WELLNESS PROGRAMS:
ISSUES EMPLOYERS MUST CONSIDER TO AVOID LEGAL CONSEQUENCES

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I. INTRODUCTION TO WELLNESS PROGRAMS

At some point it becomes difficult, if not impossible, to tune out the constant barrage of stories on radio, television, the internet and in newspapers discussing rising insurance rates and wellness programs. With continuing annual increases in health care insurance costs, employers are looking for ways to manage the health and health care costs of their workforce.

According to the CDC, chronic diseases such as heart disease, cancer and diabetes affect the quality of life of 90 million Americans, and yet these diseases are among the most preventable through such healthy behaviors as eating nutritious foods, being physically active and avoiding tobacco use. In 2005, the U.S. Department of Health and Human Services reported that more than 75 percent of all health care dollars are spent on chronic conditions such as diabetes, obesity, cardiovascular disease, and asthma – most of which are preventable.

In an attempt to control health insurance and healthcare costs, employers are increasingly focused on employee lifestyle choices, which can aide in illness and disease prevention. Employers who sponsor health plans for their employees are searching for new ways to control these ever-growing costs.

Implementing a wellness program can be very beneficial for both the employer and employee; however, before taking action, an employer must carefully consider legal issues that can arise from the Health Insurance Portability and Accountability Act ("HIPAA"), ERISA, Americans with Disabilities Act ("ADA"), Age Discrimination in Employment Act ("ADEA"), Title VII, the Ohio Civil Rights Act, and Health Savings Accounts regulations. There is limited guidance by way of case law or regulation regarding the application of these statutes to various wellness programs. In fact, only this year did the Department of Labor issue any guidelines applicable to HIPAA. This article addresses several statutory and regulatory schemes which must be considered when implementing wellness programs. This article is also limited to Ohio, inasmuch as other states have statutes prohibiting discrimination against smokers and have also enacted "lifestyle discrimination" statutes prohibiting employers from discrimination against employees for lawful off-duty conduct or the use of lawful products off-duty.

II. WELLNESS PROGRAMS DEFINED

There is no single definition encompassing a "wellness program." However, the essence of these plans or programs is to encourage individuals to take preventative measures, through education, risk assessment and/or screening, or disability management to avert the onset or worsening of an illness or disease.[1]

III. WELLNESS PROGRAM OPTIONS

Wellness programs take many forms. Some programs focus on employees with specific health problems such as heart disease and diabetes. In other instances, an employer provides incentives to employees to obtain a physical examination or participate in a health risk assessment. Some employers may offer discounts at local health clubs or a monetary reward for quitting smoking. Other companies may offer rebates of insurance premiums, decreases in co-payments or other incentives under a group health benefits plan.[2]

Most employers already have wellness programs to help employees learn about the benefits of a healthy lifestyle and what they can do to improve their personal health. Whether the information takes the form of newsletters, brochures, emails, or full fledged employer-sponsored health fairs, a program designed to increase employees' awareness of how lifestyle choices influence physical and mental health is an easy initial step for employers to take.

Even though the options are plentiful, an employer must carefully structure its wellness program in accordance with both state and federal law. These programs may raise issues regarding reasonable accommodation, privacy, confidentiality, and protection of off-duty conduct. Below are some of the issues that employers should consider to ensure that their wellness program does not become a legal "black hole" for their company.

IV. HIPAA (HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996)

The Health Insurance Portability and Accountability Act ("HIPAA") of 1996 mandated significant changes in the legal and regulatory environments governing the provision of health benefits, the delivery and payment of healthcare services, and the security and confidentiality of individually identifiable, protected health information. HIPAA prohibits health plans from discriminating among plan participants based on health related factors

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[1] Joseph Lazzarotti, *An Introduction to Wellness Programs: The Legal Implications of "Bona Fide Wellness Programs,"* 6 Bender's Labor & Employment Bulletin 270 (June 2006).

[2] *Id*. at 4.

such as health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability or disability.[3] Beginning in late 2006, the Department of Labor began providing guidance through regulations and Field Assistance Bulletins clarifying that a group health plan may not establish rules for eligibility or benefits based on a health factor.[4] HIPAA does, however, provide an exception to its non-discrimination rule permitting wellness programs that promote health and disease prevention to discriminate in plans beginning on or after July 1, 2007, so long as certain requirements are met or the program is benign. The benign discrimination provision of the regulations permits discrimination in favor of the individual based on a health factor in a plan.[5] For example, a plan is benign if it grants diabetics a waiver of the plan's deductible if they enroll in diabetes education classes. The plan is offering a reward based on an adverse health factor.

