Can wellness be mandated?

Employers grapple with carrot and stick

In response to rising health care costs, increasing numbers of employers are using wellness programs as a means to encourage employees to adopt healthier lifestyles.

Almost a third of companies offering health insurance benefits to their employees are now providing some type of wellness program. After nearly a decade of experience, we've learned that the adage "build it and they will come" is not true of workplace wellness initiatives.

Wellness Councils of America (WELCOA) reports that although eight in 10 employees believe worksite wellness programs are a good idea, only three in 10 actually participate.

This is why incentives have become a hot topic. A recent survey conducted by the ERISA Industry Committee (ERIC), the National Association of Manufacturers (NAM) and IncentOne said that the number of employers using incentives to promote wellness programs rose from 62 percent to 71 percent between 2007 and 2008.

The report included data on the effectiveness of different types of incentives, ranging from trinkets and T-shirts to premium reduction. There is a belief that the quickest and most effective incentives are tied to premium reduction. However, gift cards came out on top in 2008 as the most popular incentive that employers offer, with premium discounts and cash incentives following closely behind.

The emerging use of incentives as a way of getting employees engaged in wellness efforts has created significant concern about the degree to which employers can ethically and legally mandate participation in wellness programs. At what point does an incentive become a mandate? And at what point does the mandate become an invasion of personal rights?

In November 2007, the *Washington Post* described several scenarios in which employers are adopting mandatory wellness measures. Smoking appears to be the behavior targeted most often by employers, but other unhealthy lifestyle behaviors have also come under scrutiny.

In 2007, Scotts Miracle-Gro, the Ohio-based lawn and garden company with six work sites in Maryland and Virginia, announced it would no longer employ smokers and would conduct random urine tests for nicotine. The ban on smoking applies not only to tobacco use in the workplace, but at home as well. An employee who began working for the company in 2006 and who was let go after an initial urine test was positive for nicotine has sued Scotts over the off-site smoking ban.

Clarian Health, an Indianapolis-based hospital system, drew media attention in 2007 when it announced that by 2009, employees who were at high risk in identified health areas, including body-mass index, could expect a $5 per paycheck increase in their medical premium for each risk if they weren't doing something about it. After employee revolt, the company backpedaled and turned the $5 punishments into rewards, increasing employee buy-in to 95 percent.

Locally, many companies are moving beyond T-shirts and bonus dollars to motivate employees. Some companies are making it financially difficult for employees to choose not to participate by offering significant discounts, up to 40 percent or more, on the employee's share of the health care premium.

The most aggressive companies are requiring employees to pay 100 percent of the health premium costs if they don't participate or fail to meet the program's requirements. In some cases these incentives have dramatically improved participation from 20 percent, where no significant incentive is offered, to 90 percent with premium based incentives.

If you are an employer who is struggling with the carrot-or-the-stick approach, there are resources that can help. In a recent WELCOA report, *"Utilizing Incentives to Maximize Participation,"* David Hunnicutt, Ph.D., addresses the distinction between using incentives to manipulate employees rather than providing employees with motivation in helping them to voluntarily adopt a healthier behavior.

He believes that successful employers position programs as a key company benefit, that if embraced, has the power to transform an employee's health status so that they'll not only experience healthier, happier life now, but for years to come.

"The bottom line, is that for wellness programs to survive and thrive over the long haul, employees will have to embrace the concept of workplace wellness: if they don't, the program is doomed. In light of this reality, it is essential that employees view wellness programs as something we do for and with them, not something we do to them," Hunnicutt reports.

If you are considering implementing a mandated wellness program for your company, Littler Mendelson, the National Employment & Labor Law Firm, has issued an extremely useful and readable paper on *"Employer Mandated Wellness Initiatives"* that examines some of the legal challenges posed by wellness programs. The paper offer employers practical insight into navigating the many federal and state laws that must be considered when designing, developing and implementing an employee wellness program, and in particular when implementing a mandatory wellness program. Included are model wellness programs that are likely to reduce the risk of legal challenge. The report is available at www.littler.com.

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