



Healthcare Employment Law IN Brief

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Health Care Reform: A Fresh Look at Wellness Programs

Although there is much uncertainty about the impact of health care reform, the recently-enacted Patient Protection and Affordable Care Act offers employers some relief in at least one area that **should help reduce employer health care costs**: wellness programs.

As discussed below, the new law not only confirms federal government support for wellness programs, it also provides a means of assisting small employers with the cost of establishing and maintaining such programs.

What is a Wellness Program?

A wellness program can be any employer program intended to promote health or prevent disease. Such programs often are geared toward smoking cessation, weight management, stress management, or other healthy lifestyle initiatives. "Rewards", often in the form of a health insurance premium discount or rebate, waiver of a deductible, or cash award, may be based on participation, or they may be based on a participant meeting specified benchmarks.

The Business Case for Wellness Programs

Unhealthy workers generally are more expensive to employ than healthy workers. According to information published by the Centers for Disease Control ("CDC"), "[m]edical expenses for obese employees are estimated to be 42 percent higher than for a person with a healthy weight" and "the annual cost of tobacco use is about \$3,400 per smoker." Moreover, "[a]bout one-fourth of people with chronic conditions have one or more daily activity limitations."

An effective wellness program not only may reduce an employer's direct costs of health care, it also may reduce the costs of absenteeism, low productivity, sick and disability benefits, and providing reasonable accommodations. The CDC website has several "cost calculators" that employers may use to estimate the financial benefit of various types of wellness programs.

Although comprehensive wellness programs may provide the greatest return on investment, even basic programs may result in employer savings. Small employers (less than 100 employees) should not assume they cannot invest in a wellness program. **The Patient Protection and Affordable Care Act provides for federal grants to establish such programs.**

Practical Tips for Setting Up a Program

Once you decide to implement a wellness program, consider the following:¹

1. Gain commitment from stakeholders such as senior management, human resource managers, safety officers, staff members, etc.
2. Create a wellness committee that involves cross-sectional representation of your organization to help with the development, implementation and assessment of your wellness program.
3. Assess the needs of your worksite. Complete a worksite environmental assessment and conduct an employee interest survey to collect information on the topics that would be of most interest to staff. Gather other available data that might be helpful.
4. Look at the program strategies and resource needs.
5. Use the assessment, survey results and other data to prioritize your program components and to set goals and objectives.

¹ These ten tips are an excerpt from: Department of Health and Family Services, Division of Public Health, Nutrition and Physical Activity Program, Wisconsin Partnership for Activity and Nutrition. Wisconsin Worksite Resource Kit to Prevent Obesity and Related Chronic Diseases. September 2007.

6. Develop an action plan with appropriate strategies to address specified goals. Include a timeline, a budget, and an evaluation plan.
7. Market and implement the plan.
8. Monitor progress and make necessary changes.
9. Evaluate the outcomes.
10. Continue to revise the plan to maintain a healthy environment for all employees.

The above assumes a relatively comprehensive program. More streamlined approaches are an option. **The key is to develop a program that you believe you can administer and in which your employees are likely to participate.**

Legal Issues

Wellness programs must comply with several federal laws, including HIPAA, the ADA, GINA, and, eventually, changes to federal law as set forth in the Patient Protection and Affordable Care Act.

HIPAA

HIPAA prohibits discrimination in group health plans based on a health factor. If none of the conditions for obtaining a reward for participation in a wellness program is based on a health factor, the wellness program should comply with HIPAA's non-discrimination rules if participation is available to all similarly situated individuals.

If, however, a condition for obtaining a reward is based on a health factor, a wellness program satisfies the HIPAA non-discrimination rules if, among other requirements, the reward, together with the reward for other wellness programs that require satisfaction of a standard related to a health factor, **does not exceed 20% of the cost of coverage.** Additional rules apply, including that the employer allow a reasonable alternative standard for obtaining the reward for any individual for whom it is unreasonably difficult due to a medical condition (or medically inadvisable to attempt) to satisfy the standard.

