WELLNESS PROGRAMS: COMPLIANCE CHALLENGES

Wellness programs interact with several federal laws, such as HIPAA, GINA, the ADA and, most recently, health care reform.

Employers that offer health benefits to their employees may also offer wellness programs to contain health plan costs, help employees stay healthy and increase employees' knowledge as health care consumers. Wellness programs – also referred to as disease-management programs, employee wellness plans or programs, corporate wellness programs, or a range of other names – take many forms. They may cover only employees, or they may also cover other family members. Wellness programs may offer only limited benefits (e.g., informational brochures or periodic educational sessions) or a wide range of benefits (e.g., information, education, preventive care and wellness rewards).

In addition to plan benefits considerations, federal laws, including the Health Insurance Portability and Accountability Act (HIPAA), the Genetic Information Nondiscrimination Act of 2002 (GINA) and the Americans with Disabilities Act (ADA), can affect the design of a wellness program. The Patient Protection and Affordable Care Act (PPACA), enacted on March 23, 2010, and commonly known as "health care reform," also includes changes that affect how wellness programs can operate. These federal laws, as well as the influence of state law, are important considerations when designing a wellness program. This white paper answers common questions employers have regarding overcoming compliance challenges when designing a wellness program.

Questions addressed are:

1. What is a participation-only wellness program?
2. What is a standard-based wellness program?
3. What are alternative standards?
4. What are some examples of standard-based wellness programs that meet HIPAA requirements?
5. What are some examples of standard-based wellness programs that would not meet HIPAA requirements?
6. Can an employer charge a higher premium, i.e., a surcharge, for employees who smoke?
7. Can an employer require that an employee pass an annual physical exam to be eligible to enroll in or to stay enrolled in the group health insurance?
8. What is a health risk assessment?
9. Can a health risk assessment ask questions about genetic information?
10. Can a financial inducement be provided for completion of a health risk assessment as part of a wellness plan?
11. Can an employer ask an employee to participate in a voluntary medical examination?
12. Can an employer require that every benefits-eligible person take a health risk assessment and/or submit to biometric screening?
13. Can an employer ask employees to take a health risk assessment if it is voluntary?

WELLNESS PROGRAMS AND HIPAA

HIPAA generally prohibits a plan from discriminating among "similarly situated" individuals based on their health status. This means, among other things, that plans cannot charge individuals different premiums or impose different costs (i.e., through deductibles or copays) based on the presence or absence of a health factor. However, HIPAA also affirmatively recognizes that the nondiscrimination provisions were not meant to prevent a group health plan from establishing premium discounts or reduced copayments or deductibles in return for "adherence to programs of health promotion and disease prevention." Thus, if designed in accordance with HIPAA requirements, a wellness program may be exempt from HIPAA's general nondiscrimination requirement.

Interim final regulations, issued jointly by the Department of Labor (DOL), Health and Human Services (HHS) and the U.S. Department of the Treasury (Treasury) in 2006, provide guidance for evaluating whether a wellness program is permitted under HIPAA's nondiscrimination requirements. Different requirements apply under HIPAA depending upon whether the wellness program is a participation-only program – which rewards participation in the program regardless of whether the individual satisfies a standard related to a health factor – or a standard-based program, which provides a reward that is contingent on satisfaction of a standard related to a health factor. If the program is participation-only, the interim final regulations require only that the program be available to all similarly situated individuals. If the program is standard-based, the interim final regulations require the program to meet five specific conditions, discussed in Question 3.

1. What is a participation-only wellness program?

Wellness programs that do not condition eligibility for a reward upon a participant's ability to meet a health standard are known as participation-only programs. These programs are permissible if participation in the program is available to all "similarly situated" individuals.

"Similarly situated" relates to the status of the individual in the plan (e.g., active employees versus former employees, participant versus beneficiary) as opposed to the health status of the individual. As long as the program is made available to all similarly situated individuals, the participation-based program would satisfy HIPAA's interim final regulations. However, if the program is only made available to highly compensated or management employees and not to other similarly situated active employees, the program would likely not satisfy the requirement imposed by the interim final regulations.

