

The In-house Lawyer's Guide to Workplace Wellness Compliance

Employment and Labor



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Cheat Sheet

- **What do we mean?** Often provided by employers or insurance plans, wellness programs aim to drive greater awareness surrounding well-being, promote healthier behaviors, and reduce overall healthcare costs.
- **Many available options.** Whether “participatory” or “health-contingent,” standalone or part of a group health plan, or subject to the Employee Retirement Income Security Act (ERISA), there are many ways to structure a wellness plan.
- **Get ready for alphabet soup.** An overlapping number of federal laws and agencies sets compliance rules for wellness programs.
- **Stay compliant.** Compliance requirements can include making reasonable alternatives available, maintaining data privacy and security, and ensuring incentives do not lead to discrimination or affect minimum value and affordability under the ACA.

Your chief human resource officer has caught a bug. The wellness bug. She tells you that she is deeply concerned about the staff’s poor health. Medical claims are increasing, and many of the costs are associated with “lifestyle illnesses” such as diabetes, heart disease, and obesity. She has already told the CEO that her 2025 workplan includes aggressive tactics for promoting employee wellness, both to help staff live healthier lives, but also as a measure to contain healthcare costs. She tells you that she wants your buy-in as she creates a “best-in-class” corporate wellness program.

It will kickoff January 1, she eagerly explains. After that date, employees who smoke will be fined, co-workers who walk a certain amount will be paid US$50 per month, and every employee will be required to get an annual physical and submit the results to HR. She's feeling great about her vision! She has already accounted for cost, having shared with the CEO the anticipated increase cost for the 2025 plan year. Suddenly, you are not feeling so well.

But we are here to help you get better quickly. You can get her close to her goals (providing incentives for better employee health and wellness) while still following the law. In this article, we will provide you with an overview of the categories of wellness programs that can work for your company, some of the legal issues you will need to watch out for, and then some strategies for peeling back the layers of the onion.

What is a wellness program?

A wellness program intends to improve and promote health and wellness of an organization's staff and, in the process, reduce overall plan cost. It might incorporate benefits or incentives offered directly by the employer, through an insurance plan or by contract with a third party. A program might offer premium discounts, cash rewards, gym memberships, and other incentives to participate. A program could specifically support smoking cessation, diabetes management, weight loss and preventative health screenings. There are so many ways to mix and match here.

So first, you need to be clear about what your organization is trying to accomplish through your wellness program. Setting organizational objectives at the start will give you a rubric to measure desired tactics and outcomes. Your company could be motivated by any or all of the following reasons:

Improve employee health

By promoting healthier lifestyles and providing resources for physical and mental well-being, employers aim to reduce the incidence of chronic diseases and other health issues among employees.

Increase productivity

Healthier employees tend to be more productive, with fewer sick days and higher levels of engagement and performance at work.

