

Baird Holm Labor Law Forum Webinar Series

Session One

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Wellness in the Workplace

Presented by David J. Kramer
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Background

What is a Wellness Program?

- A Wellness Program is an organized program intended to assist employees and their family members in making voluntary behavior changes which reduce their health risks and enhance their individual productivity.
 - Wellness Council of America, 1990

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Wellness Programs

- Wellness programs are usually designed to do two things:
 - Keep healthy people healthy; and
 - Help unhealthy people change their behavior to reduce or eliminate their risk factors

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Benefits

- Control Increasing Health Care Costs
- Improve Productivity
- Reduce Absenteeism
- Improve Presentism
- Reduce Injuries
- Improve Employee Morale and Retention
- Establish a Healthy Culture

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Where does Wellness Reside?

- Wellness plans are usually found in one of two places:
 - Within the Health Plan
 - Stand alone plan

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Health Plans

- Available through all health plans
 - Routine exams
 - Routine lab work for cholesterol, glucose, etc.
 - Flu shots, immunizations
 - Preventive Cancer Screenings
 - Mammogram
 - Colonoscopy
 - Cervical Cancer Screening
 - Skin Cancer Screening

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Health Plans (continued)

- Available to members who want to stay healthy, get healthy and prevent more serious issues...
- Types of Coaching
 - Online (e.g., videos, webinars)
 - Telephonic
 - 24/7 Nurse Line
 - Face-to-Face
 - Individual
 - Group
- Health Coaching is typically offered to a member upon complete of the online health risk assessment.
 - It is intended for members who would like help controlling blood pressure, managing weight, increasing physical activity, lowering cholesterol, eating better, smoking cessation and reducing stress.

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Health Plans (continued)

- Available to help members with chronic illness better control their disease.
 - Teaches the member to take better care of themselves.
 - Teaches them ways to reduce the complications associated with their disease.
 - Encourages compliance with medication
- Chronic disease with the end result of uncontrolled health risk factors. Chronic disease is incurable but is controllable.
- Enrollment in disease management programs is typically initiated by outreach from the carrier to the member. Outreach is triggered by medical claims and prescription drug claims.
 - Intended for members with chronic conditions such as asthma, cardiac disease, COPD, diabetes and high blood pressure.

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Health Plans (continued)

- Online Health Risk Assessment
- Fitness Reimbursements
 - Discounted gym memberships
- Weight Loss Reimbursements
 - Discounts at weight loss programs (e.g., Weight Watchers, Jenny Craig, etc.)
- Tobacco Cessation Support
 - ACA mandates coverage for screening and a cessation intervention
- Educational Materials
 - Addressing topics such as: relieving stress, sleeping better, managing depression, eating healthy and increasing physical activity

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ERISA

- A wellness program will be subject to ERISA if it:
 - is a plan, fund or program;
 - is established or maintained by an employer;
 - provides one of the specifically listed benefits (which includes “medical care”); and
 - provides benefits to participants and beneficiaries.

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ERISA (continued)

- A typical wellness program will easily satisfy conditions (1), (2), and (4).
- ERISA status will be dependent on whether the wellness program provides a service such as medical care
 - Broadly defined
 - For example, an employer with a health and wellness program that provides benefits such as biometric screenings or flu shots will likely be subject to ERISA

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Tools Outside the Health Plan

- Biometric Screenings
 - cholesterol, blood pressure, glucose and body mass index
- Online Calculators
 - tools to assist in managing process
- Activity trackers
 - tools to assist in monitoring progress
- Educational Programs
- Onsite Smoking Cessation Programs
- Health Fairs / Awareness Campaigns
- Employee Assistance Program
- Fitness Challenges
- Life Cycle Accounts
 - employer reimbursement for healthy lifestyle, life events, legal services and financial planning

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Plan Design

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Characteristics of Legally Sound Wellness Plans

- Seek to improve employee health
- Ensure that program is voluntary
- Handle mandatory programs carefully
- Prudent about dependents
- Accommodate employees with disabilities
- Spell things out effectively
- Protect employee privacy

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ADA Rules

- Must be reasonably designed to promote health/prevent disease
 - Must provide follow-up after collecting medical information
 - Should not be about collecting information only.
 - Different from HIPAA/ACA
 - Only health contingent need to be reasonably designed

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ADA Rules

- Programs that collect medical information must provide employees with notice.
- Notice requirement applies even in the absence of incentives

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ADA Rules

- Notice must contain the following:
 - Be understandable
 - Describe the type of medical information to be obtained
 - Describe the specific purposes for which the information will be used
 - Who will receive the information
 - Restrictions on disclosure of medical information
 - Methods the employer will use to prevent improper disclosure

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HIPAA/ACA

- To qualify for wellness program exception, the plan must meet certain conditions:
 - Participatory programs must only be offered to “similarly situated” individuals
 - No Limit on financial incentives
 - Health-contingent programs must meet 5 factor test.

