FEDERAL REGULATION OF WORKPLACE WELLNESS PROGRAMS: SOME CONSISTENCY AND CERTAINTY, PLEASE ?

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"Foolish consistency is the hobgoblin of little minds. "
Ralph Waldo Emerson

No one will accuse the federal government of consistency when it comes to regulating employer efforts to improve employee health.

During the past few years, various federal agencies have (1) encouraged employers to get involved in improving employee health; (2) defined the extent to which employers can motivate employees to participate in wellness programs; and (3) said that employers who motivate participation within these parameters may be violating the Americans with Disabilities Act! A consistent approach would remove the federal legal cloud hanging over workplace wellness programs.

In its 2003 "Prevention Makes Common 'Cents'" report, the U.S. Department of Health and Human Services applauded the success of employer efforts to assist employees to lead healthier lifestyles. "These programs have been shown to improve employee health, increase productivity and yield a significant return on investment for the employer," HHS stated.

The Employee Retirement Income Security Act (ERISA) as amended by the Health Insurance Portability and Accountability Act (HIPAA), prohibits discrimination in a group health plan based on a health factor with regard to enrollment eligibility or premium contributions. In December 2006, three federal agencies adopted final regulations addressing the exception to the HIPAA nondiscrimination requirements for "programs of health promotion and disease prevention" – that is, "wellness programs." The wellness programs subject to these requirements generally are those that condition eligibility or receipt of a reward (or imposition of a surcharge) such as a premium discount under a group health plan on satisfaction of a health factor. These regulations define the extent of financial incentives employers may offer to motivate employees to participate in wellness programs.

If the analysis ended there, the federal message to employers would be clear and consistent: wellness programs are good and you can motivate employees to participate to the extent allowed by the HIPAA regulations. Two bills proposed in 2007 support this message. Both the Healthy Workforce Act and the Healthy Americans Act give tax incentives to employers who establish wellness programs.

Two protocols in a wellness program, regardless of whether the program is subject to the HIPAA regulations, are a health questionnaire and care plan. The questionnaire obtains baseline health information from participants. Care plans set out procedures for improving health over the baseline. The ADA prohibits employers from making "medical inquiries" of the type that are routinely part of health questionnaires and care plans. The Equal Employment Opportunity Commission (EEOC) administers federal civil rights statutes including the ADA. The EEOC has said that an employer may ask otherwise prohibited questions as part of a *voluntary*

wellness program, but that if the incentives for participating in such program are too large, the program transforms into an *involuntary* program.

Thus, an employer with a program subject to the HIPAA regulations, whose incentives comply the HIPAA regulations, may be violating the ADA. Adding to the uncertainty is the very credible legal argument that the ADA's prohibitions on medical inquiries may not even apply to wellness programs that are part of a group health plan.

As more employers offer wellness programs with incentives limited only by their creativity and the HIPAA regulations, this inconsistency and uncertainty is lying in wait. The EEOC has been relatively quiet on the topic so we suspect many employers are not even aware of the looming ADA threat to their programs and the liability threat to their pocketbooks. This inconsistency and uncertainty should be removed. The federal government should—consistently—encourage employers to motivate employees to live healthier lifestyles. Until consistency is achieved, when evaluating the lawfulness of an employer's wellness program under federal law, the oft-criticized lawyer's refrain will continue to be heard: "it depends."

We discuss below the HIPAA "bona fide wellness plan" regulations and ADA implications for workplace wellness programs.

Defining a Wellness Program

There is no single definition of "workplace wellness program." The essence of these programs is to encourage individuals to take preventative measures, whether through education, risk assessment or screening, or disability management to avert the onset or worsening of a medical condition.

Some wellness programs are part of an employer's medical plan and administered by an insurance company, third party administrator, or the employer. Such programs range from a basic health education program to a more interactive "wellness program" with rewards for achievement of certain health factors. The latter programs typically provide more direct incentives for participants to address unhealthy lifestyle choices, typically through premium penalties or rewards.

Other employer wellness programs are stand-alone programs, administered internally or through a third party administrator. Entry level programs include on-site flu shots and employee assistance programs. Another type of program might include online or onsite health assessments, or seek to identify individuals at risk for chronic diseases and disabilities and educate them on means of preventing such diseases or disabilities. Beyond this are disease and disability management programs that seek to manage an employee's disease or disability to achieve faster recovery with less cost.

