Has Your Wellness Program Had a Check-Up Lately?

Labor & Employment Law Update

By Suzannah Wilson Overholt on October 1, 2019

Wellness programs are a popular employee benefit. Whether an employer already has a program in place or is considering implementing one, it should be mindful of the requirements of federal law.

The Health Insurance Portability and Accountability Act (HIPAA) divides workplace wellness programs into two categories: participatory and health-contingent. The latter are subject to specific nondiscrimination standards while the former are not.

Participatory programs give an employee a reward for engaging in a specific act. These include gym membership reimbursement; diagnostic testing with rewards not based on outcomes; reimbursement for the cost of smoking cessation programs (regardless of whether the employee quits); and rewards for attending free health education seminars. As long as participation is available to all individuals, the program complies with HIPAA's nondiscrimination requirements. There is no limit on financial incentives for these programs.

By contrast, health-contingent programs require individuals to meet certain health-related standards to qualify for rewards. There are two categories of health-contingent programs: activity based and outcome based. These programs must follow certain nondiscrimination standards.

Activity based programs require performance or completion of an activity related to a specific health factor to obtain a reward but not a specific health outcome. Examples include walking, diet, and exercise programs.

Outcome based programs require that a particular health outcome or reasonable alternative be reached or maintained. These programs generally have a measurement, test, or screening as part of an initial standard and a larger program targeting individuals who do not meet the initial standard. Examples of such standards include quitting smoking, lowering cholesterol, or meeting certain exercise goals.

Five non-discrimination standards apply to all health-contingent programs:

1. Participants must be allowed to qualify at least once a year;

2. The incentive/penalty must be limited to 30% of the cost of the premium for the plan (50% for programs related to reducing tobacco use);
3. The program must be reasonably designed to promote health or prevent disease;
4. The full reward must be available to all similarly situated individuals, and the program must provide a reasonable alternative standard to achieve the reward; and
5. Notice must be provided of other means of qualifying for the reward.

Regardless of the type of program, privacy rules apply if the program conducts health risk assessments (HRAs) or monitors employee health. HIPAA prohibits employers from using protected health information for employment-related reasons.

The Americans with Disabilities Act (ADA) requires that wellness programs be voluntary. The rewards associated with a wellness program cannot be so significant that an employee feels coerced to participate.

The Genetic Information Non-Discrimination Act (GINA) is an issue if the program collects genetic information. Any HRA conducted prior to, or in connection with, benefit *enrollment* may not collect genetic information, including family medical history. Such information may only be requested *after* enrollment. No reward may be tied to providing genetic information. HRAs that do not request such information can be tied to a reward.

Employers should consult their program designers to ensure their wellness programs comply with these regulations.