

SOME LEGAL IMPLICATIONS OF WELLNESS PROGRAMS

March 22, 2010

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Types of programs

Raising Awareness: to help employees learn about the benefits of a healthy lifestyle and ways to improve personal health; might include brochures, informational emails, or employer-sponsored health fairs.

Health Assessments: can include questionnaires, testing, and/or health care counselors who can meet with employees to discuss ways to improve their health, such as smoking cessation or exercise programs.

Employee Assistance Programs: generally intended to address problems concerning health, marital difficulties, family, finances, alcohol, drugs, emotional issues, stress, or other factors that affect health.

Health Promotion: may include discounts or reimbursements for the cost of annual physical examinations or gym memberships.

I. Americans With Disabilities Act/Maine Human Rights Act

The ADA does not prohibit employers from implementing wellness programs that are aimed at promoting good health and preventing disease. However, the ADA does prohibit discrimination in the terms and conditions of employment and requires that employers provide employees with disabilities equal access to compensation and benefit programs. Thus, the ADA can be implicated by wellness programs in a few different ways.

A. Medical Inquiries

Generally, an employer may not inquire about medical conditions unless the inquiries are job related and consistent with business necessity. However, in 2002, the EEOC issued an enforcement guidance stating that employers are permitted to conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program without meeting this standard as long as any medical records acquired as part of the wellness program are kept confidential and separate from personnel records. Employees may be asked disability-related questions and may be given medical examinations pursuant to such

voluntary wellness programs. Such programs might include blood pressure screening, cholesterol testing, glaucoma testing, and cancer detection screening.

[Note that a program that simply promotes a healthier life style without asking any disability-related questions or requiring medical examinations (e.g., a smoking cessation program that is available to anyone who smokes and only asks participants to disclose how much they smoke) is not subject to the ADA's requirements concerning disability-related inquiries and medical examinations].

A wellness program is “voluntary” as long as an employer neither requires participation nor penalizes employees who do not participate. What if the employer provides a financial incentive for answering medical questions or participating in medical examinations? The EEOC has said that providing a monetary incentive may render the program involuntary, depending on factors like the size of the incentive and whether the incentive results in significantly higher premiums for employees not participating in the wellness program.

In an informal opinion letter issued originally in January 2009, the EEOC responded a question as to whether a requirement to participate in a health risk assessment to qualify for participation in an employer’s health plan constitutes a violation of the ADA where the health risk assessment includes answering a short health-related questionnaire, taking a blood pressure test, and providing blood for use in a blood panel screen (the information goes to the employee; the employer only receives information in the aggregate). The EEOC concluded that requiring employees to take a health risk assessment that includes disability-related inquiries and medical examinations as a prerequisite for obtaining health insurance coverage does not appear to be job-related and consistent with business necessity, and therefore would violate the ADA. The informal opinion further stated that while disability-related inquiries and medical examinations are permitted as part of a voluntary wellness program, the proposal was not voluntary because an employee’s decision not to participate in the health risk assessment results in the loss of the opportunity to obtain health coverage through the employer’s plan, a penalty for non-participation as compared to employees who participate in the assessment.

A second informal opinion was issued in August 2009 and reached a similar conclusion. That opinion was responding to a plan to require employees to complete a health risk assessment in order to receive monies from an employer-funded health reimbursement arrangement. The assessment contained more than one hundred questions in several categories including “Family Health History”; “Self Care”; “Personal Health”; “Women’s Health”; “Older Adult Health”; “Health Choices-Nutrition”; “Health Choices-Physical Activity”; “Health Choices-Alcohol and Tobacco”; “Health Choices-Safety”; and “Health Changes”. The opinion concluded that requiring employees to complete a health risk assessment that includes many disability-related inquiries -- such as questions about how often they feel depressed; whether they ever have been told that they have certain conditions, such as asthma, cancer, heart disease, or diabetes; how many different prescription medications they currently take; or how much alcohol they drink -- as a prerequisite to obtaining reimbursement for health expenses does not appear to be job-related and consistent with business necessity. It further stated that because *all* employees are required to complete a health risk assessment as a prerequisite for eligibility for a health insurance program, there is no indication that the employer believed that a particular employee

will be unable to do his job or will pose a direct threat because of a medical condition, nor was the assessment for the purpose of obtaining medical information in response to a request for reasonable accommodation. It concludes by stating that even if the assessment could be considered part of a wellness program, it is not voluntary because it penalizes any employee who does not complete the questionnaire by making him or her ineligible to receive reimbursement for health expenses.

