

Prescribing Wellness

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Employers can push the envelope on wellness initiatives without prompting employees to push back.

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By Stephenie Overman

Wellness programs—designed to encourage healthier behavior among employees and thus curtail employers’ long-term health care costs—are becoming ingrained in more health plans. But could employers’ growing enthusiasm for wellness be perceived as crossing the line between advocacy and coercion?

Some types of wellness initiatives, such as requiring workers to complete health risk assessments (HRAs) to receive benefits, may raise employees’ concerns about invasion of privacy or could set off alarms among some employment lawyers.

In fact, though, the legal limits are "a little further out there than people think," says Garry Mathiason, vice chair of the Littler Mendelson employment law firm in San Francisco. While some employers may push wellness programs too far, more often he sees employers being gun-shy. "For every one that might be a little aggressive, there will be a thousand that are timid," he says.

According to Mathiason, initiatives "such as not allowing smoking or providing health insurance that depends on participation in the wellness plan are doable" and legal in some states, but rare. The most aggressive wellness programs usually are sponsored by health providers. These organizations understand the need for wellness and what the limits are, he says.

Company managers who are less knowledgeable about the regulations covering wellness programs may worry, Mathiason says, because "they don’t know what the land mines are."

And, indeed, there are land mines.

The Health Insurance Portability and Accountability Act, for example, prohibits health plans subject to the requirements of ERISA—the Employee Retirement Income Security Act—from discriminating on the basis of a health factor such as medical



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condition, claims experience, receipt of health care, medical history or health status.

And certainly in the past some employers were not sufficiently careful about protecting employees' privacy, Mathiason adds. Although it's possible for employers to preserve the confidentiality of employees' medical information, he says, a better way to avoid privacy complaints from employees may be for a third-party buffer to gather the information. The third-party provider can collect health data from HRAs and make sure the employer receives only aggregate—not individual—information from the assessments.

Another federal law that employers should keep in mind when instituting wellness programs is the Americans with Disabilities Act (ADA), which prohibits discrimination against qualified individuals based on their disabilities. The act permits voluntary wellness programs but prohibits employers "from requiring involuntary disclosure of disability-related information," the Equal Employment Opportunity Commission (EEOC) said in an opinion letter last year.

The commission said an employer's HRA would violate the ADA if an employee's refusal to fill it out would become the basis for denying the employee health coverage when those who did participate received coverage. In effect, "the employer's [HRA] was not a voluntary wellness program because employees were penalized for nonparticipation," the EEOC said.

But by adhering to basic principles in the areas of privacy protection and nondiscrimination, employers can stay within the limits of the law, according to Mathiason. For example, wellness program rewards should be based on employees' participation, not on achievement of specific results such as weight loss or reduced blood pressure. Similarly, an employer may offer on-site fitness centers, walking trails or gym memberships to encourage employees to exercise, as long as employees with disabilities have alternative ways to participate.

Thus, keeping within bounds when designing, promoting and implementing wellness programs can come down to how such efforts are carried out: how the goals are communicated, how the results are measured, and even how the possible pushback from employees is anticipated and handled.

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Cadmus Communications Corp., a Richmond, Va., publisher, began in 2005 to require its approximately 3,000 workers and their covered spouses to take HRAs to qualify for medical coverage. Seventeen workers decided to drop coverage rather than complete the assessments.

"I do not think that is going too far," Dr. Charles Smith, chief medical officer for CIGNA national accounts, says of the Cadmus policy. CIGNA is Cadmus' health provider and now has the same requirement for its employees.

If mandating the HRAs "was just done in a silo, if it was just done to find risk but not to do anything about it, that would not be in the best interest of the employee or the company," Smith says. But CIGNA's overall wellness strategy gives employees choices and supports them in making changes that will help improve their risk assessment scores and their health.

