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# EMPLOYER WELLNESS PROGRAMS: WHAT FINANCIAL INCENTIVES ARE PERMITTED UNDER THE LAW?

The rising cost of health care is a serious concern for employers who provide health benefits to their employees. In 1960, health care spending accounted for 5 percent of the United States' Gross Domestic Product ("GDP"). As of 2008, it had risen to 17 percent. By 2018, health care spending is projected to comprise 20 percent of the GDP.[1]

Companies have and continue to establish wellness programs for their employees in an effort to reduce company costs and employee illness-related absences, although views on the actual savings generated vary.[2] Eighty percent of small company (3-199 employees) health plans, and 60 percent of large company (200+ employees) health plans, offer wellness programs.[3]

Employers who want to incorporate financial incentives into their wellness programs need to navigate a variety of federal and state laws barring discrimination that are implicated by wellness programs. Regulations recently issued by the Departments of Labor, Health and Human Services, and the Treasury have clarified how some of these restrictions operate following enactment of the Affordable Care Act ("ACA"), but they leave unanswered significant questions regarding the application of other laws, such as the Americans With Disabilities Act and the Genetic Information Nondiscrimination Act.

## TYPES OF EMPLOYER WELLNESS PROGRAMS

In general, a wellness program educates employees about health-related issues, promotes the maintenance of healthy lifestyles, and encourages employees to make healthier choices. Some programs may be purely educational and have no financial implications. For example, an employer may ask employees to complete a health risk assessment without offering any incentive or may offer free blood-pressure screenings or on-site exercise classes. Other wellness programs are tied to financial incentives that may take the form of reductions in the employee's share of the premium for health care coverage, reductions in co-pays

or other cost-sharing, or straight payments of cash or cash equivalents, like gift cards. Ten percent of small companies and 41 percent of large companies offer financial incentives for participation in wellness programs.[4]

## REQUIREMENTS FOR WELLNESS PROGRAMS THAT ARE GROUP HEALTH PLANS

The first rules expressly targeting financial incentives and wellness programs were issued as part of the implementation of the Heath Insurance Portability and Accountability Act ("HIPAA"), which prohibits group health plans from discriminating in eligibility or premiums based on health factors. A wellness program is a "group health plan" if it provides medical care to participants or beneficiaries directly or through insurance, reimbursement, or otherwise, and is *part* of a group health plan if its rewards are linked to the group health plan. In addition, the HIPAA regulations require that benefits be offered uniformly to all similarly situated individuals but allow for "benign" discrimination in which individuals with adverse health factors are treated more favorably. Examples of this benign discrimination include extending eligibility for coverage to children over age 26 who are disabled and offering disease management programs.

The HIPAA regulations also made an exception to this nondiscrimination requirement for wellness programs that meet certain requirements. This exception for wellness programs became part of the statute under the ACA with respect to what is called "nongrandfathered" coverage, effective for plan or policy years beginning on or after January 1, 2014. In adding the wellness program exception to the statute, Congress also increased the maximum reward that could be offered from 20 percent to 30 percent of the total cost of coverage and granted regulatory authority for an increase up to 50 percent.

Final regulations under the ACA and HIPAA concerning the wellness program exception have recently been issued; these regulations apply to all group coverage (not just nongrandfathered coverage), effective for plan or policy years beginning on or after January 1, 2014. These final regulations are similar to the existing wellness program regulations with a few key distinctions. One distinction is that the final regulations provide that the maximum reward is increased, including an increase to 50 percent for wellness programs that are designed to prevent or reduce tobacco use. Another distinction is that the final regulations divide wellness programs into categories in a slightly different manner than do the existing rules. The final regulations also expand the requirement to offer a reasonable alternative program for wellness programs that require the participant to meet a standard.

## WELLNESS PROGRAM CATEGORIES

The final ACA regulations divide wellness programs into three categories: (1) participatory; (2) activity-only, and (3) outcome-based.[5]

**Participatory Wellness Programs**. In a "participatory" wellness program, the group health plan provides individuals with a financial incentive to participate in the program without requiring that the employee satisfy any health-related condition to receive the incentive. Examples of participatory programs include reimbursement for membership in a fitness center, providing a reward for participating in a smoking cessation program without regard to whether the individual ultimately quits, and providing a reward for completing a health risk assessment regarding current heath status without any further obligations or conditions. The final regulations provide that a participatory wellness program does not result in impermissible discrimination as long as it is available to all similarly situated individuals.[6]

**Activity-Only Wellness Programs**. "Activity-only" wellness programs are ones that require employees to perform an activity that some individuals may be unable to perform or complete based on health status, such as walking, diet, or exercise programs. These activity-only programs require an individual to participate but not to attain or maintain a specific health outcome. Under the final regulations, an activity-only wellness program does not impermissibly discriminate as long as it meets certain requirements, summarized as follows:

1. Eligible individuals have the opportunity to qualify for the reward at least annually;
2. The aggregate reward for all activity-only and outcome-based wellness programs combined does not exceed

30 percent of the total cost of coverage (employer + employee) under the health plan (50 percent for programs designed to prevent or reduce tobacco use);
3. The program is reasonably designed to promote health or prevent disease;
4. The reward is available to all similarly situated participants;
5. The plan makes available (and pays for) a reasonable alternative standard or program for individuals for whom it is unreasonably difficult due to a medical condition or medically inadvisably to meet the normal standard; and
6. The availability of an alternative standard or program is disclosed in any materials describing the terms of the program.[7]

**Outcome-Based Wellness Programs**. "Outcome-based" wellness programs are ones that require that an individual attain and/or maintain a specific health outcome in order to obtain a reward, such as being a nonsmoker or maintaining a specific weight or body mass index ("BMI") score. Under the final regulations, an outcome-based wellness program does not impermissibly discriminate as long as it meets requirements that are generally the same as the activity-only wellness program requirements, with one major difference: the employer must provide a reasonable alternative for *any* individual who does not meet the normal standard, not just to those who have a medical issue that prevents them from meeting the standard. Specifically, requirements 3 and 5 above, with respect to an outcome-based wellness program, are summarized as follows:

3. The program is reasonably designed to promote health or prevent disease, which for outcome-based wellness programs requires that a reasonable alternative standard or program to qualify for the reward be offered to any individual who does not meet the initial standard;
5. The plan makes available (and pays for) a reasonable alternative standard or program for any individual who does not meet the normal standard.[8]

The requirement to provide a reasonable alternative for any individual who does not meet the normal standard is a significant change from the existing rules and will require adjustments to plan design for wellness programs that impose a surcharge for not meeting a standard. For example, plans that currently impose a tobacco surcharge will need to offer a reasonable alternative, beginning in 2014, for *all* participants, not just those who have a medical issue that prevents them from meeting the tobacco cessation standard. The final regulations include detailed rules about providing a reasonable alternative, including allocation of costs, accommodating recommendations of the individual's physician, and seeking verification. However, they also provide that the specifics of the reasonable alternative need *not* be communicated along with other information about the wellness program. The only things that must be communicated initially are that an alternative standard is available that will accommodate physician recommendations and the contact information to be used to inquire about the alternative. Thus, while plans must stand ready to offer the alternative, they need not advertise the specifics.

## OTHER FEDERAL NONDISCRIMINATION LAWS THAT MAY APPLY

An employer offering a wellness program, whether as part of or separate from a group health plan, will also need to take into account other federal nondiscrimination laws, such as the Americans With Disabilities Act (the "ADA"),[9] the Genetic Information Nondiscrimination Act ("GINA"),[10] and the Employee Retirement Income Security Act ("ERISA").[11] State laws concerning disability discrimination, smoker protection, and privacy may also affect what an employer can do in its wellness program. In contrast to the specific rules developed under HIPAA and the ACA for wellness programs that are group health plans, there is little guidance regarding the application of these other statutes to wellness programs. Moreover, the ACA regulations specifically state that they do not address the applicability of other federal or state laws to wellness programs.

**ADA.** The ADA prohibits an employer from requiring a current employee to answer disability-related questions or to undergo a medical exam, absent a showing that the questions or exam are job-related and consistent with business necessity. Many wellness programs, however, involve asking employees to answer questions that arguably relate to disabilities or submit to a medical exam. The EEOC has confirmed that an employer is permitted to make disability-related inquiries and/or conduct medical examinations

as part of a *voluntary* wellness program.[12] It has also indicated that a wellness program is deemed "voluntary" if the employer neither requires participation nor penalizes employees who do not participate.[13] The EEOC has not yet, however, provided clear guidance regarding the definition of "voluntary" and what amount or type of incentive may be offered by employers and still have participation be deemed "voluntary" under the ADA.[14]

In several discussion letters, the EEOC has given some hints at their thinking. A March 2009 letter concluded that requiring employees to complete a health risk assessment as a condition to participating in a health insurance plan would violate the ADA because the nature of the condition meant that the program was not truly "voluntary" because the employees were "penalized for non-participation" as they were ineligible to receive health coverage if they did not complete the health risk assessment.[15] Interestingly, this March 2009 letter was initially issued two months earlier and at that time included an assessment that a wellness program would be considered "voluntary" as long as the inducement to participate did not exceed 20 percent of the cost of the employee's coverage under the plan. This portion of the letter was deleted from the March version, with explanation from the EEOC that the initial inquiry "did not raise the question of what level of inducement to participate in a wellness program would be permitted under the ADA." Although this 20 percent "cap" initially supported by the EEOC is no longer technically the EEOC's official position, the rescinded letter gives an indication of the EEOC's potential analysis—and the potential conflict between the ADA and HIPAA/ACA. An August 2009 letter concluded that a wellness program that required completion of a health risk assessment would not be considered voluntary because it penalized employees who did not complete the health risk assessment by making the employee ineligible to receive reimbursement for health expenses.[16]

