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The Physics of Wellness at Work

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Newton's Third Law of Motion states that for every action, there is an equal and opposite reaction, and that Law is evident in the workplace wellness environment. Employers believe they are doing right by their employees by starting a wellness program. It's a win-win – the employees gain better health and longer, more fulfilling lives, while the employer saves on healthcare costs, with decreased absenteeism and happier employees. But then employers are hit with the government's equal and opposite reaction – a tangled web of regulations to ensure that access to health insurance is not compromised by supposedly "voluntary" wellness programs, and to prevent the misuse of Protected Health Information ("PHI").

The first of the four statutes regulating in this arena are the Health Insurance Portability and Accountability Act ("HIPAA") and the Affordable Care Act ("ACA"), which govern wellness programs tied to group health insurance plans. These rules require that workplace wellness programs not be overly burdensome on employees, be reasonably designed to promote health or prevent disease, and offer a different, reasonable means of qualifying for any reward if the employee cannot meet the test or standard as stated due to underlying medical conditions, with notice of this opportunity.

HIPAA and the ACA only apply to "health-contingent" wellness plans, which require employees to meet specific standards related to health in order to get rewards. Both statutes also limit health-contingent wellness incentives, such as discounts on health insurance, to 30% of the total cost of health insurance coverage available in the average employee-only plan. The ACA raised the ceiling to 50% of such coverage for certain smoking cessation programs. In addition, HIPAA limits the PHI that employers can receive.

On May 17, 2016, the Equal Employment Opportunity Commission ("EEOC") finalized regulations governing the treatment of wellness programs under the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"). The EEOC issued these regulations to fill the gap left by HIPAA and the ACA, to ensure coverage of all workplace wellness programs, whether they are health-contingent or merely "participatory," (i.e., generally available without regard to health status, such as reimbursements for gym memberships).

The ADA final rule has the following major requirements:

1) Confidentiality: The final rule reiterates the ADA's longstanding confidentiality protections, and restricts employers to receiving health information in the aggregate. Employers also may not require employees to waive the ADA's confidentiality protections, nor agree to the sale, transfer, or other disclosure of their medical information in order to participate in a wellness plan.

2) Voluntary Program: The ADA has long contained an exemption from its confidentiality provisions for voluntary wellness programs, but without any definition of "voluntary." To be voluntary, an employer may

not (i) require an employee to participate; (ii) deny any employee access to health insurance or benefits for failing to participate; and (iii) retaliate against, interfere with, coerce, intimidate or threaten any employee for failing to participate or achieve certain outcomes.

3) Notice: Employers must also provide employees written notice of the medical information that may be collected, how it will be used, and who will receive it, as well as the restrictions on disclosure and methods the employer will use to prevent improper disclosure. The EEOC has issued a sample form of Notice that is available here: https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm

4) Reasonably Designed: Any program including disability-related inquiries or medical examinations must be reasonably designed to promote health or prevent disease, which can be shown if the program has a reasonable chance of improving health or preventing disease; is not overly burdensome; is not a subterfuge for violating the ADA or other laws; and does not use a highly suspect method to promote health or prevent disease.

5) Accommodations: Wellness programs must be available to all employees and employers must provide reasonable accommodations to employees with disabilities to ensure their ability to participate.

6) Limitation on Incentives: The final rule uses ACA's 30% limit on incentives, as well as the limit of 50% for smoking cessation programs, as long as there is not a medical test used to confirm compliance with the anti-tobacco program. If employees are tested for nicotine use, then the 30% limitation applies. The rule applies to any incentives used, even where an employer does not sponsor group insurance coverage.

Similarly, Title II of GINA prevents employers from accessing genetic information about employees or using such information to make employment decisions. Genetic information is broadly defined to include medical history information, including the medical histories of family members. The GINA final rule applies the ADA limitation on incentives to spouses of employees, but only if the spouse must answer questions about current or past health status or take a medical examination in order to receive the inducement. The rule also prohibits employers from providing participation inducements to an employee's children. Children may participate in the plan as long as they are not offered inducements in exchange for information about their current health status or genetic information.

The final rule requires that any wellness-based genetic or health service be reasonably designed to promote health or prevent disease, using the criteria listed in the ADA regulation. It also requires employers to inform participants that they are not obligated to answer questions about genetic information, and that inducements are available whether or not employees answer such questions. Further, an employer may not deny health insurance to an employee whose spouse refuses to participate in a wellness plan.

While both the ADA and the GINA regulations become effective on July 17, 2016, the applicability date for the rules governing incentives and notice is the first day of the first plan year that begins on or after January 1, 2017. Thus, the time is now for employers to wrap their arms around the physics of the government's equal and opposite regulatory reaction to the rise of workplace wellness programs.

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