Make It Legal : Considerations For Workplace Wellness Programs

Wellness Council of NE Ohio and NEOBC

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Today's Agenda

- Introduction
- Background; why are we here?
- Regulatory Framework
- Regulatory Requirements (i.e., the "Acts" and laws)
  - ERISA
  - ADA
  - GINA
  - HIPAA
  - Other laws
    - COBRA
    - ADEA
    - FLSA
    - Ohio Worker's Compensation Laws
    - Invasion of Privacy
- Questions

Introduction

- About Brennan, Manna & Diamond, LLC
- About me

Background; why are we here?

What are Wellness Programs?

- Health promotion and disease prevention programs and activities offered to employees as part of an employer-sponsored group health plan or as a separate benefit of employment
- May involve employees completing a health risk assessment (HRA) and/or undergoing biometric screenings for certain risk factors
- May also include educational programs like nutrition classes, onsite exercise facilities, or health coaching

What are Wellness Programs?

- The federal government supports wellness programs as an effective cost-saving measure
- The Affordable Care Act created new incentives and built on existing wellness program policies to promote employer wellness programs and encourage opportunities to support healthier workplaces
- Indeed there has been an influx of wellness programs since passage of the ACA

Wellness Program Participation

- Many businesses (including three-in-ten large employers) provide incentives to employees who participate in wellness programs, including:
  - Discounts on health care premiums or contributions
  - Waiver of all or part of deductibles, copayments, or coinsurance
  - Credits to health care flexible spending or health reimbursement accounts
  - Cash incentives and gift cards

Wellness Program Participation

- Why?
  - Improve health of employees
  - Improve absenteeism and workplace satisfaction
  - Attract employees
  - Reduce health care costs
- Ideally, wellness programs will result in changed behavior

Workplace Wellness as an Industry

- Workplace wellness is a $6 billion industry
- In 2012, half of all employers with at least 50 employees offered wellness programs and nearly half of employers without a program said they intended to introduce one
- A 2010 review by a Harvard economist stated that wellness programs returned $3 in health care savings and $3 in reduced absenteeism costs for every $1 invested

Source: Rand Corporation. Do workplace Wellness Programs Save Employers Money?

The Effectiveness of Workplace Wellness Programs

- A 2014 RAND Wellness Programs Study, which included almost 600,000 employees at seven employers, showed that wellness programs were having little if any immediate effects on the amount employers spend on health care
- The employer's wellness program had two components: a lifestyle management program and a disease management program
  - Overall, the two component programs reduced the employer's average health care costs by about $30 PMPM

Source: Rand Corporation. Do workplace Wellness Programs Save Employers Money?

Regulatory Framework

How hard can it be?

"There are at least 10 different Federal laws and numerous state laws that employers need to be aware of relative to any company sponsored "wellness program." Most of the employers that come to us for a legal review of their program are shocked at the significant complexity – and are in violation of at least one of these legal requirements – often more than one. Of course, there are thousands of companies that simply choose no legal review at all. I can count on one hand the number of employers I've seen who have gotten this right on their own. **Kate Ulrich Saracene – Partner** – Nixon Peabody's Health and Welfare Employee Benefits practice

Source: Are Workplace Wellness Programs Legal? Forbes. July 16, 2014.

What could go wrong?

- A CVS cashier filed a class action lawsuit for a "Wellness Exam" she claims included questions on sexual activity and blood testing for "a variety of medical conditions." The survey was required in lieu of an annual $600 fine.
- Penn State University suspended part of a new employee wellness program that some professors criticized as coercive and financially punitive.
  - $100 monthly noncompliance fee that was to be levied on employees who declined to fill out an online questionnaire.
  - The questionnaire asked employees for intimate details about their jobs, marital situation and finances. It also asked female employees whether they planned to become pregnant over the next year.