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Data Privacy

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HIPAA

- The HIPAA privacy regulations cover “Protected Health Information” or “PHI”
- PHI is “individually identifiable health information” that is transmitted or maintained in any form or medium
 - PHI excludes education records, student medical records, and employment records

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HIPAA

- Applies to Covered Entities:
 - Health Plans
 - Providers who conduct one or more of the HIPAA-defined transactions electronically
 - Does not apply to entities that don't engage in covered electronic transactions
 - Clearinghouses

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HIPAA

- Many parts apply to Business Associates
 - Not a member of the covered entity's workforce who, with respect to a covered entity:
 1. Performs a function or activity using individually identifiable health information involving:

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HIPAA

- Claims processing or administration
- Data analysis, processing or administration
- Utilization review
- Quality assurance
- Billing
- Benefit management
- Practice management
- Repricing

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HIPAA

2. Performs any other function or activity regulated by HIPAA; or
3. Provides any of the following services for the covered entity and which involves the disclosure of PII:
 - Legal
 - Actuarial
 - Accounting
 - Consulting
 - Data Aggregation
 - Management
 - Administrative
 - Accreditation
 - Financial

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Incentives

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Tools to Promote Wellness Efforts

- Incentives
 - Activity-Centered
 - rewards people for participating
 - Results-Oriented
 - rewards people for achieving/maintaining positive results
- Types of Incentives
 - Cash, Gift Cards
 - T-shirts, water bottles
 - FSA, HRA, HSA contribution
 - Reduced health insurance premium

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Creating Incentives

- Rewards can be linked to health achievements:
 - Completion of a health risk appraisal
 - Participation in a tobacco cessation program
 - Attendance at a weight management/nutrition counseling class
 - Actually losing weight and keeping it off
 - Frequency of talking to a health coach
 - Reducing cholesterol to a normal range

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ADA

- Incentive Limit applies to:
 - Participatory and
 - Health contingent programs
- Only applies to programs with HRAs/Biometric Screens

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ADA

- Incentive Limit applies to:
 - Financial
 - In-Kind
 - Time off
 - Prizes

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HIPAA/ACA

- Distinction between participatory and “health contingent” is whether the reward is tied to – Health Status

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HIPAA/ACA

- Participatory program examples
 - Fitness center membership reimbursement
 - Reward for participating in health assessment
 - Waiver of health plan cost-sharing for preventive items or services
 - Smoking cessation program reimbursement
 - Reward for attending health education program

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HIPAA/ACA

- Two types of health contingent programs which must meet the five factor test:
 - Activity
 - May seek verification from physician that health factor makes it unreasonably difficult or medically inadvisable to satisfy activity.
 - Outcomes-based
 - May not seek verification

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HIPAA/ACA

- Five Factors:
 1. Qualify for reward at least once per year
 2. Total reward may not exceed 30% (50% for tobacco prevention programs) of total cost of coverage
 3. Reasonable design to promote or prevent disease

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HIPAA/ACA

- Five factors (continued):
 - 4. Full reward must be available to all similarly situated individuals.
 - Must provide reasonable alternative standard (or waiver of standard)
 - 5. Disclosure of reasonable alternative standard (or waiver) in plan materials describing the wellness program terms.

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- Incentive Limit Calculation:
 - Employees enrolled in employer plan
 - 30% total cost of self-only coverage (includes both employee and employer contribution)
 - All employees regardless of plan enrollment
 - 30% total cost of self-only coverage under employer's plan
 - All employees when multiple plans offered
 - 30% total cost of lowest cost self-only coverage
 - All employees when no plan available
 - 30% total cost of self-only coverage under 2nd lowest cost Silver Plan for 40 year old non-smoker on Exchange
- 30% incentive applies to spouse and employee separately

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Tolerance for Risk

- No Incentives (Conservative)
- Modest Incentives (Middle-Ground)
- Up to 30% (Risky)

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Incentives for Spouses

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GINA

- Collection of spousal information must be part of wellness program reasonably designed to promote health or prevent disease.
- Not reasonably designed if:
 - Imposes a penalty on individual because of a spouse's disorder prevents spouse from participating in program or achieving certain outcome
 - Collection of information does not include follow-up information or advice or not used to design a program that addresses conditions identified by the information collected

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GINA

- Employers may not deny access to health coverage based on spouse's refusal to provide information.
- Employers may not retaliate against employee based on spouse's refusal to provide information.