Mandates regulating when, where and even if employees can smoke represent another area where employers should be careful not to overstep their authority. In New York, for example, it is unlawful to discriminate on the basis of consumption of a lawful consumable such as alcohol or tobacco outside of work.

Although in a few states employers may be able to fire workers who smoke while off the job, about 30 states and the District of Columbia have passed "lifestyle" discrimination laws that protect employees and job applicants from suffering any adverse employment actions if their use of a lawful product such as tobacco occurs outside of work.

When an employer wants CIGNA to administer a no-smoking mandate to its employees, CIGNA, mindful of the multitude of state regulations, has legal counsel review the strategies for compliance and urges clients to seek their own counsel, Smith says.

He recommends offering incentives to encourage smokers to give up tobacco. But telling employees they can't smoke even off-site "is beyond the scope of wellness programs," he says. "It's perfectly reasonable to have a smoke-free campus" because of secondary smoke, but not to attempt to control smoking away from the workplace.

Weight and History

The health cost of obesity in the United States is as high as \$147 billion annually, according to a study last year from the

U.S. Centers for Disease Control and Prevention and the Research Triangle Institute. So it's not surprising that employers are looking for ways to lower those costs by, for example, encouraging employees to eat more-nutritious food and to lose weight when appropriate. Incentives often are introduced to reward those healthful behaviors.

The danger is that some employees may become convinced that their company's wellness program discriminates against them because they are obese and can't participate in some activities or achieve certain standards. Although morbid obesity—at least two times one's ideal weight—is protected by the ADA, Mathiason says few people meet that definition.

But "be careful there isn't a stigma in the workplace against people who are overweight or have certain conditions," he adds. If, for example, there are jokes or teasing about a person's appearance, that might be perceived by the employee as sex discrimination.

Another consideration: The Genetic Information Nondiscrimination Act (GINA) creates a legal concern affecting wellness programs. The act prohibits the collection of family health history information.

Previously, "probably every major health risk assessment had family history questions," Smith says. Although uncertainty remains about how assessments conducted by third parties are covered by GINA, he encourages employers to make sure that their HRAs no longer cover the area of family medical history.

Avoiding Backlash

Even if an employer is careful in following all legal requirements regarding privacy and nondiscrimination, it may still face backlash from employees who say their employer's wellness program threatens their privacy or who resent what they perceive as Big Brother-like tactics.

When automotive supplier Valeo began its health screening program four years ago, "employees were very cynical," says Robert Wade, director of human resources for U.S. Valeo in Troy, Mich. "They said, 'What other things are you testing for—steroids, AIDS, nonprescription drugs?'"

The company's answer: "No. 1, we don't get the results of testing and, No. 2, the other tests are expensive. We don't want to spend the money."

Wade and other HR professionals emphasize that any wellness program should be preceded by extensive education for employees and managers.

Miles Kimball Co., a catalog and online retailer in Oshkosh, Wis., with about 600 full- and part-time workers, started with voluntary HRAs in 2001. Now, the assessments are mandatory for employees who want company-sponsored health insurance.

About 500 employees and their spouses take the annual assessments, which include cholesterol and blood glucose tests, blood pressure tests, body fat screening, and measures of body mass indices. The assessments, administered by a third party, also include a questionnaire about existing medical conditions, stress, physical activity, smoking, and alcohol and drug use.

Employees were resistant early on, says Susan Boettcher, human resource manager, but they have come to realize the importance of HRAs in cutting health care expenses—including their own. Each time the assessments are done, she says, "one or two or three people find out something they didn't know" about risks that they should address.

Moreover, employees now understand that while they receive individual test results, the HR team receives only aggregate information. "Now everyone understands that no one else sees the data. It helped that I published the group report and I told everyone, 'This is what I see. You tell me where you can pick yourself out of this group. I can't.'... That has really helped people to feel more comfortable," Boettcher says.

