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October 2014

Does Your Wellness Program Need a Checkup?

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Wellness programs, both activity and outcome based, have become a widely utilized tool for employers to improve the health of their employees and control the rising costs of health care coverage. However, if a wellness program is not properly designed and implemented, it may become the subject of contentious litigation.

Within the last two months, the U.S. Equal Employment Opportunity Commission (EEOC) has filed two suits against corporate employers over their wellness programs. In August 2014, the EEOC filed suit against a corporate employer concerning its wellness program. Specifically, the EEOC contends that an employee was terminated for her good faith objections to the medical exams and disability related questions required under the employer's wellness program in violation of the Americans with Disabilities Act (ADA), which prohibits discrimination in the workplace against individuals with disabilities. On September 29, 2014, the EEOC filed suit against a second corporate employer alleging that the cancellation of an employee's medical insurance and shifting of the entire premium cost to the employee after he failed to complete a voluntary health assessment and testing required under the company wellness program was illegal and violated the ADA.

When asked about company wellness programs, an EEOC regional attorney for the Chicago district stated that "[e]mployers can have voluntary wellness programs – there's no dispute about that – and many see such programs a positive development. But they actually have to be voluntary. They can't compel participation by imposing enormous penalties such as shifting 100 percent of the premium cost for health benefits onto the back of the employee or by just firing the employee who chooses not to participate. Having to choose between responding to medical exams and inquires – which are not job-related – in a wellness program, on the one hand, or being fired on the other hand, is no choice at all."

So where does this leave employers with respect to understanding the permitted content and implementation of their wellness programs? It likely has most wondering if their wellness program could be in violation of federal or even state and municipal law. Unfortunately, there is very little specific guidance from the EEOC or Department of Labor regarding recommended parameters for wellness programs to ensure that the provisions do not violate the ADA or other anti-discrimination related laws. In fact, regulations published by the Departments of Treasury, Labor and Health and Human Services ("The Departments") make it clear that compliance with the published wellness program regulations is not determinative of compliance with any other provision of ERISA, the IRC Section 105(h) self-insured health plan nondiscrimination rules, ADA, Title VII of the Civil Rights Act (Title VII), Genetic Information Nondiscrimination Act (GINA) and the Family and Medical Leave Act (FMLA).

In terms of employment law issues, the Departments have provided some guidance, which confirms that an employer health plan may offer a reward for participation in the program. However, if the wellness program offers a reward based on an individual's ability to meet a specific health factor, (e.g., non-smoker), the wellness program must meet the following parameters:

1. The reward, such as a premium differential, must not exceed 30 percent of the cost of employee-only coverage under the plan. If the program allows an employee's dependents (such as spouses or children) to participate, then the reward must not exceed 30 percent of the cost of the coverage in which the employee and any dependents are enrolled. The maximum permissible reward for wellness program incentives designed to prevent or reduce tobacco use is 50 percent;
2. The program must be designed to promote good health or prevent disease;
3. Individuals must have a chance to qualify for the reward or wellness related discount at least once a year;
4. The program must accommodate those for whom (a) it is unreasonably difficult, due to a medical condition (e.g., due to nicotine addiction), to satisfy the otherwise applicable standard or (b) medically inadvisable to attempt to satisfy the otherwise applicable standard (e.g., unable to participate in a specific walking program due to heart condition) by providing a reasonable alternative standard (such as a discount in return for attending educational classes or for trying a nicotine patch); and
5. Plan materials describing the wellness program must disclose the availability of a reasonable alternative standard to qualify for the lower premium.

An example of an acceptable "reward" would include employee eligibility for a premium discount if he or she submits to a voluntary test, such as a test for cholesterol levels. However, the employer must provide all employees who voluntarily take that test with the incentive or discount and may not provide such a discount to only those who obtain a certain result. An example of an acceptable "reward" and incentive designed to eliminate or reduce smoking would include employees who have used tobacco in the previous 12 months and who are not enrolled in the plan's tobacco-cessation program are charged a $1,000 premium surcharge (in addition to the employee contribution toward the coverage) and those who participate in the plan's tobacco-cessation program are not assessed the $1,000 surcharge.

According to the Departments' regulations concerning wellness programs, effective January 1, 2014, a wellness program must have a "reasonable design," which is intended to be an easy standard to satisfy. A wellness program is considered in compliance and thus has a "reasonable design" if it has a reasonable chance of improving the health of, or preventing disease in, participating individuals and is not overly burdensome, is not a subterfuge for discrimination based on a health factor and is not highly suspect in the method chosen to promote health or prevent disease.

If a wellness programs allows participants to receive lower health care premiums or rewards, known as a "reasonable alternative," notice must be clearly disclosed to all employees. The notice must provide contact information for obtaining the alternative and a statement that recommendations of an individual's personal physician will be accommodated. For outcome-based wellness programs, this notice must be included in any disclosure that an individual did not satisfy the initial outcome-based standard. The Departments' regulations contain sample disclosure language, one of which is:

> *"Your health plan is committed to helping you achieve your best health. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact*

us at [insert contact information] and we will work with you (and if you wish, with your doctor) to find a wellness program with the same reward that is right for you in light of your health status."

Finally, if your company administers a questionnaire related to its wellness program, you must ensure that the questionnaire asks only medically related questions that are job-related and consistent with business necessity. Failure to do so could be considered a violation of the ADA or other federal, state or municipal employment-related statutes.

In order to avoid potential violation of federal, state and municipal anti-discrimination laws and the Internal Revenue Code, it is imperative that employers take action to comply with the above parameters and carefully review current wellness programs and questionnaires. Failing to do so can result in litigation instituted by the EEOC or privately by an employee for violation of federal anti-discrimination laws, which could subject the company to fines, compensatory and punitive damages and payment of the employee's attorney fees. It can also result in Internal Revenue Service violations and investigations. Employers with questions regarding their wellness programs should seek experienced counsel to guide them through the myriad of potential legal issues associated with improperly constructed or implemented programs.

For more information about this Alert, please contact Eileen Oakes Muskett at 609.572.2355 or emuskett@foxrothschild.com or any other member of the firm's Labor & Employment Department.

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