# A LEGAL ROAD MAP FOR WELLNESS PROGRAMS

*by NICOLE C. BALDWIN and BRIAN E. COLE II*

We tend to take our health for granted—until we get sick. Then, in an effort to improve our health, we take the vitamins we should have been taking, eat the foods we were supposed to be eating, and drink the water we should have been drinking. Each time, we tell ourselves we'll continue to do these things even after our health improves; yet, we rarely keep this promise.

But what if our healthy decisions meant potentially lowering our health insurance premiums? That's where wellness programs come in. The idea behind wellness programs is simple: to incentivize a company's workforce to engage in activities related to one's health. Both employers and employees alike can benefit from wellness programs.

Health insurance and benefits rank among the top costs of an employer. Wellness programs can ultimately lead to lower health insurance premiums and directly affect a company's bottom line. Similarly, employees may be eligible for rewards like annual premium rebates or cash incentives in connection with wellness program activities, such as biometric screenings and health risk assessments. Wellness programs not only create healthier employees, but may also increase employee performance. For example, a 2014 study from Stanford University observed that just ten to fifteen minutes of walking substantially enhanced an individual's creativity. Marily Oppezzo & Daniel L. Schwartz, *Give Your Ideas Some Legs: The Positive Effect of Walking on Creative Thinking*, 40 J. Experimental Psychol.: Learning, Memory, and Cognition, No. 4, 2014, at 1142-52, https://www.apa.org/pubs/journals/releases/xlm-a0036577.pdf.

Given the potential positive effects on the workplace, there are a few things to keep in mind when implementing a wellness program, such as program types and newly proposed regulations.

## Wellness Programs Under the ACA

In general, a "wellness program" is defined under the final regulations of the Patient Protection and Affordable Care Act (ACA) as a plan that is reasonably designed to promote health or prevent disease.

In 2013, the Department of the Treasury, Department of Labor, and Department of Health and Human Services implemented final regulations to provide comprehensive guidance with respect to the general requirements of wellness programs. These regulations set forth two main types of wellness programs: (1) Participatory and (2) Health-Contingent Wellness Programs. Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 78 Fed. Reg. 33,157 (June 3, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 146, 45 C.F.R. pt.147), https://www.gpo.gov/fdsys/pkg/FR-2013-06-03/pdf/2013-12916.pdf.

Wellness programs can ultimately lead to lower health insurance premiums and directly affect a company's bottom line.

## Participatory Wellness Programs

Participatory wellness programs do not require employees to meet a certain health standard. These programs can, but are not required to, provide a reward to incentivize employees.

Examples of participatory wellness programs include: (a) a program that reimburses employees for all or part of the cost of membership in a fitness center; (b) a diagnostic testing program that provides a reward for participation and does not base any part of the reward on outcomes; and (c) a program that provides a reward to employees for attending a monthly, no-cost health education seminar.

Notably, these examples all reward employees for participating in activities without requiring employees to achieve a certain outcome. If a program requires an employee to meet a certain health standard, this is not a participatory program. For example, reimbursing an employee for the cost of attending a tobacco smoking cessation program would qualify, but reimbursing employees only if they actually quit smoking by the end of the cessation program would not.

Participatory wellness programs must be open to all similarly situated employees, regardless of health status. For example, if a plan offered a premium discount in exchange for an individual attending an educational seminar, but this discount was only provided to individuals based on health factors, the program would be discriminatory. On the other hand, if a particular individual was unable to attend the seminar because of their own unavailability, the employee's inability to attend does not mean the program discriminated against him or her based on a health factor.

## Health-Contingent Wellness Programs

Health-contingent wellness programs—as one could guess from their name—require an individual to satisfy a standard related to a health factor to obtain a reward. The standard may relate to performing a certain activity or attaining a specific health outcome. There are two types of health contingent wellness programs: (1) Activity-

Only Wellness Programs and (2) Outcome-Based Wellness Programs.

*Activity-Only Wellness Programs*

Under an activity-only wellness program, an individual is required to perform an activity related to a health factor in order to obtain a reward. However, this type of program does not require an individual to attain a specific health outcome. Examples of activity-only programs include walking, diet, or exercise programs which do not require an employee to achieve a certain goal such as a particular weight, blood pressure, or body mass index (BMI). Instead, they only require the employee to engage in the activity as prescribed by the program. However, some individuals may be unable to participate in the program due to a health factor like asthma, and therefore a reasonable alternative must be provided.

*Outcome-Based Wellness Programs*

Under an outcome-based wellness program, an individual must attain a specific health outcome in order to obtain a reward. Examples include actually quitting smoking or attaining certain results on a biometric screening. Outcome-based programs usually have two tiers: (a) a measurement, test, or screening as part of an initial standard, and (b) a follow-up program that assists individuals who do not meet the initial standard.

Another example of an outcome-based program is one that tests high blood pressure and provides a reward to individuals identified within a healthy range, while requiring those who fall outside of that range to take additional steps in order to obtain the reward.

All Health-Contingent Wellness Programs must meet the following requirements:

1. Individuals who are eligible for the program must be given the opportunity to qualify for the reward at least once per year.
2. The size of the reward cannot exceed thirty percent of the total cost of employee-only coverage under the employer's health-care plan (taking into account both employer and employee contributions). For example, the total annual premium for employee-only coverage is $5,000. The maximum incentive allowed in connection with a wellness program is $1,500 (thirty percent of $5,000). For smoking cessation programs, the reward may not exceed fifty percent.
3. A wellness program must be reasonably designed to promote health or prevent disease. A program is "reasonably designed" if it has a reasonable chance of improving the health of, or preventing disease in, participating individuals; is not overly burdensome; is not a subterfuge for discrimination based on a health factor; and is not highly suspect in the method chosen to promote health or prevent disease.
4. All materials describing the terms of a health-contingent wellness program must disclose the availability of a reasonable alternative standard to qualify for a reward (or waiver of applicable standard).
5. The full reward must be available to all similarly situated employees and provide a reasonable alternative standard (or waiver of applicable standard). The details of this requirement are determined by whether the program is activity-based or outcome-based.

