BACKGROUND:

In the wake of recent litigation challenging the legality of certain workplace wellness programs under the Americans with Disabilities Act (ADA) and the Genetic Information Non-Discrimination Act (GINA) – Congress introduced wellness legislation in the House and Senate – H.R. 1189, introduced by Representative John Kline, and S. 620, introduced by Senator Lamar Alexander. The Council has communicated with members of Congress, letting them know that S. 620 and H.R. 1189 strike the right balance between providing certainty to employers while also ensuring an appropriate role for the Equal Employment Opportunity Commission (EEOC) to protect employees from discrimination.

Likely in response to the legislation and the litigation, the EEOC released long-awaited proposed rules that amend ADA regulations relating to employer wellness programs. The proposed rules provide guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that include disability-related inquiries and/or medical examinations – though the rules do also raise a number of new questions. Additionally, at a Senate hearing in mid-May, the EEOC indicated rules pertaining to the GINA would be published this summer.

TALKING POINTS:

- Employer-based wellness programs are important for achieving better health outcomes for employees and their families.

- Wellness programs also have the potential to increase employee productivity, improve workforce morale and engagement and reduce health care spending.

- Employers applaud Congress for having worked on a bipartisan basis to craft the wellness provisions in the Patient Protection and Affordable Care Act (PPACA) that built upon HIPAA.
• PPACA’s bipartisan wellness provisions increased employer flexibility in designing programs to improve the health of employees and their families.

• Notwithstanding employers’ increasing interest in establishing wellness programs, a great deal of legal uncertainty exists with respect to the application of both GINA and the ADA to these programs.

• The EEOC recently published a proposed rule that answers some of the long standing questions. However, it also raises new questions.

• For example, while the materials published by the EEOC describing the proposed rule say it tracks the HIPAA and PPACA, it is different in two important ways:
  
  o First, the proposed rule says premiums may vary by up to 30 percent of the total cost of employee-only coverage, in contrast to HIPAA and PPACA, which permit incentives of up to 30 percent of the total cost of coverage enrolled in by the employee. It is unclear if the final rule will allow premiums to vary by 30 percent of the cost of individual or family coverage as HIPAA and PPACA permit.

  o Second, PPACA gave the secretaries of Labor, Health and Human Services, and the Treasury authority to increase the reward available up to 50 percent of the cost of coverage if the secretaries determine that such an increase is appropriate. The EEOC proposed rule does not adopt this same flexibility.

• Congress should convey to the EEOC that the commission should clarify these points by working within the exact HIPAA and PPACA structure to provide certainty and stability to employers.

• Employer-sponsored benefit plans are now being designed with the express purpose of giving each worker the opportunity to achieve personal health and financial well-being.

• To maintain global competitiveness and help achieve good health in our communities, American companies must be allowed to encourage healthy behavior with every available tool.