September/October 2016 Newsletter

Congratulations to Jamie Uselding from Froedtert-Workforce Health for winning the $25 Amazon Gift Card!

As a thank you to those who stopped by the Center for Health and Wellness Law, LLC's booth at the Wellness Council of Wisconsin conference in Green Bay, WI on September 14th, the Center offered a chance to win a $25 Amazon Gift Card. After a randomized drawing, Jamie Uselding was declared the winner. Congratulations!

ADA Notice Required for Wellness Programs Collecting Employee Health Information for 2017

At the HERO Forum 2016 in Atlanta, EEOC Attorney Chris Kuczynski confirmed a conclusion about when to start providing employees a copy of the Americans with Disabilities Act (ADA) Notice required under the ADA final rule issued in May of this year. Attorney Kuczynski responded that those notices should be issued now if your wellness program meets the following criteria:

- You are asking employees or family members to complete a health risk assessment now;

- Completion of that HRA is a condition for receiving an incentive; and
- You are calculating the value of the incentive based on a plan that takes effect in 2017

If this applies to your wellness program, you should issue the ADA notices now, before you ask the employees/family members to complete the HRA. If you need a sample notice, you can obtain one through the EEOC or under "resources" on my firm's website, www.wellnesslaw.com. If you need further assistance with the notice requirement, contact the Center for Health and Wellness Law, LLC.

Clearing the Confusion on Tying Rewards to Spousal Wellness Program Participation

Since the EEOC issued the final rule under the Genetic Information and Nondiscrimination Act (GINA), there have been a number of questions relating to what is permissible with respect to rewarding employees for spousal participation in wellness programs. First, to recap, GINA prohibits employer wellness programs for imposing a penalty or disadvantage on an individual because a spouse's disease or disorder prevents or inhibits the spouse from participating in the wellness program or from achieving a certain health outcome. 29 CFR s. 1635.8(b)(2)(i)(A).

Second, GINA prohibits employer wellness programs from retaliating against an employee because of a spouse's refusal to provide information about his or her manifestation of disease or disorder to the wellness program. 29 CFR s. 1635.8(b)(2)(v).

So, with those rules in mind, how can an employer wellness program tie an employee's reward to his or her spouse's participation, if at all? Let's look at a few examples:

1. Employee can earn reward (the value of which is no more than 30% of the total cost of self-only coverage) if both the employee and spouse meet a certain cholesterol level. If either employee or spouse fails to meet the cholesterol target, the employee does not earn the reward. Permissible?

   Answer: No, this is not permissible. This program is tying the employee's reward to the spouse achieving a certain health outcome. As noted above, GINA prohibits employer wellness programs from imposing a penalty or disadvantage on an employee because the employee's spouse has a disease or disorder that prevents him or her from achieving a certain health outcome. The spouse in this case may have high cholesterol, arguably a "disease or disorder" that prevents the spouse from meeting a certain health outcome. Denying the employee the reward because of the spouse's disease or disorder is not permissible under GINA.

2. Employee earns a reward equal to 15% of the total cost of employee-only coverage and another 15% of that cost if both the employee and spouse do the following:

   a. Complete an HRA

b. Attend a biometric screen (results are irrelevant for purposes of reward)
c. Attend four seminars
d. Provide evidence of a physical exam by their primary care physician

If either the spouse or employee fail to complete all four activities (which all four are presumed to qualify as "participatory" programs under the HIPAA/ACA rules), the employee's reward is $0. That is, both employee and spouse must complete all four activities to earn the full 30% reward. Is this permissible?

Answer: Yes, this is permissible as long as the employee does not feel like they are being retaliated against for a spouse's refusal to participate in the biometric screen, for example. The activities listed above do not ask the spouse to achieve a certain health outcome. Thus, the reward is not tied to the spouse achieving a certain health outcome.

3. Same facts as #2, above, except the reward is equal to 30% for the employee's participation and 30% for the spouse's participation. Would this be permissible?

   Answer: No, this is not permissible because the reward equals 60% of the total cost of employee-only coverage, which exceeds the 30% maximum award available under GINA. The employee only gets the reward if both the employee and spouse complete all four activities. If either the spouse or employee fail to complete all four, the employee's reward is $0, which is the same as a 60% penalty if the spouse refused to provide their biometric information (which violates GINA) or a 60% penalty if the employee refused to provide their health information (which would violate the ADA final rule).

4. Employee can earn a reward of up to 60% of the total cost of employee-only coverage if both the employee and spouse join a fitness club, attend at least three health education classes (from a list of over a dozen options), and volunteer in the community. Is this permissible?

   Answer: Yes, this is permissible because all of these activities are "participatory" under the HIPAA/ACA rules, which does not place a limit on the reward amount. Also, none of the activities involve the provision of health information by the employee or the spouse, so neither the ADA nor GINA rules (and their 30% incentive limits) would apply.

Many of the responses above were confirmed by EEOC Attorney Chris Kuczynski at the HERO Form 2016. The take away is that employer wellness programs should not tie an employee's reward to a spouse's health outcome. Also, the program should be careful not to structure an employee's reward so that the employee feels retaliated against if his or her spouse refuses to provide his or her health information. If your wellness program needs compliance assistance, please contact the Center for Health and Wellness Law, LLC at www.wellnesslaw.com.

