Morgan Lewis

Corporate Wellness:
What Does the Future Hold?

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Agenda

- Objectives
- Overview
- Wellness Programs and HIPAA/PPACA/ERISA/COBRA
- Wellness Programs and the ADA
- Wellness Programs and GINA
- The EEOC's View
- More Aggressive Wellness Techniques
- Outcome
- Questions?

Objectives

- To address the breadth of wellness issues and designs from both a Labor and EB perspective
- To establish and discuss design-based guideposts that don't solve all, but do address the majority, of Labor and EB considerations

Overview

- Wellness programs are becoming far more prevalent, and encompass far more designs, than 5-10 years ago
  - Any program designed to promote health or prevent disease
- Spider's web of legal considerations and issues can snare the simplest of wellness programs
  - Significant resistance from disability advocates
- A single changed design element can significantly raise, or lower, legal risks
- Adhering to "PPVH" design approach can diminish legal concerns

Overview
(*Continued*)

- "PPVH" stands for:
  - Positive
  - Private
  - Voluntary
  - Health Plan
- We will refer to these principles throughout today's material

Wellness Programs and HIPAA

- Discriminating in a group health plan on the basis of a health factor is impermissible unless:
  - One of two HIPAA wellness approaches are satisfied:
    - *Participation based*
      - Few detailed rules; available to all
    - *Outcome based*
      - Many facets such as:
        - » Annual opportunity
        - » 20% of COBRA cost cap
        - » Reasonable alternative; clearly communicated
- Should preempt state law and reduce EEOC issues

Wellness Programs and HIPAA (*Continued*)

- HIPAA privacy rules also come into play
  - Use an independent third party to administer, evaluate, and operate wellness program
  - Treat the third party as a HIPAA Business Associate, sign a Business Associate Agreement, and NEVER seek or accept individually identifiable data from the vendor
    - *Probably acceptable to receive payroll-specific enrollment data associated with delivering incentives through premiums*
    - *Consider masking related paystub codes*

Wellness Programs and PPACA

- Codifies in ERISA, IRC, and PHSA what previously existed only on the level of regulations
  - Significant development that strengthens viability of HIPAA wellness rules and pressures EEOC
- Will kick 20% of COBRA cost cap to 30% in 2014
  - Possible 50% with agency authorization
- Numerous wellness grants/subsidies
- Possibly in jeopardy from SCOTUS decision on PPACA

Wellness Programs and ERISA

- Since part of a GHP, embrace ERISA
  - Form 5500
  - SPD
  - SMMs
  - SBCs
    - *ERISA is your friend!*

Wellness Programs and COBRA

- GHP treatment requires addressing COBRA considerations
  - After PPACA, most wellness program investigations already covered for free as preventive services
    - *Be careful if maintaining grandfather status*
  - Unlikely to offer wellness financial incentives under COBRA
  - Watch out for wellness plan participants who do not participate in medical option and who do not normally get COBRA notice

Wellness Programs and the ADA

Three ways a wellness program may violate the ADA:

1. Using obtained information in a way that violates ADA confidentiality requirements;
2. Using obtained information to discriminate against employees; or
3. Requiring wellness plan participation.

Wellness Programs and Title I of GINA

- Title I of GINA addresses group health plan issues under jurisdiction of IRS, DOL, and HHS
- Generally prevents collection of genetic information prior to, or in connection with, enrollment or any time for underwriting purposes
  - Led to immediate changes in HRAs to drop family medical history when paired with financial incentive/penalty (as this is "underwriting" for purposes of GINA)
    - *Good idea to add positive statement that HRA is not asking for genetic information*
  - Lingering doubts about ability to offer incentives for spousal health history
  - Wellness plan exception, but not as clear-cut as HIPAA rules
- Treat as part of GHP to invoke firewall between Title I and Title II

Wellness Programs and Title II of GINA

- Title II of GINA, enacted November 21, 2009, prohibits employers and other covered entities from requesting, requiring, or purchasing genetic information, subject to six limited exceptions. *See* 29 C.F.R. § 1635.8.

- Employers may not offer financial inducements for individuals to provide genetic information as part of a wellness program. *Id.*§ 1635.8(b)(2)(ii).

Wellness Programs and Title II of GINA (*Continued*)

Three ways a wellness plan may violate Title II:

1. Offering a financial incentive to an employee who participates in a wellness program if the inducement involves the employees providing his/her genetic information;
2. Failing to identify questions that fall within the purview of GINA (i.e., regarding one's family medical history or other genetic information) and not expressly noting that the questions requesting genetic information need not be answered to receive the inducement; or
3. Failing to get an employee's prior knowing, voluntary, and written authorization before eliciting health information that might include genetic information.

