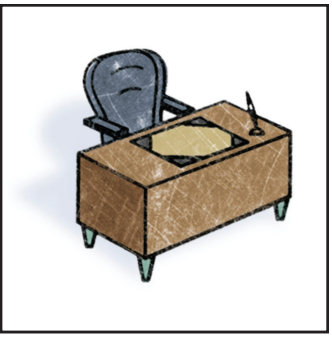
PHILLIPS LYTLE LLP ALERT
FOR BNHRA MEMBERS
LABOR & EMPLOYMENT
DECEMBER 2017



Workplace Wellness Programs: The Legal Issues

Does your company offer a workplace wellness program? Many businesses do as a way to promote employee health, reducing absences and health care costs and boosting employee morale and productivity. Workplace wellness programs can encompass a wide variety of offerings, including smoking cessation programs, lunchtime walking groups or meditation classes. They may also include rewards for getting a health screening, losing weight, lowering blood pressure or managing chronic illnesses, such as diabetes or asthma.

Because workplace wellness programs may ask employees to provide health information or to perform certain tasks, they risk running afoul of laws protecting the equal treatment and privacy of employees with disabilities and genetic conditions. As such, workplace wellness plans must be carefully designed, including close consideration of each potentially relevant statute.

ADA

The Americans with Disabilities Act (ADA) limits the information employers may request from their employees and requires that employers maintain the confidentiality of any medical information they lawfully obtain. The ADA applies to any wellness program that asks employees to respond to disability-related inquiries and/or undergo medical exams.

The ADA requires that any such wellness program be reasonably designed to promote health or prevent disease. Indeed, the plan cannot be overly burdensome, a subterfuge for discrimination or highly suspect in the method chosen to promote health or prevent disease. In addition, the program must be voluntary, meaning an employer cannot require participation, deny coverage, limit access to a particular option or limit benefits available under a plan if an employee does not participate. It also cannot take any adverse employment action or retaliate against employees for not participating or for filing a charge with the EEOC. The information obtained must not be used to discriminate against an employee.

The ADA requires that information only be collected in aggregate terms and has other confidentiality protections, which cannot be waived. Under the ADA, employee incentives are limited to 30 percent of the total cost of self-only coverage. Finally, the ADA requires that a notice containing specific information be provided to employees.

GINA

Wellness features that collect genetic information are subject to the Genetic Information Nondiscrimination Act (GINA).

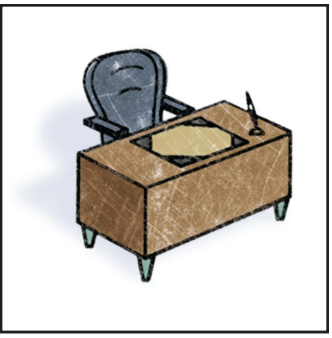
In general, GINA prohibits employers from requesting or requiring employees to provide genetic information. However, an employer may obtain genetic information if the wellness program meets the following requirements:

(1) The employee provides the information voluntarily;

(2) The employee gives prior knowing, voluntary and written authorization to provide genetic information;

(3) Only the employee and a licensed medical professional receive individually identifiable information about the employee; and

(4) The employee's individually identifiable information is only available for purposes of the program and is not disclosed to the employer except in non-specified, aggregate terms.



The information collected is subject to confidentiality requirements. Moreover, GINA prohibits group health plans from using genetic information to determine premiums or for underwriting purposes. GINA also prohibits employers from discriminating against employees on the basis of genetic information or purchasing genetic information with respect to an employee or family member.

HIPAA

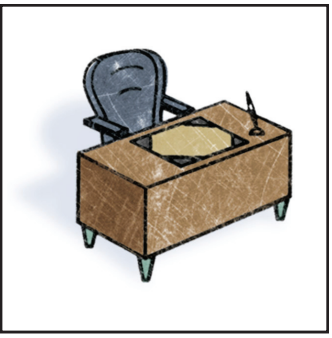
Under the Health Insurance Portability and Accountability Act (HIPAA), group health plans cannot discriminate against an individual (e.g., charging a different premium or imposing different rules on the cost of coverage) based on a health status-related factor, such as the individual's physical or mental medical condition, medical history, genetic information or disability. Workplace wellness programs that reward employees for achieving certain goals, such as losing weight, may run the risk of violating HIPAA.

The HIPAA rules divide wellness programs into two categories: (1) those that either reward employees for participating or provide no reward, and (2) those that reward employees for achieving certain goals or doing certain activities. The first type includes programs that reward employees for participating in a health screening assessment, taking diagnostic tests or joining a gym. These purely participatory programs must be offered to all similarly situated individuals to comply with nondiscrimination requirements. The second type of program – called "health-contingent" programs under HIPAA because the reward is tied to the employee, satisfying a standard related to a health factor – is subject to strict rules to make sure there is no discrimination against employees for whom achieving the goals might be unsafe or unrealistic.

HIPAA requires that health-contingent programs satisfy each of the following:

- Employees must be allowed to qualify for the reward at least once per year.
- The reward must be limited to 30 percent of employee-only coverage or 30 percent of enrolled coverage if dependents may participate; for smoking cessation programs, the reward may not exceed 50 percent of such amount.
- The program must be reasonably designed to prevent disease or promote health. In other words, it may not be a cover for discrimination, it may not be overly burdensome, it may not be based on highly suspect methods (such as crash diet programs), and it must have a reasonable chance of improving the health of those who participate.
- The program must allow a reasonable alternative standard (or waiver of initial standard) to obtaining the reward for individuals for whom it is unreasonably difficult due to a medical condition.
- The program must disclose the availability of a reasonable alternative or the possibility of a waiver in all materials describing its terms.

There are a number of legal factors to consider in designing and implementing a workplace wellness program, some of which – such as tax implications – are beyond the scope of this Alert. An improperly designed plan can give rise to claims for, among other things, discrimination, violation of privacy laws, violation of benefits reporting requirements and tax requirements, and the breach of collective bargaining agreements. As such, each of the statutes discussed above (in addition to others) must be considered separately to determine compliance. Be sure your company's wellness program meets your wellness goals without creating legal risks.



Additional Assistance

For more information regarding the legal issues that may arise with workplace wellness programs, please contact any of the attorneys on our Labor & Employment Practice Team. ■

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