Nuggets of Knowledge from HERO Forum 2016

Attorney/President Barbara J. Zabawa presented at HERO Forum 2016 and attended a number of the sessions. Some nuggets of knowledge gleaned from some of the speakers at HERO include:

- "Probabilistic" incentives can be more effective than fixed payments;
- Bigger incentives usually work better, but have the risk of sending the wrong signal;
- Incentives that leverage social connections can be more powerful than those that do not;
- Transparency in your wellness program is important;
- There is little evidence that incentives promote sustained behavior change;
- Research is lacking in how incentives can be designed to be most effective;
- According to one poll, employers are more interested in wellness program participation than outcomes;
- A well-being approach aims for a presence of thriving and absence of illness, whereas a health risk approach aims for preventing bad things from happening.

This is just a brief list of the vast amounts of knowledge shared at HERO 2016. For more information about the program, click here.

Attorney/President Barbara J. Zabawa participated in the HERO Forum 2016 5k Run in Atlanta.

ICYMI: ADA Safe Harbor Loses Wellness Program Potential in Orion Energy Decision

On the same day that the Center for Health and Wellness Law, LLC blogged about the appellate oral argument in the Flambeau case, the district court in the EEOC v. Orion Energy case issued a decision and order. Similar to the Flambeau case, the employee in Orion Energy had to pay 100% of her health insurance premium for refusing to participate in the company's health risk assessment. Also similar to the Flambeau case, Orion Energy made the argument that the safe harbor in the Americans with Disabilities Act (ADA) shielded the company from violating the ADA. The safe harbor allows group health plans to collect health information for purposes of underwriting or administering insurance risks.

That's where the similarities in the two cases end, however. The court in Orion Energy took a surprising turn from the decisions made in the Seff v. Broward County and Flambeau cases by concluding that the ADA safe harbor does **NOT** apply to Orion Energy's wellness program. The court concludes that applying the safe harbor to workplace wellness program is at odds with the safe harbor's intended purpose, which

is to allow plans to conduct basic underwriting and risk classification. Orion Energy's wellness program, as is the case with many wellness programs, was unrelated to basic underwriting and risk classification. Instead, the wellness program was a separate program from the company's health benefit plan: it was implemented after premiums had been set, it was not part of the company's health benefits summary plan, and participation in the wellness program was not required in order to enroll in coverage under the group health plan. The court adopts the EEOC's argument that allowing the safe harbor to apply to workplace wellness programs would read the voluntary medical exam provision, which permits the collection of health information if such collection occurs as part of a voluntary wellness program, out of the ADA.

Although the ADA safe harbor does not apply to Orion Energy's wellness program, the court found that Orion Energy's program did not violate the ADA because ultimately, the wellness program was voluntary. The court reasons that even though employees who refused to participate in the health risk assessment had to pay 100% of their health insurance premium, it was still a choice they could make. According to the court, employers are not required to offer health insurance (although that is arguable under the Affordable Care Act employer mandate), and therefore if an employee chooses not to participate in the wellness program and instead pay 100% of their premium, that is still offering the employee more than an employer is required to offer under the law. As stated by the court, "a hard choice is not the same as no choice." Because the employee had a choice, albeit a "hard choice," the wellness program was still voluntary and therefore not in violation of the ADA.

Of course, the Orion Energy case occurred ***before*** the EEOC released its final rules under the ADA limiting financial and nonfinancial incentives to no more than 30% of the total cost of self-only coverage. Imposing a 100% premium penalty no longer works under the final rules, and the EEOC is not applying that 30% maximum incentive requirement retroactively - meaning wellness programs that exceeded that 30% maximum incentive in the past (like Orion Energy did) will not be punished for doing so. Going forward, however, companies must adhere to the 30% maximum incentive rule if their wellness programs collect health information.

Speaking of the final rules, the Orion Energy court also determined that the EEOC properly exercised its authority when issuing the final rules. Orion Energy tried to argue that the court should not defer to the EEOC's judgment in issuing the final rules. The court disagreed stating that the EEOC had Congressional authority to issue the final ADA rules and that the rules were reasonable.

What does this decision mean for workplace wellness programs?

The Orion Energy decision creates less certainty with relying on the ADA safe harbor and strengthens the case for following the ADA final rules, which take effect starting January 1, 2017. Orion Energy may appeal the case to the Seventh Circuit, which may give that court another chance to evaluate the applicability of the safe harbor and the

final ADA rules. But if and when that happens is speculation at this point. What we do know is that the final ADA rules will take effect well before any other court decision is rendered regarding the ADA safe harbor or final rules. As a result, it is extremely important that your wellness program is compliant with the final ADA rules as well as all the other federal and state laws that impact workplace wellness. The Center for Health and Wellness Law, LLC can help you get there with our numerous compliance options: help desk, compliance evaluation, compliance program implementation, and training opportunities. Visit our website to learn more.

Upcoming Webinars by the Center for Health and Wellness Law, LLC

Friday, October 21, 2016 – Solving Problems in Workplace Wellness Programs, www.HPLive.org.

Tuesday, October 25, 2016 – ACA, EEOC, HIPAA and GINA: Wellness Regulatory Update and How to Handle its Abuse!, www.audiosolutionz.com.