

# WELLNESS PROGRAMS: LEGAL GUIDANCE FOR EMPLOYERS

November 2009

This checklist of suggestions is based on generally accepted legal principals as of the above date. It is not designed to provide comprehensive legal advice for the development of a Wellness Program. Your Wellness Program should be analyzed by attorneys familiar with current state and federal law, including employment law, tax law, HIPAA, and ERISA.

## INCENTIVIZE PARTICIPANTS THOUGHTFULLY

- If you require employees to meet health goals or standards (such as having a certain BMI or blood pressure) as a condition of enrollment in a health plan, waiver of a deductible, avoidance of a surcharge, or receipt of any health care benefits, or if your wellness program affects the health plan's benefit design or cost in any way,<sup>1</sup> all of the following must be true:
  - The employee's total reward is limited to 20% of the total cost of that employee's coverage;
  - The program is reasonably designed to promote good health or prevent disease (i.e., the program must have a "reasonable chance" of improving health or preventing disease);<sup>2</sup>
  - All program materials disclose that opportunities to satisfy reasonable alternative standards are available to individuals for whom it is unreasonably difficult or medically inadvisable because of a medical condition to attempt to meet the Wellness Program standard;<sup>3</sup>
  - Eligible employees have an opportunity to qualify for the reward at least once a year; and the same benefits and rewards are available to all similarly situated individuals.
- Do not condition health plan eligibility or other terms and conditions of employment on whether an employee takes a Health Risk Assessment Test ("HRA"). Your health plan may require employees to complete an HRA under certain circumstances.
- Do not subject employees or prospective employees to medical examinations, including an HRA, unless the

examinations are relevant to the employees' duties, or are voluntary. You may offer rewards to employees who take HRAs so long as the HRA does not seek genetic information, e.g., family history, or the genetic information will not be used to identify individuals who may benefit from a disease management program and will not be used to determine eligibility, premiums, contribution amounts, application of exclusions, entitlement to discounts, rebates, or for other underwriting purposes relating to a group policy, and so long as the rewards are not tied to results and are not so significant that they are, in reality, penalties.

- You may offer monetary rewards or prizes to employees who participate in wellness activities or reach health goals, so long as the rewards do not affect health benefits and so long as you do not discriminate.

## AVOID DISCRIMINATION

- Make benefits and rewards available to all similarly situated individuals.<sup>4</sup>
- Adjust health goals based on age, gender, disability status, and other protected characteristics<sup>5</sup> under such regulations as the ADA, the Civil Rights Act, and the Age Discrimination in Employment Act.
- Provide reasonable accommodations to employees with disabilities (i.e., ways for disabled employees to receive rewards).
- Conduct Wellness Program activities in a location accessible to employees with disabilities.
- You may favor employees who have adverse health factors,<sup>6</sup> for example, by rewarding them for visiting their health care professionals on a regular basis.

### MAINTAIN THE CONFIDENTIALITY OF EMPLOYEE HEALTH INFORMATION

- Maintain all health information in a confidential medical information file (not the personnel file) with restricted access, or have a third party administrator do so.
- Make sure everyone who will receive protected health information enters an agreement that complies with HIPAA and/or that each Wellness Program participant voluntarily executes a disclosure authorization form. (Other documents, training, and notices may be required under HIPAA and state law.)
- Consider whether ERISA Reporting and Other Requirements Apply
- Most Wellness Programs are probably not covered by ERISA; smoking cessation and weight loss programs, “lunch and learn” sessions, and exercise classes do not constitute “medical care” for ERISA purposes.
- You should consult experienced ERISA counsel about whether ERISA applies, and if it applies, about your fiduciary, reporting, and other obligations.

### CONSIDER THE EFFECT OF THE WELLNESS PROGRAM ON OTHER BENEFITS

- For example, if you offer a high deductible health insurance plan to your employees that enables them to open a Health Savings Account (“HSA”) and your Wellness Program provides “significant” health care “benefits,” the program might be a “health plan” that disqualifies the HSA. Individualized analysis is required. (Your health plan may provide or pay for certain types of wellness services with first dollar coverage [not subject to high deductible], including annual physicals, immunizations, tobacco cessation programs, weight loss programs, and screening services, which will not disqualify your HSA.)

### CONSIDER THE TAX CONSEQUENCES OF REWARDING PARTICIPANTS

- Rewards are taxable to your employees unless they are *de minimis* fringe benefits like small prizes. Cash and gym memberships are not *de minimis*.

- Rewards in the form of contributions to HSAs or Flexible Savings Accounts may be paid pre-tax.
- The following are not taxable unless they are discriminatory: The cost of an HRA; the value of in-house use of a fitness facility; the value of workplace health seminars or classes; the cost of smoking cessation or weight loss programs based on a physician’s recommendation; the cost of fitness memberships with a physician’s diagnosis and recommendation.

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1. These HIPAA anti-discrimination rules apply if you are providing “medical care,” which is broadly defined to include diagnosis, mitigation, treatment, or prevention of disease (other than educational programs, exercise classes, smoking cessation assistance, and the like).

2. The program may not be overly burdensome or a subterfuge for discriminating based on a health factor (i.e. must be based on actual or reasonably based experience), and methods may not be “highly suspect.”

3. Model language for the disclosure is: “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 \_\_\_\_ and we will work with you to develop another way to qualify for the reward.” You may tailor the standard for each employee on a case-by-case basis.

4. Consult legal counsel if the reward favors highly compensated individuals and to determine whether individuals are “similarly situated.”

5. Whether smokers and/or the obese may be penalized or denied benefits has not yet been decided in the courts. Under the ADA and California law, smoking is not a protected disability, and obesity is not a disability unless, perhaps, it is caused by a medical condition. Under HIPAA, individuals cannot be denied benefits or charged higher premiums, co-pays, or deductibles based on “health status,” which does not include nicotine addiction and/or obesity unless there is a physiological reason for those conditions. However, ERISA prevents employers from terminating employees from a plan on the ground that the employees incur higher health care costs than other employees. Additionally, many states, California included, have enacted “lifestyle” statutes that may protect smokers and/or the obese. California’s “lifestyle statute,” for example protects conduct, not the use of “lawful products.” Smoking and overeating might be considered protected conduct.

6. Health factors include health status; medical condition; claims experience; genetic information; and disability.

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### FOR MORE INFORMATION

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**Marcia Augsburger**

[marcia.augsburger@dlapiper.com](mailto:marcia.augsburger@dlapiper.com)

T +1 916 930 3255 F +1 916 403 165

[www.dlapiper.com](http://www.dlapiper.com)