Regulatory Framework Governing Wellness Plans

- Three federal laws directly address workplace wellness programs
  - ERISA
  - ADA
  - GINA
- Another federal law establishes standards to protect personal health information, including information collected by worksite wellness programs
  - HIPAA
- Wellness programs may implicate additional federal and state laws

Regulatory Framework Governing Wellness Plans

- Employee Retirement Income Security Act (ERISA) prohibits discrimination by group health plans based on an individual's health status
  - Exceptions for wellness programs to offer premium or cost sharing discounts based on an individual's health status in certain circumstances
- Americans with Disabilities Act (ADA) prohibits employment discrimination based on health status and generally forbids employers from inquiring about workers' health status
  - Exception for medical inquiries that are conducted as part of voluntary wellness programs

Regulatory Framework Governing Wellness Plans

- Genetic Information Nondiscrimination Act (GINA) prohibits employment discrimination based on genetic information and forbids employers from asking about an individual's genetic information, including information about family members' health status, or family history
  - Like ADA, allows an exception for inquiries through voluntary wellness programs

Regulatory Requirements

ERISA Standard

- Prohibits discrimination *by group health plans* based on an individual's health status

ERISA Standards for Health-Contingent Wellness Program Incentives

- The ACA amended ERISA to permit group health plans to adopt wellness program incentives that vary a person's group health plan premiums or cost-sharing based on health status
- These are called **"health-contingent"** wellness programs
- Some health-contingent programs provide rewards, such as premium discounts, to people who meet certain health outcomes, such as normal weight or blood pressure
- Others might identify people with health problems and then provide rewards if they participate in wellness classes or activities

ERISA Standards for Health-Contingent Wellness Program Incentives

- Final regulations to implement ACA provisions, issued in 2013 by DOL, said health-contingent wellness programs can vary group health plan premiums or cost sharing based on health status and will not be considered to discriminate based on health status if they meet five standards
  - One **limits the amount of rewards**
    - The maximum reward is 30% of the total cost (both the employer and employee share) of self-only group health plan coverage
    - The maximum can be increased to 30% of the cost of family coverage if spouses and dependents are eligible to participate in the wellness program, and to 50% if tobacco-related components are included in the wellness program

ERISA Standards for Health-Contingent Wellness Program Incentives

- Health-contingent wellness programs also must be **reasonably designed** to promote health or prevent disease
  - "Reasonably designed" is defined as having a reasonable chance of improving the health or preventing disease, not being overly burdensome or a subterfuge for discrimination, and not being highly suspect in the method chosen to promote health
  - By regulation, this is "intended to be an easy standard to satisfy… There does not need to be a scientific record that the method promotes wellness to satisfy this standard."

ERISA Standards for Participatory Wellness Programs

- Under the DOL rule, wellness programs that do *not* base rewards or penalties on health status are called **"participatory"** wellness programs
- Participatory wellness programs are not required to meet any of the five standards that apply to health-contingent wellness programs and generally are not considered to implicate ERISA nondiscrimination rules
- However, the DOL rule notes that other employment discrimination laws, such as the ADA and GINA, also apply, and that being in compliance with the ERISA/ACA wellness program standards does *not* relieve employers from having to comply with other federal laws

ADA and GINA Standards

- ADA – prohibits *employment discrimination* based on health status or disability, and generally forbids employers from inquiring about workers' health status
- GINA - prohibits *employment discrimination* based on genetic information and forbids employers from asking about an individual's genetic information, including information about family members' health status, or family history

ADA and GINA Standards

- An exception to both standards exists for inquiries through **voluntary** wellness programs
- In 2000, the EEOC issued enforcement guidance that a wellness program is considered voluntary under the ADA "as long as an employer neither requires participation nor penalizes employees who do not participate."
- In 2010, final regulations to implement GINA restated this definition of voluntary wellness programs

ADA and GINA Standards

- In 2014, the EEOC brought enforcement actions against employers that penalized workers who would not participate or rewarded workers who would participate in wellness programs that included medical inquiries
- Employer groups urged that the ADA should be interpreted to permit use of financial incentives similar to those authorized under ACA/ERISA

May 2016 EEOC Regulations

- In May 2016, the EEOC, which enforces ADA and GINA, issued new regulations to modify requirements for workplace wellness programs

