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Legal Issues Surrounding Wellness Plans: Why Employers Should Look Before Leaping

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What is a Wellness Program?

- Program implemented by employers to encourage healthier lifestyles amongst employees
- The ultimate goal is to contain and/or reduce rising health care costs

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Common Examples of Wellness Programs

- Offering insurance premium discounts to those who meet health standards (and surcharges to those who don't)
- Reimbursing gym memberships
- Offering financial incentives (cash, gift cards) for achieving certain health goals (cessation of smoking or weight loss)
- Providing free health coaching and other services to encourage healthier lifestyles

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Why Implement Wellness Programs?

- Combat rising health care costs
- Reduce workers' compensation and disability claims
- Reduce work days lost due to illness and injury
- Bolster productivity
- Stay competitive
- Improve employee morale

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Two Main Types of Wellness Programs

- **Participation Only**: programs that give rewards to employees based solely on their participation in the program
- **Standard based**: programs that condition eligibility for a reward upon certain health factors or the participant's ability to meet specific health standards

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Possible Legal Implications

- HIPAA
- ADA
- ADEA
- NLRA
- ERISA
- GINA
- State laws

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Health Insurance Portability and Accountability Act (“HIPAA”)

- Only applicable to programs tied to health insurance plans
- Prohibits group health plans where eligibility is based on health-related factors such as:
 - Medical condition and history
 - Claims experience
 - Genetic information

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Five Requirements for “Bona Fide Wellness Program”

- Program’s reward may not exceed 20% of total cost of appropriate coverage under plan
- Program must be reasonably designed to promote health or prevent disease
- Once a year qualification for reward
- Available to all “similarly situated individuals” or a reasonable alternative offered
- Plan must disclose reasonable alternative standards

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Reasonable Alternative Language

- “If it is unreasonably difficult due to a medical condition for you to achieve the standards for the reward under this program, or if it is medically inadvisable for you to attempt to achieve the standards for the reward under this program, call us and we will work with you to develop another way to qualify for the reward.”

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Examples of HIPAA Violations

- Group health plan gives an annual premium discount for the cost of employee-only coverage to participants who participate in annual cholesterol test and achieve a count under 200
- Separate discounts of 20% of the cost of employee-only coverage for a cholesterol level below 200, a body mass index with a specified range, and walking at least three times a week, with no upper limit on the total discount

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Examples of HIPAA-Compliant Programs

- Premium discount program that offers 20% discount of employee-only coverage for employees with cholesterol levels below 200, and a waiver for those medically unable to meet this standard, which is described in all plan materials.
- Waiver of deductible program that offers waiver of annual deductible (not to exceed 20% of employee-only coverage) for BMIs within a specific range, and a waiver for those medically unable to meet this standard.

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Two-tiered Insurance Programs (Smokers vs. Non-Smokers)

- Because medical evidence suggests that smoking may be related to a health factor, two tiered insurance policies which require smokers to pay higher premiums trigger HIPAA's non-discrimination rules
- HIPAA-Compliant Example: Surcharge of 15% of the unsubsidized cost of employee-only coverage imposed on participants who do not provide an annual certification that they haven't used tobacco products in last year. Persons addicted to nicotine can avoid surcharge by participating in a smoking cessation program, regardless of whether they actually quit smoking

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The Americans with Disabilities Act (“ADA”)

- Prohibits employment discrimination against disabled individuals
- Disability defined as a physical or mental impairment that substantially limits one or more major life activities (smoking, obesity, high cholesterol or BMI may be related to disabilities)
- Make sure wellness programs are available to all “similarly situated individuals” and that reasonable alternative standards or accommodations are offered

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EEOC Guidance for ADA Compliance

- The EEOC interprets the ADA as permitting employers to conduct physical examinations and make medical inquiries as part of a wellness program as long as:
 - Participation in the program is voluntary;
 - Information obtained is maintained according to ADA confidentiality requirements; and
 - Information is not used to discriminate against the employee

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Age Discrimination in Employment Act (“ADEA”)

- Prohibits employment discrimination based on an individual’s age
- Employers should be aware that wellness programs that could potentially have a disparate impact on individuals protected by the ADEA (40 and over)
- Older individuals might have a harder time achieving certain health related standards or goals

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National Labor Relations Act (“NLRA”)

- Defines and protects rights of employees by requiring employers to bargain with employees regarding certain terms and conditions of employment
- Some aspects of wellness programs might have to be bargained with the union:
 - Health and safety issues
 - Programs that require employees to submit to physical examinations
 - Significant changes to food offered in cafeteria

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Employee Retirement Income Security Act (“ERISA”)

- Federal law that prohibits employers from interfering with attainment of rights to which employees may become entitled under employer’s pension and health plans
- Not subject to ERISA if the program is an employment policy separate from a group health plan
- DOL advisory opinions suggest that programs are not subject to ERISA if they do not require direct administration by employer

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Genetic Information Nondiscrimination Act (“GINA”)

- Prohibits employers from discriminating against applicants or employees based on genetic tests or genetic information
- Genetic information includes information about the manifestation of a disease or disorder in family members of such individual
- Proposed regulations permit employers to acquire genetic information as part of an employer’s “health or genetic services, including such services offered as part of a ***voluntary*** wellness program”
- What is “voluntary” still open to interpretation

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State “Off Duty Conduct” Laws

- Be aware of state laws protecting the off-duty conduct of employees
- For example, several states, including Kentucky and Indiana, have specific statutes prohibiting discrimination because of smoking or use of tobacco outside the workplace

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More Bark, Less Bite

- Many of these statutes, however, provide that charging higher premiums to employees based on tobacco use is not discrimination
- No such exclusion in Kentucky, but KRS 344.040 contains LRC note indicating that state legislature has implemented a state plan which requires different contribution rates for smokers and non-smokers

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Tips for Implementing Employee Wellness Programs

- Consider target population
- Ensure that the program's rules are clearly stated and uniformly enforced
- **CONTACT YOUR ATTORNEY!**

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QUESTIONS??

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