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Wellness Plans, Health-risk Assessments, and the ADA: A Ticking Time Bomb

By Gary Phelan

CVS recently announced that it would stop selling all cigarettes and tobacco products by October 1, 2014. The company explained in a statement announcing its decision that continuing to sell cigarettes was "inconsistent" with their "goal of helping people on their path to better health." CVS' nearly 2,000 employees were already well aware that the company's attempt to meet that goal was not limited to its customers.

In March 2013, CVS announced that it was changing its health insurance plan so that, by May 1, 2014, employees would have to submit their weight, body fat levels, blood glucose levels, and other vital statistics to the company. Employees who failed to comply would be forced to pay an extra $50 per month—or $600 per year—to continue in its health insurance program. CVS explained in an e-mail to ABC News that its "benefits program is evolving to help our caregivers take more responsibility for improving their health and managing health-associated costs."

CVS said that its new policy was voluntary; however, its employees probably do not share that assessment. That disagreement crystalizes the looming clash between health-risk assessments under employer-sponsored wellness plans and Title I of the Americans with Disabilities Act of 1990 ("ADA").[1]

Chronic Diseases on the Rise

According to the Centers for Disease Control and Prevention, four behaviors—inactivity, poor nutrition, tobacco use, and frequent alcohol consumption—are the primary causes of chronic disease in the United States.[2] The costs related to treating chronic diseases account for more than 75 percent of national health expenditures.[3] Between 1998 and 2008, the number of working-age adults with a chronic condition increased by 25 percent.[4] A PricewaterhouseCoopers survey found that the indirect cost of illness-related loss of productivity due to absence or reduced performance at work was four times higher for workers with chronic diseases compared with "healthy" individuals.[5] The combined impact of the increasing number of employees with chronic conditions and escalating insurance costs has led employers to look at alternatives to promote health and prevent disease.

Wellness Plans

Employers are looking to wellness plans as the best way to limit their chronic illness and health care costs. A 2012 study conducted by the Society for Human Resource Management (SHRM) found that 87 percent of respondents believe that wellness initiatives were beneficial, 96 percent said that wellness plans assisted workers with developing healthier lifestyles, and 84 percent believed that such initiatives reduced health care costs and increased worker productivity.[6]

A wellness plan is generally an employer-based activity or employer-sponsored benefit intended to promote good health and disease management. The wide array of wellness programs can range from activities such as smoking cessation plans and free gym membership to weight reduction plans and diagnostic tests.

The Patient Protection and Affordable Care Act ("ACA") also provided employers with greater flexibility when implementing wellness plans by raising the limit on what rewards employers could offer through a group health plan for participating in a corporate wellness program that required meeting certain health-related standards.[7]

Health-risk Assessments

The foundation of many workplace wellness programs is a Health Risk Assessment ("HRA"), which generally entails providing employees with a questionnaire that asks about characteristics and behaviors such as physical activity, smoking, alcohol use, cholesterol levels, blood pressure, and dietary habits. The HRA enables employers to provide employees with an opportunity to identify and understand their health risks. Employers may also choose to follow up the HRA with health-related education, counseling, and/or intervention.

ADA

The ADA prohibits employers from making "disability-related" inquiries or requiring a medical examination unless the inquiry or exam is shown to be job-related and consistent with business necessity.[8] However, the ADA provides that employers may make disability-related inquiries of employees or ask them to take a medical examination as part of a voluntary wellness program.[9] According to the Equal Employment Opportunity Commission ("EEOC"), which enforces the ADA, permissible medical examinations could include medical screening for high blood pressure, weight control counseling, cancer detection, blood pressure monitoring, taking medical histories, and administering prescriptions, such as insulin.[10] Employees can also be asked disability-related questions as part of a voluntary wellness program.[11]

Medical records developed in the course of a voluntary medical exam must be maintained in accordance with the ADA's confidentiality requirements.[12] The medical records obtained or information learned during a voluntary wellness exam may not be used for any purpose that would violate the ADA, such as limiting health insurance availability.[13]

What Is Voluntary?

The vital question with respect to wellness plans, generally, and HRA's, specifically, is the meaning of the "voluntary" standard. Although the EEOC has failed to provide much guidance on this topic, it has displayed an interest. On May 8, 2013, the EEOC held a meeting on the effect that wellness plans had on federal EEO laws. The panelists encouraged the EEOC to issue enforcement guidance to help employers to design and administer wellness initiatives that comply with EEO laws.[14]
The EEOC's Office of Legal Counsel ("OLC")

issued an "Informal Discussion" letter on January 18, 2013 that could provide some insight. In the letter, the OLC stated that a group health plan's disease management program was a wellness plan subject to the ADA.[15] The letter stated that "[a] wellness program is voluntary as long as an employer neither requires participation nor penalizes employees who do not participate."[16] However, the letter stated that the EEOC had not taken a position on the question of "whether and to what extent a reward amounts to a requirement to participate, or whether withholding the reward constitutes a penalty, thus rendering the program involuntary."[17] In 2009, the OLC also issued opinion letters stating that an employer could not require an employee to fill out an HRA as part of a wellness plan to participate in the employer's group health plan[18] or to get a medical reimbursement from the employee's health reimbursement account."[19]