Reduce healthcare costs

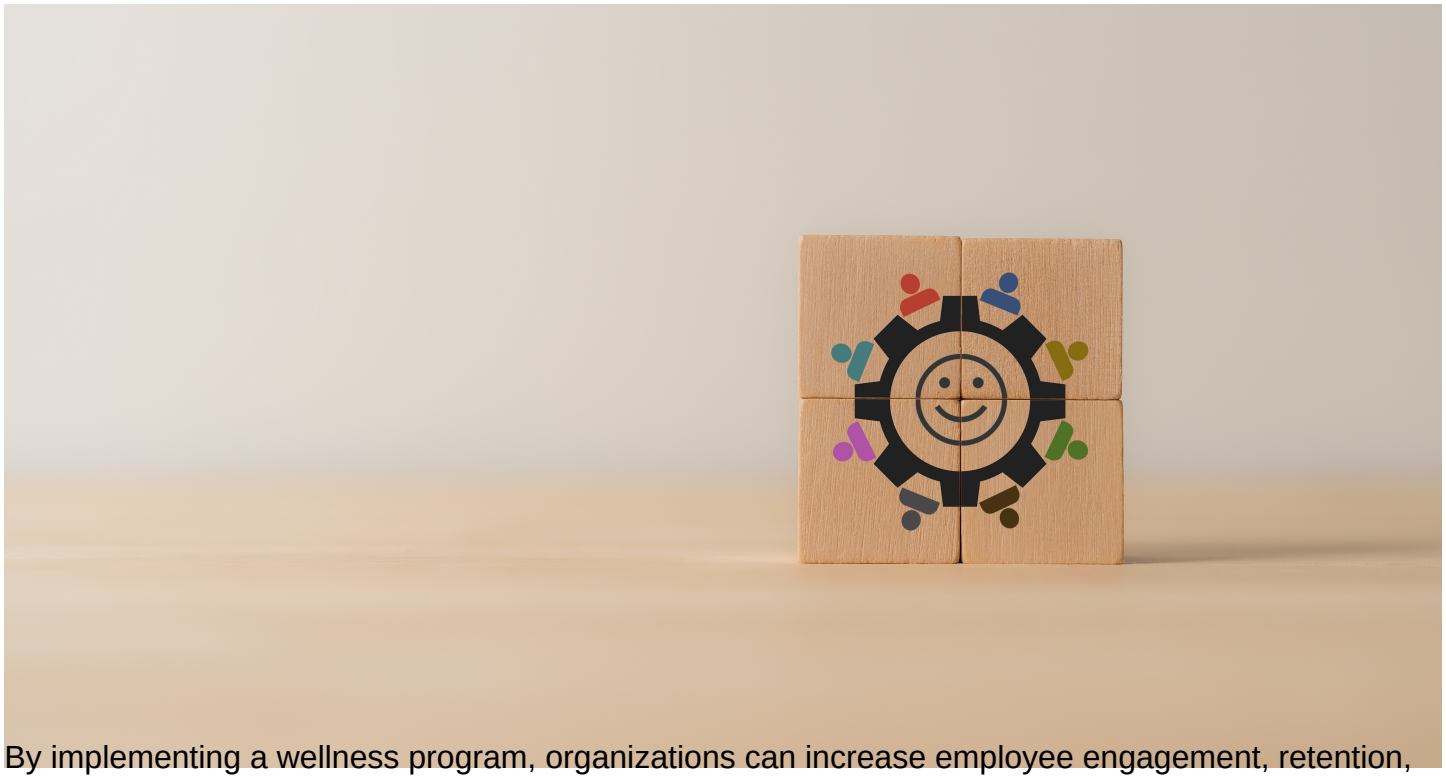
Wellness programs can help lower healthcare costs for both employers and employees by reducing the need for medical treatment and managing chronic conditions more effectively.

Enhance employee morale and job satisfaction

Offering wellness programs shows that an employer cares about their employees' well-being, which can boost morale, increase job satisfaction, and improve employee retention.

Attract and retain talent

Competitive wellness programs can be a valuable perk that attracts new employees and retains existing ones, contributing to a positive workplace culture.



By implementing a wellness program, organizations can increase employee engagement, retention, and well-being. 3rdtimeluckystudio / *Shutterstock.com*

Is your program going to be "participatory" or "health contingent"?

Establishing a wellness program most likely involves some regulatory compliance work no matter which direction you go. However, you need to decide up front whether your program is going to incentivize specific health outcomes.

Participatory

In general, participatory programs require participation, and incentives do not discriminate on the basis of a health factor. According to Affordable Care Act (ACA) wellness regulations, these programs must be available to all similarly situated individuals regardless of health status. Examples include reimbursing fitness center memberships, rewarding participation in diagnostic testing, waiving co-payments or deductibles for preventive care, and reimbursing smoking cessation program costs regardless of outcomes.

Health-contingent

Health-contingent programs, on the other hand, require individuals to meet health-related standards to earn rewards or to undertake more than similarly situated individuals to earn the same rewards. These programs are further divided into activity-only and outcome-based wellness programs.

Activity-only programs

Activity-only programs require participants to complete activities related to health factors to earn rewards but do not require specific health outcomes. An example might include incentives to walk a certain number of steps a day, with reasonable alternatives required if a participant's medical condition prevents them from meeting the reward requirements.

