

Wellness by decree

Tresa Baldas / Staff reporter
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Employers are increasingly mandating that employees have healthy lifestyles, or face repercussions.

Mandatory wellness programs are popping up everywhere, lawyers say, requiring everything from cholesterol screening to weight-loss plans and yoga classes.

Several employers are starting to reward employees with extra cash for meeting certain company health goals. Others are fining those who refuse to take part in programs such as health screenings or opt not to follow a health coach's plan to get in shape. Some are even firing, or refusing to hire, those who test positive for nicotine use.

These tactics have labor and employment attorneys predicting a barrage of discrimination and privacy lawsuits.

"I think this is a huge untapped area and a litigation minefield," said Ellen Sampson, a labor and employment attorney at Leonard, Street and Deinard in Minneapolis. "When you start asking people about weight, about diabetes, mental health issues or arthritis — about any of those types of issues — you have to ask yourself, 'Are you moving into areas that are protected under the [Americans With Disabilities Act (ADA)]?' "

Legal challenges to mandatory health checkups and screenings are already creeping their way into the courts.

In Massachusetts, a man is suing Scotts Miracle-Gro Co. for firing him after he tested positive for nicotine, violating a company policy banning smoking on and off the job. *Rodrigues v. The Scotts Co.*, No. 1:07-cv-1014-GAO (D. Mass.).

Last year, a federal court in Michigan was the first to address mandatory wellness programs in a case in which firefighters challenged the city of Taylor Fire Department over a mandatory blood draw to detect cholesterol. The plaintiffs claimed that taking the blood violated their constitutional rights. The court denied the city's motion for summary judgment and the blood draws were abandoned. *Anderson v. City of Taylor*, 2006 U.S. Dist. Lexis 38075 (E.D. Mich.).

But some companies are aggressively moving ahead with such plans, despite new federal Health Insurance Portability and Accountability Act rules that prohibit charging employees different rates for health coverage based on wellness, and ADA rules that prohibit employers from asking too many questions about an employee's health.

Maryville, Ohio-based Scotts Miracle-Gro, the national lawn care retailer, has a large-scale mandatory wellness program that includes an outright ban on all smoking. It also charges employees \$40 a month more in premiums if they refuse to take part in a health-risk assessment, and \$67 a month if they fail to comply with a health coach's plan to address various health problems.

Richmond, Va.-based Cadmus Community Corp., a publishing services company, requires workers and spouses to undergo health-risk assessments to get health coverage, including a finger-prick for blood for cholesterol, a blood pressure check and a questionnaire.

Principal Financial Group Inc. of Des Moines, Iowa, has mandatory wellness plans in Iowa and Michigan, where workers at certain firms are required to complete health exams that record weight, blood sugar, blood pressure, cholesterol and tobacco use to qualify for health insurance. Those who score poorly must work with a coach and improve, or face higher deductibles and co-payments.

Starting in 2009, Indiana-based Clarian Health will start checking employees, on a voluntary basis, for cholesterol, blood pressure and weight. Earlier this year, the company had proposed fining smokers, diabetics, the overweight and people with high cholesterol as much as \$25 a paycheck if they didn't meet certain health goals. The company nixed the plan following employees' objections and has instead opted to reward those who meet health goals with an extra \$5 to \$10 in their paychecks.

Worth the risk?

"The fact remains that many employers are cognizant of the epidemic that is the health care crisis," said Greg Keating, co-chairman of the health care practice group at Littler Mendelson. "Some large national employers are even willing to face legal challenges in an effort to reverse the rising tide of health care costs."

Littler Mendelson recently conducted a comprehensive study on employer-mandated wellness programs that looked at the potential legal pitfalls and benefits, and the effect of rising health care costs on employers.

According to Keating, health care costs are projected to double by 2016. Moreover, he said, certain health conditions are particularly prevalent and expensive, such as obesity, tobacco-related illness, diabetes and depression. Obesity alone is costing employers an estimated \$12 billion a year.

But is that justification for mandating a healthy lifestyle for employees?

"The waters are murky here," said labor and employment attorney Neil Martin of the Houston office of Dallas-based Gardere Wynne Sewell. "Mandatory wellness programs — they sound good, but to me it's an issue of managing the unmanageable. They are fraught with all sorts of 'gotchas.' "

According to Martin, the numerous legal risks associated with mandatory wellness programs include running afoul of the ADA, the Health Insurance Portability and Accountability Act and Title VII of the Civil Rights Act of 1964, which prohibits age, race and sex discrimination.

