

# Weighing the Legal Implications of Wellness Programs

Inaugural First Coast Worksite Wellness Conference  
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David S. Mohl  
Senior Counsel  
CIGNA



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# Agenda

- Why consider a wellness program
- Compliance issues
  - HIPAA nondiscrimination
  - The Americans with Disabilities Act
- Can I only hire non-smokers?



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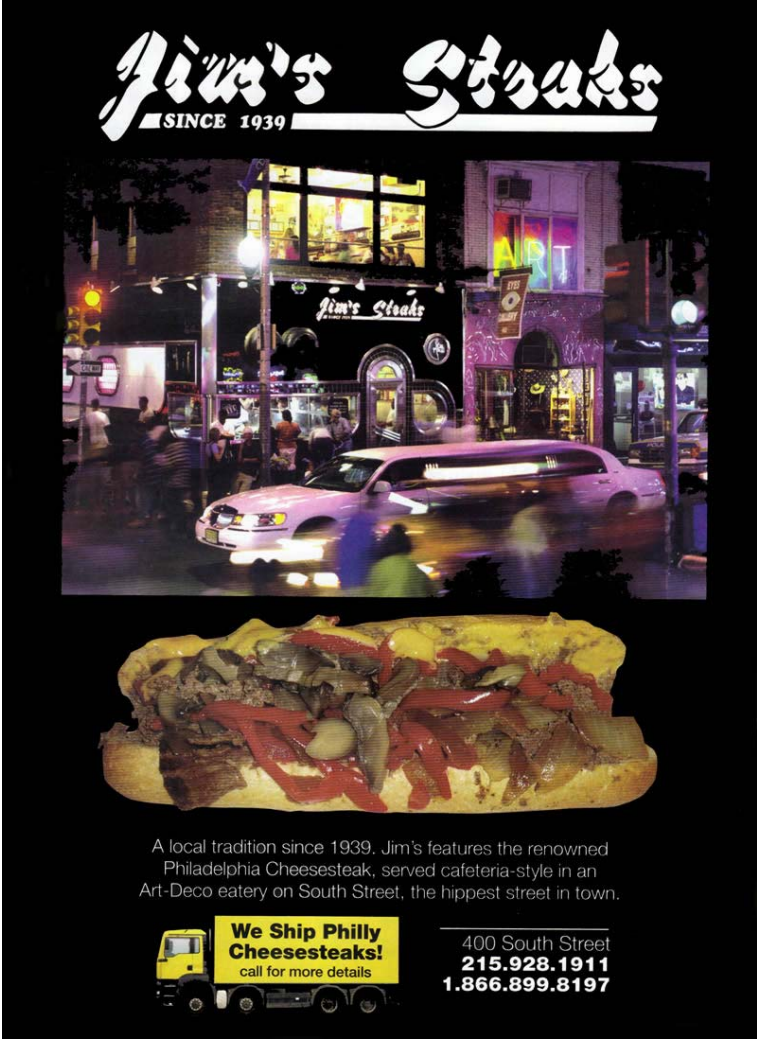
# Sick Employees are Expensive

- For typical employer
  - Medical costs have same magnitude as after tax profit
  - Over \$8,000 per employee per year
  - Annual increases approach double digits
- Disability costs are in addition to and highly correlated with medical costs
- Workers' compensation, absenteeism and presenteeism costs are additional
- By 2012 health care expenditures are expected to account for nearly 18% of our gross domestic product



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# It's All About Lifestyle Choices



