Beware Of Pitfalls In Helping Employees With New Year's Resolutions

Key steps to minimize the potential liabilities

Posted on 12-24-2018, by:

Todd Wulffson Carothers DiSante & Freudenberger LLP

The top three resolutions in the U.S. for 2019 are (1) to eat healthier, (2) get more exercise, and (3) save more money. It would, therefore , seem to be a win-win-win for companies to offer wellness programs to their employees as a free employee benefit.

It is true the corporate wellness programs such as quitting smoking, losing weight and getting in better shape are great ways for employees to be healthier, which in turn, can increase productivity and morale for all, and reduce insurance costs and medical bills for both employees and the company. However, no good deed in HR goes unpunished, so before your company offers to help its employees with their New Year's resolutions, take steps to minimize the potential liability.

Potential Wage and Hour Liability Issues

An extremely important reason to make sure participation in any wellness program is purely voluntary is that if employees who can show they were required to participate, it becomes a compensable event – including potential overtime.

Even if employees can simply show their participation was strongly encouraged or linked to a workplace advantage (such as face time with executives or having one's name posted on the break room wall as winning the kickball league), the time spent at the activity can be considered "on the clock" and thus compensable at their regular rate (plus potential overtime and penalties).

If the fitness activity such as employer-sponsored kickball, requires both participation in the games and practice sessions (this is why kickball is better than softball – because no one really needs to practice and you really just need something to serve as bases and one big rubber ball) the claim for unpaid wages could be significant (and penalties and interest may attach).

If the activity is deemed to be "on the clock," the employer has to compensate the employees not only for the time spent, but also to reimburse them for mileage, equipment and anything else they claim was necessary for them to participate, such as babysitting fees (yes, seriously, no good deed goes unpunished in HR).

Therefore, the waiver recommended above should clearly state that participation is voluntary and will not be compensated. To increase the defensibility of it being an "off the clock" activity, it is best to conduct the fitness activity away from the workplace if possible, make sure business is not discussed while participating (the idea is to get away from the stress of the workplace after all), and it is a good idea to have a written policy and solid practice of requiring employees to record working time spent away from the workplace – so as to emphasize that the fitness activity is not working time, since no recording of time is being done.

The foregoing parade of potential horrible should not dissuade you or your company from adopting and encouraging an employee wellness program. The benefits of such a program – both to the employees and to the business – will almost always dramatically outweigh the risks; but like anything else involving potential HR-related liability, the company *will* be best served by human resources personnel who can spot the often hidden liability issues and navigate around them.

It is also a good idea to work with counsel who is familiar with the nuances of wellness programs, and who understands

the federal and state laws (particularly with respect to disability discrimination, the collection of health insurance information, and wage and hour laws) that are involved. A corporate wellness program is, therefore, similar to starting a new, personal fitness program: It is a great idea, but check with a professional (in this case, HR and Legal, instead of a doctor) before you start.

Any Program Must Be Accessible to All Employees

Just like with every other employment policy and practice, wellness programs must be offered and provided in a non-discriminatory way. Whether you are starting an employee kickball league (yes – it's a thing), a weight-loss challenge, or even discounted memberships to a local gym, you must be mindful of potential disability discrimination claims.

The federal Americans with Disabilities Act (ADA) (along with state analogs such as the California Fair Employment and Housing Act) protect employees from real *or perceived* disability discrimination. The wellness program offered must, therefore, be accessible to all employees. They do not all have to participate, but the activity should not exclude some employees – or offer a choice of activities, some of which are accessible to all.

Discounted gym memberships for example, are accessible to all employees, whereas the kickball team may exclude some (although you can get very creative with accommodations – like having someone kick or run for them, or let them use a hockey stick to hit the ball), but if you offer both, it reduces the likelihood that someone will claim they are feeling discriminated against by the company's new wellness initiative.

There has also been a good deal of litigation over the past several years regarding wellness programs under the ADA, focused on restrictions on potential financial incentives offered to increase participation, notice to employees when collecting medical information (including their weight), and confidentiality and security requirements for health-related information collected.

It is also important to know that even if you collect health information properly, you have to ensure that it is not used to discriminate against employees with respect to raises, bonuses, promotions, and other terms and conditions of employment. In other words, limit access to any information collected, and train managers properly.

Participation Must Truly Be Voluntary (i.e. Minimize Peer Pressure)

As a general rule, employers are not typically liable for injuries suffered by employees at recreational or voluntary events, even when those events are offered exclusively to employees (e.g. company picnics, holiday parties or kickball games). However, it is not sufficient merely to call your wellness program "voluntary." If participation is encouraged strongly enough (peer pressure), the financial incentive is high, or if an employee otherwise reasonably believes that failure to participate might affect their review, their bonus or their raise, juries are unlikely to view the program as voluntary (and remember – it's a group of 12 licensed drivers that will be looking at your wellness program with a proverbial microscope in any litigation).

There also is the workers' compensation dilemma: one the one hand, if the wellness program is encouraged and sanctioned, a good argument can be made that it's covered by workers' compensation insurance if there are any injuries, which may dramatically increase the cost of your insurance; on the other hand, however, if it is completely voluntary such that workers' compensation insurance does not apply, then the employee can sue your company outside of the workers' compensation system, which could result in a much larger recovery.

Before you engage in any corporate wellness program, it is a good idea to check with your workers' compensation carrier, find out the financial risk, and decide whether you want workers' compensation coverage to apply (if you have the option).

Whether it is lunchtime yoga, a co-ed softball team (everything has to be co-ed by the way), or a weight-loss challenge (prizes should be wellness-related, like gift certificates to a nutrition store, never cash), employers need to take affirmative steps to make sure the program is truly voluntary to avoid liability. A good starting point is simply to offer the option to participate or not, without encouragement either way. Make sure managers are told the importance of it is voluntary and ask them to be mindful of peer pressure, even innocent-looking if it could possibly make some employees feel excluded or shamed.

Another good idea is (in conjunction with qualified counsel) to have all employees sign a waiver, confirming that they know it is a voluntary activity; it will have no effect on terms and conditions of their employment; they will not be compensated; and they understand there is a risk of injury that will not (or will if you have confirmed coverage) be covered by workers' compensation insurance. Many states have specific language that must be used for someone to waive their rights to sue if engaging in an activity that has a risk of physical injury (and even kickball runs the risk of sprained ankles and pulled muscles).

Author Bio

Todd Wulffson is the Orange County Office Managing Partner at Carothers DiSante & Freudenberger LLP. Todd has focused his practice on counseling and defending businesses in labor and employment matters for close to 30 years, and was also the General Counsel and SVP of Human Resources for a public company for several years. He frequently presents and publishes articles on a wide variety of employment law-related topics.
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December 2018 HRIS & Payroll

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