

A D I F F E R E N T   A P P R O A C H

# Latest Update on Wellness Programs, including Mental Health, Substance Abuse and Drug Testing

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This presentation covers general topics. The statements in the seminar and written materials are not legal advice regarding any specific factual situation.

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# Challenges – Unprecedented Times

- ▶ MENTAL HEALTH CONCERNS
- ▶ SUBSTANCE ABUSE
- ▶ DRUG TESTING COMPLIANCE

# MENTAL ILLNESS IS COMMON

- ▶ 17 million Americans affected in any given year. With 28 million in the workforce, that is approximately 40% of the workforce
  - Alcohol abuse/dependence
  - Major depression
  - Social phobia/anxiety disorder

# MENTAL HEALTH AWARENESS

- ▶ Reducing stigma surrounding mental illness is critical in today's workforce
  - Top-down communication – Upper management support
    - Employer-sponsored wellness programs
  - Employee communications about mental health and well-being
  - Training for managers and supervisors in recognizing and addressing mental health in the workplace

# WELLNESS PROGRAMS

- ▶ Well-designed wellness programs can:
  - reduce health care costs,
  - improve worker productivity and overall morale,
  - reduce health-related absenteeism, and
  - promote employee engagement in their health and well-being.
- ▶ Wellness programs take many forms, including:
  - Disease management programs.
  - Case management programs.
  - Smoking cessation programs.

# EMPLOYEE ASSISTANCE PROGRAM (EAP)

- ▶ As a result, the COVID-19 pandemic has led to renewed focus on EAP implementation and compliance requirements
- ▶ An EAP may encompass a broad range of programs and services, commonly offered in the workplace free of charge to employees from a third-party provider or vendor.
- ▶ Common EAP benefits and objectives include:
  - Promoting employee well-being and resiliency, managing disease, and reducing absenteeism, sometimes in conjunction with a disease management or wellness program, EAPs may offer consulting on:
    - fitness and nutrition;
    - smoking cessation; and
    - stress management.
- ▶ Referral services and short-term substance use disorder counseling, including for alcohol and drug use
- ▶ Mental health counseling (for example, through short-term counseling, grief assistance, or suicide prevention awareness) and substance abuse assistance.

# EMPLOYEE ASSISTANCE PROGRAMS

- ▶ Provided by insurer as part of group health plan
- ▶ Provided in-house by employer
- ▶ ERISA applicability to those benefits that are deemed an employee welfare benefit, unless an exemption applies (e.g., voluntary)
  - Most EAPs are supplemental to other coverage offered by employers and are ERISA-exempt if certain conditions are met

# WELLNESS PROGRAMS USING REWARDS AND INCENTIVES

- ▶ Employer or insurer-provided (part of health insurance program)
- ▶ Rewards for participation
  - Discounts or rebates on health plan premiums or contributions
  - Credits to health flexible spending accounts or health reimbursement arrangements
  - Waiver of cost-sharing
  - Absence of a surcharge for value of benefits payable under a group health plan
  - Cash incentives/gift cards



# LAWS APPLICABLE – DESIGN AND IMPLEMENTATION OF WELLNESS PROGRAMS

- ▶ The Health Insurance Portability and Accountability Act of 1996 (HIPAA)
- ▶ The Americans with Disabilities Act of 1990 (ADA)
- ▶ The Genetic Information Nondiscrimination Act of 2008 (GINA)
- ▶ The Age Discrimination in Employment Act of 1967 (ADEA)
- ▶ Title VII of the Civil Rights Act of 1964 (Title VII)
- ▶ The Employee Retirement Income Security Act of 1974 (ERISA)
- ▶ The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)
- ▶ The Affordable Care Act (ACA)
- ▶ The Internal Revenue Code (Code)

# HIPAA NONDISCRIMINATION

- ▶ HIPAA's nondiscrimination rules generally prohibit group health plans from charging similarly situated individuals different premiums or contributions based on a health factor.
- ▶ Generally, a wellness program is not subject to the HIPAA nondiscrimination requirements if it is both:
  - Provided to similarly situated individuals.
  - Either:
    - not related to a health plan, or
    - related to a health plan **and** the reward is not conditioned on the individual satisfying a standard relating to a health factor.

# HEALTH FACTORS

- ▶ Health status.
- ▶ Medical condition (including both physical and mental illnesses).
- ▶ Claims experience.
- ▶ Receipt of health care.
- ▶ Medical history.
- ▶ Genetic information.
- ▶ Evidence of insurability (including conditions arising out of acts of domestic violence).
- ▶ Disability.
- ▶ Any other health status-related factor determined appropriate by the Department of Health and Human Services (HHS)

# PARTICIPATORY VS. HEALTH-CONTINGENT PROGRAMS

## ▶ Examples of Participatory Wellness Programs

- A program that reimburses employees for all or part of the cost for membership in a fitness center.
- A diagnostic testing program that:
  - provides a reward for participation in that program; and
  - does not base any part of the reward on outcomes.
- A program that encourages preventive care through the waiver of a group health plan copayment or deductible for the costs of, for example, prenatal care or well-baby visits
- A program that reimburses employees for the cost of participating in a smoking cessation program, regardless of whether the employee quits smoking.
- A program that provides a reward to employees for attending a monthly, no-cost health education seminar.
- A program that provides a reward to employees who complete a health risk assessment concerning current health status, without any further action required by the employee regarding health issues identified in the assessment.