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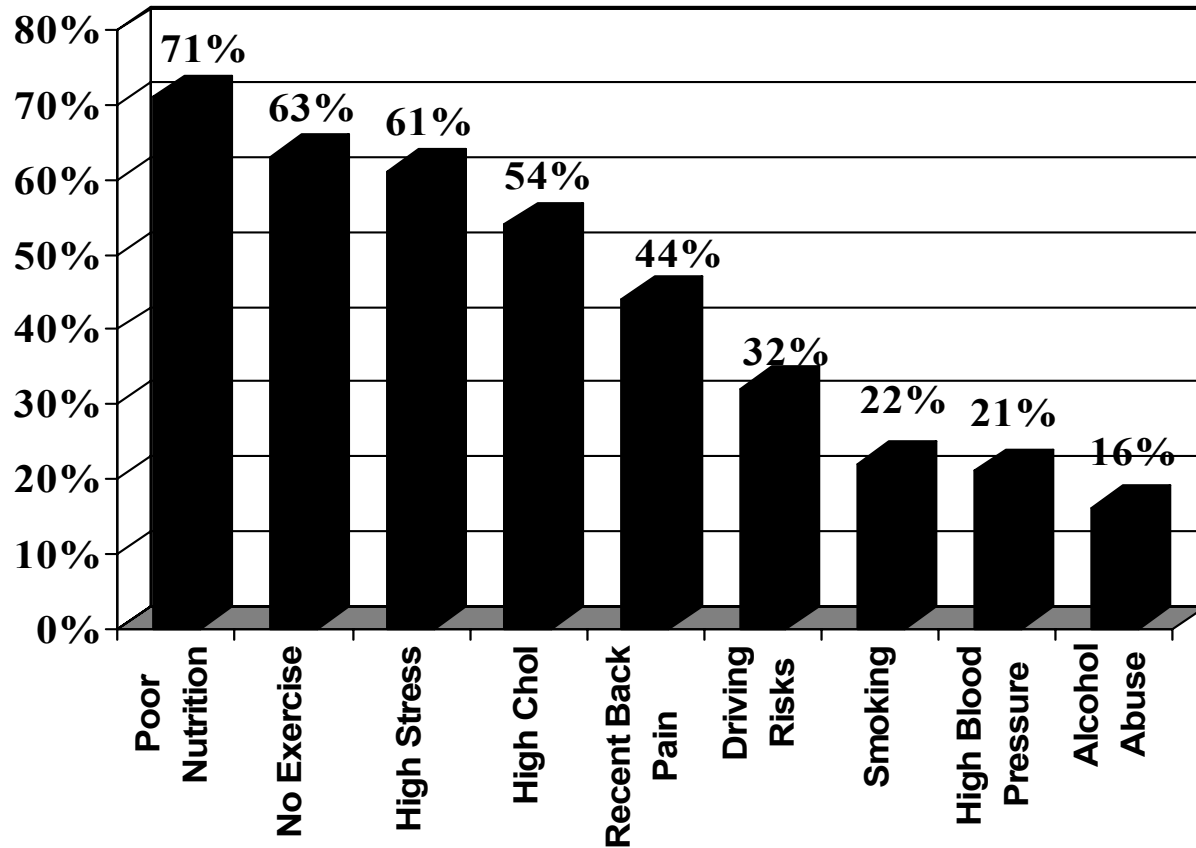
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# It's All About Lifestyle Choices



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# 70% of Claims are from Poor Lifestyles Choices



Sources: Corporate Health Partners, Summex, 2004 and New England Journal of Medicine



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# What's Happening in Your Workplace

Statistically, if there are 100 people in your company...

- 1 uses cocaine
- 50 feel they are under moderate stress
- 10 are heavy drinkers
- 30 smoke
- 27 have cardiovascular disease
- 10 have high blood pressure
- 5 have diagnosed diabetes
- 5 have undiagnosed diabetes
- 25 or more have high cholesterol
- 35 are overweight by 20% or more
- 50 don't wear seatbelts regularly
- 7 use marijuana

Source: The Wellness Councils of America - Healthy, Wealthy & Wise: Fundamentals of Workplace Health Promotion



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# Do You Encourage Healthy Behavior?



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# Wellness

- Helping people stay healthy
- ...often includes broader meaning encompassing disease management
- Long-term investment and commitment by employer
- ...to achieve sustainable behavior modification
- Can mean almost anything: covering physical exams to comprehensive program
- Can be done with or without external resources



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# Wellness Incentives

- Many employers are interested in rewarding healthy behaviors
  - Not smoking
  - Exercising
  - Healthy diet
- 71% of companies offer workers wellness incentives
- Number of employers offering wellness incentives rose almost 10% in the past year
- Theory: Healthier employees will result in lower health plan costs, greater productivity



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# Wellness Programs Raise a Variety of Compliance Issues