## Wellness Program Regulations Proposed by EEOC

In 2015, the Equal Employment Opportunity Commission (EEOC) proposed regulations pertaining to wellness programs, which would amend the Americans with Disabilities Act of 1990 (ADA) and the Genetic Information Nondiscrimination Act (GINA), as discussed below.

*Americans With Disabilities Act of 1990*

On April 20, 2015, the EEOC proposed regulations discussing the impact of Title I of the ADA as applied to wellness programs. The EEOC's proposed regulations pertaining to the ADA would require employers to do the following:

(1) Describe employer practices that are wellness programs, and those that are not. A program must be reasonably designed to promote health or prevent disease, must not be overly burdensome, cannot be used to violate the ADA or other laws prohibiting employment discrimination, and cannot be highly suspect in the method chosen to promote health or prevent disease.

(2) Define what it means for an employee health program to be "voluntary." For a program that includes disability-related inquiries or medical examinations to be considered voluntary, an employer:

- May not require employees to participate;
- May not deny access to health coverage or generally limit coverage under its health plans for non-participation; and
- May not take any other adverse action or retaliate against, interfere with, coerce, intimidate, or threaten employees (such as by threatening to discipline an employee who does not participate or who fails to achieve certain health outcomes).

(3) Explain how provisions of the ADA requiring employers to keep medical information confidential are applicable to medical information obtained as part of a voluntary employee health program. If a health program is considered a wellness program that is part of a group health plan, an employer must provide a notice clearly explaining: what medical information will be obtained, how it will be used, who will receive it, and the restrictions on disclosure.

(4) Receive information collected by a wellness program in aggregate form only when it does not disclose, and is

not reasonably likely to disclose, the identity of specific individuals except as is necessary to administer the plan.

Wellness programs that are part of a group health plan, including those administered by employers, generally are subject to the requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which mandate certain safeguards to protect the privacy of personal health information and set limits and conditions on the uses and disclosures of that information.

*GINA*

On October 30, 2015, the EEOC proposed additional regulations pertaining to wellness programs, this time proposing amendments to Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA). GINA prohibits employers from obtaining genetic information about an employee and their family members, but allows for an employer to obtain this type of information in connection with a voluntary wellness program.

The EEOC's proposed amendments to GINA include:

(1) Defining what is meant by a wellness program to be "reasonably" designed to promote health or prevent disease.

(2) Limiting incentives, which cannot be contingent on an employee or their spouse providing genetic information. An employer may provide incentives to an employee whose spouse provides information about their own current or past health status as part of a health risk assessment. The total incentive for participating in a wellness program cannot exceed thirty percent of the annual cost of coverage for the plan in which the employee and any dependents are enrolled. For example, if an employer offers health insurance coverage at a total cost (including both employer and employee contributions) of $14,000 annually to cover an employee and the employee's spouse/dependents, the total incentive to participate in a wellness program can be no greater than thirty percent of $14,000, or $4,200.

(3) Capping the maximum share of an incentive for an employee's participation in an employer wellness program to thirty percent of the cost of self-only coverage. The rest of the incentive can be provided in exchange for an employee's spouse providing information about the spouse's own health status.

Taking the example from above, the maximum incentive allowable for an individual to provide information about their current or past health status is thirty percent of the total annual cost for their health plan of $14,000, which is $4,200. For an annual self-only coverage cost of $6,000, the maximum allowable incentive is thirty percent of $6,000, or $1,800. The rest of the incentive ($4,200 minus $1,800), which is $2,400, may be offered for an employee's spouse to provide information about his or her own current or past health status.

(4) Providing that incentives under a wellness program cannot be conditioned on an agreement to the sale of, or waiver of confidentiality pertaining to, an individual's genetic information.

(5) Permitting employers to seek information about the current or past health status of an employee's spouse who is covered by the employer's group health plan in connection with the completion of a voluntary health risk assessment. This means that an employer does not unlawfully acquire genetic information about an employee when it seeks information—through a medical questionnaire or medical exam in connection with a wellness program—about the current or past health status of an employee's spouse.

(6) Providing that incentives may be financial or "in-kind." Employers can provide financial rewards or non-financial awards such as time-off awards or prizes.

## Tips for Implementing Wellness Programs

As previously mentioned, wellness programs have the potential to create many positive changes within a company's workforce. In light of the aforementioned proposed EEOC regulations, the following steps are recommended when implementing a wellness program:

- Do not require employees to participate in a wellness program.
- Do not deny health insurance to employees who do not participate in a wellness program.
- Do not take adverse employment action or retaliate against employees who don't participate in wellness programs or who don't achieve health outcomes.
- Provide reasonable accommodations.
- Protect the confidential medical and genetic information of employees and their family members.

***Nicole C. Baldwin*** *and* ***Brian E. Cole II*** *are attorneys at Carothers DiSante & Freudenberger LLP. In addition to the laws discussed in this article, a number of federal and state laws also apply to wellness programs. Nicole Baldwin may be contacted regarding questions related to potential compliance issues with wellness programs at nbaldwin@cdflaborlaw.com.*

*This article first appeared in* Orange County Lawyer*, March 2016 (Vol. 58 No. 3), p. 32. The views expressed herein are those of the Authors. They do not necessarily represent the views of* Orange County Lawyer *magazine, the Orange County Bar Association, the Orange County Bar Association Charitable Fund, or their staffs, contributors, or advertisers. All legal and other issues must be independently researched.*