# HEALTH-CONTINGENT WELLNESS PROGRAMS

- ▶ Health-contingent wellness programs require an individual to either:
  - Satisfy a standard related to a health factor to obtain a reward.
  - Undertake more than a similarly situated individual based on a health factor to obtain the same reward.
- ▶ Two types of health-contingent wellness programs
  - Activity Only
  - Outcome-Based

# ACTIVITY-ONLY

- ▶ Activity-Only, Health-Contingent Wellness Programs
  - Requires an individual to perform or complete an activity related to a health factor to obtain a reward.
  - Does not require the individual to reach or maintain a specific health outcome.
- ▶ Requirements
  - Once-per-year requirement
  - Size of reward limited
  - Reasonable Design
  - Reasonable Alternative Standard
    - Disclosure requirement – plan or insurer must disclose availability of reasonable alternative standard

# OUTCOME-BASED

- ▶ A wellness program is outcome-based if:
  - A measurement, test, or screening is used as part of an initial standard.
  - Individuals who meet the standard are provided the reward.
- ▶ Examples of outcome-based wellness programs include programs that:
  - Test individuals for certain medical conditions or risk factors (including biometric screening), such as testing for:
    - high cholesterol/ high blood pressure;
    - abnormal body mass index (BMI); or
    - high glucose level.
- ▶ Requirements similar to activity-based program – once-per-year; size of reward limited; reasonably designed; reasonable alternative and disclosure.

# ADDITIONAL CONSIDERATIONS

## ▶ HIPAA Privacy, Security and Breach Notifications

- HIPAA imposes restrictions on the use and disclosure of protected health information (PHI) by HIPAA covered entities (CEs). The HIPAA Privacy Rule addresses, among other standards, the uses and disclosures that CEs or business associates (BAs) may make of PHI. The HIPAA Security Rule requires CEs and BAs to implement administrative, physical, and technical safeguards to secure electronic PHI

## ▶ Americans with Disabilities Act (ADA)

- Prohibits employers from discriminating or harassing on the basis of a disability.
- Requires that employers reasonably accommodate disabled individuals, unless doing so would pose an undue hardship
- Limits an employer's ability to make disability-related inquiries, which may affect the type of questions asked on a health risk assessment.

## ▶ Genetic Nondiscrimination in Health Coverage

- Prohibits genetic discrimination related to health coverage
- Prohibits employment discrimination on basis of genetics



# **ALCOHOL, DRUG AND OTHER SUBSTANCE ABUSE DRUG TESTING IN THE WORKPLACE**

## ▶ Drug Free Workplace Act

- Applies to some federal contractors and all federal grantees and requires that they provide a drug free workplace as a condition of receiving the contract or grant from the federal agency.
- The Act does not require or authorize drug testing or employee assistance programs.

## ▶ Americans with Disabilities Act:

- Prohibits discrimination in employment against a “qualified individual” on the basis of disability.
  - Discrimination includes failure to make reasonable accommodations to known limitations of an “otherwise qualified” person with a disability.

# Hidden Realities – Are PA workplaces drug-free?

- ▶ 75% of drug users are employed
- ▶ Estimated 1 in 10 employees has a substance abuse problem
- ▶ 24% of workers admit to drinking during the workday at least once in the past year
- ▶ 15% of workers nationwide report using alcohol or being impaired on the job in the past year

# Hidden (or not so hidden) Costs

- ▶ Health Care Costs
- ▶ Workers' Compensation Premiums
- ▶ Potential Workplace Violence
- ▶ Employee Morale

# DRUG, ALCOHOL & OTHER SUBSTANCE ABUSE POLICY

- ▶ Communicates clearly the employer's stance on drug, alcohol or other substance abuse
- ▶ Encourages employees with problems to seek help voluntarily
- ▶ Protect health & safety of all employees, customers and the public
- ▶ Safeguard employer assets – tangible and intangible
- ▶ Reduce losses among staff
- ▶ Comply with the Drug-Free Workplace Act of 1988 (and other applicable laws)

# SUBSTANCE ABUSE POLICY TERMS

- ▶ What is the purpose of the policy and program?
- ▶ Who is covered by the policy?
- ▶ When does the policy apply?
- ▶ What behavior is prohibited?
- ▶ Are employees required to notify supervisors of drug-related convictions?
- ▶ Does the policy include searches?
- ▶ Does the program include drug testing?
- ▶ What are the consequences for violating the policy?
- ▶ Are there Return-to-Work Agreements?
- ▶ What type of assistance is available to employees?
- ▶ How is employee confidentiality protected?
- ▶ Who is responsible for enforcing the policy?
- ▶ How is the policy communicated to employees?