Some of the more common wellness programs include:

24 hour nurse hotline	Healthy choices in cafeteria and vending machines
Education for managing health	On-site fitness facilities
Employer sponsored sports teams	On-site massage therapy
Flu shots	On-site medical clinics
Health fairs	Smoking cessation programs

Health risk assessments	Subsidized weight management programs
Health screenings	Subsidized fitness programs

The HIPAA Regulations

Section 702 of ERISA, as amended by HIPAA, generally prohibits group health plan sponsors from using a *health factor* as a basis for discrimination with regard to eligibility to enroll or premium contributions. In December 2006, the Departments of Treasury, Labor and Health and Human Services issued final "HIPAA" regulations concerning wellness programs.

Basic Rules for Wellness Programs

Programs that require meeting a standard related to a health factor to obtain a reward must comply with the wellness plan regulations. The health factors targeted through most wellness programs are generally those with the highest correlation to increasing health costs, which include obesity, nicotine addiction/tobacco use, and high cholesterol.

The following programs are *not* subject to the HIPAA nondiscrimination standards because they are *not* related to a health factor:

- reimbursing membership costs of a fitness center.
- rewarding diagnostic testing regardless of the outcome of the test.
- encouraging preventive care through the waiver of the co-payment or deductible requirement for the costs, for example, of prenatal care or well-baby visits.
- reimbursing the cost of smoking cessation programs without regard to whether the employee quits smoking.
- rewarding employees for attending periodic health education seminars.

Programs subject to HIPAA's nondiscrimination standards must:

- limit the size of the reward.
- be reasonably designed to promote good health or prevent disease.
- give eligible individuals the opportunity to qualify for the reward at least once a year.
- make the reward available to all similarly situated individuals unless the program provides for a reasonable alternative standard or waiver for individuals who have difficulty meeting the standard due to a medical condition.
- disclose the existence of a reasonable alternative standard or possibility of a waiver in all descriptive plan materials.

Limitations on the Reward

A "reward" could include a discount or rebate of a premium contribution, a waiver of all or part of a cost-sharing mechanism (such as deductibles, co-payments, or coinsurance), the absence of a surcharge, or the value of a benefit that would otherwise not be provided under the plan.

The reward cannot exceed 20% of the cost of employee-only coverage under

the plan. If any class of dependents (such as spouses and dependent children) may also participate in the wellness program, the limit on the reward is based on the cost of the coverage category in which the employee and any dependents are enrolled. For example, if the annual premium for employee-only coverage is $3,600 and the annual premium for family coverage is $9,000, the annual reward for participating in the wellness program could not exceed $720 (20% of the employee-only cost of $3,600) if employees only may participate in the program. However, if any class of dependents is allowed to participate in the program and the employee is enrolled in family coverage, the plan could offer the employee a reward of up to $1,800 (20% of the cost of family coverage).

Reasonably Designed to Promote Good Health or Prevent Disease

A program satisfies this standard if "it has a reasonable chance of improving the health of or preventing disease in participating individuals and it is not overly burdensome, is not a subterfuge for discriminating based on a health factor, and is not highly suspect in the method chosen to promote or prevent disease." The "reasonably designed" requirement is intended to be an easy standard to satisfy, according to the overview of the regulations. For example, a program would not be reasonably designed to promote good health or prevent disease if it required an overly burdensome time commitment.

Annual Opportunity to Qualify

The program must permit individuals to qualify for a reward at least once per year.

Available to All Similarly Situated Individuals

The program must allow a reasonable alternative standard for obtaining the reward for any individual for whom it either is (i) unreasonably difficult to satisfy the standard due to a medical condition or (ii) medically inadvisable to attempt to satisfy the standard. A plan sponsor may seek verification that a health factor makes it unreasonably difficult or medically inadvisable for the individual to satisfy or attempt to satisfy the standard.

Some basic alternatives include lowering or waiving the standard. Also, an alternative standard could be that an individual follow his or her physician's recommendations regarding the particular health factor. Still, plan sponsors need to carefully consider some of the practical issues that arise in the course of designing, administering and enforcing these alternatives, as well as the privacy and data security of the information used to verify compliance with the program.

Description of Program

Plan materials must disclose that some reasonable alternative standard will be made available; however, they need not describe specific reasonable alternative standards. Where a program is merely mentioned (such as in an employee handbook), and does not describe the general standard required under the program, the availability of the reasonable alternative need not be disclosed. The HIPAA regulations provide sample language that would satisfy the disclosure requirements.

Penalties for Violations

Failure to comply with the HIPAA nondiscrimination requirements, which includes the failure of a wellness program to meet the requirements under these regulations, will subject the plan to excise taxes under Internal Revenue Code Section

4980D(a). The excise tax generally amounts to $100 per day with respect to each individual to whom the failure relates.

