Does Your Workplace Wellness Program Comply With Existing Laws?

Labor & Employment Law Update

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The National Business Group on Health's Eighth Annual Survey on Corporate Health recently revealed the growing prevalence of workplace wellness programs. Many such programs are expanding their aim to not only better the physical health of employees, but also to improve employees' emotional health and financial security.

Employers should be cautious that health and wellness programs, particularly those dealing with the physical and emotional health of employees, do not run afoul of existing laws. Many employers offer employees health promotion and disease prevention activities, commonly including programs aimed at smoking cessation, weight management, and physical activity challenges. Any wellness program that asks participants to provide personal medical information or submit to health testing should comply with the Americans with Disabilities Act (ADA), Genetic Information Nondiscrimination Act (GINA), and the Health Insurance Portability and Accountability Act (HIPAA).

Looking closer at the ADA, it generally prohibits employers from making disability-related inquiries or requiring employees to submit to medical exams. The statute exempts wellness programs from this prohibition, stating that employers may "conduct voluntary medical examinations, including voluntary medical histories that are part of an employee health program available to employees at that worksite." 42 U.S.C. § 12112(d)(4)(B). EEOC regulations confirm that wellness programs must be voluntary, confidential, and reasonably designed to promote health or prevent disease. 29 C.F.R. § 1630.14 (d)(1)-(4).

- **Wellness programs must be used only to improve the health of participating employees.** A wellness program is reasonably designed to promote health or prevent disease if it has a reasonable chance of bettering the health of participants, is not overly burdensome, and is not a subterfuge for violating the ADA or any other law.

- **Employers must be able to show how they utilize any collected medical information to better participants' health.** A wellness program will raise suspicion if it collects employee health information through questionnaires, testing, or screening without providing any results, follow-up information, or

advice designed to improve the participant's health.

- **Wellness programs that collect employee health information must be voluntary.** This means that employees may choose not to participate in the wellness program without suffering any retaliation or adverse action, including denial of coverage under a group health plan.
- **An incentive-based program may still be deemed voluntary.** Use of a financial reward, financial penalty, or other incentive to encourage participation in a wellness program does not render the program involuntary if the maximum incentive does not exceed regulatory thresholds. For employers offering a group health plan, incentives must not exceed thirty percent of the total cost of coverage for the employee (including both contributions from employer and employee).
- **Employers must provide employees with notification about the wellness program.** The notification must describe all personal medical information that will be collected and how it will be used. The notification must also explain what measures the employer will take to ensure the information is not improperly disclosed.

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