
Workplace Wellness Programs: What's Legal, What's Not (and Why Your Company Should Have One)

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August 2009

Background

Researchers estimate that 75 percent of all healthcare costs stem from preventable chronic health conditions such as diabetes, hypertension, and obesity.¹ Many chronic diseases and acute conditions, such as seasonal flu, can be effectively prevented through lifestyle changes, immunizations, preventive medications, or screenings. Despite this, only half of insured adults receive preventive interventions.² That translates to only one percent of the \$1.9 Trillion spent on healthcare in the United States being used to prevent illness and injury.

With this knowledge many employers are taking a proactive approach to prevention and management of employee wellness by investing in workplace wellness programs as a cost savings tactic. With health insurance premiums as one of employers' major costs, effective workplace wellness programs have been shown to produce savings not only in health insurance premiums but in employee productivity. Effective workplace wellness programs result in a healthier workforce and employer's report that healthier employees show up to work more often, are more productive, and visit the doctor less frequently. Additional costs savings may be ahead for employers who sponsor workplace wellness programs in the form of federal tax credits.

Incentives for Employers in the Healthcare Overhaul Legislation

As Congress tackles the healthcare overhaul, incentives for employers to implement workplace wellness programs are likely to be included. Following one of President Obama's eight principles of health legislation is that it must "invest in prevention and wellness", Congress's plan to invest in workplace wellness programs is included in recent policy options presented by the Senate Finance Committee.

What Does a Workplace Wellness Program Look Like?

A wide range of wellness programs exist to promote health and prevent disease. Not all are even labeled wellness programs. Examples include a program that reduces individual's cost sharing for complying with a preventive care plan; a diagnostic testing program for health problems; rewards for attending educational classes; following healthy lifestyle recommendations, or meeting certain biometric targets such as weight, cholesterol, nicotine use, or blood pressure targets.

A well known example of an aggressive workplace wellness program for a large company is Scott's Miracle-Gro Company. Scott's created its wellness program in 2005. Components of the wellness program include a medical and fitness center across the street from its headquarters in Marysville, Ohio, which employees may use even during work hours, and that is staffed by two full time doctors, five nurses, a dietician, counselor, two physical therapists, and a team of fitness coaches, with a drive thru pharmacy for freeprescription drugs. Throughout the company, employees who agree to take a health care self-assessment earn a \$40 per month reduction in their share of insurance premiums. In addition to the health care assessment, an outside management company was retained to review physical, mental, and family health histories of nearly every employee and cross-reference that information with insurance claims data. Health coaches

¹ Center for Medicare & Medicaid Services. National Health Expenditures and Selected Economic Indicators, Levels and Average Annual Percent Changes: Selected Calendar Years 1990-2013. Office of the Actuary, 2004.

² Institute of Medicine. The future of the Public's Health in the 21st Century, Washington, DC, National Academy Press; 2002.

identify employees at moderate to high risk, draw up management program, and employees who do not follow the recommendations and work with the health coach are required to pay an additional \$67 a month in insurance premiums. Additionally, the company has a tobacco-free policy that prohibits employees from using tobacco products at any time, on or off duty (in states that do not protect an employee's right to smoke). Tobacco use testing is required of all new hires and is done randomly on the existing workforce; the presence of nicotine is grounds for termination of employment.

While Scotts Miracle-Gro is a large company with an extensive wellness program, most employers' programs are not as aggressive. Many employers have voluntary wellness programs. These can range from employers offering discounted gym memberships, providing conference space for weight watchers, offering healthy choices in vending machines, offering flu shots, sponsoring health fairs, and generally try to create cultural and environmental changes that support long term behavioral change.

The Legal Implications

When a wellness program is structured so that employee participation is entirely voluntary, there are few legal issues. However, when an employer desires to implement a program that provides incentives for participation or a more proactive program, legal issues arise as the level of incentives for participation increase.

A. The Health Insurance Portability and Accountability Act (HIPAA)

The first step is to consider whether a wellness program is subject to the Health Insurance Portability and Accountability Act (HIPAA) requirements or not. To determine this, the employer can ask the following questions about its wellness program:

1. Is the wellness program part of a group health plan? Yes No

A wellness program is only subject to HIPAA if it is part of a group health plan. If the employer operates the wellness program as an employment policy separate from the group health plan, the program may be covered by other laws, but it is not subject to HIPAA.

Example: An employer institutes a policy that any employee who smokes will be fired. Here the health plan is not acting, so the HIPAA rules do not apply. However other law may apply.