Application of Other Laws

If the full extent of federal regulation of workplace wellness programs were contained in the HIPAA regulations, there would be no inconsistency. But in a section entitled ominously "[n]o effect on other laws," the regulations caution that compliance with the HIPAA nondiscrimination requirements does not mean the program complies "with any other State or Federal law, *such as the Americans with Disabilities Act."* (emphasis supplied). Thus, the HIPAA regulations explicitly recognize the potential for inconsistent federal regulation of employer wellness programs.

The Americans with Disabilities Act

Nothing in the ADA prohibits employers from implementing wellness programs geared toward promoting good health and disease prevention. Whether, and to what extent, the ADA regulates workplace wellness programs depends on an analysis of numerous ADA provisions, regulations, and interpretations. This analysis will define the extent of the inconsistency and uncertainty caused by the ADA.

Title I of the ADA applies to private sector employers with at least fifteen employees. Title V of the ADA includes various "miscellaneous" provisions, including those concerning insurance.

As part of its effort to prohibit discrimination against individuals with disabilities, the ADA severely limits an employer's ability to ask employees about their medical condition. The ADA's "medical inquiries and examinations" provisions apply to both disabled and non disabled individuals. That section states:

> Prohibited examinations and inquiries
>
> A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity. 42 U.S.C. §12112(d)(4).

The section's injunction is clear: any disability-related inquiries and medical examinations of an employee must be job related and consistent with business necessity. Generally, this standard will be met when an employer has a reasonable belief, based on objective evidence, that: (a) an employee's ability to perform essential job functions will be impaired by a medical condition; or (b) an employee will pose a direct threat due to a medical condition. See U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act*, July 27, 2000.

In its *Guidance*, the EEOC explained that a "disability-related inquiry" is any question likely to elicit information about a disability, and gave these examples:

- Asking an individual whether s/he has (or ever had) a disability or how s/he became disabled or inquiring as to the nature or severity of an individual's disability;

- Asking an individual to provide medical documentation regarding his/her disability;

- Asking a co-worker, family member, doctor or other third person about an individual's disability;

- Asking about an individual's genetic information;

- Asking about an individual's prior workers' compensation history;

- Asking an individual whether s/he is currently taking any prescription drugs or medications, whether s/he has taken any such drugs or medications in the past, or monitoring an individual's use of such drugs or medications; and

- Asking an individual a broad question about his/her impairment that is likely to elicit information about a disability.

In contrast, questions concerning whether an individual can perform specific job functions, or about an individual's general well-being or about non-disability related impairments (e.g., "how did you break your leg?") are not "disability-related inquiries."

As noted earlier, participants in wellness programs are typically asked the types of questions the EEOC would likely consider disability-related inquiries. With regard to wellness programs, the ADA provides:

> Acceptable examinations and inquiries:
>
> A covered entity may conduct *voluntary* medical examinations, including *voluntary* medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions. 42 U.S.C. §12112(d)(4) (emphasis added).

According to the EEOC's 1992 Technical Assistance Manual, programs that evaluate and monitor employee medical conditions may violate the ADA unless:

> participation in the program is voluntary;
>
> the information obtained is maintained according to ADA confidentiality requirements; and
>
> the information is not used to discriminate.

In 1998, the EEOC responded unofficially to an inquiry on whether a wellness program that elicits information about an individual's potential disabilities is "voluntary." In its response, the EEOC noted:

> it could be argued that providing a monetary incentive to successfully fulfill the requirements of a wellness program renders the program *involuntary*...The size of the financial benefit is significant... Also, where an employer decreases its share of the premium and increases the

> employee's share, resulting in a significantly higher health insurance premium for employees who do not participate or are unable to meet the criteria of the wellness program, the program may arguably not be *voluntary*. (emphasis added).

In its 2000 *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees*, the EEOC offered additional insight into the meaning of "voluntary":

> A wellness program is *voluntary* as long as an employer neither requires participation nor penalizes employees who do not participate. (emphasis in original).

Debating "penalty versus reward" is akin to the "half full versus half empty" glass debate. Is a day off or a reduced health insurance premium rewarding participants, or penalizing non participants?

Informal statements of EEOC counsel in an opinion letter and in bar association meetings suggest that any reward or penalty that is more than nominal may make a program involuntary. The EEOC will scrutinize any incentive, including a premium reduction or surcharge, to decide whether, in its view, the program is truly voluntary.

None of the EEOC's guidance on wellness programs distinguishes between stand-alone programs and those integrated with a group health plan. For stand-alone programs, given the EEOC's position, the program may violate the ADA even if the employer has designed the program to comply with the HIPAA regulations.