# EMPLOYER OBLIGATIONS - WALKING A FINE LINE

## ► Responsibility to:

- Maintain a safe, secure and productive work environment
- Evaluate and discuss performance w/employees
- Treat all employees fairly
- Act in a manner that does not demean or label people

## • No responsibility to:

- Diagnose drug and alcohol problems
- Provide counseling or therapy
- Provide law enforcement

# WHEN CAN EMPLOYERS DRUG TEST?

- ▶ Pre-Employment - most often after a conditional offer extended.
- ▶ Reasonable Suspicion – must be based on “probable cause” – generally, “documented” and objective/observable signs and symptoms; supervisors should be trained – and then supervisor must make call.
- ▶ Post-Accident – objective criteria, and contemporaneousness is critical.
- ▶ Random – computer generated, random test; to which all employees are subjected.
- ▶ Periodic – regularly scheduled in advance and uniformly administered (e.g., annual basis).
- ▶ Return-to-Duty – one-time, noticed test for employee returning to workforce after previous positive test and completion of treatment.



# EMPLOYER EXPOSURE

- ▶ Disability discrimination.

ADA protects job applicants/employees taking prescription medication for disability.

- ▶ Other discrimination claims.

Employer liable for singling out specific groups by age, race, or gender.

- ▶ Invasion of privacy.

Addresses the manner in which the tests are administered.

- ▶ Defamation or false light.

Employee or applicant could have actionable claim if a “false positive” is publicized – but only liable in the event the employer knew or should have known the result was incorrect.

# DRUGS AND ALCOHOL UNDER THE ADA

- ▶ Alcoholism and addiction are disabilities, but....
- ▶ Current alcohol and/or illegal drug use is not.
- ▶ The exemption for current illegal drug use does not include employees who:
  - Successfully completed rehab and are no longer using;
  - Are participating in supervised rehab and are no longer using; or
  - Are erroneously regarded as using illegal drugs

# ADA DOES NOT PROHIBIT:

- ▶ Screening new hires for illegal drugs.
- ▶ After completing a rehabilitation program, testing employees for illegal drug use pursuant to “reasonable policies or procedures.”
- ▶ Random testing for drugs or alcohol on an individual pursuant to “last chance” agreement.
- ▶ Drug or alcohol testing where employer has objective evidence that employee cannot perform essential functions of job or poses direct threat.
- ▶ Asking an applicant if they use illegal drugs.

# EMPLOYERS MAY

- ▶ Prohibit use of alcohol or illegal drugs at work or during work hours.
- ▶ Prohibit employees from working under the influence of drugs or alcohol.
- ▶ Request documentation that employee has a disability and requires accommodation.
- ▶ Hold employees who abuse drugs or alcohol to same “qualification standards” for job performance or behavior as other employees, even if the unsatisfactory behavior or performance is related to drug use or alcoholism.

# REASONABLE ACCOMMODATIONS

- ▶ Time off or leave for treatment, counseling, AA meetings, etc.
  - May include leave beyond the 12 weeks required under the FMLA.
- ▶ Modifications to work schedule.
- ▶ Ability to interact with AA sponsor or health care provider) during work day.

# FAMILY AND MEDICAL LEAVE ACT

- ▶ Eligible employees may take up to 12 weeks of unpaid, job protected leave during any 12-month period for a serious health condition that makes employee unable to perform functions of position.
- ▶ A serious health condition is an illness, injury, impairment, or physical or mental condition that involves:
  - Inpatient care; or
  - Continuing treatment by health care provider.

# PA MEDICAL MARIJUANA ACT

- ▶ The purpose of the Act is to:
  - Alleviate pain and improve quality of life for patients suffering from *serious medical* conditions.
  - Provide access to medical marijuana to patients in a safe and regulated manner.
  - Promote research into the effectiveness of medical marijuana

# ARE EMPLOYEES ENTITLED TO USE MEDICAL MARIJUANA AT WORK?

- ▶ No. State law does not require employers to accommodate the use of marijuana in the workplace.
- ▶ *Nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the premises of any place of employment*



# EMPLOYEE TESTS POSITIVE FOR MARIJUANA BUT HAS A MMA CARD – TERMINATION PERMITTED?

- ▶ *“No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee’s compensation, terms, conditions, location or privileges solely on the basis of such employee’s status as an individual who is certified to use medical marijuana.”*
  - Distinction between MMA cardholder and underlying reason for holding MMA card

# MARIJUANA USE OUTSIDE OF THE WORKPLACE

- ▶ *This act shall in no way limit an employer's ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for the position.*

# TESTING POSITIVE FOR THC?

- ▶ When can MMA cardholders be treated differently?
  - Working with high-voltage electricity
  - Working with certain chemicals
  - Working at a public utility
  - Working in confined spaces or at heights
  - Work that could be categorized as life-threatening or a public health or safety risk

# PRACTICAL TIPS FOR EMPLOYERS

Review and evaluate current handbooks and policies

Implement Wellness or EAP for employees.

Train managers and supervisors.

**Document** everything.

Review hiring practices.

Evaluate drug-testing procedures.

Confidentiality!

# FOLLOW-UP

- ▶ Questions?
- ▶ Comments?

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Shareholder



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