The EEOC's View on Wellness Programs

EEOC Enforcement Guidance, *Disability-Related Inquiries and Med. Examinations of Employees under the Am. with Disabilities Act (ADA)* (July 27, 2000).

- "A wellness program is 'voluntary' as long as the employer neither requires participation nor penalizes employees who do not participate." *Id.* at Q&A 22.

- "The ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination (including medical information from voluntary health or wellness programs), as well as any medical information voluntarily disclosed by an employee, as a confidential medical record." *Id*.

The EEOC's View on Wellness Programs *(Continued)*

EEOC Opinion Letter, *ADA: Disability-Related Inquiries and Med. Exams/Mandatory Clinical Health Risk Assessment* (Jan. 6, 2009) (Partially Rescinded by 3/6/2009 Opinion Letter).

- "[R]equiring that all employees take a health risk assessment that includes disability-related inquiries and medical examinations as a prerequisite for obtaining health insurance coverage does *not* appear to be job-related and consistent with business necessity, and therefore would violate the ADA." (emphasis added).

- "Disability-related inquiries and medical examinations are . . . permitted as part of a voluntary wellness program."

The EEOC's View on Wellness Programs *(Continued)*

The Partially Rescinded 1/6/2009 EEOC Letter

"[Y]ou may offer wellness programs that include medical monitoring and comply with the 20 percent rule with respect to any inducement you offer, or you may offer programs that have health benefits but do not require medical monitoring" (e.g., weight loss and smoking cessation programs).

The EEOC's View on Wellness Programs *(Continued)*

EEOC Opinion Letter, *ADA: Disability-Related Inquiries and Med. Exams; Health Risk Assessment* (Mar. 6, 2009).

- Referring to its January 6, 2009 letter, the EEOC said: "We said that a wellness program would be considered voluntary and . . . would not violate the ADA, as long as the inducement to participate in the program did not exceed twenty percent of the cost of employee only or employee and dependent coverage under the plan, consistent with . . . [HIPAA]."

- "Because your letter did not raise the question of what level of inducement to participate in a wellness program would be permitted under the ADA, ***we are rescinding the portion of the January 6, 2009 letter that discusses this issue.***"

The EEOC's View on Wellness Programs *(Continued)*

EEOC Opinion Letter, *ADA: Health Risk Assessments* (Aug. 10, 2009):

- "[R]equiring employees to complete a health risk assessment that includes many disability-related inquiries — such as . . . how often they feel depressed; whether they ever have been told that they have certain conditions; . . . how many different prescription medications they currently take; . . . or how much alcohol they drink . . . as a prerequisite to obtaining reimbursement for health expenses does not appear to be job-related and consistent with business necessity."

- "[E]ven if the health risk assessment could be considered part of a wellness program, it is not voluntary because it penalizes any employee who does not complete the questionnaire by making him or her ineligible to receive reimbursement for health expenses."

The EEOC's View on Wellness Programs *(Continued)*

EEOC Opinion Letter, *ADA & GINA: Incentives for Workplace Wellness Programs* (June 24, 2011).

- The EEOC reaffirms its position that financial penalties are not permitted in connection with a voluntary wellness program, but the agency has taken "no position" as to whether and to what extent the ADA permits an employer to offer financial incentives to provide medical information in connection with a voluntary wellness program.
- The EEOC reaffirms that under GINA, the final rule makes clear that covered entities may not offer financial inducements for individuals to provide genetic information as part of a wellness program.
- Covered entities may use the genetic information voluntarily provided by an individual to guide that individual into an appropriate disease management program. However, if that program offers financial incentives for participation and/or for achieving certain health outcomes, the program must also be open to employees with current health conditions and/or to individuals whose lifestyle choices put them at increased risk of developing a condition.

Seff v. Broward Cnty., 2012 U.S. App. LEXIS 17501 (Aug. 20, 2012)

- Under its wellness program, Broward County imposed a $20 per pay period surcharge on health plan premiums for employees who refused to complete a health risk assessment or participate in biometric screenings for cholesterol and glucose. Only participation was required to avoid the penalty; results of the health risk assessment and screenings were not considered in determining whether the surcharge would be assessed.

- The Eleventh Circuit Court of Appeals found that a wellness program that placed a surcharge on nonparticipation did not violate the ADA, relying on the ADA's "safe harbor" provision.