Whether programs integrated into a group health plan face the same risk depends on the interpretation of the insurance provisions in Title V of the ADA. Section 501(c) deals with insurance. Section 501(c)(2) addresses insured plans while (c)(3) addresses self-insured benefit plans. The preface to these provisions uses some very broad language which creates a "safe harbor" for insurance plans. The issue is the nature and extent of that "safe harbor" protection. Section 501(c) states, in relevant part:

> c. Insurance
>
> Subchapters I through III of this chapter [Titles I through III] and title IV of this Act *shall not be construed, to prohibit or restrict*
>
> ...
>
> (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a *bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law*; or
>
> (3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a *bona fide benefit plan that is not subject to State laws that regulate insurance*.
>
> Paragraphs (1), (2), and (3) shall not be used as a

> subterfuge to evade the purposes of subchapter I and III of this chapter.
>
> (emphasis supplied)

While Section 501(c)(2) refers to plans that are based on "underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law," Section 501(c)(3) does not have this language, but merely references that Title I is not intended to "prohibit or restrict" employers from "establishing, sponsoring, observing or administering the terms of a bona fide plan that is not subject to State laws that regulate insurance." A benefit plan is "bona fide" if it exists and pays benefits and its terms have been accurately communicated to covered employees, according to the EEOC. *See, EEOC's Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer Provided Health insurance*, June 8, 1993.

To what extent will Title V's safe harbor protect wellness programs that are part of a group health plan from Title I liability? *Barnes v. Benham Group*, 22 F. Supp. 2d 1013 (D. Minn. 1998) provides some guidance. There, the employer retained a broker to obtain new group health insurance. The broker asked all 34 of the potentially covered employees to complete a medical questionnaire. Three bidding insurance providers planned to use the information to assess the employees' health risks and calculate the appropriate premium. Employees who elected not to participate in the health plan were asked to sign a waiver of coverage. Barnes sued, alleging, *inter alia*, ADA medical inquiry discrimination because the inquiries, e.g., regarding tobacco use, mental health, and pregnancy, were not job related and consistent with business necessity or related to his ability to perform job related functions.

Relying on the Section 501(c) safe harbor provision, the court granted the employer's motion for summary judgment. In effect, the court held that Title V's safe harbor shielded the defendant from Title I liability because the inquiries related to a health plan. The court reasoned that the questions were asked

> solely for the purpose of underwriting, classifying, and administering risks in conjunction with defendant's search for a new group health plan. Further, defendant sought to establish, sponsor, observe, or administer the terms of a bona fide benefit plan based on underwriting, classifying, or administering risks. The purpose of the safe harbor provision is to permit the development and administration of benefit plans in accordance with accepted principles of risk assessment. This was exactly the point of the questions asked here.

The court also concluded that none of the questions violated state law or were used as a subterfuge for discrimination. They were merely part of the routine procedures undertaken in assessing risks associated with insuring a group of employees.

Other cases rejecting challenges to plan limitations or exclusions applicable to various medical conditions also tend to support the view that Title V's safe harbor shields an employer from Title I liability. However, these cases may have limited application beyond that general principle

due to the different types of programs involved.

Employers will argue that 501(c)(2) protects insured health plans from Title I challenges as long as they have established and observed the terms of a bona fide benefit plan that is based on underwriting risks, classifying risks, or administering risks based on or not inconsistent with state law. Employers will argue that 501(c)(3) protects self-insured health plans from Title I challenges as long as they are "bona fide", i.e., the terms of the plans have been communicated to employees and the plan exists and pays benefits. In both (c)(2) and (3) cases, employers will argue that the only exception to Section 501(c)'s "safe harbor" is if the plan is a "subterfuge" to evade the purposes of Title I.

As one court has observed, despite these arguments for a broad safe harbor for insurance plans, the meaning and application of Section 501(c) presents some challenges. Among them are that courts must determine the meaning of "a bona fide benefit plan" and a "subterfuge to evade the purposes of the ADA". *Piquard v. City of E. Peoria*, 887 F. Supp. 1106 (C.D. Ill. 1995).

Informal Guidance from the EEOC Concerning Medical Inquiries and 501(c)

The EEOC has not issued any formal guidance concerning the interaction between Title V's safe harbor and Title I in the context of wellness programs.