2. Discriminatory practices

The ADA requires employers to provide accommodation in the provision of services and programs. Some wellness programs offer incentives, financial or otherwise, to employees who achieve certain physical goals, such as walking a certain distance each week, or have a mandatory wellness program that requires employees achieve some measurable standard. Such programs might discriminate against employees whose disabilities preclude them from either participating or from reaching the target number. An employer may have to make reasonable accommodation by setting a less stringent objective or give the employee the alternative of participating in a program designed to manage or mitigate the medical condition. For example, if a wellness program offers an incentive to all employees who agree to run 10 miles per week, the benefit would need to be made available to an individual who, because of a disability, is unable to do so. Accommodation also has to be made for participation in that alternative program; for instance, if the employee who cannot run 10 miles a week agrees to spend a certain amount of time each week in a gym doing other physical activities, the gym itself must be accessible to the person's disability.

3. Confidentiality

The ADA requires confidentiality of medical information in the employer's possession. Any information collected during permissible inquiries or examinations for a wellness program must be maintained in separate medical files and treated as confidential.

II. Workers' Compensation

When does the potential exist that an injury incurred while participating in a wellness program will arise out of and in the course of employment?

In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "in the course" of employment. "Arises out of" employment means there must be some causal connection between the conditions under which the employee worked and the injury – that is, that the injury, in some proximate way, had its origin, its source, or its cause in the employment. The term "in the course of" employment relates generally to the time, place, and circumstances under which an injury occurs: the question is "whether the injury occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incidental thereto."

The Maine Law Court has set forth factors to consider in determining whether an injury arises out of and in the course of employment: 1) whether the employee was promoting an interest of the employer or the activity benefited the employer; 2) whether the activities of the employee benefit or accommodate the needs of the employer; 3) whether the activities were within the terms, conditions or customs of the employment or were acquiesced in or permitted by the employer; 4) whether the employee's activities serve both a business and personal purpose or represent an insubstantial deviation from employment; 5) whether the hazard or causative condition can be viewed as employer or employee created; 6) whether the employee's actions were unreasonably reckless or created excessive risks or perils; 7) whether the activities were prohibited by the employer; 8) whether the injury occurred on the premises of the employer.

III. Age Discrimination in Employment Act (ADEA)

The ADEA prohibits discrimination against any individual in the terms, compensation, conditions, or privileges of employment on the basis of age. The Older Workers' Benefit Protection Act of 1990 extended these protections to employee benefits, which includes a bona fide wellness program.

The ADEA recognizes "disparate impact" claims, which are claims that do not require any proof of discriminatory intent and are based on the theory that employment policies that appear neutral on their face may actually affect protected groups more harshly than an unprotected group. If an employer has a wellness program that provides a premium discount to employees who meet a particular cholesterol level, such a program might be subject to a disparate impact claim by older employees who may not be able to meet that level due to their age.

IV. Genetic Information Nondiscrimination Act of 2008 (GINA)

GINA prohibits discrimination on the basis of genetic information in employment and health insurance, among other things. The broad intent of the law is to protect individuals who are genetically predisposed to certain illnesses and those with latent conditions that are revealed through genetic testing. In employment, GINA amends Title VII of the Civil Rights Act of 1964 to add genetic information as a protected category for applicants and employees. It applies to employers with 15 or more employees.

Generally, GINA does the following: 1) prohibits discrimination on the basis of genetic information, without regard to how the information is derived, in hiring, promotion, compensation, termination and other terms and conditions of employment; 2) prohibits employers from requiring or requesting genetic testing or from purchasing or collecting genetic information; 3) prohibits disclosure of genetic information; and 4) provides for genetic information received by the employer to be maintained in a confidential manner and limits disclosure of the information. Genetic information is information regarding an employee's own genetic tests, the genetic tests of family members, and any manifestation of disease or disorder in family members. Family members include the employee's spouse, dependent children (either by birth or adoption) and up to fourth-degree relatives.