Revised ADA Standards for Wellness Programs Offered Through a Group Health Plan

- For voluntary wellness programs offered on or after 1/1/17, the rule requires any wellness program that involves medical inquiries to be reasonably designed, as defined under the ERISA/ACA rule
  - A reasonably designed wellness program must not be designed mainly to shift costs onto employees based on their health
  - Reasonably designed wellness programs that collect health information must also provide participants with their results, follow-up information, or advice designed to improve health or use collected information to design a program that addresses at least a subset of health conditions identified
  - A program is *not* reasonably designed if it exists "simply to give an employer information to estimate future health care costs"
- Whether a wellness program is reasonably designed to promote health or prevent disease will be evaluated by EEOC in light of all relevant facts and circumstances

Revised ADA Standards for Wellness Programs Offered Through a Group Health Plan

- In addition, two new standards relating to financial incentives and notice will apply
- Incentives
  - Employers cannot deny eligibility for group health plan benefits or take adverse employment action, or retaliate against, intimidate, or threaten employees who refuse to participate in workplace wellness programs
  - The rule allows use of financial or in-kind incentives (e.g., time off) to encourage participation in wellness programs that include medical inquiries
  - The maximum financial incentive is 30% of the total cost (employer and employee share) of self-only group health plan coverage
    - This limit applies to both health-contingent *and* participatory wellness programs
    - A wellness program will be considered voluntary under the ADA if the amount of an incentive offered for participation – alone or in combination with incentives offered for health-contingent wellness programs – does not exceed this maximum
    - Incentives need not be conditioned on participating in the group health plan (i.e., 30% maximum will be based on the cost of self-only coverage under the second lowest cost silver plan)
  - Finally, the rule specifies that wellness programs cannot condition the incentive on the individual's agreeing to the sale, exchange, sharing, transfer, or other disclosure of medical information or to waive confidentiality protections that would otherwise apply

Revised ADA Standards for Wellness Programs Offered Through a Group Health Plan

- Notice
  - Notice requirements will apply to any workplace wellness program, either health-contingent or participatory, that involves medical inquiries, such as HRAs
  - Programs will be required to provide workers notice of what information would be requested, how it would be used, and how the privacy and security of personal information would be protected

Modified GINA Standards for Wellness Programs

- In addition, EEOC issued a final rule to make similar changes in workplace wellness standards under GINA
- The GINA wellness rule addresses the extent to which an employer may offer inducements to an employee's *spouse* to participate in its workplace wellness program
  - Inducements for the spouse to participate in a wellness program can be made without regard to whether the employer offers group health benefits to the spouse or whether the spouse participates in the employer's group health plan

Modified GINA Standards for Wellness Programs

- Under GINA, genetic information is defined to include not only results of a genetic test, but health information about an individual's family members, including the spouse
- The rule makes an exception to this definition and permits wellness programs to offer incentives to spouses to provide information about their own health status, though *not* about results of genetic tests
- The final rule does *not* permit workplace wellness programs to offer incentives for children (including adult children) of employees to disclose their genetic information or any other health information

Modified GINA Standards for Wellness Programs

- The GINA wellness rule amends the standard for voluntary wellness programs to permit a maximum incentive for the spouse to participate in the workplace wellness program
  - 30% of the cost of self-only coverage offered by the employer, regardless of whether the spouse participates in the health plan
  - If the employer does not offer a health plan, the maximum incentive would be based on the cost of the second lowest cost silver plan in the Marketplace
- The GINA wellness rule also adopts the ERISA/ACA definition of a reasonably designed wellness program as modified by the ADA wellness rule

HIPAA

Knock Knock!
~Who's there?
HIPAA!
~HIPAA Who?

I can't tell you
THAT!

Health Insurance Portability and Accountability ACT (HIPAA)

- HIPAA protects individuals' identifiable health information (called "protected health information" or "PHI") held by covered entities and their business associates
  - Covered entities = health care clearinghouses, health plans, and most health care providers
  - Business associates = persons or entities (other than members of the workforce of a CE) that perform functions or activities on behalf of, or provide certain services to, a CE that involve access to PHI

HIPAA – Privacy and Security

- **Privacy Rule** regulates, among other things, the uses and disclosures that a CE or BA may make of PHI
- **Security Rule** requires CEs and BAs to implement administrative, physical, and technical safeguards to secure electronic PHI