- HIPAA nondiscrimination
  - Prohibits discrimination based on health factors
- HIPAA privacy
  - Limits the information that an employer can receive, use, and disclose in connection with a health plan
- The Americans with Disabilities Act
  - Prohibits discrimination on the basis of a qualified individual's disability in the provision of benefits and other terms and conditions of employment
- State laws



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# HIPAA NONDISCRIMINATION



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# HIPAA Nondiscrimination Final Regulations

- Issued December 2006
- Wellness program defined
  - “Any program designed to promote health or prevent disease.”
- Health plan benefits must be uniformly available to all similarly situated employees
- Health plans prohibited from discriminating in eligibility, benefits, premiums or contributions due to employee/dependent’s health factors
- Compliance with HIPAA ≠ automatic compliance with Americans with Disabilities Act



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# What is a Health Factor

- Health factors include:
  - health status
  - medical condition (including both physical and mental illnesses)
  - claims experience
  - receipt of health care
  - medical history
  - genetic information
  - evidence of insurability (including conditions arising out of acts of domestic violence)
  - disability



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# HIPAA Nondiscrimination Exception for Wellness Programs

- Wellness program must satisfy 5 criteria
- Exception for non-health related standard
  - Programs that have no reward
  - Programs which offer reward to everyone regardless of health factors
    - » Reimburse cost of fitness center membership
    - » Diagnostic testing with reward based on participation and not outcome
    - » Waive copay or deductible for preventive care such as prenatal or well-baby visits
    - » Reward for participation in smoking cessation regardless of results
    - » Reward for attending health education seminar



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# HIPAA Wellness Program Requirements

- Value of total reward must not exceed 20% of cost of employee-only health coverage
  - Includes employer and employee portion of cost
  - May be 20% of family coverage cost if other family members can also participate
- Reasonably designed to promote health or prevent disease
  - Reasonable chance of improving health or preventing disease
  - Not overly burdensome
  - No subterfuge for discrimination
  - Not “highly suspect” (extreme or illegal)



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# HIPAA Wellness Program Requirements

- Opportunity to qualify once each year
- Available to all similarly situated individuals – Reasonable alternative standard
  - Any individual for whom meeting standard is unreasonably difficult due to a medical condition, or medically inadvisable
  - Examples –
    - » Smoking cessation class or 12 hour video on health issues associated with tobacco
    - » Follow physician's advice about medication and monitoring
    - » Walking three times per week (or other as required)
    - » Standard not required ahead of time but available upon request
    - » Plan may seek verification



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# HIPAA Wellness Program Requirements

- Reasonable alternative availability must be disclosed
  - In all plan materials regarding wellness, unless it's a mere mention
    - » Safe harbor language
    - » “If it is unreasonably difficult due to a medical condition for you to achieve the standards for the reward under this program, or if it is medically inadvisable for you to attempt to achieve the standards for the reward under this program, call us at [insert telephone number] and we will work with you to develop another way to qualify for the reward.”



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# DOL Checklist Criteria

- On February 14, 2008, DOL issued a checklist of criteria wellness programs must satisfy to comply with HIPAA
  - <http://www.dol.gov/ebsa/pdf/fab2008-2.pdf>
- Can combine health based incentives and non-health based incentives that exceed 20% of premium limit
  - Health based incentives cannot exceed 20%
  - Non-health based incentives can exceed 20%
- Limitations on wellness programs do not apply to programs that discriminate in favor of individuals with adverse health conditions
- DOL checklist only applies to HIPAA nondiscrimination rules
- Watch out for the Americans with Disabilities Act



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# THE AMERICANS WITH DISABILITIES ACT



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# Americans with Disabilities

- 15% of Americans are disabled = 40 million people
- Common worker disabilities = heart disease, back problems, arthritis, asthma, diabetes
- The congressional purpose of the ADA “is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring those individuals into the economic and social mainstream of American life”