ADA

The ADA prohibits discrimination against qualified individuals with disabilities with respect

to terms, conditions, and privileges of employment. Employers may not require employees to submit to medical examinations or inquiries unless they are job-related and consistent with business necessity. There is, however, an exception for voluntary medical examinations.

The EEOC's position on inquiries and exams associated with wellness programs as being "voluntary" for purposes of the ADA has fluctuated over time. With no clear EEOC position, each wellness program should be analyzed on its own merits. Satisfying the following should increase the likelihood that the program will be deemed "voluntary":

1. Communications to employees stress the voluntary nature of the program;
2. The program complies with the HIPAA 20% rule (referenced above);
3. All medical information is maintained in accordance with the ADA's confidentiality requirements; and
4. Medical information is not used to discriminate against an employee.

Employers also may wish to consider whether they could benefit from undergoing an analysis of the cost to their health plan of not having a wellness program in an effort to take advantage of the ADA provisions that call for not prohibiting or restricting employers "from establishing, sponsoring, observing, or administering the terms of a bona fide benefit plan" See, generally, 42 U.S.C. Sec. 12201(c).

GINA

Under GINA, employers generally should not require employees to provide genetic information (including, without limitation, family medical history) as a condition of participation in a wellness program. However, if some genetic information must be provided once a person is in the program (**for "treatment" rather than for participation or as a condition of a reward**), the employer should determine, likely with counsel, whether the program complies with GINA if:

1. The employee provides prior, knowing, voluntary, and written authorization;



2. Only the employee (or family member, if the family member is the one participating in the program) and the licensed health care professional or board certified genetic counselor involved in the program receives the genetic information; and
3. Individually identifiable genetic information is only available for the program and is not disclosed to the employer.

Health Care Reform

The recently-enacted Patient Protection and Affordable Care Act provides some good news for employers by allowing for **more generous treatment for satisfying non-discrimination rules than currently exists under HIPAA** (see the discussion of HIPAA above).

Under the Patient Protection and Affordable Care Act, if none of the conditions for obtaining a reward for participation in a wellness program is based on a health factor, the wellness program should comply with the Act if participation is available to all similarly situated individuals.

If, however, a condition for obtaining a reward is based on a health factor, a wellness program satisfies the Patient Protection and Affordable Care Act if, among other requirements, the reward for the program, together with the reward for other wellness programs that require satisfaction of a standard related to a health factor, does not exceed 30% of the cost of the coverage (The HIPAA rule currently is 20%). The Patient Protection and Affordable Care Act authorizes the adoption of regulations to allow rewards of up to 50% of the cost of coverage. Additional rules apply, including that the employer allow a reasonable alternative standard for obtaining the reward for any individual for whom it is unreasonably difficult due to a medical condition (or medically inadvisable to attempt) to satisfy the standard.

The above provisions of the Patient Protection and Affordable Care Act concerning wellness programs are effective for plan years beginning on or after **January 1, 2014**.

Grants

The Patient Protection and Affordable Care Act provides for grants for a five (5) year period (FY 2011 through 2015) to **small employers (less than 100 employees who work at least 25 hours per week) that do not have a wellness program as of March 23, 2010**. The program must include the following:

1. Health awareness initiatives;
2. Efforts to maximize employee engagement;
3. Initiatives to change unhealthy behaviors and lifestyle choices; and
4. Supportive environment efforts.

* * *

In sum, wellness programs can be an effective tool for increasing productivity and employee morale while at the same time reducing health care costs. Although comprehensive programs may provide a greater return on investment, even a simple program involving education and nominal rewards may pay dividends.

If you would like our assistance in helping you establish and implement a wellness program for your organization, or if you would like us to help you apply for a federal grant to establish such a program, please call.

***This briefing does not constitute legal advice. Please see an attorney about any particular matter.**

Greg is a partner and a member of the firm's Employment and Labor and Healthcare Groups. Since 1994, he has counseled, trained, and represented Indiana hospitals, physician practices, long term care facilities, and other healthcare employers and human services organizations in dealing with a wide variety of employment matters.

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