Additionally, 29 states have so-called "lifestyle discrimination statutes," which prohibit employers from taking adverse action against employees for lawful off-duty conduct. Those states include Colorado, Illinois, Nevada and New York.

In states that don't have lifestyle statutes, Martin said employers could probably fine smokers or charge higher health insurance deductibles to the overweight whose problems are the result of voluntary lifestyle choices.

Genetics: off limits

But employers will run into trouble if they penalize those with genetic traits or medical predispositions, he said.

"It's one thing to punish people or penalize them for lifestyle choices," Martin said. "It's another if you're taking punitive action against them and they have a biological disposition or immutable characteristic . . . Sometimes someone's health is beyond their control."

Employee rights attorney Seth J. Elin of Keches & Mallen in Taunton, Mass., believes that employers are going too far in meddling with employees' health habits and choices.

"How far are we going to allow the employer to enter the employee's personal life? Where does it end? If you drink soda, do you get penalized? Are you only allowed to drink water?" said Elin, who expects plaintiffs will use state and federal privacy and discrimination laws to challenge mandatory wellness programs. "I'm sure we'll find ways to challenge it because I find it very troubling."

Joshua Zuckerberg of New York's Pryor Cashman, who represents both employees and employers in labor matters, expressed similar concerns, saying that mandatory health goals are "fraught with complications and potential liability.

"It's one thing to say, 'Look, we're going to encourage individuals to be healthy. If you go out jogging with a club, you're going to get some kind of healthy-person's bonus.' But what I do see as problematic is if they're penalizing people, either for being overweight or obese or for some perceived use of drugs or alcohol. That certainly will lead to legal

issues and complications."

Zuckerberg said employers are most likely to get into trouble if they fail to tie a perceived health problem to performance. For example, if someone's weight problem or diabetes doesn't affect job performance, he or she shouldn't be penalized for it.

Employers have a say?

But if employers are footing the bill for health care, and employees are making poor choices that lead to expensive health problems, some lawyers believe that employers should have some say in the matter.

"I think the law is quite clear that employers have the right to use appropriate financial incentives to encourage employees to remain healthy or improve their health. That's a legitimate part of managing the work force," said Michigan attorney David J. Houston of the Lansing office of Detroit's Dickinson Wright. "It's about time that employers have taken a look at the positive side of taking care of employees, rather than neglecting employee health."

Houston helped draft a wellness program that included a no-smoking policy at Weyco Inc., a medical benefits administrator in Okemos, Mich., that had four employees quit their jobs in 2005 rather than take a mandatory smoking breath test.

Houston said the no-smoking policy triggered a huge wave of controversy.

"I had a lot of people, including lawyers, come at me and say, 'How can you do that?' And the answer is that there's no prohibition on that in the state of Michigan," said Houston, noting the firing policy has not yet faced a legal challenge. "When we started this, everyone said, 'Heck no, you can't do that.' And I guess they were wrong."

And not all mandatory wellness programs are problematic, said Jon D. Meer of DLA Piper's Los Angeles office, who has a number of clients with mandatory health programs in place.

One is an investment banking firm that has a mandatory yoga class, three times a week, for stress-reduction purposes. Another is a commercial real estate company that has mandatory weekly stress-management classes, which include meditation and breathing exercises. A third is a CEO who is a running enthusiast and requires employees to run with him while having meetings.

Why are these programs legal? They all have a business objective: to reduce stress at work, said Meer. Those types of stress-reduction initiatives aren't likely to trigger a lawsuit, he said.

It's the mandatory health screenings and blood draws that will disclose otherwise private health conditions, and that will open the doors to lawsuits, he said.

"Somebody can say, 'I don't want people to know that I'm HIV-positive. I have a right to keep that private. But if I have to participate in blood screenings, that's going to violate my privacy,' " Meer said. "Courts and juries in my experience are very hostile to what they think are employers' invasions into private issues that have nothing to do with the workplace."

Meer also cautioned against hitting employees with fees for failing to meet various health goals, saying, "That \$25 fee can be turned into a very expensive lawsuit."