Outcome-based programs

Outcome-based wellness programs require participants to achieve specific health outcomes to earn rewards and typically involve a two-tier structure. The first tier involves a measurement or screening, such as measuring a participant's Body Mass Index (BMI). In this example, if the participant's BMI is determined to be outside the plan's definition of a healthy range, they move to the second tier, which requires additional steps such as meeting a health coach or complying with a care plan.

ACA regulations for wellness programs include annual qualification requirements, reward limits, program descriptions, reasonable design standards, and uniform availability requirements. Programs must allow participants to qualify for rewards at least once a year, and incentives cannot exceed 30 percent of the employee-only coverage premium or 50 percent for tobacco-related programs. Plan materials must disclose the existence of reasonable alternative standards or waivers, and programs must be designed to improve health or prevent disease without being overly burdensome or discriminatory.

Here's an example of how an employer could create a "reasonable alternative" program for curtailing tobacco use.

Let's imagine a scenario where you want to create an incentive for tobacco users on your staff to quit. Unfortunately, doing so is not as simple as charging smokers more for their share of health insurance premiums as such a program design may discriminate on the basis of a health factor,

namely nicotine addiction. However, if you provide a “reasonable alternative” means to obtain the same benefit as a non-smoking smoking employee (such as participation in a smoking cessation program), your wellness incentive can be saved. Characteristics can include:

Awareness

Tobacco users must be notified about and aware of the reasonable alternative.

Availability

It must be an option for everyone each year, regardless of the individual’s achievement in prior years.

Cost

At least one reasonable alternative option should be available at no cost to the individual.

Individual circumstances

If an individual’s physician states that the standard is not medically appropriate for that individual, an employer must provide a different reasonable alternative that accommodates the physician’s recommendations.

Time commitment

The time required to complete the reasonable alternative must be realistic. For example, regulations state that requiring attendance at a one-hour class every night would not be reasonable.

Reward duration

Individuals who complete the reasonable alternative of a company-sponsored quit smoking program must receive the reward for the full plan year.

Get ready for an alphabet soup of compliance requirements

When it comes to wellness programs, ERISA and the ACA are not the only games in town. The potential for discrimination on the basis of a disability and/or making impermissible disability-related inquiries trigger requirements under the Americans with Disabilities Act.

Additionally, wellness programs have to navigate the stringent protections for genetic information under the Genetic Information Nondiscrimination Act (GINA). Even if your wellness program stays away from genetic information, the privacy and security regulations under (Health Insurance Portability and Accountability Act (HIPAA) create detailed compliance requirements for program administration.

More recently, the DOL's Employee Benefit Security Administration (EBSA) expanded its cybersecurity requirements to include health and welfare plans such as wellness programs. And don't forget the Internal Revenue Service. In many instances, wellness incentives can be taxable income.

For instance, imagine that your program requires individuals to provide proof through an app that they are meeting a certain average number of steps per day or certify that the medical condition that prevents them from participating. The provision of information relating to a disability, even through an app, could put you at risk for an ADA claim unrelated to the program because you as an employer, would be aware of the disability.

Further, if the program permitted spouses to participate, the spouses medical information could be considered genetic information relative to the employee, raising GINA issues. Finally, if the app is not secure and doesn't meet HIPAA security requirements, in the event of breach, you could find yourself subject to a Department of Health and Human Services Office of Civil Rights investigation, followed by a Department of Labor audit.

If your company purchases healthcare insurance, your company might need to comply not only with the requirements referenced above, but also with state insurance requirements. However, your insurance company might be well positioned to help you navigate these requirements. If your company is self-insured or wants to create a separate smoking cessation plan, ERISA might help you preempt state laws. However, more of the regulatory compliance work could fall into your hands.

Understand the options and compliance needs

In sum, understanding the types and regulatory requirements of wellness programs is essential for ensuring compliance and maximizing benefits. Programs must be carefully designed and administered to comply with federal and state laws, protect employee privacy, and provide meaningful health benefits.

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