2. Does the wellness program discriminate based on a health factor? Yes No

A wellness program discriminates based on a health factor if it requires an individual to meet a standard related to a health factor in order to obtain a reward or to avoid a penalty. A reward can be in the form of a discount or rebate or a premium or contribution, a waiver of all or a part of a cost-sharing mechanism (such as deductibles, copayments, or coinsurance), the absence of a surcharge, or the value of a benefit that would otherwise not be provided under the healthcare plan.

Example 1: Employees who have a cholesterol level under 200 will receive a premium reduction of 20%. In this example the plan requires employees to meet a standard related to a health factor in order to obtain a reward and is subject to HIPAA.

Example 2: The program provides premium discounts to employees who don't smoke, who are not obese or hypertensive, or who have low cholesterol. In this example, the health plan related rewards are tied to having or attaining favorable health risk factors and is subject to HIPAA.

Example 3: A plan requires all eligible employees to complete a health risk assessment to enroll in the plan. Employee answers are fed into a computer that identifies risk factors and sends educational material to the employee's home address. In this example, the requirement to complete the assessment does not, itself, discriminate based on a health factor and thus is not subject to HIPAA. However, if the plan used individuals' specific health information to discriminate in individual eligibility, benefits, or premiums, there would be discrimination based on a health factor.

If the employer answered "No" to either of the above questions, the wellness program does not need to comply with HIPAA.

If the employer answered "Yes" to either question the wellness program must comply with HIPAA.

To comply with HIPAA the wellness program must meet the following five requirements:

1. The size of the reward offered may not exceed 20% of the total cost of health care coverage for an employee or employee's family.

2. The wellness program must be reasonably designed to promote good health or prevent disease. *(It may not be a subterfuge for discriminating based on a health factor.)*
3. Individuals who are eligible for the program must have the opportunity to qualify for the reward under the program at least once a year. *(This does not mean that the employer must continue the program for more than one year, but if it does it must, for example, allow employees who went through the smoking cessation program last year to go through it again this year.)*
4. The reward must be available to all similarly situated individuals. *(A component of meeting this requirement is that the program must have a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual for whom, for that period: (i) it is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard; or (ii) it is medically inadvisable to attempt to satisfy the otherwise applicable standard. It is permissible for the employer to seek verification that a health factor makes it unreasonably difficult or medically inadvisable for the individual to satisfy the otherwise applicable standard.*
5. The wellness program materials must disclose the availability of an alternative standard for those who need it. The regulations suggest the following:
"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 at [insert phone number] and we will work with you to develop another way to qualify for the reward."

While the main legal issue with wellness programs is HIPAA compliance, a host of other laws can be implicated. Below is a brief overview of the others.

B. Disability Discrimination under the American with Disabilities Act

Under the Americans with Disabilities Act (ADA), an employer may not discriminate against an individual with a disability with regard to, among other things, employee compensation and benefits available by virtue of employment. ADA issues could arise in wellness programs in various ways. For example, an employer is implementing a non HIPAA wellness program that includes a "Walk Five Miles a Week" program which rewards employees who walk five miles a week with a \$50 gift certificate. An employee with a disability limiting his or her ability to walk at all, nonetheless five miles a week will not be able to participate and therefore cannot earn the additional compensation. This can be remedied by ensuring that the wellness program provides alternatives for disabled employees to earn the additional compensation or award. For example, the employer could offer the disabled employee the opportunity to teach a class on the benefits of exercise in order to obtain the reward, or even give the reward outright to avoid potential discrimination.

The ADA was amended in 2008 making the threshold for establishing a disability much lower than prior to the amendment, making it possible for almost every employee to be "disabled" in some way. To ensure that plan does not discriminate against those with disabilities, it should be designed to be as inclusive as possible.

C. Age Discrimination in Employment Act (ADEA)

The Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating on the basis of age. Wellness programs should be designed so that older workers can meet the criteria to earn the rewards. For example, if the wellness program has a mandatory program requiring employees to meet a certain health standard, that standard should take into account and/or be adjusted for the age of the employee.

D. National Labor Relations Act (NLRA)

If the employer has unionized employees the National Labor Relations Act (NLRA) provides that employers must bargain in good faith over mandatory subjects of bargaining including wages and other terms and conditions of employment. Because many wellness programs are likely to impact employees' wages via reduced health insurance premiums employers will likely be required to propose wellness programs to the union and engage in bargaining over the terms of the program.

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This paper is not intended to be exhaustive on the subject matter nor to provide legal advice to the reader.

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