

# Wellness checkup

## How to ensure your program doesn't present legal problems

**B**enjamin Franklin once stated, "In this world nothing can be said to be certain except death and taxes." If he were alive today, he might include on his list of certainties an annual increase in health care costs for employers and employees.

*Smart Business* spoke with Jonathan L. Stark, a partner at Brouse McDowell, regarding the increased attention employers are giving to instituting wellness programs to combat spiraling health care costs and the potential issues that may arise when employers structure such programs.

### Can employees be required to participate in a wellness program?

Yes, employers can institute mandatory wellness plans, but such plans cannot discriminate against plan participants or beneficiaries based upon eligibility, benefits, or premiums because of a 'health factor,' or violate other laws. Health factors include a participant's physical and mental illness, claims experience, medical history and genetic information. Discounted insurance premiums or rebates of deductibles or co-payments if the participant abides by health promotion or disease prevention programs are allowed.

### What significant changes have the final wellness regulations generated?

The final rules, effective Jan. 1, 2014, implement a change in the Affordable Care Act that increases the maximum award allowed under a wellness program from 20 percent of the total cost of health care coverage (employee and employer cost) to 30 percent. The maximum reward can be 50 percent for wellness programs that prevent or reduce tobacco use. Also, the definition of a 'participatory' program has changed slightly. Previously, a program, such as

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a walking program, was participatory, but now it falls within the category of an 'activity-only' program which must offer the five wellness program requirements. Now, participatory programs are more passive, such as attending health education seminars or receiving reimbursement for purchasing a gym membership.

### Can a wellness program dictate that employees not use tobacco?

A wellness program can condition rewards on a participant's non-use of tobacco. However, employers should be aware that some states have laws that protect employees engaging in lawful conduct during off-duty hours, including protections for tobacco use.

### If a program offers rewards to participants for achieving a health outcome, what problems could arise?

Employers should be careful in requiring participants to achieve any specific health outcome (e.g., specific cholesterol level or body mass index) to avoid issues in which health factors may lead to discrimination based on health status, genetic information, medical conditions and disabilities. If a specific target is used to measure compliance in a wellness program, or if a certain activity is required, there should be a reasonable alternative standard for

a participant who may find the standard difficult to meet due to a medical condition or if the participant's doctor advises the participant that satisfying the standard is too risky. An option to waive the standard must also be offered.

All outcome-based and activity-only wellness programs must meet the following five requirements:

- Eligible individuals must have the opportunity once a year to earn health-contingent awards.
- Available awards must not exceed 30 percent of total health plan coverage costs, however, if there are tobacco cessation rewards, those rewards may increase the reward limit to 50 percent.
- Programs must be 'reasonably designed' to promote health or prevent disease.
- Plan information must describe how the reward is earned and offer reasonable alternative means to obtain the reward.
- Participants must have the opportunity to earn the reward. Activity-only programs must offer a waiver of the requirement or a reasonable alternative to the initial standard if an individual's medical condition makes it unreasonably difficult or medically inadvisable to achieve the initial standard. And outcome-based programs must offer a waiver or reasonable alternative to every participant. ●