Although GINA generally prohibits disclosure of genetic information, it does not do so: 1) in the event of an employee request for the information; 2) to an occupational or health researcher; 3) under court order; 4) to a governmental official investigating compliance with the law; 5) in connection with FMLA compliance; or 6) to a public health agency.

There are exceptions to the provision that the employer is not permitted to require, request, or purchase genetic information. One such exception is where the employer offers health or genetic services including wellness programs. In the event genetic information is sought as part of a wellness program, the law requires that the production of the information by the employee be entirely voluntary and accompanied by a written authorization signed by the employee *before* the information is revealed. The information has to remain with the licensed health care professional or board certified genetic counselor involved in providing the services and cannot be shared or produced to the employer.

Proposed regulations state that a wellness program seeking medical information must be voluntary. According to the EEOC, a wellness program is voluntary “as long as an employer neither requires participation nor penalizes employees who do not participate.”

GINA also prohibits group health plans and insurance companies from collecting genetic information for underwriting purposes or prior to or in connection with enrollment. Underwriting purposes include changing deductibles or other cost-sharing mechanisms or providing discounts, rebates, payments in kind or other premium differential mechanisms in return for activities such as completing a health risk assessment (HRA) or participating in a wellness program.

Any wellness program that provides rewards for completing HRAs that request genetic information, including family medical history, violates the prohibition against requesting genetic information for underwriting purposes. This is true even if rewards are not based on the outcome of the assessment. Genetic information can be collected as long as no rewards are provided (and if the request is not made prior to or in connection with enrollment).

The proposed regulations state that although an employer may be able to seek family medical history voluntarily for a wellness program, other provisions in GINA Title I place strict limits on the genetic information that group health plans may request or require from covered individuals. Other entities, including the Department of Labor and Department of Health and Human Services are responsible for addressing the limitations on group health plans and insurance issuers under Title I.

V. Off-Duty Conduct

Some Maine state laws protect off-duty behavior of employees, such as smoking. Wellness programs must not penalize employees for such conduct.

VI. Health Insurance Portability and Accountability Act (HIPAA)

HIPAA makes it illegal for group health plans to base eligibility for health coverage (including participation, eligibility, premiums and contributions) on the following health-related factors: health status, medical condition (including physical and mental illnesses), claims experience, receipt of health care, medical history, genetic information, evidence of insurability (including conditions arising out of domestic violence), or disability. Therefore, under HIPAA's provisions, a group health plan cannot require an individual to pay a greater premium on the basis of any "health status-related factor."

HIPAA has an exception to its Nondiscrimination Rule for certain wellness programs. Wellness programs that reward employees simply for participating comply with the HIPAA if they are made available to all similarly situated individuals and do not base any part of the reward on outcome. Some types of programs that do not discriminate according to regulations: programs that reimburse all or part of cost of membership in a fitness center; diagnostic testing programs that provide a reward for participation and does not base the reward on the outcome of the testing; programs that encourage preventative care by waiving co-payments or deductibles under a group health plan for the cost of programs such as prenatal care and well-baby visits; programs that reimburse employees for the cost of smoking cessation programs without regard to whether the employee actually quits smoking; and programs that reward employees for attending a monthly health education seminar.

On the other hand, wellness programs that require satisfaction of a health-related factor are permissible only if they meet specific criteria. Examples of standard-based wellness programs include requiring employees to achieve a certain blood pressure or weight reduction to qualify for the program's reward.

HIPAA regulations define a bona fide wellness plan as one that adheres to the following four requirements:

- The total reward that may be given to an individual under the plan for all wellness programs must not exceed 20% of the cost of the employee-only coverage (purpose is to avoid having a reward or penalty so large that it has the effect of denying coverage or creating too heavy a financial penalty on individuals who do not meet initial wellness program standards that are related to a health factor);
- The design of the wellness program prevents disease or promotes good health and employees have the opportunity to qualify for the discount annually;
- Practical alternative standards must be provided for those for whom it is medically or unreasonably difficult to meet the criteria; and
- All plan materials describing the terms of the plan must disclose the availability of reasonable alternative standards.