HIPAA – Privacy and Security

- HIPAA Rules apply only to CEs and BAs – and *not* to employers *in their capacity as employers*
- The application of the HIPAA Rules to workplace wellness programs depends on the way in which those programs are structured
  - Some employers offer a workplace wellness program as part of a group health plan for employees
  - Other employers offer workplace wellness programs directly and not in connection with a group health plan

HIPAA – Privacy and Security

- So, do the HIPAA Rules apply to workplace wellness programs?
  - It depends

HIPAA – Privacy and Security

- Where a workplace wellness program is offered *as part of a group health plan*, the individually identifiable health information collected from or created about participants in the wellness program is PHI and protected by the HIPAA Rules
  - While the HIPAA Rules do not directly apply to the employer, a group health plan sponsored by the employer is a covered entity under HIPAA, and HIPAA protects the individually identifiable health information held by the group health plan (or its BAs)
    - The HIPAA Rules also protect the individually identifiable health information held by a health insurance issuer or HMO providing coverage under the group health plan, which are themselves covered entities

HIPAA – Privacy and Security

- HIPAA also protects PHI that is held by the employer as plan sponsor on the plan's behalf when the plan sponsor is administering aspects of the plan, including wellness program benefits offered through the plan
  - An employee welfare benefit plan that has fewer than 50 participants and is self-administered is not a group health plan as defined at 45 CFR 160.103, and thus, not a covered entity, under the HIPAA Rules

HIPAA – Privacy and Security

- Where a workplace wellness program is offered by an employer directly and *not* as part of a group health plan, the health information that is collected from employees by the employer is *not* protected by the HIPAA Rules
- However, other federal or state laws may apply and regulate the collection and/or use of the information

HIPAA – Privacy and Security

- Where a workplace wellness program *is* offered through a group health plan, what protections are in place under HIPAA with respect to access by the employer as plan sponsor to individually identifiable health information about participants in the program?
  - It depends (on whether the employer as plan sponsor performs plan administration functions on behalf of the group health plan)

HIPAA – Privacy and Security

- HIPAA Privacy and Security Rules place restrictions on the circumstances under which a group health plan may allow an employer as plan sponsor access to PHI, including PHI about participants in a wellness program offered through the plan, without the written authorization of the individual
- Often, the employer as plan sponsor will be involved in administering certain aspects of the group health plan, which may include administering wellness program benefits offered through the plan

HIPAA – Privacy and Security

- Where this is the case, and absent written authorization from the individual to disclose the information, the group health plan may provide the employer as plan sponsor with access to the PHI necessary to perform its plan administration functions, but only if the employer as plan sponsor amends the plan documents and certifies to the group health plan that it agrees to, among other things:

HIPAA – Privacy and Security

- Establish adequate separation between employees who perform plan administration functions and those who do not;
- Not use or disclose PHI for employment-related actions or other purposes not permitted by the Privacy Rule;
- Where electronic PHI is involved, implement reasonable and appropriate administrative, technical, and physical safeguards to protect the information, including by ensuring that there are firewalls or other security measures in place to support the required separation between plan administration and employment functions; and
- Report to the group health plan any unauthorized use or disclosure, or other security incident, of which it becomes aware.

HIPAA – Privacy and Security

- Where the employer as plan sponsor does *not* perform plan administration functions on behalf of the group health plan, access to PHI by the plan sponsor without the written authorization of the individual is much more restricted
  - In these cases, the Privacy Rule generally would permit the group health plan to disclose to the plan sponsor only: (1) information on which individuals are participating in the group health plan or enrolled in the health insurance issuer or HMO offered by the plan; and/or (2) summary health information if requested for purposes of modifying the plan or obtaining premium bids for coverage under the plan

HIPAA - Nondiscrimination

- Under HIPAA, an individual cannot be denied eligibility for benefits or charged more for coverage because of any health factor
- 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 (including conditions arising out of acts of domestic violence),
  - Disability, or
  - Any other health status-related factor determined appropriate by the Secretary of the Department of Health and Human Services (HHS), added under the ACA