ADA's "Safe Harbor" Provision

- Section 42 U.S.C. § 12201(c) of the ADA provides that the prohibition should not be construed to prohibit or restrict "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." 42 U.S.C. § 12201(c). The provision further states that "this exception "shall not be used as a subterfuge to evade the purposes of the [ADA]."
- The ADA regulations provide that this "is a limited exception that is only applicable to those who establish, sponsor, observe, or administer benefit plans, such as health and life insurance plans. . . . The purpose of this provision is to permit the development and administration of benefit plans in accordance with accepted principles of risk assessment." 29 CFR § 1630.16(f) & app. The regulations go on to say that the "activities permitted by this provision do not violate [the ADA] even if they result in limitations on individuals with disabilities, provided that these activities are not used as a subterfuge to evade the purposes of this part." App. to part 1630.

Rationale in *Seff*

- In finding that the wellness program was part of a bona fide benefit plan, the district court noted that the plan's health insurer administered the program under its contract with the county and that only those enrolled in the health plan were eligible to participate in the wellness program. The court also noted that the wellness program was described in communications materials related to health plan benefits.
- The district court also found that:
  - The plan was designed to develop and administer present and future benefit plans using accepted principles of risk assessment.
  - the wellness program provided data to the county for use in the development of future benefit plans and, although it was not underwriting or classifying risk on an individual basis, it was underwriting and classifying risk at the group level to create economically sound benefit plans.
  - The wellness program also was designed to "mitigate risks" by getting employees involved in their own healthcare, which would lead to a healthier population that would be less costly to insure. The court stated, "Such inquiries, when not pretextual, are permissible under the safe harbor provision of the ADA."

Rationale in *Seff*

- The district court concluded, “[I]t is hard to see how the wellness program relates to discrimination in any way. In fact, the program is enormously beneficial to all employees of Broward County—disabled and non-disabled alike. It is clear to this Court that the wellness program is not a subterfuge; it was not designed to evade the purpose of the ADA. Rather, it is a valid term of a benefits plan that falls within the ambit of the ADA's safe harbor provision.”
- When heard on appeal, the Eleventh Circuit noted that there was no legal authority indicating that a wellness plan had to be “explicitly identified in a plan’s written documents to qualify as a ‘term’ of the benefit plan within the meaning of the ADA’s safe harbor provisions.”
- It also noted that the evidence did establish that the wellness program was only available to group plan enrollees and was presented that as part of the plan in two employee handouts. As such, the Eleventh Circuit found it was appropriate that the district court granted summary judgment to the employer and that the plan fell within the ADA’s safe harbor provisions.

More Aggressive Wellness Techniques

- Employing physical testing programs; and
- Using obesity and smoking as hiring criteria.

Applicant Physical Testing Programs

- As a general proposition, enforcement agencies do not like applicant testing programs.
- Critical threshold question: Does testing result in an adverse impact on a protected classification?
  - If yes, validation required.
  - If no, validation not required.
- Determining adverse impact
  - Standard methods (4/5 Rule, Fisher's Exact test, etc.).
  - ADA issue: Problem of "regarded as" disability creating inherent adverse impact.

Applicant Physical Testing Programs *(Continued)*

- Determine in scientific manner what physical characteristic to test for
  - Does presence of characteristic create a "direct threat" (e.g., severe median nerve impairment in applicant for high force/high repetition job)
  - Does absence of characteristic (e.g., requisite strength) show:
    - Inability to perform job adequately
    - Inability to perform job safely
  - Determine whether the characteristic(s) being tested for can be justified as required by business necessity.

Obesity as a Hiring Criterion

- To assert a federal disability discrimination claim based upon failure to hire under a weight-restriction hiring policy, claimants first would have to establish that they are disabled under federal law. *See, e.g.*, *Paine v. Eilman*, No. 06 C 3173, 2010 WL 785397, at * 5 (N.D. Ill. Feb. 26, 2010) (slip copy).

- EEOC Guidelines provide that obesity is considered a disability only in rare circumstances. 29 C.F.R. pt. 1630 app. § 1630.2(j).

- The EEOC Compliance Manual, however, expressly states that morbid obesity is an impairment: "severe obesity, which has been defined as body weight more than 100% over the norm, is clearly an impairment." § 902.2(c)(5)(2).

Obesity as a Hiring Criterion
(*Continued*)

Plaintiffs have succeeded in establishing obesity as a qualified disability under the ADA where they are morbidly or severely obese or where they suffer from a weight condition that is caused by a physiological condition.

- *See EEOC v. Res. for Human Dev.*, *Inc.,* No. 10-3322, 2011 WL 6091560, at *4 (E.D. La. Dec. 7, 2011). A 500-pound employee at the time of her termination prevailed against a summary judgment motion, with the court relying on the EEOC's ADA compliance manual, which states "severe obesity, which has been defined as body weight more than 100% over the norm, is clearly an impairment." The court also held that there is no requirement that an employee's obesity be based on a physiological impairment (e.g., metabolic dysfunction).

