SALSBURY & SALSBURY
A LEGAL PROFESSIONAL ASSOCIATION
75 Milford Drive, Suite 110, Hudson, Ohio 44236

**Date:** January 9, 2009

**Re:** Smoking Cessation & Wellness Plans

Many employers are looking to reduce health insurance costs by banning smoking and adopting wellness programs. This memorandum discusses implementing anti-smoking bans and wellness programs in Ohio.

***Refusing to Hire and Firing Workers Who Smoke in Ohio***

Ohio currently does not have smoker protection laws.[1] Thus, smokers are not a protected class under Ohio or Federal law (unless the ADA is implicated)[2] and, therefore, employers can take steps to refrain from hiring or even fire current employees who smoke.

At least three major Ohio employers: the Cleveland Clinic, Scotts Miracle-Gro Co., and Medical Mutual have stopped hiring smokers. Scotts Miracle-Gro went one step further and mandated that all employees stop smoking or risk losing their job. Scotts Miracle-Gro has fired employees who have not quit smoking. Notably, the company is being sued by a former employee in Federal Court over this policy.[3]

As Ohio law is currently silent on this issue, employers should weigh the savings associated with anti-smoking policies against the potential for litigation – and the costs that naturally follow. Importantly, the new ADA Amendments *may* impact the ability of employers to refuse from hiring smokers or even to fire smokers. The extent is unknown because the 2008 amendments to the ADA have only been effective since January 1, 2009. It will take time for such issues to become clarified. Employers should monitor ADA case law developments and their impact on anti-smoking policies.

---

[1] According to the National Worker Rights Institute, these states have some form of lifestyle discrimination laws: AZ, CA, CO, CT, DC, IL, IN, KY, LA, ME, MN, MS, MO, MT, NV, NH, NJ, NM, NY, NC, ND, OK, OR, RI, SC, SD, TN.
*See* h*ttp://www.workrights.org/issue_lifestyle/*ldbrief2.pdf.

[2] Presumably, some workers will argue that smoking or other lifestyle issues (such as obesity) are "disabilities" under the ADA, especially in light of the recent ADA Amendments Act of 2008 which has expanded the definition of disability.

[3] *Scott Rodrigues v. the Scotts Company, LLC*, in the United States District Court, Massachusetts Case No. 1:07cv10140 (complaint alleges that the firing violates Massachusetts state laws and ERISA)

***Complying with HIPAA when Implementing Wellness Programs***

HIPAA's nondiscrimination provisions generally prohibit group health plans from charging similarly situated employees different premiums or contributions or imposing different deductible, co-payment or other cost sharing requirements based on a health factor.[4] HIPAA does except plans that offer wellness programs from this nondiscrimination rule.

If employees are not rewarded under a wellness plan for satisfying a standard related to a health factor, or if no reward is offered, the program complies with the nondiscrimination requirements (all similarly situated individuals must be allowed to participate). For example, DOL guidance provides that these wellness programs are legal:

- A program that reimburses all or part of the cost for memberships in a fitness center.
- A diagnostic testing program that provides a reward for participation rather than outcomes.
- A program that encourages preventive care by waiving the co-payment or deductible requirement for the costs of, for example, prenatal care or well-baby visits.
- A program that reimburses employees for the costs of smoking cessation programs without regard to whether the employee quits smoking.
- A program that provides a reward to employees for attending a monthly health education seminar.

In each of these cases, the "reward" is not given or withheld based on a health related factor. Thus, employers may legally adopt wellness programs that are not conditioned on employees satisfying a standard related to a health factor, such as obesity or smoking. **The keys are**:

1. participation must be voluntary; and

2. participation by the employee may not be tied to a reward or detriment.

By contrast, wellness programs that depend on health factors are required to meet the standards of the new regulations. For example, wellness programs often require exercise or some other form of physical activity in order to achieve the program reward. The ability to participate in these activities and gain rewards

[4] See FAQS About HIPAA Nondiscrimination Requirements at http://www.dol.gov/ebsa/faqs/faq_hipaa_ND.html

can be limited by a health condition or may be medically inadvisable, and so those portions of wellness programs are impacted by the new HIPAA regulations.