If none of the conditions for obtaining a reward under a wellness program is based upon achieving a standard relating to a health factor in order to obtain a reward, or if no reward is offered, the program complies with the non-discrimination provisions. Examples include:

- Reimbursement for all or part of fitness club membership
- Diagnostic testing with a reward for participation and not for outcome
- Program that encourages preventative care by waiving co-pays or deductibles for prenatal care or well baby visits
- Program that reimburses employees for costs of smoking cessation programs, regardless of outcome.

Also, if the wellness program is outside of the group health plan, then HIPAA does not prohibit or restrict such a program, although other laws may.

A wellness program that provides a "reward" based on a health factor (such as a reduced health insurance premium) complies with HIPAA if the discriminatory provision is benign (in favor of the individual based upon a health factor) or satisfies each of the following five requirements:

1. the reward cannot be more than 20% of the total cost of the coverage;[6]

[3]29 C.F.R. 2590, 702(a)(i-viii).

[4]U.S. Department of Labor, Field Assistance Bulletin No. 2008-02.

[5]29 C.F.R. 2590.702(g).

[6]29 C.F.R. 2590.702(f)(2)(i).

2. the plan must be reasonably designed to promote health or prevent disease;[7]

3. individuals eligible to participate must be given a chance to qualify at least once per year;[8]

4. the plan must be available to all similarly-situated participants or offer reasonable alternatives;[9] and

5. the plan must disclose, in all materials describing the terms of the program, the availability of a reasonable alternative standard (or the possibility of a waiver of the standard).[10]

If the plan meets all of the above criteria, there are no violations of the HIPAA wellness program rules. If the plan does not meet any of the five criteria, the plan has a wellness compliance issue. Specifically, the plan could be violating the General Benefit Discrimination Rule or the General Premium Discrimination Rule.[11]

An entity who violates HIPAA is subject to both civil and criminal penalties. The civil penalties include fines of up to $100 per violation for a yearly maximum of $25,000 for violations of the same requirements. Criminal fines and possible jail time are also possible.

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[7]29C.F.R. 2590.702(f)(2)(ii).

[8]29 C.F.R. 2590.702(f)(2)(iii). A reward is not available to all similarly situated employees unless it allows for a reasonable alternative standard or waiver for obtaining a reward if it is unreasonably difficult due to a medical condition or medically inadvisable to satisfy the standard. The plan or issuer may seek medical verification that a health factor makes it unreasonably difficult or medically in advisable to satisfies or attempt to satisfy the standard;

[9]29 C.F.R. 2590.702(f)(2)(iv).

[10]29 C.F.R. 2590.702(f)(2))(v). If plan materials merely mention that the program is available, without describing its terms, its disclosure is not required. Additionally, disclosure does not have to say what the reasonable alternative standard is in advance. The plan can individually tailor the standard on a case-by-case basis. Pursuant to the Department of Labor, the following language is permissible: "If it is unreasonably difficult due to a medical condition for you to achieve the standards for the reward under this program, call us at [insert telephone number] and we will work with you to develop another way to qualify for the reward." Id.

[11]29 C.F.R. 2590.702(b)(2)(i) and 29 C.F.R. 2590.702(c)(1).

The HIPAA regulations specifically state that compliance with these regulations does not insulate an employer or insurer from violations of other state and federal laws.[12] Accordingly, below are some other laws that impact wellness programs.

V. ERISA (EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974)

The Employee Retirement Income Security Act of 1974 ("ERISA") is a federal law that sets minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans. ERISA covers employee welfare benefits plans, which are broadly defined to include any program established or maintained by an employer providing medical care to participants.

ERISA Section 510[13] prohibits employers from firing employees to prevent them from attaining a benefit – it expressly prohibits employers from disciplining or terminating the employment of an ERISA plan participant "for the purpose of interfering with the attainment of any right to which such participant may become entitled" under an ERISA plan.[14] Medical care could be considered entitlements.

The Department of Labor (DOL) – the federal agency responsible for enforcing ERISA – has specifically indicated that wellness programs providing medical care may be subject to ERISA. Although the DOL has not aggressively pursued this position to date, it may step up enforcement as wellness programs become more prevalent in the workforce over the years.