# Americans with Disabilities Act

- ADA – Americans with Disability Act became effective in 1992
- Prohibits discrimination based on disability
- Applies to employers as well as health insurers
  - Employees or job applicants
  - Are or may become disabled
    - » Disability means: substantially limits major life activity – every day tasks –
      - Household chores, caring for oneself
      - History of such condition, or
      - Regarded as having such a condition
  - Must be able to perform essential functions of job with or without a reasonable accommodation
  - Applies to all terms and conditions of employment – including providing insurance, wellness programs, and other benefits



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# ADA Amendments Act of 2008 (ADAAA)

- Through a series of court decisions, the Supreme Court narrowed the definition of disability
- ADA Amendments Act of 2008 (ADAAA) rejects Supreme Court's narrow application of ADA
- Intent was to broaden scope of ADA



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# ADA's Impact on Providing Insurance Coverage

- Cannot deny coverage to employees based on disability status
- Cannot refuse to hire based on fear of workplace injury
- Cannot refuse to hire based on fear of increased premium costs
- Compliance with HIPAA ≠ automatic compliance with ADA



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# Who Qualifies for Protection Under the ADA

- Individual with a qualifying disability
  - Mental or physical impairment
  - Significantly impacts one or more major life activities
    - » i.e. seeing, talking, hearing, walking, self-care
  - There has been a history of such condition
  - Person is perceived as having such condition
- Otherwise qualified to perform the essential functions of the job
- With or without a reasonable accommodation
- Those who associate with or who provide care to disabled
- Retaliation



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# ADAAA

- Disability determination must be made without regard to ameliorative effects of mitigating measures
  - Exception = eyeglasses/contact lenses may be considered
- ADAAA extends protection to impairments that are episodic or in remission if, when condition is active, it substantially limits a major life activity
- Individuals regarded as disabled are protected if they can demonstrate that they suffered an adverse employment action



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# Seeking Medical Information

- Do not assume that an employee is entitled to a reasonable accommodation
- If disability is not obvious, employer is entitled to documentation from health care professional establishing qualifying disability
- Only entitled to information necessary to determine whether the employee can perform the essential functions with or without reasonable accommodation or work without posing a direct threat
- Requested information should be job related and consistent with business necessity
- If disability or need for reasonable accommodation is not obvious, the employee *must* provide medical documentation
- Medical information must be kept confidential



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# Reasonable Accommodations

- Wellness programs should offer a reasonable accommodation to employees with disabilities
- Employer is entitled to supporting medical documentation
- Must be requested by employee or someone on his/her behalf
- Get employee suggestions
- Not required to make the accommodation requested by employee



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# Employer Defenses to Reasonable Accommodation

- Job relatedness and business necessity
  - Neutral qualification standards
  - Essential qualifications of the job
- Accommodations that result in an undue hardship are not reasonable
  - Employer must demonstrate undue hardship
  - Fact specific
- Employer may require that employees not pose a direct threat to the health and safety of other individuals in the workplace
- Religious entities



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# Health Risk Assessments

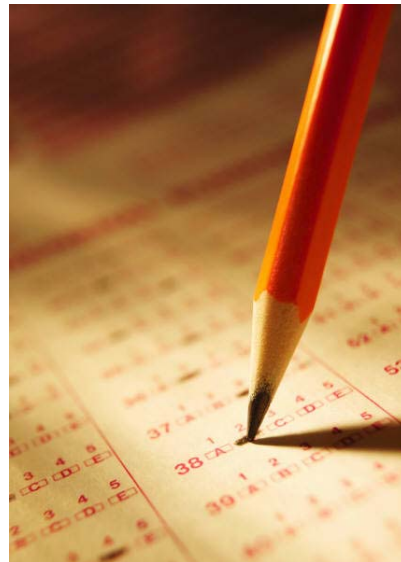
- A key hurdle for incentive-based wellness programs
- ADA prohibits employers from making disability-related inquiries or requiring medical examinations
- Disability-related inquiry = any question likely to elicit information about a disability
- Narrow exceptions
- Different rules for applicants and employees



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# Pre-Employment Screening

- Tests that unlawfully screen out persons with disabilities are illegal
- Pre-employment tests must be job related and consistent with business necessity
- Tests should be designed to test essential functions of job



# Pre-Employment Inquiries

- You cannot ask about disabilities in an interview
- You can ask whether or not the essential job functions can be performed with or without reasonable accommodations
- Pre-offer questions should target ability



# Pre-Employment Inquiries

## IMPERMISSIBLE

What is your corrected vision?

