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Client Alert

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Various Legal Issues May Arise in Implementing Wellness Programs

In an effort to address the issue of rising health care costs, employers are focusing on wellness programs. This effort has been reinforced by the Affordable Care Act (the "Act"), which, effective January 1, 2014, not only codified the existing Health Insurance Portability and Accountability Act of 1996 ("HIPAA") nondiscrimination regulations with respect to wellness programs, but also increased the maximum reward that could be offered from 20% to 30% of the cost of coverage. The Act further provided that the Department of Labor, Department of Health and Human Services and Department of Treasury may increase the reward up to 50% of the cost of coverage if the agencies determine that such increase is appropriate. The Act also provided for grants to be awarded to small employers (fewer than 100 employees who work 25 hours or more per week) who did not provide a workplace wellness program prior to the enactment of the Act (March 23, 2010) to provide their employees with access to a comprehensive workplace wellness program. A "comprehensive workplace wellness program" must include:

- health awareness initiatives (such as health education, preventive screenings and health risk assessments);
- efforts to maximize employee involvement and participation;
- initiatives to change unhealthy behaviors and lifestyle choices (such as counseling, seminars and self-help materials); and
- workplace policies to encourage healthy lifestyles, healthy eating, increased physical activity and improved mental health.

Further, the Center for Disease Control ("CDC") is required to study and evaluate employer-based wellness programs to expand the utilization of such programs. The CDC will measure participation in wellness programs and identify methods to increase participation.

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There are various legal concerns businesses should be aware of with respect to the implementation of a wellness program. One issue, with respect to which there has been limited guidance, is whether a wellness program is an ERISA employee benefit plan subject to certain ERISA and HIPAA privacy requirements. The Americans with Disabilities Act ("ADA"), which generally prohibits discrimination against a qualified individual with a disability in employment, compensation and other terms, conditions and privileges of employment (including employee benefits) is a greater concern due to the lack of clear guidance from the Equal Employment Opportunity Commission ("EEOC"). This prohibition against discrimination extends to medical exams and inquiries. In order to make disability-related inquiries or request medical information, such inquiries or requests must be job-related and consistent with business necessity. In light of the ADA's broad definition of "disability," obese individuals, those addicted to nicotine and those with certain cholesterol or blood pressure measurements may be considered disabled. Consequently, practices under a typical wellness program such as health risk assessments and various biometrics become problematic. An exemption to this prohibition against discrimination under the ADA is made for voluntary wellness programs. Under EEOC guidance, a program is voluntary if the employer does not require participation, or penalize employees who do not participate. For example, requiring a health risk assessment as a condition for health plan enrollment would be treated by the EEOC as involuntary. However, to date, the EEOC has taken no position as to whether a financial incentive provided as part of its wellness program would render the program involuntary. Although structuring an incentive as a reward rather than a penalty is likely to be more acceptable to the EEOC, the EEOC has also not expressed its view as to the manner in which the wellness incentive provisions of the Act would interact with the ADA. However, in a recently released informal discussion of voluntary wellness programs and the ADA, the EEOC indicated that if a wellness program is voluntary and requires participants to meet certain health outcomes or to engage in certain activities in order to remain in the program or to earn rewards, it must provide reasonable accommodations, absent undue hardship, to those individuals who are unable to meet the outcome or engage in specific activities due to a disability.

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A 2011 Federal District Court case in Florida, *Seff v. Broward County*, suggested a way that the voluntariness issue might be avoided. The ADA contains a safe-harbor provision that exempts certain insurance plans from the ADA's general prohibitions, including the prohibition for required medical examinations and disability-related inquiries. The safe harbor provision states that the ADA shall not be construed as prohibiting a covered entity from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on identifying risks, classifying risks or administering such risks that are based on or not

inconsistent with state law. The District Court determined that the County's wellness program was a "term" of the County's group health plan for three reasons:

- the County's insurer paid for and administered the program under its contract with the County;
- only those enrolled in the health plan could participate in the program; and
- the program is described in the County's benefit plan handout.

Recently, in affirming the District Court, the Court of Appeals for the Eleventh Circuit held there was no authority for the proposition that an employee wellness program must be explicitly identified in a benefit plan's written document to qualify as a "term" of the benefit plan within the meaning of the ADA's safe harbor provision. It should be noted, however, that the EEOC was not a party to the litigation, and it might not agree with the analysis of the Eleventh Circuit. Also, other wellness programs may not be restricted to participants in the plan, and wellness programs with more expansive eligibility requirements might fall outside of the safe harbor. Nonetheless, the case is a useful precedent for employers maintaining or considering maintaining a wellness program, and it will be interesting to see if it will be followed in other Circuits and whether the EEOC concurs with the Court's analysis.

An employer wellness program must also comply with the Genetic Information Nondiscrimination Act ("GINA"), which prohibits the use or collection of genetic information, including family medical history, for "underwriting purposes." Underwriting purposes include most incentives under a group health plan such as discounts, payments in kind, rebates or other premium differentials; or changing deductibles or cost-sharing mechanisms. To avoid potential GINA issues, many employers have removed family medical history questions from their health risk assessments. If a health risk assessment requires genetic information, no reward under the plan should be provided for its completion.

With respect to the HIPAA nondiscrimination requirements, different sets of rules apply depending upon whether a participant must obtain a certain status or outcome related to a health factor referred to under the proposed regulations as health-contingent wellness programs. Participation only programs, such as programs that provide an award for attending monthly seminars or that reimburse the costs of smoking cessation programs or programs that reimburse all or part of the cost of group memberships, satisfy HIPAA if they are available to all similarly situated employees. However, five requirements must be satisfied for health-contingent wellness programs:

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- the reward may not exceed 20% of the cost of coverage (30% effective January 1, 2014);
- the program must give eligible individuals the opportunity to qualify for the award at least once a year;
- the reward must be available to all similarly situated individuals;
- the program must provide "reasonable alternative standards to obtain the reward for individuals who cannot meet the standard due to a medical condition"; and
- the program must disclose the availability of the alternative standard.

In addition to ERISA, ADA, GINA and HIPAA, there are other employment discrimination laws that employers may need to consider when implementing wellness programs, including the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964. Although not a primary concern, employers providing incentives for participants in wellness programs should also consider the income and employment tax implications of such awards.

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Please contact the Olshan attorney with whom you regularly work or either of the attorneys listed below if you have any questions regarding wellness programs under the Act.

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