Potential Legal Issues Associated with Workplace Wellness Plans

While there are many benefits that can be achieved through a workplace wellness program, there are also potential legal issues related to employer-sponsored wellness plans that employers should be aware of. Wellness programs must be carefully structured to comply with both state and federal laws. To avoid noncompliance, employers should have legal counsel review their wellness programs before they are rolled out to employees.

Below is a list of compliance concerns related to employer-sponsored wellness plans. The list of issues presented in this article is not exclusive.

The Americans with Disabilities Act (ADA)

The ADA prohibits employers with 15 or more employees from discriminating against individuals with disabilities. Also, under the ADA, an employer may make disability-related inquiries and require medical examinations after employment begins only if they are job-related and consistent with business necessity. However, these inquiries and exams are permitted if they are part of a **voluntary wellness program**.

On May 16, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) released a final rule that describes how the ADA applies to wellness programs that include questions about employees' health or medical examinations.

The final rule provides long-awaited guidance for employers on how to structure employee wellness programs without violating the ADA. Most importantly, the final rule provides that wellness programs that ask questions about employee health or include medical examinations may offer incentives of up to 30 percent of the total cost of self-only coverage.

UPDATE: A federal district court has vacated the final rule's 30-percent incentive limit, effective Jan. 1, 2019. It is possible that the EEOC will issue new proposed wellness rules prior to 2019. However, due to this legal uncertainty, employers should be careful about structuring incentives for wellness programs that ask for health information or involve medical exams.

The Health Insurance and Portability and Accountability Act (HIPAA)

Wellness programs are subject to HIPAA's nondiscrimination rules if they relate to group health plans. HIPAA generally prohibits group health plans from using health factors to discriminate among similarly situated individuals with regard to eligibility, premiums or contributions. Health factors include health status, medical condition (including both physical and mental illnesses), claims experience, receipt of health care, medical history, genetic information, evidence of insurability and disability.

HIPAA includes an exception that allows employers to offer their employees incentives to participate in health promotion and disease prevention programs. Qualifications for this exception vary depending on whether the employer uses a participatory or health-contingent wellness program.

Participatory Programs

Participatory wellness programs either do not require an individual to meet a health-related standard to obtain a reward or do not offer a reward at all. Also, these programs generally do not require an individual to complete a physical activity. Participatory wellness programs comply with the nondiscrimination requirements without having to satisfy any additional standards, as long as participation in the program is made available to all similarly situated individuals, regardless of health status.

Health-contingent Programs

Under a health-contingent program, employers provide the reward only to employees who meet a standard or goal related to a health factor. There are two types of health-contingent wellness programs:

- Activity-only wellness programs require an individual to perform or complete an activity related to a health factor in order to obtain a reward (for example, walking, diet or exercise programs).
- Outcome-based wellness programs require an individual to attain or maintain a certain health outcome in order to obtain a reward (for example, not smoking, attaining certain results on biometric screenings or meeting exercise targets).

In all health-contingent wellness programs, employers must satisfy five requirements to comply with nondiscrimination rules:

1. The value of the incentive must not exceed 30 percent of the cost of coverage under the plan (50 percent for wellness programs designed to prevent or reduce tobacco use);

2. The program must be reasonably designed to promote health and prevent disease;
3. Participants must be able to qualify for the incentive at least once per year;
4. The incentive must be available to all similarly-situated individuals and there must be an alternative standard for those with adverse health factors that affect their ability to meet the standard requirements; and
5. The alternative standard must be disclosed in all the materials that describe the wellness program.

The Genetic Information Nondiscrimination Act (GINA)

Employer obligations regarding GINA vary depending on whether the program is part of a group health plan. If the program is part of a group health plan, employers are subject to Title I, which prohibits offering incentives for completing a health risk assessment that asks for **genetic information**. Genetic information includes genetic tests and asking for a family medical history. To avoid this issue, employers can refrain from offering an incentive for completing health risk assessments or provide an assessment that does not request genetic information.

