

Wellness Programs and Nondiscrimination Issues: What Employers Need to Know

Wellness programs come in many different shapes and sizes, from very basic health-related education to entire divisions dedicated to organizational wellbeing. It is incumbent upon employers to understand the importance of aligning wellness programs with organizational goals and culture while appreciating the potential compliance implications of the various wellness program structures. In this article, we will review statutory and regulatory requirements, with a focus on the Health Insurance Portability and Accountability Act (HIPAA), and various EEO-related statutes, and articulate the crucial role of HR in designing a compliant wellness program.

If you remember nothing else – best practices for any wellness program

Too many times when organizations begin a wellness program, they do it in a vacuum, with the HR Department tasked with ‘getting a wellness program going’ or some well-meaning employees putting their heads together without any real guidance or infrastructure support. In those circumstances, it is very difficult for a program to get off the ground. Regardless of their starting point, all wellness programs should keep these four things in mind:

- **Tie to organizational vision, mission, goals:** Any program should relate back to the purpose of the organization itself, and further that purpose. Team members should be able to see this clearly and be able to articulate how the program elements relate to the purpose of the organization.
- **Establish a committee:** A well-run committee is an important element for any wellness program. It can drive the program, engage employees and build organizational commitment, and provide much needed capacity to perform the operational functions related to the program.
- **Don’t let the tail wag the dog:** Wellness programs can often get bogged down from what I like to call the mission distractors, which is most often feeling overwhelmed by the seemingly myriad compliance issues and variety of activities, elements and tools available to any organization interested in wellness. It can be information overload and lead to decision paralysis. Don’t let these distractors derail you, stay focused, and use the wellness committee to break it down into manageable pieces.
- **Leadership buy-in:** Organizational leadership plays a key role in determining the success of any wellness initiative. The level of support – or lack of support from leadership will be readily apparent to any workforce and the workforce will likely respond accordingly. The most successful programs I have witnessed are those where it is very clear that leadership is engaged and a true advocate for employee wellbeing.

Types of Programs

Generally speaking, wellness programs fall into four basic types, with the program type determining which laws apply and how. Those types are:

- General educational or participatory and not health plan related
- Participatory and health plan related
- Activity only and health plan related
- Outcome based and health plan related

General educational or participatory and not health plan related

- Voluntary & educational in nature – employees and sometimes families
- No requirement to access information or participate in an activity
- May have an activity to promote healthy lifestyle choices but any reward not tied to health plan
- Not individualized and do not provide medical care
- Not subject to many legal restrictions

EXAMPLE: workplace posters/newsletters, gym memberships (regardless of participation in health plan), health coaching

Participatory and health plan related

- Require participation in a health-related activity, but don't tie the reward to the results of participation
- Limited to employees enrolled in employer's health plan
- Several employment/benefit laws apply with more requirements if provide health care services (i.e. Biometric screenings)

EXAMPLE: premium holiday for enrolling in tobacco cessation program, reward for completing a health risk assessment

Activity only and health plan related

- Apply only to individuals enrolled in employer's health plan
- Require an individual to complete a specific activity
- Several employment/benefit laws apply

EXAMPLE: walking program completion, activity tracker contests

Outcome based and health plan related

- Only apply to employees enrolled in employer's health plan
- Require individual to satisfy a health-related standard in order to receive the reward
- Several employment/benefit laws apply and rules are more stringent than for other types of wellness programs

EXAMPLE: meeting certain results on biometric screening, premium reduction if tobacco free

Nondiscrimination

There are numerous federal and state statutes that are applicable to wellness programs, covering issues such as taxation, reporting requirements, provision of affordable health care. The following is an overview of the more frequently occurring considerations relative to nondiscrimination.

Health Insurance Portability and Accountability Act (HIPAA)

HIPAA provides that plans may not discriminate in health coverage on basis of a health factor, in terms of eligibility, benefits or costs. Wellness programs that provide medical care or are linked to the employer's health plan are subject to nondiscrimination requirements. There are eight health factors to consider: health status; medical condition; claims experience; receipt of health care; medical history; genetic information; disability; and evidence of insurability. Wellness programs that meet HIPAA's nondiscrimination requirements are allowed to provide a reward based upon meeting a specific health-related standard, as long as:

- The maximum reward does not exceed 30% of the cost of employee-only coverage
- The program is reasonably designed to promote health or prevent disease
- The program must allow eligible individuals at least one opportunity per year to qualify for the reward
- The reward must be available to all similarly situated individuals and must provide for a reasonable alternative standard
- The program must disclose the availability of the reasonable alternative standard

Age Discrimination in Employment Act (ADEA) and Title VII of the Civil Rights Act

The ADEA and Title VII are generally applicable to all wellness programs. The ADEA prohibits employment discrimination against employees and applicants on basis of age (40+) with respect to benefits. Title VII prohibits discrimination based upon race, religion, sex, color or national origin as it relates to terms conditions of privileges of employment.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA) prohibits employers from discriminating against individuals with disabilities and limits when employers may make medical inquiries or conduct medical exams.

The EEOC's ADA regulations govern employer-sponsored wellness programs that include either disability-related inquiries (HRA) or medical exams (i.e. biometric screenings). These regulations require a wellness program to:

- Be reasonably designed
- Reasonable chance of promoting health or preventing disease
- Not overly burdensome
- Not a subterfuge
- Not highly suspect in methods chosen

- Limit the maximum reward

If such health-related information is collected, the maximum allowable incentive an employer can offer is 30 percent of the total cost for self-only coverage of the plan in which the employee is enrolled, or if not enrolled in a plan, a maximum incentive of 30 percent of the lowest cost major medical self-only plan it offers. For example, if the total cost of self-only coverage was \$5,000 the employer could offer a maximum incentive of \$1,500. Qualifying incentives can be financial or in-kind (such as time off awards, prizes, and other items of value).

Any wellness program must also be voluntary. Employees may not be required to participate, be denied coverage under group health plans or be subjected to adverse employment actions based on non-participation.

Additionally, any program must provide a notice that is: clearly written; explains what medical information will be obtained and purpose; who will receive medical information and how used; states the restrictions on disclosures and safeguards in place. A model notice to employees can be found on EEOC website.

Genetic Information Nondiscrimination Act (GINA)

The Genetic Information Nondiscrimination Act (GINA) prohibits discrimination against employees with respect to compensation, terms, conditions or privileges of employment on basis of genetic information. Generally, employers may not request, require or purchase genetic information, they must maintain any genetic information as a confidential record and strict limits apply on disclosure.

It is important to note that genetic information includes family medical history. Therefore, a wellness program that seeks family history for underwriting purposes would violate GINA. Additionally, an employer may not collect genetic information in conjunction with enrollment or provide a reward for providing genetic information regardless of when it is collected. For example, it is a violation to provide premium reduction for employees who complete an HRA that includes questions about employee family history.

The Role of HR

The HR Department is highly likely to have a role in the design and implementation of any wellness program. It is also likely that any wellness program will not fit neatly into one of the four program types; they are almost always a blend, particularly if they are designed to tie to the organization vision, mission and goals. Additionally, there is much overlap amongst the laws and regulations with the EEO-related laws often the most stringent. The key is to evaluate each element in light of the applicable statutes to ensure compliance. This article provides an outline as a starting point – there are numerous tools and resources available to ensure you are designing a program which meets your organizational needs as well as keep you on track from a compliance perspective. Hickok & Boardman HRIQ is here to assist you in design, development and implementation of your wellness program and assist with compliance issues related to all HR matters. Please visit our website at www.hbhriq.com.

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