

Incentivizing Healthcare

Corporate wellness initiatives may run afoul of the law and offer more potential liability than benefits, experts warn. Careful crafting of policies and procedures is crucial, and focusing on incentives -- instead of penalties -- is key, proponents say.

By Jared Shelly

Are corporate wellness programs healthy in the eyes of the law?

Two attorneys recently proclaimed such initiatives can easily violate the law and companies would be "best served to let this trend pass." Business and HR experts, however, say that wellness programs are not only lawful but provide benefits for both employee and employer.

In an April 2 article in the Philadelphia-based *Legal Intelligencer*, Todd Alan Ewan and Carolyn M. Plump, both partners in the labor and employment law practice group of the Philadelphia-based law firm Mitts Milavec, argue that wellness programs could violate the Health Insurance Portability and Accountability Act, the Employee Retirement Income Security Act, the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964 and even a few others.

Some examples they include in the article are enough to make any employer think twice.

A corporate wellness program does not comply with HIPAA, for example, if it requires an employee to meet specific health criteria, such as losing a certain amount of weight, say Ewan and Plump. The initiative would be lawful, however, if it rewards that employee for taking steps toward losing weight, such as joining a health club.

In addition, a program may violate the ADA, say the attorneys, because disabled employees may not be able to get the same benefits as other workers. The ADA also limits an employer's ability to make disability-related inquiries and require medical exams, things that may occur when implementing a corporate wellness program.

Ewan and Plump also point out potential violations of Title VII based on "disparate treatment or disparate effect on a protected class." Such a situation could occur when a medical condition is more prevalent in a certain race, gender, national origin or religion -- if the condition results in medical problems for which higher premiums would be enacted due to a company's wellness program, they say.

J.D. Piro, a principal in the health law consulting practice at Lincolnshire, Ill.-based Hewitt Associates, says that, although corporate wellness programs may have compliance issues, they should not be avoided. To stay on the right side of the law, employers should focus on rewarding positive behavior without punishing negative behavior, he says.

Piro used the example of cigarette smoking. While there may be a plan in place to reward employees who don't smoke, there should also be a reward given to those who take steps, such as entering a smoking-cessation program, to quit.

"It would not be legal if you said to the smoker, 'You have to quit and if you don't quit, you don't get [the reward,]' " he says.

Fiona Gathright, president of Wellness Corporate Solutions, based in Cabin John, Md., says that creating a program that falls within the rules of law is not that difficult.

"We work hard so that our wellness programs are incentivized, opposed to penalizing employees for unhealthy behavior," she says.

Plump, however, says that because of the ever-evolving law regarding new types of programs, it would be best if companies waited before starting wellness programs.

"What seems simplistic and like you are following an algebraic equation today may change tomorrow because the law is still developing in this area," says Plump. "Even assuming you have a good, well-drafted wellness program in place, there are lots of potential ramifications that people have not adequately focused on."

If a company does have its heart set on starting a wellness program, Plump recommends that the employer go into the process "with their eyes wide open," and make sure that a lawyer reviews the criteria.

Most companies seem to believe wellness programs are worth the potential legal risks.

According to a recent Hewitt survey of 500 U.S. companies, nearly nine in 10 (88 percent) plan to make investments in longer-term solutions aimed at improving the health and productivity of their workforce, up from 63 percent last year.

"The rewards to the employers in these programs far outweigh whatever risks they have incurred so far," says Piro. "I have never heard of any major lawsuits or any major judgments. It's a big trend among employers and I would predict their expansion over the next few years."

Another aspect of corporate liability cited by Ewan and Plump was the federal case of Huffman vs. Smithkline Beecham Clinical Laboratories Inc., in which the family of Whirlpool employee Dennis Huffman sued the lab and the company after he had gotten a blood test as part of a wellness program.

The test showed he had a low hemoglobin count. Months later, Huffman went for another blood test and doctors found he had an aggressive form of colon cancer; he died nine months later. His family sued the company for negligence in interpreting, evaluating and providing the test results. The case was settled out of court.

"The cost for employers to defend a case past the summary judgment stage is significant, these cases are not being tossed out on motion to dismiss," says Plump. "That tells me, let's be cautious and conservative."

Sharon Cohen, group and health care benefits council at the global HR consulting firm Watson Wyatt, based in Washington, says she believes companies implementing wellness programs are making sure to tread carefully.

"Does every single corporation comply with every single regulation that the government puts out there?" she asks. "I think the answers would vary."

In her experience, however, companies have been following the rules.

As for wellness programs working in the long-term, the jury is still out.

"What's the alternative?" asks Cohen. "The costs just keep going up and up and up."

Plump says an employer could start by supplying smaller benefits, such as paying for health-club memberships or providing information about nutrition.

Employees, however, are not quite as enthusiastic about such initiatives as their employers. Of 30,000 employees participating in a separate Hewitt survey, only 12 percent believe companies have a role in helping them understand how to stay healthy.

Gathright says programs may not be welcomed by some employees because of the fear of potential discrimination or even losing their jobs because of unhealthy practices, such as smoking.

"Certainly some companies have done that, but I don't think that wellness providers are in the business of getting employees fired," says Gathright.

Cohen believes that the challenge for HR is to better understand and communicate the company's policy – something employees may find confusing – and to be able to effectively respond when workers have questions.

HR, she says, "is still seen as the parental unit with respect to health coverage."

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