If a wellness program is not part of a group health plan, Title I of GINA will not apply, but the employment discrimination requirements of GINA Title II will restrict the ability of the employer to obtain and utilize genetic information. Under Title II, employers are prohibited from requesting, requiring or purchasing an employee's genetic information, **unless**:

- The employee provides the genetic information voluntarily (employee is **not** required and there is **no** penalty for declining to provide the information);
- The employee provides an informed, voluntary and written authorization;
- The genetic information is only provided to the individual receiving genetic services and the health care professionals or counselors providing the services; and
- The genetic information is only available for the purposes of the services and is **not** disclosed to the employer except in aggregate terms.

An employer does not violate GINA when it offers financial incentives to employees for completing assessments with questions about family medical history, if the incentives are available regardless of whether the employees answer those questions.

The Employee Retirement Income Security Act (ERISA)

A wellness program is subject to ERISA if it is funded or maintained by the employer for the purpose of providing, among other things, medical, surgical or hospital care and benefits to participants and their beneficiaries. The definition of medical services includes diagnosis and prevention. For this reason, wellness programs that offer significant screening benefits as part of their incentives may be subject to ERISA.

Programs subject to ERISA must comply with special claims procedures, summary plan descriptions (SPDs) and summary of material modifications (SMMs) requirements. Employers often combine their wellness programs with their major medical plans and other employee welfare benefits to help meet ERISA's compliance requirements.

Health Savings Account (HSA)

An employer may offer incentives such as contributions to employees' HSAs for individuals who participate in the employer's wellness program. To retain their tax-exempt status, HSA contributions must **not** exceed the employee's maximum HSA contribution for the year.

Also, employer-provided wellness rewards in the form of employer HSA contributions may raise discrimination or comparability issues. HSA contributions that are made through a cafeteria plan must comply with the cafeteria plan nondiscrimination rules. Under a cafeteria plan, HSA contributions lose their tax-exempt status if they favor highly compensated individuals or extend additional benefits only to key employees. HSAs outside of a cafeteria plan must follow the comparability rules, meaning that benefits must be the same for each category of employees who have the same high deductible health plan (HDHP) coverage.

Health Reimbursement Account (HRA)

Nondiscrimination rules for HRAs prohibit favoring highly compensated individuals in terms of eligibility requirements or benefits. Wellness program incentives that are in the form of employer HRA contributions could raise HRA discrimination issues. To help avoid discrimination issues, the program should not base its incentive amount on an individual's employment compensation, age or years of service.

The Age Discrimination in Employment Act (ADEA) and Title VII of the Civil Rights Act

ADEA provisions are limited to individuals over the age of 40. For this reason, employers should construct their wellness programs so that they do **not** reduce incentives, impose a surcharge or otherwise discriminate against individuals in this protected group.

Under Title VII of the Civil Rights Act of 1964, a wellness program cannot discriminate against its participants on the basis of race, color, religion, sex or national origin. This includes preventing discrimination regarding employee eligibility, the terms and conditions for coverage and any surcharges employees must pay to participate. Employers should also note that under Title VII, it is unlawful to discriminate between men and women with regard to fringe benefits (including medical, hospital, accident and life insurance and retirement plans) even when third parties are involved.

The Fair Labor Standards Act (FLSA)

Wellness programs should have a voluntary participation policy. If participation in the program is mandatory or required, the time employees spend in lectures, meetings,

training and any other activity associated with the program may be considered compensable time and may be subject to employee overtime wage pay requirements.

Employee participation in the program may be considered voluntary if:

- Attendance in program activities is outside of the employees' regular working hours;
- Attendance in program activities is not required by the employer;
- Program activities are not related to the employee job descriptions or responsibilities; and
- Employees do not perform any productive work while they participate in program activities.

For more information on compliance issues surrounding employer-sponsored wellness program, contact Insure NW today.