This past May, the EEOC held hearings and heard testimony regarding the applicability of the ADA and GINA to wellness programs. Panelists included representatives from employee rights and disability rights organizations, as well as lawyers representing large employers and other interested parties. Employer representatives emphasized the importance that incentives play in the success of wellness programs, while employee advocates questioned whether a wellness program is truly voluntary under the ADA if an employer withholds incentives from employees who do not participate. While the EEOC did not commit to any future course of action, several Commissioners indicated their agreement that it would be beneficial to all parties for the EEOC to provide guidance regarding wellness programs.

Federal courts also have yet to resolve the ADA "voluntariness" issue. Indeed, only one appellate decision has addressed the application of the ADA to wellness programs. *Seff v. Broward County*, 691 F.3d 1221 (11th Cir. 2012), involved a wellness program that required that participating employees undergo a biometric screening and complete a health risk assessment. Employees who chose not to participate had $20 automatically deducted from their biweekly paycheck. The court held that this program did not violate the ADA as it fell under the ADA's insurance safe harbor provision. This safe harbor provision was drafted to allow insurance companies to hedge their risks by identifying risk factors in an employee population and to design benefits to mitigate those risks. The court, therefore, did not address whether the County's program was "voluntary" in light of the automatic $20 biweekly charge.

The safe harbor provision in the ADA exempts bona fide employee benefit plans from the ADA's requirements, including the prohibitions on required medical examinations and disability-related inquiries. In accordance with this provision, employers are allowed to establish plans based on underwriting, classifying risks, or administering risks, as long as the exemption is not used as a subterfuge to evade the purposes of the ADA. While the decision in *Seff* would appear to allow employers to tie all wellness programs to a bona fide health care plan and thereby avoid the ADA "voluntariness" issue, there is no guarantee that the EEOC and/or other circuits will agree with the 11th Circuit. Moreover, even if it is ultimately confirmed that employers can sidestep the voluntariness issue in this manner, doing so will also likely require employers to comply with the HIPAA requirements described above, applicable to health-contingent wellness plans associated with health plans. Additionally, it is important to note that the EEOC's Acting Associate Legal Counsel has stated that *Seff* is inconsistent with the EEOC's own standards.

**GINA.** GINA, as its name suggests, prohibits health insurers and employers from discriminating based on genetic information. GINA also strictly limits the acquisition of "genetic information," and broadly defines "genetic information" to include genetic tests, genetic tests of family members, and "the manifestation of a disease or disorder in family members."[17] Health risk assessments that ask questions about family medical history—which is typical—may violate GINA.[18]

Based on GINA and regulations issued by the EEOC, wellness programs may request genetic information when:

1. The provision of genetic information is "voluntary";
2. The individual provides prior, "voluntary," knowing, and written authorization for the provision of the information;
3. Any individually identifiable information is provided only to the individual and medical professionals and is not accessible by managers, supervisors, and/or those making employment decisions; and
4. The employer does not offer financial inducement for individuals to provide genetic information, unless the employer makes it clear that the incentive is available to the employee regardless of whether the participant answers the questions regarding genetic information (e.g., by express disclosure on the health risk assessment).[19]

Under GINA, "voluntary" means that the employer neither requires the individual to provide genetic information nor penalizes the individual for refusing to provide it.[20] As with the ADA, the EEOC and the courts have not yet firmly established the point at which an incentive to participate in a wellness program becomes a penalty under GINA.[21] Regardless of whether the program meets the "voluntariness" standard, however, in order to comply with GINA, employers with wellness programs that include an incentive for completing a health risk assessment seeking genetic information must be careful to inform employees that they can receive the incentive without providing the genetic information.

**ERISA.** An employer's wellness program will fall under ERISA's purview if the employer's benefit plan is otherwise subject to ERISA and if the wellness plan provides medical care rather than just educational information or access to health care facilities.[22] "Medical care" for this purpose is defined as care for "the diagnosis, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body."[23]

Wellness programs that are subject to ERISA pose additional considerations for employers, most significantly: (i) additional filing and notice requirements; and (ii) potential for liability under section 510.

Wellness programs that are subject to ERISA will need to satisfy ERISA's filing and notice requirements, which include filing a Form 5500 (annual report) with the Department of Labor and distributing a Summary Plan Description to participants. If the wellness program is part of a group health plan, these requirements may be fulfilled in the filings and notices for the group health plan. However, if the wellness program is separate from the employer's group health plan, the employer must separately comply with these requirements.

