

## CLIENT ADVISORY

### Employee Benefits: Cost Control Strategies

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## Health Risk Assessments: Be Careful What You Ask For

*Employers need to walk a fine line when implementing HRA programs.*

Wellness programs are a highly effective strategy for reducing a company's healthcare costs. And until recently, such programs seemed to be free of legal pitfalls and potential lawsuits. But thanks to a recent letter from the Equal Employment Opportunity Commission (EEOC), employers now need to walk a fine line when implementing such cost control measures.

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#### ALERT:

EEOC believes mandatory HRA programs violate the Americans with Disabilities Act (ADA).

Formal opinion pending.

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At issue is the use of health risk assessments, or HRAs. HRAs are a primary component to every worksite wellness program. The assessments normally consist of a health questionnaire, biometric screening, and follow up consultations. HRAs provide employees with a comprehensive look at their current health status.

The results, which are 100% confidential, are used to direct employees into employer-sponsored wellness programs, such as smoking cessation, nutrition, stress reduction and weight-loss courses. These assessments are a primary "early intervention" tool which have proven highly successful in identifying and controlling a wide range of employee health issues.

Employers never, repeat NEVER, receive the results of individual employee tests; employers receive only the aggregate "de-identified" results for their entire workforce which eliminates any privacy violation concerns.

In the past, many employers offered financial incentives to employees who voluntarily complete HRAs. Some employers are now requiring employees to complete HRAs as a requirement to be eligible for the health plan or adding a surcharge to their premiums for not participating.

However, lawyers for the EEOC say they don't favor mandatory HRA completion and they are even questioning the use of financial incentives for voluntary participation in HRA surveys. Although the EEOC hasn't taken a formal position on the HRA prerequisite issue, they responded to such an inquiry earlier this year that "this office believes that your proposed policy would violate provisions of the Americans with Disabilities Act." The EEOC went on to note that the ADA requires any questions

about disabilities or medical exams “to be job-related and consistent with business necessity”.

The EEOC is responsible for enforcing the ADA’s employment provisions and it can sue for compensation and punitive damages on behalf of employees who file complaints. Individual employees can take employers to court if the EEOC doesn’t pursue their case.

*Translation: the EEOC has some serious teeth.*

Despite the vagaries of the EEOC opinion, the idea of making HRAs mandatory is appealing - - and rightly so - - for employers battling rising health-care costs and a weak economy. When employers subsidize 70% to 80% of health insurance premiums, they have a right to want employees to manage their health in a productive and proactive manner.

As an employee benefits consultant, the EEOC’s initial assessment is causing me to trend cautiously when advising clients on cost control strategies such as wellness programs and HRAs. While wellness programs and HRAs are, without a doubt, highly effective expense reduction strategies, employers must have eyes wide open when implementing such measures. If the EEOC continues down its current illogical and misdirected path regarding the use of HRAs, many employers could find themselves in an unforgiving chasm of legal battles and government fines.

In my opinion, the EEOC has misinterpreted the intent of employers seeking to implement mandatory HRA participation; they obviously misunderstand the HRA process and the level of information available to employers; and more important, the EEOC seems to be misinterpreting the overall value received both by employees and employers. HRAs save lives and reduce healthcare expenses; mandatory HRAs will simply save more lives and reduce healthcare expenses exponentially...without invading the privacy of individual employees.

The EEOC should consult with their brethren in the Department of Labor which has unequivocally endorsed the use of HRAs. Meanwhile, employers need to stay up-to-date on this potential problem.

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