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GINA

- Allows wellness programs to offer incentives for employee's spouse to provide certain information
 - Limited to spouse's own manifestation of disease or disorder
 - Must be part of a health assessment or medical examination or both
 - Incentive rule applies regardless if spouse or employee is enrolled in health plan.

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- In addition to employee, spouse must provide prior, knowing, voluntary and written authorization.
- Authorization must:
 - Be easy to understand
 - Describe the type of genetic information to be obtained and the purpose for which it will be used
 - Describe the restrictions on disclosure of genetic information
 - State that the genetic information is being collected for purposes of providing health or genetic services
 - State that the information will only be provided to individual and licensed health care professionals involved in providing genetic services and not disclosed to the employer except in aggregate terms.

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GINA

- Calculation Example
 - Cost of family coverage is \$14,000. Self-only cost is \$6,000. Incentive can be up to \$1,800 for employee and \$1,800 for spouse (30% of \$6,000).

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Incentives for Dependents

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- No inducements are permitted in return for information about the manifestation of disease or disorder of an employee's children.
- This does not mean employers are prohibited from offering health or genetic services (including participation in an employer's wellness program) to an employee's children on a **voluntary** basis. They may do so, but may not offer any inducement in exchange for information about the manifestation of any disease or disorder in the child.

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Voluntariness

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ADA

- Carves out an exception to the general prohibition on taking employee "medical exams" for "voluntary" medical exams which are a part of an employee wellness plan.

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ADA

- In order to be considered "voluntary," an employer may not retaliate against, interfere with, coerce, intimidate or threaten employees.
- That is, you cannot coerce an employee to participate in an employee health program or threaten to discipline an employee who does not participate.

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Taxation

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Internal Revenue Code

- Excludes from gross income amounts received for "medical care"
 - Expenses beneficial to general health or wellbeing are not "medical care" expenses
 - De-minimis benefits are excludable
 - Cash or cash equivalent incentives are NOT excludable from gross income

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Caution

- Gift cards, cash, gym memberships, etc. are ***taxable***.
- On-site athletic facilities, premium reduction, FSA, HRA or HSA contribution are ***non-taxable***.
 - Note that reimbursement of employee portion of health insurance premiums IS taxable.

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Other Laws of Note

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ADEA

- ADEA provisions are limited to individuals over the age of 40.
- Employers should construct their wellness programs so that they do not reduce incentives, impose a surcharge or otherwise discriminate against individuals in this protected group.

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Title VII

- A wellness program cannot discriminate against its participants on the basis of race, color, religion, sex or national origin.
 - Includes employee eligibility, the terms and conditions for coverage and any surcharges employees must pay to participate.
- It is unlawful to discriminate between men and women with regard to fringe benefits (including medical, hospital, accident and life insurance and retirement plans) even when third parties are involved.

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FLSA

- Wellness programs should have a voluntary participation policy.
- If participation in the program is mandatory or required, the time employees spend in lectures, meetings, training and any other activity associated with the program may be considered compensable time and may be subject to employee overtime wage pay requirements.

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Practical Tips

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Practical Tips

- Be Careful About Premium Related Incentives
- Review the Program Rewards to Determine Whether Any Should Be Taxable Income to Employees.
- Beware of Conflicts with Other Health Plan Programs

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Practical Tips (continued)

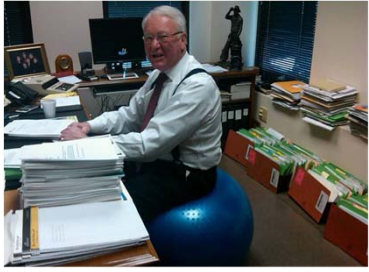
- Review of Employee Handbooks
- Determine whether you have an ERISA Covered Plan
- Review Participatory Rewards for Compliance with HIPAA
- Determine if your plan is covered by the ADA
- Comply with Notice Requirements

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Who says you can't teach an old dog new tricks?

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