High fashion, high rewards and high risk

Cher E. Wynkoop and Corina V. San-Marina
Willcox Savage

Corporate wellness programs are definitely in vogue and for good reason. Thoughtfully designed wellness programs can help improve employee health, workplace presenteeism and reduce employer health care costs.

Health care reform initiatives have placed wellness programs in the spotlight with detailed guidance and significant economic incentives tied to such programs. Corporate wellness programs come in all shapes, sizes and levels of effectivity. As with most life endeavors, higher returns are often accompanied by higher risks. Corporate wellness programs are no exception.

Examples of "wellness programs" include a smoker surcharge, health risk assessments, biometric screenings, cash or premium adjustment incentives based on participation in and/or achieving stated outcomes based on health related criteria - cholesterol levels, blood pressure readings, and employee assistance programs.

Generally, the larger and more predictable the return on investment to the employer in the sense of reduced health care insurance claims and costs, the more careful the employer must be to abide by the intersecting federal laws that will govern the wellness programs, such as the Health Insurance Portability and Accountability Act, the Employee Retirement Income Security Act, the Patient Protection and Affordable Care Act, the Consolidated Omnibus Budget Reconciliation Act, the Genetic Information Nondiscrimination Act and the Americans with Disabilities Act.

For example, a "simple" smoker surcharge on health plan enrollees who confirm they are smokers, either through a certification or urine screening test prior to annual open enrollment, is considered a wellness program under HIPAA. A smoker surcharge can result in a significant and predictable ROI for the employer, in that annual premium costs of the employer are directly and predictably reduced by the higher premium contributions collected from the smoking participants.

Unfortunately, the smoker surcharge exposes the plan sponsor to a bevy of legal requirements and risks. Under HIPAA nondiscrimination rules, the smoker surcharge described above is considered an outcome-based wellness program incentive/penalty, which must offer specified alternatives for those employees who cannot meet the required "outcome" - cessation of smoking - due to nicotine addiction or other physical impairment confirmed by their physician, as well as many other written and operational requirements. These requirements are not insurmountable but invoke the concept, "it's complicated."

A health risk assessment or biometric screening on the other hand is less controversial and complicated. Many employers "tiptoe" into the wellness programs arena by simply offering a small cash award, non-cash incentive or premium break for employees who fill out a health risk assessment or participate in a biometric screening. These "participation only" wellness programs, where the incentive is tied only to participation and not related to achieving any specific outcome or screening results, are subject to minimal HIPAA rules.

Unfortunately, statistics show that this type of wellness program provides minimal employer ROI unless there are more substantive dimensions to the program. Specifically, employer ROI increases when family medical history is included in a health risk assessment, which helps determine health risks and inform effective coaching modalities. However, GINA prohibits family medical history questions when there is a monetary or other incentive tied in whole or part to completion of the family medical history questions. It is possible to divide the health risk assessment into two segments, where the family medical history portion is unrelated to the incentives - it can be left blank, but completion of the remaining portion of the health risk questionnaire triggers the incentives.

Additionally, even if no family medical history is collected, statistics show employer ROI significantly increases when participants receive immediate and individualized feedback, counseling and coaching along with their health risk assessment/biometric screening results. However, individualized counseling will likely transform a simple assessment/screening exercise into an ERISA medical plan, which may also trigger COBRA obligations.

Layered on top of this discussion is the clear support for wellness programs embedded within the Affordable Care Act. The Internal Revenue Service, Department of Health and Human Services and Department of Labor have recently finalized guidance to allow very large health insurance premium differentials based on participation in wellness programs that comply with HIPAA nondiscrimination rules. Specifically, wellness program participation/nonparticipation may trigger penalties/rewards up to 30 percent of the total premium cost for single coverage, which can increase to 50 percent for wellness programs targeted to smoking cessation (e.g., smoker surcharge).

For example, if the total employer/employee annual premium for single coverage is $5,000 with the employee (nonsmoker) portion equal to $1,400, the employer could charge smokers up to $2,500 for single coverage. Talk about a direct and large ROI for the employer.

Employers must be aware that the legal infrastructure to support such an aggressive smoker surcharge arrangement will be substantial. Moreover, the Equal Employment Opportunity Commission has not approved or even formally weighed in on these wellness program rules already published by the IRS, DOL and HHS.

The EEOC has indicated that the substantive rules under the ADA may constrain negative actions directed specifically at employees with nicotine addictions or even weight/obesity-related health conditions.

As noted earlier, substantial employer ROI flowing from corporate wellness programs will be accompanied by both legal requirements and risks. Proceed carefully when developing your own corporate wellness program and confer with your ERISA and/or employment counsel in the early stages of design.

Cher E. Wynkoop is a partner in the Employee Benefits group of Willcox Savage and she can be reached at cwynkoop@wilsav.com or at 628-5581. Corina V. San-Marina is an associate in the Employee Benefits group of Willcox Savage and she can be reached at csanmarina@wilsav.com or 628-5607.