Employers Fine-Tune Wellness Incentives, Wait for EEOC Guidance

Study compares incentive designs with health outcomes

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Financial incentives can encourage employees to participate in workplace initiatives that help workers achieve health goals, but critics see incentive programs as penalizing the unhealthy or as a way to coerce employees to disclose protected health information.

Nevertheless, wellness incentives remain pivotal to workplace wellness programs. A 2019 survey of 164 large companies by Fidelity Investments and the nonprofit Business Group on Health showed that 56 percent of large employers offered a well-being program to their workforce (https://s2.q4cdn.com/997146844/files/doc_news/archive/88150356-0c7e-4f0c-9d5e-8a8aa45131b0.pdf), and the average per-employee financial incentive to participate in such programs was $762. More than one-third of program budgets, on average, were applied to financial incentives that encouraged employees and their spouses or domestic partners to participate.

How incentives affect participation in well-being programs and health outcomes is now the focus of a new study (https://journals.lww.com/joem/Abstract/2020/10000/Influence_of_Incentive_Design_and_Organizational.16.aspx) from the nonprofit Health Enhancement Research Organization (HERO), published in the October 2020 issue of the *Journal of Occupational and Environmental Medicine*. HERO summarized the findings (https://hero-health.org/wp-content/uploads/2020/10/Infographic_HERO-incentives-study_100220_FINAL.pdf) in an infographic.

"There is no magic bullet when it comes to the influence of incentives on employee well-being, but employers can look to this research for a better understanding of how different incentives strategies can influence program participation and outcomes," said Jessica Grossmeier, the study's lead author and vice president of research at HERO.

Over three years, the study tracked the implementation of incentives and health status outcomes at 174 companies that ranged in size from 95 to 24,940 employees. Grossmeier highlighted these study takeaways:

- Any incentive approach must be supported by an organizational commitment to a culture of health, senior leadership support, ongoing comprehensive communications and SMART (i.e., specific, measurable, attainable, relevant, and time-bound) objectives.
- Incentives that incorporate a combination of participation and health-related objectives are associated with higher levels of program participation and statistically significant improvements in lowering workers' cholesterol, blood pressure and blood glucose.
- Incentives alone appear insufficient to produce significant improvements in workers' weight, based on body mass index (BMI) measures.

According to Grossmeier, while most employer well-being initiatives used a mix of outcomes- and participation-focused incentives, the most successful also invested in creating and sustaining a more supportive workplace health culture.

Waiting for Revised EEOC Guidance

The Health Insurance Portability and Accountability Act (HIPAA), as amended by the Affordable Care Act, allows employers to offer incentives of up to 30 percent of the total cost of an employee's health insurance plan to encourage participation in certain types of wellness programs. However, the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA) generally prohibit employers from collecting employee health and genetic information. Both laws have an exception that permits the collection of such information as part of employer wellness plans, as long as an employee provides such information "voluntarily."

In 2016, the U.S. Equal Employment Opportunity Commission (EEOC) issued regulations that allowed employers to provide incentives of up to 30 percent of the cost of self-only health plan coverage for participating in a workplace wellness program, regardless of whether the program was tied to a group health plan.

AARP sued the EEOC over these rules, which AARP argued coerced employees to disclose ADA- and GINA-protected personal health information and therefore made these programs, in effect, involuntary. In December 2017, the district court for Washington, D.C., vacated the regulations, effective Jan. 1, 2019.

New Rules Forthcoming?

That's where the matter stood as of June 11, when the EEOC signaled it was moving forward with new rules on financial incentives in wellness programs, voting 2-1 to send draft regulations to the federal budget office for review.

The text of the proposed regulations was not released, but the transcript of the EEOC hearing (https://www.eeoc.gov/meetings/meeting-june-11-2020-discussion-notice-proposed-rulemaking-wellness-programs/transcript) summarized the key provisions. Since then, no proposed regulations have been issued and it appears that none will be until after the November elections.

A press release issued by the EEOC after its June vote (https://www.eeoc.gov/newsroom/eeoc-holds-remote-public-meeting-wellness-nprm) noted that "in the absence of any ADA statutory definition of 'voluntary,' the [EEOC] proposes that for most wellness programs employers may offer no more than a de minimis incentive to encourage participation, and must meet other requirements, to comply with the ADA." Certain wellness programs, however, "would be permitted to offer the maximum allowed incentive" under HIPAA regulations.

According to Emerald Law, a consultant with benefits compliance firm Sequoia, the EEOC hearing transcript indicated that "under the proposed rules, only employers with health-contingent wellness programs tied to their group health plan (https://www.sequoia.com/2020/08/the-eeoc-advances-proposed-regulations-on-wellness-program-incentives/) (or that qualify as a group health plan) can provide incentives of up to 30 percent of total cost of coverage of the plan in which an employee is enrolled."

Katie Keith, a former research professor at Georgetown University's Center on Health Insurance Reforms and a contributor to the Health Affairs blog, wrote that "based on the hearing, the proposed rule would prohibit most types of wellness programs from using incentives to get employees to disclose health information (https://www.healthaffairs.org/do/10.1377/hblog20200617.824130/full/). Incentives that are too high would coerce employees into sharing this information, which violates the ADA and GINA."

To be deemed voluntary, Keith said, the proposed rule would require most programs that track employees' health outcomes "to offer no more than de minimis incentives to employees to participate."

She added, "It was not clear from the hearing how 'de minimis' will be defined but this could be an important issue"—and one that could oblige employers to redesign their programs.

Related SHRM Article:

Wellness Programs Are in Limbo Without EEOC Regulations (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/wellness-programs-are-in-limbo-without-eeoc-regulations.aspx), *SHRM Online*, May 2019

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