



## The GSH 60-Second Memo

December 7, 2011

*Sponsored by the GSH Employment Group*



**Suzanne M. Glisch,  
Esq.**

[www.gshllp.com](http://www.gshllp.com)

(414) 277-8500

Want more  
information on this  
topic?

[CLICK HERE!](#)

[Join Our Mailing List!](#)

### **Incentivizing Wellness without Incentivizing Litigation**

By Suzanne M. Glisch, Esq.

The holidays are upon us. 'Tis the season for family, merriment, and, my personal favorite, overindulgence. It is thus no wonder that after the holiday season ends, one of the top New Year's resolutions is to get healthy. Although there are those few, valiant individuals who actually succeed in implementing and maintaining such a resolution, many people - myself included - lose the momentum to continue with it quite quickly. Over the past few years, however, employers have begun implementing health and wellness incentive programs, which can not only support employees' personal health goals, but which can also significantly reduce the skyrocketing health care costs for the employer.

A wellness incentive program ("WIP") encourages employees to adopt or maintain a healthy lifestyle in a number of ways - or at least take the first steps toward learning about healthy alternatives. For example, regular exercise can help reduce or eliminate a number of health problems, such as high cholesterol. And, the thought goes, healthier employees can also mean increased productivity, better attendance, and improved morale. Therefore, through a WIP, employers will offer a variety of incentives to employees who maintain or achieve health-related goals, such as maintaining a cholesterol level below a certain number or earning points through exercising.

While this type of program seems like a simple appealing way to help accomplish the goals of improving employee health while reducing business costs, employers need to be aware that the way they structure WIPs could run afoul of federal, state, and/or local laws. Indeed, WIPs should be crafted in such a way that they do not

favor one group of employees and/or potentially discriminate against another group. To demonstrate, the following scenarios present a limited sampling of some of the issues that could arise in formulating a WIP:

#### Scenario 1

Your company just implemented a new WIP, which consists solely of giving annual premium discounts for the cost of employee-only insurance coverage to participants who walk a certain minimum number of miles per week and maintain a targeted cholesterol level. No alternatives are offered. Justin, who utilizes a wheelchair, is unable to participate in the plan, thereby denying him the financial incentives many of his colleagues are able to obtain. On its face, this plan could face a challenge under the Health Insurance Portability and Accountability Act ("HIPAA"), which mandates, among other things, that: (1) a plan may not require individuals to meet a standard related to a health factor in order to obtain a reward; and (2) any reward be available to all similarly situated individuals through the allowance of reasonable alternative standards to qualify for the reward if an individual cannot participate due to a medical condition. Further, this WIP may face disability discrimination and accommodations challenges under the Americans with Disabilities Act ("ADA"), in that it would not allow Justin to take advantage of the premium discounts because of an alleged disability, unlike an employee who does not have a disability preventing him/her from participating in the WIP; and it does not offer any alternatives to reasonably accommodate Justin, who is unable to participate because of his potential disability.

#### Scenario 2

Your company's new WIP offers a cash bonus and the chance to win a fully paid vacation to the Caribbean for employees who purchase a gym membership and utilize said membership at least four times per week. No alternatives are given. Sally, a sixty-year-old salesperson at your company who travels four days a week, is unable to meet the terms set forth in the WIP due to the travel demands of her position, thereby denying her the rewards many of her colleagues are able to obtain. Further, 80% of the employees who hold the same traveling sales position as Sally are women. Based on these circumstances, this plan could face a challenge under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), as it potentially disparately impacts a protected group of employees based on gender. Indeed, depending on the particular make-up and demographics of your workforce, your company could face allegations that the WIP disparately impacts a number of other groups protected by Title VII as well. In addition, this WIP could face a challenge under the Age Discrimination in Employment Act ("ADEA"), as, even if Sally did not have to travel four days a week, perhaps she would still not be able to participate in the WIP due to age-related maladies, thereby running afoul of the ADEA's protection of employees over the age of forty.

Overall, the driving forces behind, and resulting benefits from, employer-implemented wellness programs are positive and offer advantages to both employers and employees. But in crafting these

**GONZALEZ  
SAGGIO  
HARLAN**

**Office Locations:**

Arizona  
California  
Connecticut  
Florida  
Georgia  
Illinois  
Indiana  
Iowa  
Massachusetts  
New Jersey  
New York  
Ohio  
Tennessee  
Washington D.C.  
Wisconsin

[www.gshllp.com](http://www.gshllp.com)

programs, employers need to remember that various legal restrictions exist, and that they must carefully navigate the legislative waters in order to develop a plan that will not land them with discrimination charges or other legal challenges. Planning a WIP must therefore be supported with an in-depth understanding of the array of federal, state, and local regulations that could come into play.

A few general suggestions for structuring a WIP are:

- Avoid pushing employees to achieve unattainable goals;
- Include a variety of incentives and requirements that do not all revolve around physical goals, which could disproportionately affect certain protected groups of employees;
- Offer alternatives;
- Aim for participation, not performance;
- Focus on education;
- Be sure the WIP does not encourage conversations about employees' personal medical conditions or violate employees' legally mandated privacy rights with regard to health and medical information; and
- Keep things positive, rather than imposing consequences for not meeting WIP goals.

Further, it is wise to consider consulting knowledgeable experts who understand the constantly changing laws and the implications of developing and administering WIPs, as, in the end, a carefully planned WIP can yield significant benefits for both employees and employers, while one that is ill-conceived could land an employer in court.

*The 60-Second Memo is a publication of Gonzalez Saggio & Harlan LLP and is intended to provide general information regarding legal issues and developments to our clients and other friends. It should not be construed as legal advice or a legal opinion on any specific facts or situations. For further information on your own situation, we encourage you to contact the author of the article or any other member of the firm. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.*

*Copyright 2011 Gonzalez Saggio & Harlan LLP. All rights reserved.*