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3 Tips For Avoiding EEOC Suits Over Wellness Programs

By **Ben James**

Law360, New York (October 10, 2014, 3:44 PM ET) -- Corporate wellness programs have become increasingly attractive as employers look to reduce health care costs and avoid the Affordable Care Act's so-called Cadillac tax, but recent U.S. Equal Employment Opportunity Commission suits show they can come with legal risks.

Employer interest in wellness programs is currently high, not only because of cost issues and the ACA's Cadillac tax — a 40 percent excise tax on high-cost health benefits set to kick in in 2018 — but because of a genuine interest in improving employees' health, which can yield productivity and attendance gains, lawyers said.

"I would say wellness programs keep me very busy," said Littler Mendelson PC's Russell Chapman. "Whether or not they save money, in my experience, they save lives."

But while some see clear benefits to corporate wellness programs' benefits, the legal landscape surrounding them remains murky, attorneys say. Wellness programs can present a nettlesome intersection of overlapping laws and regulations, to which the EEOC added a new wrinkle recently when it filed its first Americans with Disabilities Act suits directly challenging wellness programs.

In the face of that complex overlay of statutes, lawyers point to a few commonsense moves employers that want to offer and incentivize wellness programs can make to lower their chances of getting slapped with EEOC suits.

Link Wellness Programs to a Group Health Plan

Attorneys agree that a wellness program should be set up as part of an employer health benefit plan. That's because the ADA has a safe harbor provision for bona fide benefit plans that exempts certain insurance plans from the statute's bans on requiring medical examinations or making disability-related inquiries.

"If at all possible, make the wellness program a part of the health insurance benefits available to employees," advised Epstein Becker Green member Frank Morris. "You potentially set up the bona fide employee benefit plan safe harbor provision under the ADA that has been endorsed by the Eleventh Circuit. We know that at least one court of appeals through that can make the program lawful."

Morris was referring to the Eleventh Circuit's August 2012 decision in a case called Seff v. Broward

County, which held that the county's employee wellness program fell within the ADA's safe harbor provision for insurance plans.

That unsuccessful class action, which lawyers say has been the only appellate decision so far on wellness plans and the ADA's safe harbor provision, was brought by a former county employee who incurred a $20 biweekly charge levied against workers who enrolled in the group insurance plan but refused to take part in the wellness program.

That program used a biometric screening and health risk assessment questionnaire to identify employees with diseases including asthma and hypertension.

In light of the Seff decision, the best practice for employers is to make any wellness programs part of their existing group health plans, said Chapman, even though it's not clear exactly how the EEOC sees the safe harbor exemption.

"The EEOC doesn't even seem to recognize the existence of this exemption under the ADA," Chapman said. Still, businesses should set themselves up to be able to use the safe harbor as a defense in the event of a challenge, he added.

Making a wellness program part of a health plan will mean that "at least they have a position to argue that it comes within the exemption in the ADA for a bona fide benefit plan," Chapman said.

Reward, Don't Punish

This month, the EEOC filed what it called its **second direct challenge** to a wellness program under the ADA, alleging that a plastics manufacturer canceled a worker's medical insurance and shifted the entire premium cost to him, after he failed to complete a "voluntary" health assessment and testing required under a company wellness plan.

In August the EEOC filed its first such suit, targeting a company for firing a worker who had opted out of a purportedly voluntary corporate wellness program.

Both suits alleged that workers were forced to submit to medical exams and inquiries that weren't voluntary, in violation of the ADA. Disciplining or firing a worker, or threatening to do so, because he or she won't comply with a wellness program is likely to have negative consequences for an employer, said Mayer Brown LLP partner Marcia Goodman.

"What the EEOC is now doing is saying, 'Well, we're going to take action against those employers that are really out there getting aggressive with wellness programs,'" Goodman said. "'We're going to at least outline, through litigation, what you as an employer can't do, but we're going to leave for another day what you can do.'"

Exactly what steps an employer can take to incentivize participation in a wellness program while still keeping the program and associated examinations voluntary in the eyes of the EEOC is unclear, lawyers said. The EEOC held a May 2013 meeting on wellness programs, and the agency's most recent regulatory agenda said a proposed rule tackling the extent to which the ADA allows financial inducements or penalties as part of wellness programs would be issued in June, but that didn't happen.

Commissioner Victoria Lipnic **recently said** at a law firm event in New York that employers shouldn't

hold their breath for wellness program guidance from the EEOC, which was left one person short of a full five-commissioner roster when Jacqueline Berrien recently departed.

ACA regulations increased the maximum reward under a health-contingent wellness program to 30 percent of the cost of health coverage and up to 50 percent for programs aiming to cut tobacco use.

"Other agencies have taken a position and have put out regulations on what an employer needs to do to have a plan that will pass muster under the ACA. Unfortunately, the EEOC has yet to provide guidance," Morris said.

Despite the uncertainty, one smart move for employers is to structure their wellness programs to provide incentives for participation, as opposed to sanctions or penalties for not taking part, lawyers said.

"Where challenges have been brought — and certainly this is true of the two EEOC cases — there have been penalties," Morris said.

Don't Forget About GINA

While the EEOC's wellness program suits thus far have invoked the ADA, lawyers say employers that offer wellness plans would be well-served to keep another statute the agency enforces on their radar.

The Genetic Information Nondiscrimination Act of 2008 made it illegal to discriminate against workers or job applicants based on genetic information. Title II of the law bars requesting or requiring genetic information, which includes family medical history, and puts strict limits on its disclosure, according to the EEOC's website.

The same gray areas that exist with respect to the ADA and wellness program incentives aren't there with GINA. The final regulations of Title II — which were issued in late 2010 and took effect in January 2011 — specifically addressed wellness programs and allayed many concerns about GINA's potential to undermine them.

However, lawyers say it's clear that asking for genetic information on a health risk assessment, if there's any reward or incentive involved, violates the law.

"You want to be careful with regard to not asking about family medical history information, which can run afoul of GINA. And under GINA, you can't really incentivize even voluntary disclosures, so while the focus is on the ADA and ACA regulations, GINA can in the picture for the unwary," Morris said.

GINA's applicability underscores the need for lawyers to take a panoramic view of the various laws and rules that can trip employers up when it comes to wellness programs.

Jason Rothman, an Ogletree Deakins Nash Smoak & Stewart PC shareholder, says compliance with the Health Insurance Portability and Accountability Act is the starting point for him when evaluating a wellness program.

He says questions about whether rewards to workers who participate in a wellness program can be taxed may also rear their heads, as might questions related to the Employee Retirement Income Security Act.

But while in the past, employers may have been preoccupied with HIPAA, the EEOC's recent actions have lawyers thinking more about the ADA safe harbor provision, Rothman said.

"Now that the EEOC is getting a little more involved, you not only want to talk to your employee benefits attorney but to your employment attorney as well, to make sure everybody is on the same page with respect to all the compliance issues," Rothman said.

--Editing by Kat Laskowski and Katherine Rautenberg.
