EMPLOYEE WELLNESS PROGRAMS: BALANCING THE BENEFITS WITH THE LAW

Legal Quickie
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Programs aimed at encouraging employees to take preventative measures to control illnesses and unhealthy behavior in an attempt to manage the burgeoning cost of health care.

Wellness programs take many forms including:
- Educational programs for managing health
- Health Risk Assessments
- Health Screenings
- Onsite fitness facilities
- Subsidized fitness programs
- Smoking cessation programs
WHY ARE EMPLOYERS ADOPTING WELLNESS PROGRAMS?

- According the Center for Disease Control – more than 75% of employer’s health care costs and productivity losses are related to employee lifestyle choices
  - Workplace alcohol, tobacco and other drug use costs American companies over $100 Billion each year
  - Job stress is estimated to cost American industries $200-$300 billion annually
  - Obesity health care costs totaled an estimated $117 billion in 2000 and have climbed steadily
  - 95% of our nations health expenditures is committed to diagnosing and treating disease after it becomes manifest
  - In 2004, tobacco use was estimated to cost the United States $193 billion, including $97 billion in lost productivity and $96 billion in direct health care expenditures
Research shows that an effective employee wellness program can result in a:

- 28% reduction in sick leave absenteeism
- 26% reduction in the use of health care benefits
- 30% reduced worker’s compensation claims and reduced “presenteeism”

Employee wellness programs can yield large dividends resulting in a rate of return from $1.49 to $4.91 for every dollar spent.
Swimways Corporation, a member of the Association of Corporate Counsel, is a worldwide manufacturer of leisure and recreational water products headquartered in Virginia Beach, Virginia.

Swimways began implementing a wellness program for its employees in response to a 20-30% increase in health insurance costs over a three year period.

The goal of its employee wellness plan is to incentivize their employees to make better health choices and provide them with much needed information on their healthcare options.

One Swimways employee, a female factory worker in her fifties, was participating in a health screening when medical personnel determined that her blood pressure was at extremely dangerous levels. She was immediately rushed to the hospital via ambulance. Medical personnel were amazed that she was still able to walk around and function with such elevated levels.

The health assessment provided as part of Swimways’ newly implemented wellness plan effectively saved a life and in turn created a more health conscious employee.
ACC EMPLOYEE WELLNESS PROGRAM INITIATIVES

**NelNet** - is one of the leading education planning and education finance companies in the United States. Nelnet’s comprehensive wellness program is implemented by Total Well-Being, includes an annual health screening and health assessment along with lifestyle coaching, self-care initiatives, gym membership reimbursement, a tobacco quit line, pedometer walking program and nutrition education, among other initiatives. These efforts have resulted in a 3% decrease in medical costs, 9% reduction in high cholesterol, 6% reduction in obesity, 5% reduction in blood pressure and a 3% reduction in tobacco use.

**Nabholz Construction Wellness Program** - provides construction services throughout the United States. As part of their employee wellness program Nabholz covers 100% of the Employee Only portion of the monthly insurance premium. If the employee chooses not to have his/her wellness screening, he/she will be responsible for 50 percent of the monthly premium (about $150/month). The employee is still responsible for the spouse and/or family coverage.

**Healthwise Wellness Program** – is a nonprofit organization in Boise, Idaho, which creates consumer health information and tools for other organizations. This company was also chosen by *The Wall Street Journal* as one of 15 Top Small Workplaces. The organization’s exceptional work culture is bolstered by its employee wellness program which incorporates such things as weekly fitness classes, bike loans, wellness buckets as well as weekly healthy snacks and organic fruit/vegetable share programs and onsite massages. Healthwise’ wellness initiatives are spearheaded by their Wellness Team.
MANDATORY VS. VOLUNTARY EMPLOYEE WELLNESS PROGRAMS

More employers are moving towards more aggressive wellness and disease management programs for employees

**The Carrot**

Many wellness programs focus on encouraging employees to kick unhealthy habits as well as to develop a sustainable plan to maintain their health and wellness

- Pitney Bowes employees can earn up to $225/year for participating in corporate sponsored workout programs

**The Stick**

More employers are seeking legal advice on how to create more aggressive wellness programs that utilize penalties to change employee behavior

- Scotts Miracle Grow Co., charges $40 more per month in health premiums for employees who do not complete annual risk assessments. The company charges $65 more for workers who do not try to reduce any high risks that show up.
EMPLOYEE WELLNESS PROGRAMS AND THE RISK OF LITIGATION


In 2005 The Scotts Company instituted a nicotine-free policy prohibiting the smoking of tobacco products by its employees.

Scott Rodrigues, a former employee filed suit in federal court after being fired for testing positive for nicotine in violation of Scotts nicotine free policy.

Rodrigues alleges that the company’s policy violated his rights under Massachusetts privacy statutes (Mass. G.L. c. 214 § 1B), the Massachusetts Civil Rights Act, and that firing him amounted to wrongful termination and that the company’s policy violates the Employee Retirement Income Security Act (ERISA) because it discriminates by imposing a penalty on employees who do not quit smoking.

The Court dismissed the count for wrongful termination and the count for violation of the states civil rights act and determined that Rodrigues’ claim for invasion of privacy and for violation of the ERISA provisions were sufficient enough to entitle him to have a chance to prove his allegations at trial.
FEDERAL AND STATE LAWS TO CONSIDER WHEN DESIGNING AN EMPLOYEE WELLNESS PROGRAM

- Health Insurance Portability and Accountability Act (HIPAA)
- Americans with Disabilities Act (ADA)
- Age Discrimination in Employment Act (ADEA)
- Employment Retirement Income Security Act (ERISA)
- Title VII
- Collective Bargaining Agreements
- State “Lifestyle Discrimination” Laws
The HIPAA nondiscrimination requirements, which are found in Section 702 of the Employee Retirement Income Security Act (ERISA) (as amended by HIPAA) generally prohibits ERISA group health plans or group health insurance issuers from denying an individual eligibility for benefits based on a health factor and from charging an individual a higher premium than a similarly situated individual based on a health factor.