Do you ever get ill from stress?

Do you have a disability that would prevent you from performing the essential functions of the job, with or without a reasonable accommodation?

## PERMISSIBLE

Do you have 20/20 vision?

How well can you handle stress?

This job requires an employee to transport 20-pound bags down two flights of stairs. Can you perform this function with or without a reasonable accommodation?

**FOCUS ON ABILITY, NOT DISABILITY!**



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# Pre-Employment Medical Exams

- Medical examination = procedure or test that seeks information about an individual's physical or mental impairments or health
- Permitted under ADA with limitation
  - Medical exam after offer of employment made and before first day of work
  - All employees in job category subjected to same exam
  - Information is confidential
- Difficult to demonstrate that employer does not use results in discriminatory manner



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# Health Risk Assessments Exception

- EEOC – certain disability inquiries may be acceptable if they are part of a **voluntary** wellness program
- Wellness program not voluntary if:
  - Requires participation
  - Offers participants significant financial incentives;
  - Penalizes those who do not participate; or
  - Penalizes those who cannot meet a program's goals by requiring higher premiums



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# Rewards for Healthy Behaviors – Tax and ADA Issues

- Providing rewards unrelated to the health plan for engaging in healthy behaviors (seat belt use, walking, etc.)
  - Rewards may be nominal (e.g., pins, water bottles, baseball caps) or have significant value (e.g., gift certificates, cash, paid days off)
    - » Rewards are taxable compensation and must be included on employees' W-2s
    - » Exception: Items of nominal value if the value is sufficiently difficult to establish that it would not be worthwhile to attempt
    - » Any gift certificate or cash award must be included in W-2 pay, no matter how small the reward
- ADA probably requires offering reasonable alternatives to the activity so that disabled individuals can get the reward too



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# Did You Know...

- Treating smoking-attributable diseases account for 6-8% of health expenditures <sup>1</sup>
- 17 million people try to quit smoking each year, but fewer than one out of ten succeed <sup>2</sup>
- Among smokers who suffer a heart attack, 38% resume smoking while they are in the hospital <sup>3</sup>
- If all women quit smoking during pregnancy, about 4,000 new babies would not die every year <sup>4</sup>
- Among infants 18 months of age, secondhand smoke is associated with as many as 300,000 cases of bronchitis and pneumonia each year <sup>5</sup>

<sup>1</sup> (American Cancer Society)

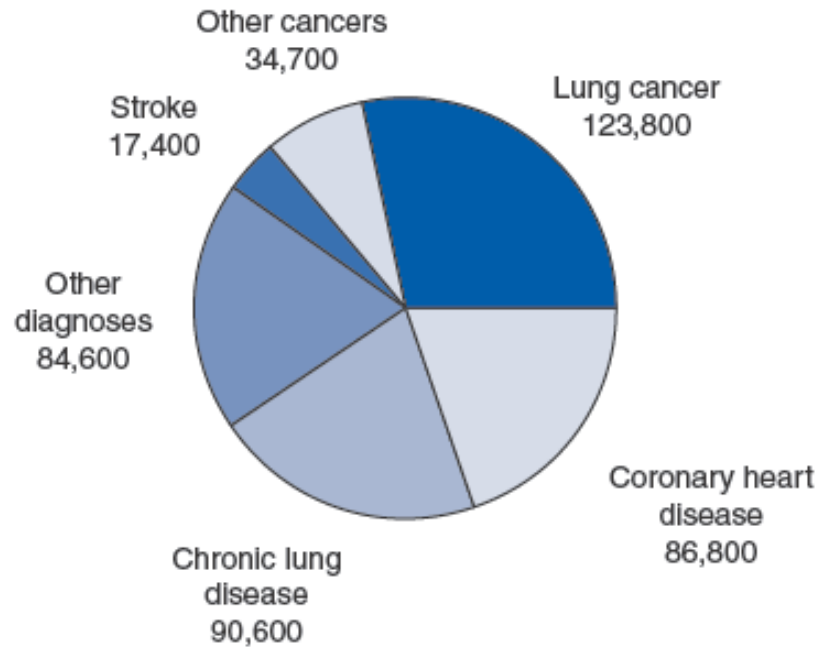
<sup>2,3</sup> (U.S. Food and Drug Administration – Statement on Nicotine-Containing Cigarettes)

<sup>4,5</sup> (National Cancer Institute – Smoking: Facts and Tips for Quitting)



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## About 438,000 U.S. Deaths Attributable Each Year to Cigarette Smoking\*



\* Average annual number of deaths, 1997–2001.  
Source: *MMWR* 2005;54(25):625–8.

