Carrot or Stick? Keeping a Healthy Workforce

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Topics

- Health Related Employment Practices
- Wellness Programs
Health Related Employment Practices
Equal Employment Opportunity Commission

- Enforces –
  - Civil Rights Act
  - Americans with Disabilities Act
- Title VII of CRA and Title I of ADA –
  - Prohibit employment discrimination on the basis of race, color, sex, national origin, religion, age, and disability
- Applies to employees and job-applicants
Title VII of CRA & Title I of ADA

- Three Stages of disability-related inquiries:
  - Pre-offer
  - Post-condition offer
  - After employment begins

- What is a disability related inquiry?
Genetic Information

- GINA – Genetic Information Non-Discrimination Act
- Genetic Testing –
  - Genetic Screening
  - Genetic Monitoring
Psychological Examinations

- Equal Employment Opportunity Commission - Medical examination if intended to disclose mental disorders or impairments
- Regulated by Americans with Disabilities Acts - No broad protection against being asked personal questions (State counterparts)
- Test must be “job-related” and “compelling interest” in administering it
Medical / Fitness Exams

- Similar to Disability related inquiries
- Medical/Fitness examination
- No medical/fitness examination
Drug Tests

- Reasons for drug tests
- Various forms and manners of testing
- BUT, careful – prescription drugs, etc.
Smoking

- Federal –
  - Smokers = Not a protected class

- Michigan –
  - Smoking in Public Places
  - No workplace smoking law
  - No requirement to create designated smoking areas or provide other accommodations

- Trend –
  - Employers imposing bans on smokers (ie. Not hiring smokers)
Medical Marijuana

- 16 States and DC Legalizing MM
- Michigan –
  - Qualifying condition + physician note = affirmative criminal defense
  - Not required to accommodate ingestion
  - Not required to accommodate employee working while under the influence
  - Employer can terminate if employee tests positive during employment-related drug screening.
  - No triable claim for wrongful discharge
Wellness Programs

- Unhealthy employees affect
  - Health plan costs
  - Productivity
  - Absenteeism rates
Wellness Programs

- Towers Watson “Pathway to Health and Productivity” 2011/2012 Survey

  - Employers with successful wellness programs report:
    - Annual health care cost savings of more than $1,000 per employee
    - Fewer lost days due to unplanned absences and disability
    - Reductions in some health risks (tobacco use, physical inactivity)
Legal Issues

- HIPAA nondiscrimination rules
- Patient Protection and Affordable Care Act
- Genetic Information Nondiscrimination Act of 2008 ("GINA")
- American’s with Disabilities Act
Non-discrimination: plan may not deny eligibility for benefits or charge higher premiums or contributions based on a health factor.
- Exception for wellness programs
- Plans may vary benefits and premiums and contributions based on whether an individual has met the standards of a wellness program, provided that the program meets certain requirements
HIPAA only applies to wellness programs that:

- Are part of a group health plan
- Offer a reward
- The reward is based on employee satisfying a standard that is related to a health factor (outcome focused)
Participation only programs are not subject to HIPAA
HIPAA

- If subject to HIPAA, wellness program must meet five conditions
The reward must be no more than 20% of the cost of coverage

- “Reward” includes discounts or rebates of premiums, waivers of cost sharing (deductibles, co-pays)
- Include employer paid and employee paid portions
  - Self insured plans
- If the program allows spouses and/or dependents to participate, the reward may not exceed 20% of the cost of coverage in which the employee and any dependents are enrolled

Limit applies to all wellness programs
The program must be designed to promote health or prevent disease.

A program meets this requirement if it:
- has a reasonable chance of improving the health or preventing disease in, participating individuals.
- is not overly burdensome.
- is not a subterfuge for discriminating based on a health factor.
- is not highly suspect in the method chosen to promote health or prevent disease.
The program must give individuals an opportunity to qualify for the reward at least once a year.