Health factors include such things as:
- Health status
- Medical condition
- Claims experience
- Receipt of health care
- Medical history

Wellness programs that do not provide a reward to employees based on satisfying a health factor do not have to satisfy additional HIPAA non-discrimination standards.
If a wellness program conditions obtaining a reward or providing a penalty on an individual satisfying a standard that is related to a health factor, that wellness program must meet five additional requirements or risk violating the HIPAA non-discrimination regulations.

1. Rewards (and penalties) based on health factors cannot exceed 20% of the total cost of employee only coverage

2. The program must be reasonably designed to promote health or prevent disease
   - Not overly burdensome
   - Not a strategy for discrimination

3. The program must give individuals eligible for the program the opportunity to qualify for the reward under the program at least once per year

4. The reward under the program must be available to all similarly situated individuals

5. The plan must disclose in all plan materials describing the terms of the program the availability of a reasonable alternative standard.
The ADA specifically exempts health programs from its requirements if participation in the program is voluntary. In addition to a program being voluntary the ADA requires that medical records acquired as a part of a wellness program to be kept confidential and separate from personal records that the information obtained is not used to limit health insurance coverage eligibility or to take adverse employment action or deny promotional opportunities.

Is it possible to design a mandatory wellness program that complies with the ADA?

Yes - so long as the employer administering the program does not ask its employees any questions likely to elicit information about a disability or require a medical exam.

For example, if an employer were to require an employee who smokes to attend a smoking cessation program if the employer only asks questions about the employee’s smoking habits, rather than questions about their health, the employer would be in compliance with the ADA.
ERISA prohibits group health plans and health insurance issuers from discriminating against individuals in eligibility and continued eligibility for benefits and in individual premium or contribution rates based on health factors.

These health factors include:
- health status, medical condition (including both physical and mental illnesses),
- claims experience,
- receipt of health care,
- medical history,
- genetic information,
- evidence of insurability (including conditions arising out of acts of domestic violence and participation in activities such as motorcycling, snowmobiling, all-terrain vehicle riding, horseback riding, skiing, and other similar activities), and
- disability.

See ERISA section 702.
AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

ADEA prohibits employers from discriminating against any individual with respect to "compensation, terms, conditions, or privileges or employment, because of such individual's age."

If an employer provides fringe benefits to its employees, it generally must do so without regard to an employee's age. Employers may, however, provide a lower level of benefits to older workers than younger workers in limited circumstances.

Such an age-based benefit distinction will not violate the ADEA if it can meet the "equal benefit/equal cost" rule set forth in EEOC regulations and expressly incorporated in the ADEA's provisions.

Under this rule, the ADEA will be satisfied by providing equal benefits to older workers, or by incurring equal costs for their benefits.
The Civil Rights Act of 1964 (Title VII) prohibits discrimination based on race, color, national origin, sex and religion.

A Title VII violation can arise if an employee wellness program results in disparate treatment or disparate effect on a protected class.

For example, if a particular medical condition is more common in individuals of a certain race, national origin, gender or religion and that medical condition resulted in higher premiums being paid by that protected class, there may be a violation of Title VII.

For the wellness program to be permissible, the employer must show it is job-related and consistent with business necessity.
Employers must bargain in good faith over “mandatory subjects of bargaining” such as health insurance plans according to the National Labor Relations Act.

If a wellness initiative that is sponsored by an employer changes the structure of employee contributions, co-pays, and deductibles or offers new programs such as smoking cessation or weight loss, the employer will most likely be required to bargain over such changes.

Health and safety issues such as instituting a non smoking policy or programs that might require that employees submit to physical examinations must also be bargained for with a union.
There have been several bills to promote wellness initiatives that have been introduced in the U.S. Congress.

**The Healthy Workforce Act of 2007** proposes to amend the Internal Revenue Code of 1986 by providing a ten-year tax credit of up to $200 per employee for the first 200 employees, and up to $100 per employee thereafter, to employers that provide qualified comprehensive wellness programs.

**The Workforce Health Improvement Program Act of 2007** focused on providing financial incentives for employee use of fitness facilities or purchase of fitness equipment.

**The Help America Act** proposes to give an employer credit for wellness programs and exclude employer-paid fitness facility fees from an employee’s income.

Another proposed bill would amend the Public Health Service Act to establish a workplace wellness education campaign and provide evaluations for both private and public Employer Wellness Programs.

All of the aforementioned bills are currently stalled in Congress.
Many states protect an employee from being discriminated against for engaging in lawful activities.

States have enacted “lifestyle discrimination” laws that protect an employee’s right to engage in any lawful activities away from employer’s premises during non-work time (California, Colorado, North Dakota).

Or that protects employees from discrimination in employment due to their use of lawful products away from work (Illinois, Minnesota, Montana, North Carolina, Tennessee, Wisconsin).

Like other discrimination claims an individual may allege that an employer’s explanation for adverse employment action is simply a pretext to mask a violation of conduct that is protected by statute.
RESOURCES

 ACC InfoPAK: Employee Wellness Programs: A Federal and State Analysis of the Legal and Practical Implications
http://www.acc.com/legalresources/resource.cfm?show=167801

 Total Well-Being: ww.employeetotalwellbeing.com

 Tangerine Wellness: http://www.tangerinewellness.com

 WELCOA: http://www.welcoa.com

 Integrated Wellness Solutions: http://www.iwellsolutions.com/

 Well Steps: http://www.wellsteps.com/

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