# Hiring Only Non-Smokers and Firing Smokers

- Effective January 1, employer implements a non-smoking program
  - No smoking anywhere on business premises, indoors or outdoors
    - » Employees violating the smoking ban will be disciplined, repeated violations will result in termination of employment
  - All new employees must be non-smokers
  - Employees who smoke have two years to quit
    - » Employer will offer assistance (free of charge) during the two years
    - » If fail to quit by deadline, employment will be terminated
  - Verification of non-smoker status is based on employee statement
    - » Employees who fail or refuse to complete a statement are presumed to be smokers
    - » Employees found to have falsely stated that they do not smoke will be terminated



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# State Smokers' Rights Laws

- Generally prohibit employers from discriminating based on “off-duty” smoking
- None require allowing employees to smoke on employer premises



# State Smokers' Rights Laws

Many states have laws that prohibit employers from discriminating against smokers

Arizona

California

Colorado

Connecticut

District of Columbia

Illinois

Indiana

Kentucky

Louisiana

Maine

Minnesota

Mississippi

Missouri

Montana

Nevada

New Hampshire

New Jersey

New Mexico

New York

North Carolina

North Dakota

Oklahoma

Oregon

Rhode Island

South Carolina

South Dakota

Tennessee

Virginia

West Virginia

Wisconsin

Wyoming

Source: American Lung Association 1/12/2009



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# Prohibiting Smoking

- Smoking has not been found to be a disability for ADA purposes
- Different result would apply under HIPAA nondiscrimination rules
- Nicotine addiction is a health condition under the nondiscrimination rules
- Nondiscrimination rules prohibit basing eligibility on health conditions
- HIPAA nondiscrimination rules would prevent denial of health coverage based on smoking
- Because employer's policy (not hiring/firing smokers) does not alter health plan eligibility, nondiscrimination rules do not apply



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# Applying HIPAA Nondiscrimination Rules

- Smoking surcharges/non-smoker discounts
  - Varies premiums based on health condition
    - » HIPAA nondiscrimination rules generally would prohibit
- Rules allow variations based on wellness criteria, subject to several limitations
  - Reward/surcharge cannot exceed 20% of individual COBRA cost
  - Reasonably designed to promote health or prevent disease
  - Available to all similarly situated employees
    - » Requires offering reasonable alternative standard for those for whom it is medically inadvisable or unreasonably difficult to meet wellness criteria



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# Applying Rules to Smoking Surcharge/Discount

- Assume COBRA premium (102% of actual cost) for individual coverage is \$306 per month
  - Smoking surcharge/discount cannot exceed \$60
- Plan must allow at least one chance per year to qualify
  - If someone quits smoking in the middle of the year, plan is not required to immediately change contribution
- Alternative to actually quitting must be offered
  - Permissible alternative to not smoking: if nicotine-addicted, participant can attend smoking cessation program
  - Rules provide a sample disclosure



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# Balancing Risks and Rewards

- With a few exceptions, risks of implementing wellness programs are difficult to quantify
  - Same applies to rewards of implementing wellness programs
- Measures to limit risks
  - Reward or penalize behaviors—not conditions—in all cases
  - Communicate program clearly and do so well in advance
  - Provide reasonable incentives/discounts/penalties
  - Explain incentives/discounts/penalties clearly and conspicuously
  - Enforce or award incentives/discounts/penalties uniformly



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# Questions



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# Weighing the Legal Implications of Wellness Programs

David S. Mohl  
Senior Counsel  
CIGNA

David.Mohl@CIGNA.com

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