- Employer is not required to continue the program.
- But, if the employer continues the program, it must allow employees who went through the program last year to go through it again this year.
The reward must be available to all “similarly situated” individuals

- Bona fide employment based classification consistent with the employer’s usual business practices
- Full time vs. part time, geographic location, union, date of hire, length of service, current employee vs. former employee, different occupations
Wellness program must offer a reasonable alternative standard (or waiver of the standard) to obtain the reward for individuals for whom:

- It is unreasonably difficult to meet the standard due to a medical condition, or
- It is medically inadvisable to attempt to satisfy the standard
Therefore, a wellness program may have to provide

- Individually tailored adjustments to the standards to qualify for the reward
- Alternative methods of qualifying for the reward that does not involve a health factor

A plan may request evidence, such as a statement from a physician, that an individual cannot meet the standard due to a health factor
The plan must disclose that alternative standards (or waivers) are available

- All plan materials describing the terms of the program must disclose the availability of a reasonable alternative standard
- Model language available
Safe harbor programs

- A 20% premium discount for individuals who have an annual cholesterol test and achieve levels below 200
- A waiver of the plan’s annual $250 deductible (which is not more than 20% of cost of coverage) for individuals who have a body mass index within a specified range
HIPAA

- DOL checklist on wellness program coverage and compliance
Incorporates prior HIPAA regulations into statute

Increases overall limit to 30% for plan years beginning on or after January 1, 2014

Provides credits for certain employers to launch wellness programs

Employers that employ fewer than 100 employees who work 25 hours or more per week

Who did not provide a workplace wellness program as of March 23, 2010
GINA

- Generally prohibits employers from requesting or requiring “genetic information”

- Genetic information includes
  - Information about genetic tests of individual and family members (e.g. test to determine whether individual is predisposed to breast cancer)
  - Family medical history
  - Requests for and receipt of genetic services
  - Genetic information about fetus
Exception permits employer to acquire genetic information as part of a wellness programs

- Must be voluntary
  - What level of incentive will cause program to not be voluntary?
- Employee must give written consent
- Information may be provided to employer in aggregate form
GINA

- Employer may not offer financial incentives for individuals to provide genetic information as part of a wellness program
  - May offer financial incentive to encourage completion of health risk assessment that requests information on family medical history and other medical history, but must identify question and make clear that individual need not answer the question to receive the incentive
  - May provide financial incentives to encourage employees to participate in disease management or other wellness programs and/or to meet particular health goals, but these incentives must also be offered to others who did not provide genetic information but have current health conditions or at a risk of developing such conditions
ADA generally prohibits employment discrimination against disabled individuals.

The ADA limits an employer's ability to:

- make "disability related inquiries";
- "require medical examinations".
The ADA allows employers to conduct voluntary medical examinations and inquiries as part of a wellness program if:

- the program is voluntary
- any medical records acquired as part of the wellness program are kept confidential and separate from personnel records
- the information is not used to discriminate against the employee
A wellness program is considered “voluntary” as long as an employer neither requires participation nor penalizes employees who do not participate.

EEOC has not taken a position on whether and to what extent the ADA permits an employer to offer financial incentives for employees to participate in wellness programs that include disability-related inquiries or medical examinations.
- EEOC informal opinions
  - It would be an ADA violation to require an employee to take a health risk assessment in order to be eligible for coverage under an employer's group health plan
  - An employer's requirement that employees complete a health risk assessment in order to receive medical expense reimbursements from the employer's health reimbursement arrangement violated the ADA
Exception to employment discrimination for “bona fide employee benefit plan”
- Bona fide health plan
- Terms based on underwriting, classifying, or administering risk and not a subterfuge for discrimination
- Consistent with state law
ADA

- **Seff vs. Broward County**
  - Wellness program included health risk assessment, biometric screening and health counseling – participation only
  - Employees who did not complete health risk assessment and submit to screening paid additional premium
  - Did not violate ADA because program was term of insured group health plan and it was designed to enable the employer to use de-identified information to classify and assess risks in order to develop economically sound benefit plans
Goals of Wellness Programs

- Hold employees accountable for lifestyle choices
- Control health plan costs
Designing Wellness Programs

- Look for fun and engaging ways to improve health
  - Improve nutrition
  - Increase physical activity
  - Quit harmful behaviors

- Incentives work!
  - But, may have limited impact on changing behavior long term
Designing Wellness Programs

- **Trends**
  - Increase in financial penalties for employees not participating
  - Rules for earning rewards becoming more stringent
    - Requiring employees to complete activities
    - Reward based on achievements
  - Inclusion of spouses and dependents
Designing Wellness Programs