Wellness programs that are subject to ERISA are also subject to section 510 of ERISA, which provides that an employer may not terminate, fine, or discipline an employee in order to prevent the employee from receiving his or her benefit rights.[24] This section creates an additional risk of litigation if an employee views the terms and conditions of a wellness plan as impeding access to benefits.

**State Law Restrictions.** State laws may affect the legality of an employer's wellness program. For example, laws that prohibit employers from discriminating against employees on account of the employees' use of lawful products, including tobacco, would affect the legality of smoking cessation programs and health-contingent programs that have incentives tied to not being a smoker. To date, 29 states and the District of Columbia have enacted such smoker protection laws. In addition, although currently only Michigan has a law prohibiting discrimination based on an individual's weight, such prohibitions on discriminating against obese employees also affect wellness programs.[25] Similarly, state laws prohibiting discrimination based on "medical conditions" (such as the California Fair Employment and Housing Act) may come into play, especially with health-contingent programs. Thus, employers must be cognizant of state-specific laws when drafting wellness programs.

## CONCLUSION

Employers now have guidance on how to ensure that a wellness program is compliant with, and not in violation of, the HIPAA and ACA nondiscrimination requirements for group health plans. The application of nondiscrimination requirements in other federal and state laws remains less clear. Given the legal uncertainties, we recommend adhering to the following when considering implementing a wellness program: (i) refrain from making a health risk assessment or any other aspect of the program mandatory in order to qualify for health coverage; (ii) avoid any questions (written or otherwise) regarding family health history, in order to avoid violating GINA; and (iii) weigh the costs and benefits of various financial incentives considering, among other things, the income and employment tax implications. We also recommend having the wellness program reviewed comprehensively for compliance with the range of applicable laws.

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## ENDNOTES

1 Centers for Medicare and Medicaid Services, *National Health Expenditure Projections 2008-2018*, *available at* http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and Reports/NationalHealthExpendData/downloads/proj2008.pdf (last accessed June 15, 2013).

2 RAND Health, *Workplace Wellness Programs Study: Final Report*, *available at* http://www.dol.gov/ebsa/pdf/workplacewellnessstudyfinal.pdf.

3 Kaiser Family Foundation, *Employer Health Benefits 2012 Annual Survey*, 177–88 (2012)

4 *Id.* at 185.

5 26 C.F.R.. § 54.9802-1(f)(1); 29 C.F.R. §. 2590.702(f)(1); 45 C.F.R §146.121(f)(1).

6 26 C.F.R.. § 54.9802-1(f)(2); 29 C.F.R. §. 2590.702(f)(2); 45 C.F.R §146.121(f)(2).

7 26 C.F.R.. § 54.9802-1(f)(3); 29 C.F.R. §. 2590.702(f)(3); 45 C.F.R §146.121(f)(3).

8 26 C.F.R.. § 54.9802-1(f)(4); 29 C.F.R. §. 2590.702(f)(4); 45 C.F.R §146.121(f)(4).

9 42 U.S.C. § 12101, *et seq*.

10 42 U.S.C. § 2000ff, *et seq*.

11 Pub. L. No. 93-406.

12 Equal Employment Opportunity Commission, *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA*, *available at*: http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

13 *Id.*

14 EEOC Informal Discussion Letter dated January 18, 2013, *accessible at*: http://eeoc.gov/eeoc/foia/letters/2013/ada__wellness__programs.html (last accessed June 15, 2013).

15 EEOC Informal Discussion Letter dated March 6, 2009, *accessible at*: http://eeoc.gov/eeoc/foia/letters/2009/ada__disability__medexam__healthrisk.html (last accessed June 15, 2013).

16 EEOC Informal Discussion Letter dated August 10, 2009, *accessible at*: http://eeoc.gov/eeoc/foia/letters/2009/ada__health__risk__assessment.html (last accessed June 15, 2013).

17 GINA Sec. 201(4)(A).

18 GINA provides that if an employee undergoes a medical exam related to employment, the employer must instruct the medical professional to not ask questions regarding genetic information. 29 C.F.R. 1635.8(d). Accordingly, employers are advised to instruct any medical professionals conducting a medical exam related to employment, or as part of a wellness program, to refrain from asking the patient about genetic information.

19 42 U.S.C. § 2000ff-1(b)(2); 29 C.F.R. § 1635.8(b)(2)(i).

20 29 C.F.R. § 1635.8(b)(2)(i)(A)

21 EEOC Informal Discussion Letter dated June 24, 2011, *accessible at*: http://eeoc.gov/eeoc/foia/letters/2011/ada__gina__incentives.html (last accessed June 15, 2013).

22 29 U.S.C. § 1002(1).

23 29 U.S.C. § 1191b(a)(2)(A).

24 29 U.S.C. §1140

25 Michigan Statutes Annotated § 3.548(102)