Employers are the principal source of health insurance in the United States, providing health benefits for more than 155 million nonelderly people in America. Escalating health-care costs that are outpacing inflation and wage growth are putting increased pressure on the employer-sponsored health-insurance system. Employers are the principal source of health insurance in the United States, providing health benefits for more than 155 million nonelderly people in America, and according to a recent study by the Kaiser Family Foundation, premiums for employer-sponsored health insurance have risen four times faster on average than workers' earnings since 2000. In an effort to control escalating health-care costs and mitigate their effect on the bottom line, some employers are going beyond utilization management and higher cost-sharing tactics and are instituting "wellness programs" to promote and reward healthy behavior. While this approach is gaining ground with companies such as IBM, Microsoft and Turner Broadcasting, there are legal pitfalls that should be avoided in implementing and administering such wellness programs.

Nondiscrimination Rules for Group Health Plans
The Health Insurance Portability and Accountability Act of 1996 (HIPAA) prohibits group health plans and insurers from discriminating against individuals based on health status. HIPAA nondiscrimination provisions generally prohibit a group health plan from charging similarly situated individuals different premiums or contributions based on health factors (e.g., health status, medical condition, medical history, genetic information or disability). However, HIPAA's safe-harbor exception to the general rule enables employers to establish "wellness programs" to encourage participation in health promotion and disease prevention programs through discounts, rebates and modifications to applicable copayments or deductibles. Alternatively, HIPAA prohibits plans from imposing any penalty for unhealthy activities. U.S. Department of Labor (DOL) regulations issued under HIPAA provide the following specific guidelines for wellness programs:

- A wellness program reward or penalty may not exceed 20 percent of the total cost of coverage.
- The program must be reasonably designed to promote health or prevent disease.
- The program must give individuals eligible for the program the opportunity
An employer who offers discounted health-insurance premiums to nonsmokers must offer the same discount to smokers who participate in smoking-cessation programs.

to qualify for the reward at least once per year.
• The reward under the program must be available to all similarly situated individuals.
• The program must allow alternative standards to accommodate individuals who have medical conditions that prevent them from reaching certain goals to receive a reward, and the employer must advertise those alternative standards. For example, an employer who offers discounted health-insurance premiums to nonsmokers must offer the same discount to smokers who participate in smoking-cessation programs. The wellness program materials must describe the terms of the plan and the alternative standard. Some types of wellness programs are deemed to comply with HIPAA nondiscrimination requirements without having to satisfy any additional standards, assuming that all similarly situated individuals may participate in the program. These include programs which accomplish the following:
  • Reimburse all or part of the cost of fitness-club memberships.
  • Reward participants for diagnostic testing (but not based on outcomes).
  • Encourage preventative care by waiving copayments or deductibles for costs, such as well-baby visits or prenatal care.

• Provide reimbursement for programs to help participants quit smoking, whether or not the participant actually quits.
• Reward employees for attending monthly health-education seminars. In addition to HIPAA, there are numerous laws that impose additional limitations, including the Americans with Disabilities Act, Age Discrimination in Employment Act, Title VII and applicable state and local laws.

Wellness and Disease-Management Programs

In recent years, many employers have begun to provide education, decision-support tools, integrated disease management, coaching, and wellness and preventative-care programs to offer employees more holistic ways to manage their health. Increasingly, employers also are offering incentive programs that provide additional employer contributions toward the cost of benefits if employees pledge to comply with or actively participate in certain health programs. At Xerox, for example, employees who participate in a health assessment receive a $200 credit toward their benefits costs. Another example of employer incentives, according to *HR Magazine*, is the American Institute for Cancer Research's reward of $500 to any employee who quits smoking for one year.

*BusinessWeek* recently described the health-care management approach taken by Scotts Miracle-Gro in Ohio—and its ramifications. In an effort to cut the rising costs of providing health insurance to its employees, the company has invested heavily since 2005 in a multimillion dollar wellness program, complete with a $5-million fitness gym and health clinic to which participating employees have free access. Under the Scotts plan, participants are encouraged to exercise, eat well and consult health coaches for preventative care. In overhauling its approach to health benefits, Scotts doubled the employee share of health premiums and added extra charges for those who refuse to take a health-risk assessment or comply with an intervention plan. Moreover, the company has undertaken an intense consumer-education campaign and hired third party Whole Health Management to manage the wellness program. Whole Health Management manages on-site primary-care and fitness centers for dozens of corporations (such as Continental Airlines and Sprint Nextel) and analyzes aggregated claims data so that Scotts can divine trends, but individual data are kept strictly confidential. Despite some employee reluctance, Scotts expects a return on its investment.
Corporate HR executives who are closely watching the Scotts case rightly question whether it is legal to fire a smoker if his work performance is otherwise acceptable.

Within three to four years of starting the program.

Since last October, as part of the company's wellness program, Scotts employees also have been subject to an anti-smoking policy under which they are randomly drug tested for nicotine. The employment of those who test positive for nicotine may be terminated.

The company announced the ultimatum last November, saying it was allowing employees one year to quit and offering to help with smoking cessation programs and counseling. Scotts, which has approximately 7,000 employees, is one of the largest companies to ban smoking outright, even off the job. Scotts officials consider this just one component of a larger effort to help its employees become healthier. Those efforts have been tempered with a recent lawsuit.

**Scotts Miracle-Gro**
Last August, Scotts Miracle-Gro hired Scott Rodrigues as a lawn-care technician. Rodrigues was made aware of the company's efforts to trim health-care costs through the wellness program—and that Scotts was going tobacco-free on Oct. 1, 2006. Rodrigues recalls the company's interviewer saying that once Rodrigues completed the 60-day probation period, Scotts would help him combat his 15-year smoking habit by paying for counseling, smoking-cessation aids, prescription drugs and hypnosis.

But two weeks after being hired, Rodrigues was fired after he failed a drug test for smoking. In November, Rodrigues filed a wrongful-dismissal lawsuit, now in federal court in Massachusetts, in which he alleges that Scotts discriminated against him by firing him before he was eligible for health-care benefits and had an opportunity to take advantage of the smoking-cessation initiative.

Scotts argues that Rodrigues' job offer was contingent upon the drug test and his at-will employment subject to a defined probationary period.

**A Changing Landscape**
Corporate HR executives who are closely watching the Scotts case rightly question whether it is legal to fire a smoker if his work performance is otherwise acceptable. But although 30 states prohibit workplace policies that discriminate against smokers, neither Ohio (where Scotts Miracle-Gro is based) nor Massachusetts (where Scott Rodrigues was employed) is among them. Invasion of privacy claims, by which courts balance an individual's right to privacy against an employer's need to invade that privacy, may be defeated if an employer can demonstrate it provided reasonable advance notice of the new policy. The result in the Scotts case likely will turn on the court's interpretation of HIPAA nondiscrimination rules and the regulations governing wellness programs.

The implications of the Scotts case will impact an increasing number of companies. According to a recent study of large employers, nearly seven of 10 respondents were using disease-management programs through a health plan in 2005, representing a 50-percent increase over the previous year. During the same period, the number of employers adopting a lifestyle behavior change through a health plan doubled to 40 percent. Wellness programs can represent a win-win solution for employers and employees: employees may indeed become healthier, and employers may achieve significant reductions in their benefits costs. As this is a developing area of the law, employers such as Scotts Miracle-Gro inevitably will face legal challenges over whether a program unlawfully discriminates on the basis of health factors and just how involved employers may become in their employees' health.

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