Wellness programs that reward individuals for satisfying a standard related to a health factor are legal if they meet these five requirements to comply with the nondiscrimination rules:

1. The total reward for all of the plan's wellness programs that require satisfaction of a standard related to a health factor is limited – generally, it must not exceed 20 percent of the cost of employee-only coverage under the plan. If dependents (such as spouses and/or dependent children) may participate in the wellness program, the reward must not exceed 20 percent of the cost of the coverage in which an employee and any dependents are enrolled.
2. The program must be reasonably designed to promote health and prevent disease.
3. The program must give individuals eligible to participate the opportunity to qualify for the reward at least once per year.
4. The reward must be available to all similarly situated individuals. The program must allow a reasonable alternative standard (or waiver of initial standard) for obtaining the reward to any individual for whom it is unreasonably difficult due to a medical condition, or medically inadvisable, to satisfy the initial standard.[5]
5. The plan must disclose in all materials describing the terms of the program the availability of a reasonable alternative standard (or the possibility of a waiver of the initial standard).[6]

Thus, for example, a group health plan that complies with the above five requirements may maintain an insurance premium differential between smokers and nonsmokers and not be considered discriminatory.

---

[5] This rule touches on compliance with the ADA as the program must allow any employee with a disability a reasonable accommodation sufficient to allow the employee to meet the standard. Thus, employers should be aware that any wellness program should be designed to comply with ADA rules.

[6] See FAQS About HIPAA Nondiscrimination Requirements at http://www.dol.gov/ebsa/faqs/faq_hipaa_ND.html

***Complying with ADA When Implementing Wellness Programs***

The Americans with Disabilities Act ("ADA") does not prohibit employers from implementing wellness programs that are geared at promoting good health and disease prevention. It does, however, prohibit employers from denying, qualified disabled employees an equal opportunity to participate in, or receive benefits under, programs or activities conducted by those employers.

More than likely, for example, a bona fide wellness program that assesses a premium surcharge on smokers would not trigger the ADA because nicotine addiction, potentially a physical or mental impairment, generally does not substantially limit a major life activity.[7] Of course, other health factors upon which a bona fide wellness program might be based could constitute disabilities as defined under the ADA. For example, providing a premium discount to participants who achieve a particular score on a health risk assessment, where such scores are affected by a person's disabilities (weight, lifting restrictions, heart conditions, etc..), would likely have ADA implications. If so, such programs must comply with the ADA's reasonable accommodation requirements to allow individuals with known disabilities who are asked to participate in these programs.

According to the EEOC's limited discussion and pronouncement of wellness programs, an employer can only guarantee complete compliance with the ADA if participation in the wellness program is voluntary.[8] Consistent with HIPPA, a voluntary program is one that neither penalizes nor rewards employees based on participation.

Finally, the EEOC has stated that any wellness program must also comply with ADA requirements regarding the storage of medical information. In particular the EEOC has stated that the ADA requires employers to treat any medical information obtained from a disability related inquiry or medical examination (including that from a voluntary health or wellness program) as a confidential medical record.[9]

---

[7] This issue has yet to be addressed under the ADA Amendments Act of 2008, which has substantially broadened the definition of disability.

[8] Equal Employment Opportunity Commission Enforcement Guideline on Disability Related Inquires and Medical Examinations of Employees (2005)– Question 22

[9] Equal Employment Opportunity Commission Enforcement Guideline on Disability Related Inquires and Medical Examinations of Employees (2005)– Question 22

***Conclusion***

Currently, in Ohio it is legal for employers to refuse to hire and/or fire employees who smoke. However, employers should weigh the cost of likely litigation against the health insurance cost savings before implementing any anti-smoking ban. Additionally, employers should also consider other factor such as whether such a ban will cost the employer essential employees who will decide not to comply with the ban.

Employers not looking to adopt a strict anti-smoking ban should discuss with their health insurance provider and legal professionals implementing a wellness program that is designed to address smoking and other health issues, and how to ensure that the wellness program meets the described HIPAA nondiscrimination requirements.

**The information contained in this Bulletin is not, nor is it intended to be, legal advice. You should consult an attorney for individual advice regarding your own situation.**