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Workplace Wellness Programs – Key Legal Considerations

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Wellness programs have been, and continue to be, of interest to both employees and employers. Employees are more and more aware of healthy living initiatives. Similarly, employers are being inundated with information about the importance of employee health and workplace productivity. Due to mutual interest, it is tempting to jump into the implementation of new wellness programs with both feet. Beware, however, as there are hidden concerns in wellness program implementation and maintenance. The following are a few of the key issues to consider.

Incentive Confusion

Effective January 2019, the EEOC formally removed its 30% incentive limit under the Americans with Disabilities Act ("ADA") and Genetic Information Nondiscrimination Act ("GINA") regulations. The EEOC removed this limit pursuant to a decision in the U.S. District Court for the District of Columbia which held that there was no supported justification for the proposed incentive threshold of 30%. Prior to removal, employers could, with some comfort, offer penalties or rewards up to 30% of the cost of self-only coverage i
otherwise be protected under the ADA and GINA. Any
would cause the ADA and GINA to be violated because
and "involuntary" under the acts.

As a result of the EEOC's recent action, employers are
paths forward and will find very little comfort in knowi
Without clear guidance, employers more comfortable v
limit should still apply and hold to this limit within the
consider that a lower limit (such as 10%) is the best op
is potentially too high. An alternative option would be to maintain the 30% incentive for

screenings that require disclosure of otherwise protected information but also ensure that the same 30% incentive is available for employees through less invasive means, such as attending health seminars. Experienced ERISA counsel can help discuss these options in more depth and the risks associated with these different choices.

Tax Surprises

Rather than simply offering a reduction in the deductible, premium or copayment of a certain percentage, employers may also be interested in exploring other wellness incentives. An example of such incentives would be gift cards, off-site gym memberships, cash payment for approved purchase of at-home exercise equipment, healthy snacks or water bottles, or access to healthy living seminars. Alternatively, employers may try to restructure the employee's working hours by offering additional paid time off, additional vacation, or creating shared positions.

Unfortunately, although reductions in employee cost sharing are nontaxable as a "medical expense," other types of wellness-related rewards and benefits are riddled with questions of whether they will be taxable or nontaxable to employees. Although water bottles, snacks, and some healthy living seminars may largely be classified as "de minimis fringe benefits" and therefore nontaxable, the gift cards, cash payments, and payment of gym memberships often must be reported as taxable income to the employees. Additionally, when the swag gets to be of greater value, such as higher-end Fitbits or a set of golf clubs, further analysis on whether the items would qualify as "de minimis fringe benefits" will be required. An employer acting out of generosity and for the overall health of his or her employee base can easily overlook its own tax withholding obligations and the tax ramifications to employees.

Conflict with Other Health Plan Objectives

As highlighted above, an employer acting generously can sometimes backfire. One prime example of this is with Health Savings Accounts ("HSAs") being offered with other health programs. HSA guidance limits other "health plans" that may be offered to and utilized by the employees alongside the HSA. Two items that can be overlooked b
promote health and wellness for its employees are on-s
programs ("EAPs").

In order to provide both an HSA and either an EAP or
must carefully consider the nature of the benefits offer
an employer provides to employees significant medical
an on-site clinic then the HSA may become compromis
and excise taxes on any HSA contributions. It is import
benefit programs with experienced ERISA counsel in o
unfavorable financial consequences to employees who may be using HSAs.

Review of Employee Handbooks

Employees may indicate that increased flexibility with their work schedule and additional vacation time are desired to promote more health and wellness in the workplace. If shifting to more flexible work time and increased vacation time is of interest and beneficial to the employer then this could be an option. However, programming to increase flextime availability at work should be discussed with employment law and ERISA counsel to make sure that it is an appropriate fit for the employer. Counsel should further review the company handbook, policies, plans, and employee communications to ensure that employees who are benefiting from flextime or shared position arrangement are covered as expected under the company's plans and policies. Additionally, some employers may view additional vacation time as fulfilling a similar need as flexible work time for its employee base and opt to increase the time provided or change the structure of the vacation policy. However, again a review of the handbook and paid time off or vacation leave policies will be necessary to ensure that the additional vacation time will not result in any surprises, i.e. required payout of unused time on termination.

Considering the ever-growing interest in wellness programming in the workplace, it is always important to be prudent when enhancing your company's benefits. It takes focused and experienced review of your programs to try to help maintain compliance.

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