HIPAA - Nondiscrimination

- The HIPAA nondiscrimination provisions generally prohibit group health plans from charging similarly situated individuals different premiums or contributions or imposing different deductible, copayment or other cost sharing requirements based on a health factor
- However, there is an exception that allows plans to offer wellness programs
- 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)
- (HIPAA nondiscrimination provisions do not apply to wellness programs not offered as part of a group health plan)

HIPAA - Nondiscrimination

- Examples:
  - 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 outcomes
  - A program that encourages preventive care by waiving the copayment 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

HIPAA - Nondiscrimination

- Wellness programs that *do* condition a reward on an individual satisfying a standard related to a health factor must meet five requirements:
  1. The total reward for all the plan's wellness programs that require satisfaction of a standard related to a health factor is limited – generally, it must not exceed 20% of the cost of employee-only coverage under the plan. If dependents (such as spouses and/or dependent children) may participate in the wellness program, the reward must not exceed 20% 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 unreasonably 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).

HIPAA - Nondiscrimination

- Example: can a plan provide a premium differential between smokers and nonsmokers?
  - The plan is offering a reward based on an individual's ability to stop smoking
  - 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

LAWS OF THE LAND

More

Consolidated Omnibus Budget Reconciliation Act (COBRA)

- To the extent that an employer-sponsored wellness program implicates ERISA, the program is also subject to COBRA (which amended a portion of ERISA)
- An otherwise qualified COBRA beneficiary must be offered coverage (at the beneficiary's own cost) identical to that available to similarly situated beneficiaries who are *not* receiving COBRA coverage under the plan
- Essentially, a qualified former employee could continue to participate in the wellness program in the same manner as he/she would be able to participate in the continuation of health care coverage

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

- ADEA prohibits an employer from discriminating against any individual on the basis of "compensation, terms, conditions, or privileges of employment, because of such individual's age"
  - Employers should construct wellness programs so that they do not reduce incentives, impose surcharges, or otherwise discriminate against individuals in this protected group and ensure their wellness programs do not have a disparate impact on older workers (i.e., target health or risk factors that occur disproportionately in older workers)
- Employers should also ensure proposed wellness programs do not disproportionately impact a protected group under Title VII

Fair Labor Standards Act (FLSA)

- Employer wellness programs may also implicate FLSA
  - Example: where an employer offers a wellness training program, it should ensure that its employees' attendance at the program is not considered "working time" under FLSA or, alternatively, properly compensates employees for their attendance
- Generally, an employer does not have to pay for the time an employee spends in connection with a wellness program if:
  - Attendance is outside of the employee's regular working hours;
  - Attendance is voluntary (the employer should emphasize whether the program is voluntary or required);
  - The course, lecture, or meeting is not directly related to the employee's job; and
  - The employee does not perform any productive work during such attendance
- Attendance is *not* considered voluntary if it is required by employer
  - In making this determination, employers should consider whether employee's working conditions could be adversely affected by nonattendance

Ohio Workers' Compensation

- Where an employee is injured while performing an employer-sponsored recreational or fitness activity, the employee's injury will be covered by workers' compensation insurance, *unless* the employee signs a recreational waiver before participating
- A wellness program may be considered to be "employer-sponsored" for workers' compensation purposes where the following factors are present:
  - The employer paid for or organized the activity;
  - The activity was conducted on the employer's premises (or the employer paid for rental of the premises);
  - The employer supervised the activity;
  - The employer paid the entry fee;
  - The employer purchased uniforms or equipment;
  - Only employees participated in the activity; and
  - The employer received an economic or intangible benefit
- Employers should make sure their employees sign waivers for activities that are clearly employer-sponsored

Invasion of Privacy

- Both Ohio and Federal laws recognize a claim for invasion of privacy in the employment context
- Employers have a responsibility to refrain from divulging information contained in employees' medical records that an employer reviews or possesses (much like HIPAA Privacy Rule)
- Employers must only obtain such information through lawful means

Summary

- Despite myriad state and federal laws affecting employer-sponsored wellness programs, a properly-structured program can be an effective and beneficial means to manage employees' healthcare costs.
- Employers should:
  - Consult legal counsel for program development and compliance review
  - Favor a conservative approach while case law develops
    - For now, participatory wellness programs and activity-only, health-contingent wellness programs limit employer liability most effectively

Questions?

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