- *But see EEOC v. Watkins Motor Lines, Inc.,* 463 F.3d 436, 440-43 (6th Cir. 2007). The EEOC argued that, while simple obesity not caused by a physiological disorder may not be an impairment, weight that grossly exceeds the normal range may constitute impairment. The Sixth Circuit rejected the EEOC's position, holding that an employee's obesity must have a physiological cause to be considered an impairment. According to the court, to hold otherwise may create a slippery slope whereby any physical abnormality—such as being "extremely tall or grossly short"—could be considered an impairment under the ADA.

Obesity as a “Regarded As” Disability

- A “regarded as” claim can be established if the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both “transitory and minor.”
- An individual is “regarded as having such an impairment” if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity.
- Where an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the “actual disability” or “record of” prong, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the “regarded as” prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment.

Obesity as a "Regarded As" Disability *(Continued)*

See, e.g., Lowe v. Am. Eurocopter, No. 1:10CV24-A-D, 2010 WL 5232523, at *6 (N.D. Miss. Dec. 16, 2010).

A former employee alleged that she was terminated due to her weight. The defendant-employer argued that obesity was not a disabling impairment under the ADA. The district court found that under the ADAAA's expansive definitions of "substantially limits" and "major life activities," obesity could constitute an impairment under the Act, even if not causally linked to a disorder. The plaintiff asserted that her weight affected the major life activity of walking. The court noted that plaintiff possibly could be considered disabled if the employer *perceived* or *regarded* her weight as an impairment, finding that the plaintiff pled facts sufficient to allege that she qualified as disabled under the ADA and denied defendant's motion to dismiss her disability claim.

State and Local Statutes Prohibiting Weight Discrimination

- **E.g., Michigan** is the only state to make it illegal to discriminate on the basis of weight. The statute provides, in relevant part: "the opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and education facilities without discrimination because of . . . weight." Mich. Comp. Laws § 37.2202(1)(a).

- **E.g., The District of Columbia** has a law that prohibits discrimination based on "personal appearance," albeit with many exceptions. *See D.C. Code Ann*. § 2-1402.11 (2003).

- **E.g., San Francisco** and **Santa Cruz** have city ordinances as well. *See* San Francisco, Cal. Police Code Art. 33 (2000); Santa Cruz, Cal. Mun. Code § 9.83.010 (2004).

Smoking as a Hiring Criterion

- To assert a federal disability discrimination claim based upon failure to hire applicants who smoke tobacco, claimants first must establish that they are disabled under federal law. *See, e.g., Paine*, 2010 WL 785397, at *5.

- The EEOC maintains that smoking alone is not a disability, although nicotine addiction may still qualify. *See* 8 N.D.L.R. 62 (EEOC 1996) ("Smoking itself is not a disability because smoking is an activity, not an impairment. While addiction to nicotine may be an impairment, such a conclusion would not necessarily trigger ADA coverage . . . [T]he [EEOC] has taken no position on whether nicotine may be covered under the ADA.").

Smoking as a Hiring Criterion
(Continued)

Courts generally hold that smoking is not an ADA - covered disability.

- *See Brashear*, 138 F. Supp. 2d at 695 (holding that because both smoking and nicotine addiction are "readily remediable," neither qualified as a disability under ADA); *United States v. Happy Time Day Care Ctr.*, 6 F. Supp. 2d 1073, 1082 (W.D. Wis. 1998) (implying in dicta that smokers are not considered disabled absent medical or physical problems beyond smoking); *Doukas v. Metro. Life Ins. Co.*, No. Civ. 4-478, 1997 WL 833134, at *4 n.3 (D.N.H. Oct. 21, 1997) ("[T]obacco users cannot qualify as disabled in the absence of a physical impairment or a perceived impairment.").

State Statutes Protecting Smokers

- States with "Tobacco Only" Statutes
  - Connecticut, District of Columbia, Indiana, Kentucky, Louisiana, Maine, Mississippi, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, South Carolina, South Dakota, Virginia, West Virginia, and Wyoming
- States with "Lawful Product" Statutes
  - Illinois, Minnesota, Missouri, Montana, Nevada, North Carolina, Tennessee, and Wisconsin
- States with "Engage in Lawful Activities" Statutes
  - California, Colorado, New York, and North Dakota

See National Conference of State Legislatures (NCSL) (2011).

Questions?

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