On May 4, 2006, members of the EEOC legal staff attended the 2006 Joint Committee of Employee Benefits Technical Session and gave unofficial, nonbinding views on medical inquiries in the context of wellness programs and Section 501(c). At a question and answer session, the EEOC legal staff essentially reiterated what is in the EEOC's *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees*. Noting that the EEOC has not taken an official position on some of the issues discussed below, the legal staff opined:

> If a wellness and disease management program requires employees to answer disability-related inquiries or submit to medical examinations, participation in the program must be voluntary, which means that it must neither require participation nor penalize employees for non-participation in the program.
>
> "Punitive triggers" in a plan which would require uncooperative participants and beneficiaries to pay a higher premium or deductible "would seem to amount to penalties for non-participation" and would make the program involuntary.
>
> Conditioning the availability of employer-provided health insurance on an employee's participation in a health risk assessment (HRA) might well render participation in the HRA involuntary, making unlawful the disability-related inquiries or medical examinations that are part of the HRA.
>
> An employer whose bona fide wellness plan offers incentives that satisfy the Department of Labor's HIPAA requirements

> *does not necessarily satisfy* the EEOC's requirement that wellness programs be voluntary. HIPAA and ADA require separate and independent analyses (emphasis supplied).

The staff answers do not include any reference to Section 501(c) even though the hypotheticals posed involved health care plans.

The Proposed Healthy Workforce Act: An Opportunity to Eliminate Inconsistency and Uncertainty

As if there were not enough inconsistency, Congress is actually (and actively) considering enacting a law that would only further the conflicts in federal public policy. The Healthy Workforce Act, pending in the Senate as S. 1753, would amend the Internal Revenue Code of 1986 to provide employers a tax credit in connection with their adoption of a "qualified wellness program." Qualified wellness programs must include 3 of 4 components listed in S.1753 and be certified by the Secretary of Health and Human Services, in coordination with the Director of the Centers for Disease Control.

The four program components are: 1) health awareness, to provide health education and screenings; 2) employee engagement, to engage employees in the program and track employee participation; 3) behavioral change, to help employees alter their lifestyles and to encourage healthy living; and 4) a supportive environment, which would include on-site policies and services, participation incentives approved by the Secretary of Health and Human Services (including potentially adjustments to health insurance premiums or co-pays), and employee input in the management of the program.

The supportive environment component's use of "participation incentives" arguably runs counter to the EEOC's position concerning "rewards" or "penalties" in wellness programs. Incredibly, if passed and signed into law, the HWA would reward employers for adopting wellness programs that, in the opinion of the EEOC, violate the ADA.

From this potential conflict may emerge a saving grace for wellness programs. If tinkered with slightly, the HWA could resolve the wellness program conflicts and uncertainty discussed above. Establishing a consistent federal policy for wellness programs, the HWA could amend Titles I and V of the Americans with Disabilities Act to confirm that adopting any of the HWA wellness program components does not violate the ADA.

Specifically, Congress could amend 42 USC Section 12112(d)(4)(B) to read:

> B) Acceptable examinations and inquiries. - A covered entity may conduct voluntary medical inquiries and examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions. A covered entity may use financial incentives to encourage employees to participate in otherwise voluntary employee health programs. (New text underlined)

Congress could also amend Title V of the ADA by adding a new provision clarifying that the ADA does not prohibit the adoption of "qualified wellness programs" under the Healthy Workforce Act. This provision, which could be included as 42 USC Section 12201(e), would read:

> (e) Qualified Wellness Programs. - Nothing in this chapter shall be construed to prohibit an employer, insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from adopting a wellness program that satisfies the requirements of the Internal Revenue Code of 1986 (relating to business related credits) as amended by the Healthy Workforce Act of 2008.

If legislators seize this opportunity, the Healthy Workforce Act could finally cure employer ills caused by a fractured federal policy governing wellness programs.

SUMMARY OF PERTINENT LEGISLATION FROM THE 2007 SESSION OF THE CONNECTICUT GENERAL ASSEMBLY

BY THE 2006-7 LEGISLATIVE SUBCOMMITTEE OF THE LABOR AND EMPLOYMENT LAW SECTION OF THE CONNECTICUT BAR ASSOCIATION (MARK J. SOMMARUGA, ESQ., CHAIRMAN)

PUBLIC ACT 07-30: AN ACT CONCERNING VISITING INTERNATIONAL TEACHER PERMITS

This Act, which took effect on July 1, 2007, requires the State Board of Education, upon request from a local or regional board of education, to issue an international teacher permit in a subject shortage area identified by the Commissioner of Education. The permits are issued for one year. Upon the request of the local or regional board of education, the permit may be renewed for up to a period of one year. The permit cannot be renewed more than twice during the two years following the issuance of the initial permit. The board of education requesting the permit must attest to the existence of a plan for supervising the visiting teacher. The Act lists minimum qualifications that the teacher must hold in order to be eligible for the permit.