Featured Professionals

Debra J. Linder

Related Services

Compensation Planning & Employee Benefits

Employment, Labor & Benefits

Wellness Programs – A Complex Cure

Legal Update
09.01.2011

Employee wellness programs have become increasingly popular as employers seek to control health insurance costs, improve the health and productivity of their workers, and reduce absenteeism. According to the Kaiser Family Foundation's Employer Health Benefits 2010 Annual Survey, approximately three-fourths of employers offering health benefits already provide some type of wellness program.

Employer-based wellness programs can include a broad range of components, such as influenza vaccination clinics, gym membership discounts, smoking cessation programs, personal health coaching, and wellness newsletters. Health risk assessments (HRAs) are another tool that many employers include as part of their wellness programs. HRAs are designed to help identify potential health risks and generally include questions about medical history, health status, and lifestyle.

Common sense dictates that offering financial incentives will increase participation, and many employers provide such incentives to employees who participate in wellness programs. Commonly provided incentives include gift cards, travel, merchandise and cash, although many companies provide smaller deductibles, lower premiums, or higher contributions to health savings accounts or health reimbursement arrangements.

In addition, the Patient Protection and Affordable Health Care Act (PPACA) contains provisions designed to encourage employers to adopt wellness programs. For example, PPACA provides increased financial incentives and creates grants for small employers to help them create wellness programs.

Although wellness programs have clear advantages, they also carry legal risks. In particular, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Americans with Disabilities Act of 1990 (ADA), and the Genetic Information Nondiscrimination Act of 2008 (GINA) place a patchwork of restrictions on wellness programs.

HIPAA

HIPAA generally prohibits health insurance issuers or group health plans from using health- related factors as a basis for discrimination with respect to eligibility or premiums. If a wellness program provides incentives based solely on participation or

if it does not provide a reward related to the health care plan, then the program complies with HIPAA as long as it is available to all similarly situated individuals. For example, a program could reimburse employees for the costs of smoking cessation programs without regard to whether the employee quits smoking.

If a wellness program provides an incentive that is both related to a health care plan (such as a premium discount or deductible waiver) and conditions the incentive on an individual meeting a standard relating to a health factor (such as being a non-smoker or attaining certain results on biometric screenings), then the program must meet five regulatory criteria, including a requirement that the size of the reward may not exceed 20 percent (increasing to 30 percent in 2014) of the total cost of coverage for an employee or family.

ADA

The ADA prohibits employers from discriminating against qualified individuals on the basis of disability. This includes limitations on medical examinations and disability-related inquiries. The Equal Employment Opportunity Commission (EEOC) has stated that employers may offer wellness programs to employees, including programs that involve medical examinations or medical histories, so long as the wellness program is "voluntary" and records acquired as part of the program are kept confidential and separate from personnel files. According to the EEOC, a wellness program is "voluntary" if the employer does not require participation or penalize employees who do not participate. However, the EEOC has not taken a position as to what level of inducement to participate in a wellness program is permitted under the ADA, if any.

Of course, a wellness program implicates the ADA only to the extent it requests employees to provide disability-related information or undergo a medical examination. In an August 2009 informal discussion letter, the EEOC suggested that questions in an HRA asking whether an employee sees a personal doctor for routine care, how many servings of vegetables or fruit an employee eats, and how much an employee exercises, are not likely to elicit information about a disability and, therefore, are not subject to the ADA's restrictions.

The ADA also imposes a reasonable accommodation requirement on employers. Thus, if an employee is unable to obtain an incentive under a wellness program due to his or her disability, the employer must engage in an interactive process with the employee to determine if a reasonable accommodation can be made.

GINA

GINA prohibits group health plans and employers from discriminating on the basis of genetic information. Title II of GINA forbids employers from requesting or obtaining the genetic information of an employee or employee's family member, with limited exceptions. One of those exceptions applies to health or genetic services offered by the employer as part of a wellness program where the individual receiving the services provides prior written and voluntary authorization. Individualized genetic

information may be provided to the individual receiving the services and his or her health care provider, but genetic information may be disclosed to the employer only in aggregate terms.

In November 2010, the EEOC issued regulations under Title II of GINA. The regulations state that employers may not offer financial incentives for individuals to provide genetic information. Thus, if an employer provides financial incentives as part of a wellness program, it must be sure that eligibility for the incentive does not require disclosure of genetic information. For example, the regulations state that an employer that offers $150 to employees who complete an HRA with 100 questions, the last 20 of which concern family medical history and other genetic information, does not violate GINA if the instructions for completing the assessment make clear that the incentive will be provided to those who respond to the first 80 questions whether or not they answer the remaining 20 questions.

In June 2011, the EEOC issued an informal discussion letter addressing workplace wellness program issues under GINA and the ADA. Citing the EEOC's GINA regulations, the letter reiterated that an employer may use genetic information voluntarily provided by an individual as part of a wellness program "to guide that individual into an appropriate disease management program." If that program offers financial incentives for participation or to reach health-related outcomes, however, then it "must also be open to employees with current health conditions and/or to individuals whose lifestyle choices put them at an increased risk of developing a certain condition." The letter declined to address certain inconsistencies with the regulations implementing Title II of GINA, which prohibits discrimination on the basis of genetic information by group health plans and health insurance issuers. The EEOC also declined to take a position as to whether, and to what extent, the ADA permits employers to offer financial incentives for employees to participate in wellness programs that include disability-related inquiries or medical examinations, but stated that it would carefully consider the comments it has received on this issue.

Other Legal Considerations

Wellness programs can raise issues under other employment laws, such as the Age Discrimination in Employment Act of 1967 and Title VII of the Civil Rights Act of 1964, the Employee Retirement Income Security Act of 1974, the Internal Revenue Code of 1986, and state laws. For example, many states, including Minnesota, have laws that may protect employees from being discriminated against for engaging in lawful activities away from the workplace. Additionally, a wellness program may be considered a mandatory subject of bargaining for employers with unionized workforces.

Takeaway

Although providing incentives to employees for achieving positive health outcomes seems like good business sense, a minefield of laws and regulations govern employee wellness programs. Proper planning can help employers develop effective

wellness programs that comply with the various requirements. For more information on this topic, or for assistance in updating policies and practices relating to wellness programs, please contact a member of Fredrikson & Byron's Employment & Labor Law Group or Employee Benefits Group.