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How Healthy is Your Wellness Plan?

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Most employers know that healthy employees are more productive, take fewer sick days, and are generally happier - and not to mention, are less expensive to insure. As a result, a majority of companies offer their employees some form of a wellness program as a benefit. Sounds like a win-win, right? While promoting healthier lifestyles to your employees may sound harmless enough, there are an increasing number of federal laws that could affect the legality of these programs. Specifically, the Americans with Disabilities Act (ADA), the Health Insurance Portability and Accountability Act (HIPAA), the Genetic Information Nondiscrimination Act (GINA), and the Affordable Care Act (ACA) all include provisions that may affect your wellness program.

For example, both the ADA and GINA limit the circumstances under which an employer may request or acquire health-related information. HIPAA and the ACA affect how employers may condition the cost of insurance to employees based upon their meeting certain health goals. GINA generally prohibits providing financial incentives to employees who provide information as part of a wellness program, while the ADA says that an employer may not penalize employees who do not participate in a wellness program. In addition, a wellness program that is compliant under HIPAA and the ACA could still potentially violate the ADA or GINA.

Confused yet? You are not alone. Many employers are, and as a result, a panel of experts representing business, health care providers, and advocacy groups has recently requested that the Equal Employment Opportunity Commission (EEOC) provide guidance with regard to the interplay of these laws and their impact on employer

provided wellness programs.

One of the issues posed to the EEOC is how to reconcile wellness programs that comply with one law but potentially violate another. Looking to HIPAA, for example, recently published regulations allow wellness plans to offer incentives for participation in a health-contingent program - that is, the individual receives a reward for meeting certain benchmarks such as blood pressure or body mass index within a certain range. The regulations provide that the reward, which under the ACA is not to exceed 30 percent of the total cost of employee-only coverage, must be available to all similarly situated individuals through some form of a reasonable alternative. Thus, those individuals who are identified as outside the healthy range may be required to take additional steps such as meeting with a health coach, taking a fitness course, or adhering to a health improvement plan to receive the same reward. One of the issues to consider is, while a reasonable alternative may be sound under HIPAA, will it pass muster under the ADA?

As the EEOC enforces both the ADA and the section of GINA related to employment discrimination, those are areas that may merit special consideration by the agency. (Other sections of GINA that apply to health plans are enforced by the Department of Labor.) The EEOC has already issued informal guidance reiterating that the ADA permits employers to make disability-related inquiries or to request employees take medical examinations when they are part of a voluntary wellness program. The EEOC has further noted that a program is considered voluntary if an employer neither requires participation in the program nor penalizes an employee who does not participate.

Likewise, GINA prohibits the collection of genetic information prior to or in connection with enrollment in a health plan, including wellness programs, as well as prohibits collection for underwriting purposes. The collection of information includes completing a health risk assessment (HRA). GINA also prohibits offering an incentive to individuals for participating in an HRA. Similar to the exceptions provided under the ADA, GINA generally allows the acquisition of genetic information about an employee or his or her family members when the employer offers health or genetic services, including wellness programs, on a voluntary basis. However, such services should also be available to employees who have not volunteered family history through an HRA. As both the ADA and GINA provide exceptions in the context of voluntary disclosure or participation, one of the areas the EEOC has been asked to address what is meant by "voluntary" in this context.

The ADA may also implicate the need for accommodations. For example, an employer may want to offer certain rewards, such as a bonus, or perhaps a reduction in contributions or a gift card, to

employees for meeting certain health goals through a wellness program. What is an employer's responsibility to those employees who are unable to meet those goals due to a disability? Situations like this may require an employer to find an alternative way - that is, a reasonable accommodation - for the disabled employee to also earn the incentive. Thus, in our hypothetical program, employees get a \$20 gift card if they meet certain weight goals, but a disabled employee is unable to do so because of a thyroid condition. The hypothetical employer might provide this employee with the opportunity to earn the incentive through participation in a health management class or a similar program.

In addition, the EEOC may also consider whether employer wellness programs run afoul of other laws, such as Title VII of the Civil Rights Act or the Age Discrimination in Employment Act. For example, certain minority and ethnic groups are disproportionately impacted by certain health conditions such as diabetes and obesity, and older people tend to have more health issues than younger people do, so there is the potential for wellness programs to disparately impact these and other groups.

While the EEOC is expected to issue further guidance in the future, employers are urged to begin examining their wellness programs now to identify areas for potential liability and to follow-up with their counsel for further guidance as necessary.

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