incentives to respond to requests for genetic information

Title I of GINA builds on HIPAA’s nondiscrimination rules
GINA Title II - Employers

- Employers are prohibited from collecting genetic information and discriminating on the basis of genetic information.

- Key exceptions from GINA’s prohibition against employers requesting, requiring, or purchasing “genetic information”:
  - An inadvertent request for genetic information, such as in situations where a manager or supervisor overhears someone talking about a family member’s illness.
  - A request in the context of a voluntary wellness program if certain specific requirements are met.
  - A request for family medical history to comply with the certification provisions of the Family and Medical Leave Act or state or local leave laws.
  - Acquisition through commercially and publicly available documents like newspapers is permitted, as long as the employer is not searching those sources with the intent of finding genetic information.
To be considered a voluntary wellness program

- An employer may not require an individual to provide genetic information or penalize those who choose not to provide genetic information.
- Additionally, the employee must provide knowing, voluntary and written authorization

Genetic information may:

- Be provided only to the individual (or family if the family member is receiving genetic services), the licensed healthcare professional and/or genetic counselor, and
- Not be accessible to managers, supervisors, or others making employment decisions, or to anyone else in the workplace.

Genetic information that is provided is only available for the health services offered and is not disclosed to the employer except in aggregate terms that do not disclose the identity of specific individuals.
Subject to limited exceptions, it is unlawful for an employer to disclose genetic information about applicants or employees.

Genetic information may be kept in the same file as other medical information in compliance with the Americans with Disabilities Act.
ERISA applies when the wellness program is a group health plan itself or is part of an existing group health plan.

Key ERISA requirements and compliance challenges:
- Plan documents, SPDs and summary of coverage and benefits
- Annual reporting requirement (i.e., Form 5500)
- Claims and appeals procedures
- Fiduciary obligations
- ERISA Section 510 prohibits employers from disciplining, discharging or discriminating against a plan participant for the purpose of interfering with the participant’s right to attain a benefit under the plan.

ERISA preemption:
- General rule – ERISA preempts state laws that relate to employee benefit plans
- State regulation of insurance is saved from ERISA preemption
- Is the wellness program part of the “plan” or its own group health plan?
- If preemption applies, wellness program avoids state laws that might otherwise invalidate all or a portion of the program.
ERISA Retaliation

- ERISA Section 510 prohibits employers from disciplining, discharging, or discriminating against a plan participant for the purpose of interfering with the participant’s right to attain a benefit under the plan

- *Rodrigues v. The Scott Company, LLC*
Wellness programs and/or initiatives that are entirely voluntary likely do not run afoul of ERISA section 510.

However, programs that impose punitive costs or that base employment decisions on failure to reach certain health requirements arguably allow employers to take “discriminatory” action that prevents an employee from receiving health benefits.
Wellness programs that are designed for participants to meet certain health levels may have a disparate impact on older employees or any other protected classification, including those protected by the Age Discrimination in Employment Act of 1967, Title VII of the Civil Rights Act of 1964, and the ADA.
Most behaviors targeted by wellness programs are lawful activities, e.g., tobacco use, unhealthy eating, sedentary lifestyle.

Many states protect an employee’s right to engage in lawful activities and use lawful products (e.g., Illinois, New York).

An employer may not discriminate against individuals because of these “lifestyle” choices.
The pivotal issue which determines whether a recreational activity is within coverage of the IWCA is whether the employee is ordered or assigned to participate in the activity.

If the employee must choose between foregoing pay or benefits and attending a company sponsored recreational program, the employee is, as a matter of law, assigned to attend the function.
QUESTIONS TO ASK WHEN DESIGNING WELLNESS PROGRAMS
Ask Yourself?

- Do you have a “one-way” or a “two-way” wellness program?
Help employees be better health consumers and live healthier lives

Give increased information about:
- Health care providers
- Nutrition
- Health screening
- Prescription drugs

No employee mandates

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GOOD NEWS V. BAD NEWS

- Good News:
  - Relatively little legal risk

- Bad News:
  - Questionable effectiveness
“Two Way” Wellness Plans

- Help employees be better health consumers and live healthier lives, **but**

- Expect employees to give something in exchange
  - Provide health information
  - Participate in medical screening
  - Change unhealthy behaviors/lifestyle
**Good News v. Bad News**

**Good News:**
- Potentially greater control over outcomes

**Bad News:**
- Potentially greater legal and regulatory control
Ask Yourself?

- Is the program part of a group health program?
Group Health Plan: To Be or Not to Be?

Protections
- ERISA preemption
- ADA § 501 “safe harbor”

Responsibilities
- HIPAA non-discrimination
- ERISA Reporting and Disclosure
- HIPAA privacy and security
- GINA Title I limitations
Assessing Other Legal Risks

- Some factors to consider:
  - How intrusive is program?
  - How is program structured ... is it part of a benefit plan or a stand alone program?
  - In what states are individuals employed?
Ask Yourself?

- Does the program request or require personal health information?
Personal Health Information (PHI)

- Subject to non-discrimination and medical confidentiality obligations of
  - HIPAA
  - GINA
  - ADA
  - State medical privacy laws
- HIPAA and state obligations extend to third-parties
Ask Yourself?

- How are you explaining the program to employees?
Practical Considerations/Questions

- When is an employee’s personal life personal?

- Are you prepared to negatively affect the employment of good workers who have no interest in being healthy?

- How does wellness impact your commitment to tolerance and diversity?

- Are there “non-medical” factors impacting employee ability to attain wellness incentives (e.g., socio-economic and ethnic factors)?
Getting Employees To Buy Into the Program

- Communication strategies
  - Evidence of motivation for the program
  - Practical and operational challenges
  - Good for employee morale?
  - Union Implications?
1. State the positive purposes for the program and consider whether these purposes may be achieved without medical inquiries.
2. Avoid a “coercive” tone and emphasize voluntary participation.
3. Frame incentives as “rewards” not “penalties.”
4. Provide accommodations for individuals with disabilities to enable them to participate in the wellness program.
5. Retain a third party to manage medical information.
6. Comply with applicable state lifestyle or disability discrimination laws.
QUESTIONS???

Please contact Well Works For You for a face consultation or demo.

800-425-4657  or

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