Wade says advance warning was vital to the acceptance of changes made to Valeo's program. Employees and family members need to have time and information to understand the merits of the new program, he explains. In Valeo's case, it was a 15-month process that included one-on-one communication and a "dry run" of the testing process. Valeo brought in its third-party administrator to explain the testing process.

In addition, he continues, the company brought the program to its general managers "because we knew there was a possibility of pushback. When they saw the pure savings to their bottom line," they became strong supporters.

Concern about confidentiality "was only an issue during the dry run," he adds. "It never came up again."

Companies invite unnecessary risks "if they don't

communicate, if they don't have a dry run, if they don't take the testing externally" to a third party, Wade concludes.

Doctors' Orders

Every year, Appleton Cardiology in Appleton, Wis., introduces a feature to its wellness program. As a cardiology practice, "we need to be in the forefront because we see so much on the back end," says Lori Miron, HR director. "We have not had any negative feedback, maybe because they are health care professionals and are aware of the privacy" safeguards. It may also be because Appleton Cardiology has made sure the program complies with the law and has communicated about it in a positive way.

"We cannot penalize people if they cannot attain the goals—they can still get the rewards. We don't say, 'You can't have our insurance.' We say, 'Here's what it costs, here's the reward program. If you don't [participate], you don't get the rewards,'" she says, explaining that the goal is not to be punitive but to raise employees' awareness of the importance of wellness initiatives.

The only time Miron has seen "a little bit of backlash," she says, was when "maybe two spouses complained" about finding a way to schedule their HRAs. The approximately 125 employees and their spouses can have the assessments done on company time at the company clinic.

"You need to create an understanding. You need to tell [employees and spouses] what's in it for them, monetary or otherwise," Miron says. "Someone might say, 'Who are you to be Big Brother?' But we say, 'We're not telling you what to do. We're giving you a choice, about areas you might want to know about and follow up on.' "

Give Thought to Food

Employees' awareness of an employer's commitment to wellness can be especially evident in the kitchen when the only options in the vending machines are nutritious snacks. Food can be part of a company's "culture of health," says CIGNA's Smith, and promoting nutritious food choices is a way of demonstrating that the organization stands by its commitment to wellness.

At Appleton Cardiology, for example, vending machines offer nutritious choices, Miron says, and "if we are offering lunches for employees, we make sure it is a healthy lunch such as

wraps, salads, with more veggies and fruit."

Similarly, Miles Kimball has implemented nutritional requirements for any food that the company purchases and for food in the vending machines. "Of course, with a new program, we got a little pushback from some people," Boettcher says. "We said, 'We're not telling you what you can eat.' ... We're pushing the point that individuals are responsible for their own health. We can give them motivation and incentives, but we know we cannot control their behavior."

Boettcher says she knows of companies that go so far as to restrict the types of food brought in by employees—"any food has to be within the healthy guidelines. We have not gone there yet. That could be taking it too far, especially if an explanation [of the company's reasoning] doesn't go with it."

Although Mathiason says he has not heard of any company restricting food brought in by employees, doing so may be legal if the food is for a work event rather than a social one.

At the Cleveland Clinic, a medical center in Cleveland, the cafeteria and the vending machines offer nutritious options, but the clinic does not go so far as to restrict what employees bring to the worksite.

The organization offers an on-site fitness center, discounts at local gyms and free Weight Watchers classes. It also engages employees in the wellness planning process, says James Jadallah, director of employee health and wellness. "We have champions and committees. They are our eyes and ears. They listen to employees." Wellness, he says, is "ingrained into the [organization's] day-to-day operations."

In fact, employee involvement—coupled with the message that wellness is a core organizational value, not an add-on—could be key to the successful creation of a wellness program. Employees are less likely to feel pressured and are more likely to want to participate if they feel they have a personal stake in the program.

With employee communication and legal guidance, employers can avoid the risks of exceeding the boundaries of persuasive advocacy and can use wellness programs to lower health costs and improve productivity.

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Next-Generation Wellness at Work (Praeger, 2009).

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