



Is Wellness Program Uncertainty Making You Sick?



Is Wellness Program Uncertainty Making You Sick?

Agenda

- ❖ All about wellness programs
- ❖ Laws that apply to wellness programs and how they interact
- ❖ The uncertainty in adopting a wellness program



What Companies are Doing

- ❖ Safeway's Healthy Measures Program – evaluates tobacco use, weight, blood pressure and cholesterol levels for a premium reduction – voluntary, non-union only
- ❖ CVS Caremark – “voluntary” wellness review that carries a \$600 penalty for non-participation (sued in March 2014 by an employee for privacy concerns and compensation of travel costs and time for doctor's appointment)

Do They Work?

- ❖ Safeway CEO in Wall Street Journal in 2009: Helped keep costs (employer and employee portion) flat while other companies' costs rose 38%
- ❖ PepsiCo 2003-2010: long term study by *Health Affairs* showed lower healthcare costs after the third year from the disease management components of the program (targeting participants with particular diseases)
- ❖ DOL Study: Lifestyle management works, cost savings results are varied

Wellness Programs

- ❖ Refusing to hire smokers as a Wellness Program
 - Not unlawful in Arizona to refuse to hire smokers



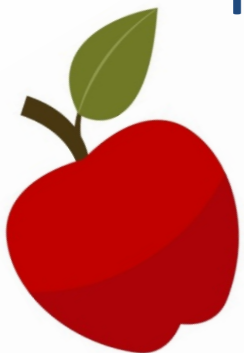
Wellness Programs and HIPAA

- ❖ Prohibits participant discrimination in health plans as to eligibility, benefits, or premiums based on health factors
- ❖ HIPAA does allow for wellness programs to establish limited rewards under certain conditions
- ❖ PPACA expands HIPAA wellness program allowances

Wellness and the Patient Protection and Affordable Care Act

❖ PPACA encourages Wellness

- Restaurants must provide calorie information
- Preventative health services covered
- Employee premium surcharges allowed for employees not meeting wellness program goals



Wellness Programs and PPACA

- ❖ Two type of Wellness Programs
 - Participatory
 - Health Contingent
- ❖ Compliance burdens are different

Wellness Programs and PPACA

❖ Participatory Wellness Program

- Do not provide a reward, or
- Do not contain any conditions for obtaining a reward based on an employee satisfying a health factor standard



Wellness Programs and PPACA

- ❖ Must be available to all *similarly-situated* individuals, regardless of health status
- ❖ No additional compliance burdens
- ❖ No limit on financial incentives or rewards

Wellness Programs and PPACA

- ❖ Health Contingent Wellness Program
 - Require satisfying an standard based on a health factor to get a reward, OR
 - To do more than individuals meeting the health standard to get the reward



Wellness Programs and PPACA

- ❖ Health Contingent Wellness Program
 - Opportunity to qualify at least once per year,
 - Reward available to all similarly situated individuals &
 - Reasonable alternative

Wellness Programs and PPACA

- ❖ Health Contingent Wellness Program
 - The established health care standard may be performing or completing a health care related activity or requiring or maintaining a specific health outcome

Wellness Programs and PPACA

- ❖ Health Contingent Wellness Program may be:
 - Activity only, or
 - Require individual to do something, but not hit or maintain a target
 - Outcome-based
 - Attain and maintain a health outcome

Wellness Programs and PPACA

❖ Health Contingent Wellness Program

➤ Size of reward limited

- 30% of the cost of employee coverage, and 30% of apportioned dependent coverage
- 50% for tobacco cessation



All is not Well

- ❖ Wellness programs are subject to DOL audit



All is not Well

❖ Laws that can make you sick

- Genetic Information Nondiscrimination Act
- Americans with Disabilities Act
- Pregnancy Discrimination Act
- Title VII of the Civil Rights Act of 1964
- Age Discrimination in Employment Act
- Employee Retirement Income Security Act

All is not Well

- ❖ GINA— its effect on wellness programs
 - Prohibits employers from using genetic information in employment decision-making; restricts employers from requesting, requiring, or purchasing genetic information; ...
 - “Family members” includes spouses,... parents, siblings, children, grandparents, grandchildren, uncles, aunts, ... great-grandparents, ... great uncles/aunts, ... great-great-grandparents, ...

All is not Well

- ❖ GINA – its effect on wellness programs
 - Depending on design, wellness programs have the potential to look at family history of:
 - Parents, aunts, uncles, grandparents, and other ancestors, &
 - Spouse and children
 - Personal medical history



The EEOC

- ❖ *EEOC v. Honeywell*, No. 0:14-04517 (D.MN 2014)
 - Honeywell's wellness program is designed so that employees will pay more for group health premiums and lose HSA contribution if spouse does not complete biometric screening
 - EEOC argues that inquiring into spouse's health status is a GINA violation

All is not Well

- ❖ Americans with Disabilities Act, as amended
 - ❖ The ADA prohibits discrimination against qualified individuals with disabilities in job application procedures, hiring, advancement, discharge, compensation, training, or other terms, conditions, and privileges of employment. The ADA also considers failing to provide reasonable accommodation to be prohibited discrimination.

The EEOC

1. *EEOC v. Orion Energy Systems*, Civil Action 1:14-cv-01019
 - Employees must submit to medical exam or pay for 100% of group insurance cost
2. *EEOC v. Flambeau, Inc.*, Civil Action No. 3:13-cv-00638
 - Employees must submit to biometric testing and health assessment or have health insurance coverage cancelled

Is there hope?

- ❖ The ADA has a statutory exemption that exempts from liability:
 1. An insurer, medical provider, HMO, agent, third party benefits plan administrator, or similar organization, in underwriting risks, or administering risk based on or consistent with State laws; or
 2. A covered person or organization in establishing, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering risks based on or consistent with State law; or

Is there hope?

3. A covered person or organization in establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance
- ❖ *Seff V. Broward County* No. 11–12217 (D. FL. 2012.) held that a wellness program that required a health risk assessment and health screen to receive a premium discount met the ADA Safe Harbor

Beware of Other Laws

- ❖ Pregnancy Discrimination Act
- ❖ Title VII of the Civil Rights Act of 1964
- ❖ Age Discrimination in Employment Act
- ❖ Employee Retirement Income Security Act



The Uncertainty...

“You said these companies’ wellness programs complied with PPACA and HIPAA, but the EEOC went after them anyway for violating GINA and the ADA. How am I supposed to know whether my wellness program works?”



Where do We Go From Here

- ❖ EEOC plans to issue clarifying regulations in February 2015
- ❖ Tomorrow will be a good day!

Where do We Go From Here

- ❖ Proceed cautiously
- ❖ Be aware of EEOC's position about requiring biometric testing, health assessments for premium reductions

Is Wellness Program Uncertainty Making You Sick?

Thanks for attending

Dave Smith, Esq. dsmith@msec.org &

Jen Ward, Esq. jward@msec.org

602.955.7558

Mountain States Employers Council