It is unclear however, whether ERISA protects job applicants who engage in unhealthy behaviors such as smoking. Thus, even though an employer could not terminate an employee based on anticipated higher health care costs, it may be permissible under ERISA for an employer to refuse to hire an applicant based on anticipated higher health care costs. This is on account of some recent case law which suggests that ERISA Section 510 does not go so far as to protect job applicants. But, the case law in this area in sparse, and accordingly, employers must be prudent and use caution before taking action to deny employment (and consequently benefits) based upon health-related lifestyle choices.

VI. ADA (AMERICANS WITH DISABILITIES ACT)

[12] 29 C.F.R. 2590.702(h).

[13] 29 USC §1140

[14] Id.

The Americans with Disability Act ("ADA") does not prohibit employers from implementing wellness programs that are geared at promoting good health and disease-prevention. The ADA does prohibit employers from denying, on the basis of disability, qualified individuals an equal opportunity to participate in or receive benefits under programs or activities conducted by those employers. Employers are under a duty to offer a reasonable accommodation to any employee with a disability known to that employer. The ADA also places significant restrictions upon an employer's ability to make disability-related inquiries or require medical examinations. Specifically, the ADA states in relevant part:

> A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, unless such examination or inquiry is shown to be job-related or consistent with business necessity.[15]

The statutory language makes it clear that the ADA restriction on inquiries and examinations applies to all employees, not just those with disabilities. Despite the general restriction on medical inquiries or examinations, according to the Equal Employment Opportunity Commission ("EEOC") Guidelines, an employer may conduct medical examinations and activities, including voluntary medical histories, which are part of an employee health program, without having to show that they are job-related and consistent with business necessity, 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. A wellness program is "voluntary" as long as an employer neither requires participation nor penalizes employees who do not participate.[16]

Therefore, offering employees the opportunity to voluntarily participate will not likely violate the ADA as long as there is no penalty for non-participation and any information is maintained in the strictest confidence.

VII. HSAs (Health Saving Accounts)

Health Savings Accounts ("HSAs") were created in Medicare legislation signed into law on December 8, 2003. An HSA is an account an individual uses to set aside funds on a pre-tax or tax-deductible basis to pay for routine healthcare – such as office visits, prescription drugs and lab tests. The money put into the HSA will reduce the individuals income tax similar

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[15]42 U.S.C. 12112(d)(4)(A).

[16]Equal Employment Opportunity Commission, "Enforcement Guidance and Disability-Related Inquiries and Medical Examination of Employees" at Q. 22(2000).

to the money saved in a 401(k) plan. A HSA can be established through a bank, insurance company or third party administrator. If the individual's HSA is part of his or her employee benefits program, the employer may also make contributions to that HSA.

More specifically, HSAs are tax favored, IRA-like accounts that employees covered by a high-deductible health plan can establish to pay medical expenses for themselves, their spouses, and their tax dependents. A key limitation on contributing to an HSA is that the employee must not have any other health coverage other than the high-deductible health plan. The IRS has clarified that an individual will not be prevented from contributing to an HSA simply because of participation in a wellness program, so long as the program does not provide significant benefits in the nature of medical care and treatment.

In other words, the wellness program cannot be a sneaky maneuver to provide medical care that otherwise should be provided under the high-deductible health plan. If an employer has implemented a high-deductible health plan, the employer must ensure it is not inadvertently disqualifying the employees from being able to contribute to an HSA.

VIII. ADEA (AGE DISCRIMINATION AND EMPLOYMENT ACT)

The Age Discrimination and Employment Act ("ADEA") and the Ohio Civil Rights Act both prohibit discrimination on the basis of age. In implementing wellness programs, an employer should take care to ensure that the plan does not have a disproportionate or disparate impact on older workers.

The ADEA prohibits disparate impact discrimination. No discriminatory motive is necessary to establish this kind of discrimination. Rather, a facially neutral policy or practice that has a disproportionately adverse affect on a protected group, i.e., older workers, is said to disparately impact that group. If an employee can establish that a certain wellness program disparately impacts it, an employee may challenge the program in a court of law. It would then be up to the employer to establish that the neutral wellness program policy is based on reasonable factors other than age, such as reducing health care costs. The burden then shifts back to the employee to ultimately persuade a jury that the method selected by the employer to reduce health care premiums was unreasonable. There is absolutely no case law providing any employer with guidance as to whether or not, as a matter of law, a court would conclude that the reduction of health care premiums was a reasonable factor and there is always the attendant risk of making that argument to a jury.

IX. CONCLUSION

Wellness programs can be an integral part of a company's health plan, so long as they are properly structured to comply with the patchwork of laws that apply. Even with the legal

issues identified above, many employers have found wellness programs to be an efficient and effective means to manage employees' health and health care costs.