The EEOC did state in its final regulations under Title II of the Genetic Information Nondiscrimination Act ("GINA")[20] that employers could offer certain types of financial incentives to encourage employees to participate in health or genetic services, but could not offer a financial incentive to employees to provide genetic information. For example, an employer could offer inducements to any employee to complete an HRA that includes questions about family medical history or other genetic information, but the employer would need to clarify the questions related to genetic information and employees know that they do not have to answer the questions seeking genetic information to get the financial incentive.[21] However, the GINA regulations did not address whether a financial incentive would be permissible under the ADA.[22]

Despite objections from its employees and workers' rights groups, a CVS spokesperson stated that, as of August 2013, more than 80 percent of its employees had completed the HRA and, as a result, will not be required to pay an additional $50 per month to continue in its health insurance program.[23] Nevertheless, until the EEOC provides further guidance on what it considers a "voluntary" wellness plan, employers who offer either financial "carrots" for completing or "sticks" for not completing HRAs will continue to be in a precarious position. Also, because courts have generally held that an individual challenging an unlawful inquiry under the ADA need not be an "individual with a disability,"[24] an employer that creates and administers an HRA that is later found to be involuntary is risking ADA claims from both disabled and non-disabled employees. **CL**

Notes

1. 42 U.S.C. § 12201 *et. seq.*
2. Centers for Disease Control and Prevention, *Chronic Disease Overview*, 2010 (http://www.cdc.gov/chronic disease/overview/index.htm)
3. *Id.*
4. *Id.*
5. PricewaterhouseCoopers Health Research Institute, The Price of Excess: Identifying Waste in Healthcare Spending, 2010. PricewaterhouseCoopers.
6. SHRM Survey Findings: Workplace Wellness Initiatives (Dec. 2012)
7. 42 U.S.C. § 300gg-4. The ACA amended the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the Employment Retirement Income Security Act of 1974, as amended ("ERISA"), and the Public Health Services Act ("PHSA") to increase the amount of the reward an employer could offer an employee for participating in a wellness plan that requires meeting health-related standards from 20 to 30 percent of the cost of health care coverage, taking into account both employer and employee contributions. An employer can offer a reward of up to 50 percent of the cost of health care coverage of the plan that relates to tobacco use and cessation.
8. 42 U.S.C. § 12112(d)(4)(A)
9. 42 U.S.C. § 12112(d); 29 C.F.R. §§ 1630.13, § 1630.14; EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the ADA (July 27, 2000); available at http://www.eeoc.gov/policy/docs/guidance-inquiries.html (Hereinafter cited as EEOC Enforcement Guidance: Disability-Related Inquiries).
10. 29 C.F.R. Pt. 1630, App (*see* Section 1630.14(d) Other Acceptable Examinations and Inquiries)
11. *Id.*
12. 29 C.F.R. Pt. 1630, App (*see* Section 1630.14(d) Other Acceptable Examinations and Inquiries). The ADA's confidentiality provision states that information related to current employees must be collected and maintained on separate forms and in separate medical files and must be treated as a confidential medical record except that (1) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; (2) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency medical treatment; and (3) government officials investigating compliance with the ADA shall be provided relevant information upon request. 42 U.S.C. § 12112(b)(3); 29 C.F.R. § 1630(c).
13. 29 C.F.R. Pt. 1630, App (*see* Section 1630.14(d) Other Acceptable Examinations and Inquiries)
14. *See* EEOC Press Release, Employer Wellness Programs Need Guidance to Avoid Discrimination (May 8, 2013), available at http://www.eeoc.gov/eeoc/newsroom/release/5-8-13.
15. Peggy R. Mastroianni, Associate Legal Counsel, U.S. EEOC, Informal Discussion letter, January 18, 2013, available at http://www/eeoc.gov/eeoc/gov/eeoc/foia/letters/2013/ada_wellnessprograms.html
16. *Id.*
17. *Id.*
18. Peggy R. Mastroianni, Associate Legal Counsel, U.S. EEOC Informal Discussion letter, March 6, 2009, available at http://www.eeoc.gov/eeoc/foia/letters/2009/ada_health_risk_assessment.html
19. Peggy R. Mastroianni, Associate Legal Counsel, U.S. EEOC Informal Discussion letter, Aug. 10, 2009, available at http://www.eeoc.gov/eeoc/foia/letters/2009/ada_health_risks_assessment.html. Because the EEOC commissioners neither review nor vote on the informal discussion letters prior to their release they do not necessarily articulate the position of the agency.
20. U.S.C. §§ 2000 ff *et. seq.*
21. 29 C.F.R. §163538(b)(2)(ii)(A)(B); § 1635.8(b)(2)(iii)(A)
22. *Id.* The EEOC's GINA Regulations stated that employees would need to provide prior "knowing, voluntary and written" authorization and that the employee would need to use an authorized form that was written in language that an individual would be reasonably likely to understand, described the information requested, and described the mechanics in place to prevent unlawful disclosure of the information.
23. Anna Wilde Matthews and Timothy M. Martin, "Penn State Employees Protest Wellness Effort, Aug. 15, 2003, WSJ.com.
24. *See, e.g., Owasu-Ansah v. Coca-Cola Co.*, 715 F.3d 1306 (11th Cir. 2013); *Kroll v. White Lake Ambulance Authority*, 691 F.3d 809 (6th Cir. 2012) *Conroy v. New York State Dept. of Correction Services*, 333 F. 3d 88 (2d Cir. 2003); *Roe v. Cheyanne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1229-30 (10th Cir. 1997)