Wellness Programs - Legal Considerations

Employment Considerations

- Americans with Disabilities Act (Overview)
  - Prohibits discrimination against qualified individuals with disabilities in any terms, conditions and privileges of employment, which includes compensation and benefits.
  - An individual is “disabled” if s/he:
    - Has a physical or mental impairment that substantially limits one or more major life activities;
    - Has a record of such an impairment; or
    - Is regarded as having such an impairment.
Wellness Programs - Legal Considerations
Employment Considerations

- Americans with Disabilities Act (cont.)
  - A qualified employee or applicant with a disability: Individual who, with or without reasonable accommodation, can perform the essential functions of the job in question.
  - Reasonable accommodation required to allow disabled individuals equal access to compensation and benefits available to other employees.
  - Accommodation may include modifying or adjusting policies to allow equal access.

Wellness Programs - Legal Considerations
Employment Considerations

- Americans with Disabilities Act (cont.)
  - Implications for wellness programs:
  - (1) Prohibited medical exams and inquiries/strict confidentiality requirements
  - (2) Benefits of wellness programs must be made available to all employees regardless of disability; employers must provide reasonable accommodation to employees who cannot achieve health factor requirement in wellness program due to disability
  - (3) Participation in wellness programs must be voluntary
Wellness Programs - Legal Considerations

Employment Considerations

- **ADA and Wellness Programs**
  - (1) ADA Prohibits Medical Examinations and Inquiries
    - **Applicants:** Employers may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform specific job functions. A job offer may be conditioned on the results of a medical examination (if required for all applicants in similar jobs).
    - **Employees:** Medical examinations of employees must be job-related and consistent with the employer's business needs.

Wellness Programs - Legal Considerations

Employment Considerations

- **The ADA and Wellness Programs**
  - (1) ADA Prohibits Medical Examinations and Inquiries
    - **Employees (cont.):**
      - ADA prohibits employers from requiring an employee to take tests or provide information that screens, or tends to screen employees with disabilities and respond to disability-related inquiries.
      - Employee may "voluntarily" furnish to employer information about medical examination or respond to health-related inquiries, surveys, etc.
Wellness Programs - Legal Considerations
Employment Considerations

- The ADA and Wellness Programs
  - (1) ADA Prohibits Medical Examinations and Inquiries (cont.)
    - How to acquire information for use in wellness program?
      - Firewall: Contract with a third party to administer wellness program, to collect and analyze information (health surveys, exams, etc.) to design and implement program.
      - Ensure that third party administrator does not disclose personal health information to employer.

- The ADA and Wellness Programs
  - (2) Programs Must Offer Reasonable Accommodation to Qualified Individuals with Disabilities
    - Offer to accommodate, via interactive process, disabled employee who cannot meet wellness program requirements because of disability. (Similar to “reasonable alternative” standard, but same?)
Wellness Programs - Legal Considerations

Employment Considerations

- The ADA and Wellness Programs
  - (2) Programs Must Offer Reasonable Accommodation to Qualified Individuals with Disabilities (cont.)
    - Example: Offer waiver, less stringent health factor target, or alternative program that promotes healthy behavior while accommodating employee’s condition.
    - Example: Adherence to low-fat/low-sodium diet, appropriate medication, or exercise regimen as alternative to attaining and maintaining "normal" blood pressure level, if elevated due to disability.

- (3) Participation in wellness programs must be voluntary
  - EEOC View: Programs Must Be Voluntary
  - i.e., cannot make eligibility for health benefits or benefits themselves (privilege of employment) contingent on participation in the wellness program.
Wellness Programs - Legal Considerations
Employment Considerations

- The ADA and Wellness Programs
  - (3) Participation in wellness programs must be voluntary (cont.)
  - What is a “voluntary” wellness program?
    - EEOC: "wellness program is voluntary as long as an employer neither requires participation nor penalizes employees who do not participate."
    - EEOC: ADA prohibits requiring employee to submit to health-risk assessment as condition for receipt of health insurance benefits, or using punitive triggers for employees who refuse to participate (such as higher health care premiums or deductibles)

- The ADA and Wellness Programs
  - (3) Participation in wellness programs must be voluntary (cont.)
    - EEOC interpretation: suggests that a qualified disabled employee’s failure to qualify for a reward/incentive because s/he does not want to participate is a violation of the ADA.
    - This interpretation renders Wellness Program Rules meaningless: if disabled employee refuses to participate in wellness program and does not receive access to reward or incentive, employer has violated ADA, according to EEOC.
Wellness Programs - Legal Considerations

Employment Considerations

- The ADA and Wellness Programs
  - (3) Participation in wellness programs must be voluntary
  - Harmonizing EEOC view and Wellness Program Rules
    - Those who refuse to participate and do not qualify for incentives are not discriminated against on basis of disability.
    - Wellness program participation terms apply equally to all employees regardless of disability status.
    - Participation is prerequisite to qualify for health factor based incentives, and does not discriminate against disabled employees, who will receive reasonable accommodations if their condition serves as obstacle to the incentives.
    - Same rationale applies to mandatory wellness programs (in which all employees are required to participate).

Title VII

- Prohibits discrimination on basis of characteristics such as race, religion, national origin, ethnicity, sex, etc.
- Religious Discrimination. Certain religions use prayer as supplement to, or replacement for, medical treatment (faith healing) or medication.
Wellness Programs - Legal Considerations

Employment Considerations

- **Title VII**
  - **Religious Discrimination**
    - Example: Requiring employees to undergo health screening to qualify for reduction in premium. What about employee who refuses to submit to screening based on religious beliefs?
    - Example: Incentive for participation in well-baby program requires preventive medication (e.g., shots). Religion may prevent participation.

- **Title VII (cont.)**
  - **Race Discrimination.** Studies have shown that certain races are subject to significantly higher rates of high blood pressure, high cholesterol, and diabetes.
    - Example: 20% Reduction in premiums for maintaining “healthy” cholesterol levels, blood sugar levels. Discriminatory?
Wellness Programs - Legal Considerations
Other Considerations

- **Age Discrimination (ADEA)**
  - Age-related conditions which prevent qualifying for wellness program incentives.
  - Program standards (e.g., fitness) should be adjusted for age of employee.

- **Genetic Discrimination**
  - Many states have laws prohibiting genetic discrimination based on genetic testing.
  - Example: Genetic testing reveals elevated risk of heart disease, sickle cell anemia or cancer. Cannot use genetic composition to discriminate against employees.
Other Considerations

- State Laws that prohibit an employer from penalizing an employee from engaging in lawful conduct outside of work
  - smoking
  - drinking
  - eating fast food
  - skiing, mountain climbing
  - spouse, children

Other Considerations

- Chicago Tribune Plan
  - January 2008
  - employees who smoke are charged $100 per month
  - unless they enroll in a smoking cessation program; what if it does not work

- Scott Rodrigues and Scotts Miracle-Gro Co.
  - Massachusetts lawsuit
  - ERISA §510
Wellness Programs - Legal Considerations

Other Considerations

- Conclusion
  - Exercise care in creating and administering wellness programs, and consult with counsel or experienced professionals
  - Be sure to establish reasonable alternatives and reasonable accommodations for employees who cannot meet wellness program standards because of health conditions
  - There will be legal challenges!