- Tie incentives to
  - *Participation* in wellness activities
    - Reward for *participating* and making healthy choices – not tied to group health plan
      - Activities: exercising, eating healthy foods, losing weight
      - Rewards: gift cards, water bottles, jump ropes
      - Wellness bingo
      - “Biggest loser” contests
Designing Wellness Programs

- Reward for *participating* in wellness activities – tied to group health plan but not outcome driven
  - Activities
    - *Participation* in health risk assessment
    - *Participation* in disease management program
  - Rewards
    - Lower premium
    - Employer contribution to FSA, HRA or HSA
Designing Wellness Programs

- Achievement of a targeted health goal
- Reward for participating in wellness activities – tied to group health plan and outcome driven
  - Activities
    - BMI at specified level
    - Bad cholesterol counts at specified level
  - Rewards
    - Employer contribution to FSA, HRA or HSA
    - Lower premium
Designing Wellness Programs

- Popular programs
  - Health risk assessment
  - Biometric screenings (blood pressure, BMI, cholesterol)
  - Disease management program
  - Smoking cessation program
  - Weight management program
- Education
- Worksite activities (yoga, walking programs)
- Team challenges
Health Risk Assessments

- Helps identify individuals who may benefit from wellness program, identify areas of concern and help set health-related goals
Health Risk Assessment

- **Legal issues:**
  - HIPAA compliance if reward for completing and reward is based on outcome of health risk assessment
    - Premium discount for employees who participate (may not exceed 20% if subject to HIPAA)
  - **GINA**
    - Do not *require* family medical history
  - **ADA**
    - Do not condition employment or participation in health plan on completion
Disease Management Programs

- Health professionals work with individuals who have specific diseases or conditions, such as asthma or diabetes, to assist the individuals in understanding and complying with treatment.
Disease Management Programs

- Legal issues
  - HIPAA
    - A program that requires higher premiums or deductibles from individuals who do not cooperate must comply with HIPAA
Smoking Cessation Programs

- Higher premium to those that use tobacco as an incentive to quit smoking

- HIPAA safe harbor:
  - Program assesses a 20% surcharge on the cost of coverage for individuals who cannot certify that they have not used tobacco products in past 12 months
  - If it is unreasonably difficult for an individual to stop smoking due to an addiction to nicotine, the program requires the individual to participate in a smoking cessation program to avoid the surcharge
  - The individual can avoid the surcharge as long as he participates in the program - regardless of whether he ever actually stops smoking and as long as he continues to be addicted to nicotine
Smoking Cessation Programs

- Practice – most employers find this only moderately successful in helping employees quit smoking
  - Do you test employees for nicotine use?
    - Any restrictions in collective bargaining agreement?
  - Do you use the honor system?
  - When do you pay the incentive?
    - Wait until the smoking cessation program completed?
Cafeteria Plan Change in Election Issues

- Generally, employees may not change election mid-year
- Exception if cost increases or decreases during the year
  - If earn premium reduction may reduce pre-tax salary reduction to pay premium
  - If earn additional employer contribution to health flexible spending account, may employee reduce his/her contribution?
HSA Contributions

- Employer contributions to HSA subject to comparability rules unless made through a cafeteria plan
  - All HSA eligible individuals in same employee category
    - Current full time, current part time or former employees
  - Who have same HDHP coverage category
    - Single, two person, three person or family
  - Must receive same dollar amount or percentage
Tax Issues

- Cash or cash equivalents (gift cards) included in taxable income
  - De minimis fringe benefits excluded (unreasonable and impracticable to account for)

- Reimbursement of health club dues generally taxable
  - May be excluded if individual was diagnosed with a specific disease, is using the gym to treat the disease and would not have incurred the gym fee but for the disease
Tax Issues

- Lower premiums and employer contributions to FSA, HRA or HSA excluded from income
ERISA Issues

- Program may be subject to ERISA if provides medical services (e.g., diagnostic services, preventive services)
  - Plan document and summary plan description
  - Form 5500
  - COBRA – opportunity to continue participation in wellness program at employee’s cost
  - HIPAA privacy
Questions?