2. What is a standard-based wellness program?

A standard-based wellness program is one that conditions eligibility for a reward upon a participant's ability to meet a standard related to a health factor (e.g., an employee must maintain a cholesterol level below 200). These programs are allowed only if they meet the five requirements set forth in HIPAA's interim final regulations:

a. The total reward for all the plan's standard-based wellness programs must not exceed 20 percent of the total cost of employee-only coverage under the plan. If dependents (such as spouses and/or dependent children) are eligible to participate in the wellness program, the reward must not exceed 20 percent of the total cost of the coverage in which an employee and any dependents are enrolled. Under PPACA, this limit is increased to 30 percent for plan years beginning on or after Jan.1, 2014, and may be increased to as high as 50 percent of the total cost of coverage if the secretaries of the DOL, HHS and the Treasury choose to do so by regulation).

b. The program must be reasonably designed to promote health and prevent disease.

c. The program must give individuals eligible to participate the opportunity to qualify for the reward at least once per year.

d. The reward must be available to all similarly situated individuals. The program must allow a reasonable alternative standard (or waiver of initial standard) for obtaining the reward to any individual for whom it is unreasonably difficult due to a medical condition or medically inadvisability, to satisfy the initial standard.

e. The plan must disclose, in all materials describing the terms of the program, the availability of a reasonable alternative standard (or the possibility of a waiver of the initial standard).

3. What are alternative standards?

A health plan must disclose in all plan materials describing the standard-based wellness program that reasonable alternative standards (or the possibility of waiving the otherwise applicable standard) are available. The interim final regulations provide that the following language will satisfy the notice requirement:

"If it is unreasonably difficult due to a medical condition for you to achieve the standards for the reward under this program, or if it is medically inadvisable for you to attempt to achieve the standards for the reward under this program, call us at [insert telephone number] and we will work with you to develop another way to qualify for the reward."

For example, if a plan offers a premium discount or other reward based on not smoking, then an alternative must be offered, such as completing a smoking cessation program and receiving the same discounted premiums regardless of whether the individual still smokes. For smoking in particular, the DOL maintains that addiction to nicotine is a medical condition. Therefore, if the employee's physician certifies that it is unreasonably difficult or "medically inadvisable" for an individual to quit smoking, then the individual would be eligible for the alternative standards available under the program design.

4. What are some examples of standard-based wellness programs that meet HIPAA requirements?

The interim final regulations contain several examples of programs that meet the requirements for standard-based wellness programs. Below are three examples of acceptable standard-based wellness program plan designs.

Example 1
A group health plan implements a surcharge of 20 percent of the cost of employee-only coverage for employees who do not provide an annual certification that they have not used tobacco products in the preceding 12 months. The program provides that individuals for whom quitting smoking is unreasonably difficult due to a medical condition (such as addiction to nicotine) or for whom it is medically inadvisable to attempt to meet the standard may avoid the surcharge for as long as they participate in a smoking-cessation program, regardless of whether the individuals actually quit smoking.

The program 1) complies with the limits on rewards under the program, 2) is reasonably designed to promote health or prevent disease, 3) provides individuals eligible for the program the opportunity to qualify for the reward at least once per year, 4) ensures the reward under the program is available to all similarly situated individuals, and it accommodates individuals for whom it is unreasonably difficult due to a medical condition, and 5) includes within all the plan materials a disclosure describing the availability of a reasonable alternative standard.

Therefore, the premium surcharge is permissible as a wellness program because it satisfies the five standard-based wellness program requirements.

Example 2
A group health plan gives an annual premium discount of 20 percent off the cost of employee-only coverage for participants who submit to an annual cholesterol test and achieve cholesterol levels below 200. The program provides that an alternative standard (or a waiver of the otherwise applicable standard) will be made available to individuals for whom it is medically inadvisable to meet the standard. The plan materials describing the terms of the wellness program include disclosure that alternative standards are available.

The program 1) complies with the limits on rewards under the program, 2) is reasonably designed to promote health or prevent disease, 3) provides individuals eligible for the program the opportunity to qualify for the reward at least once per year, 4) ensures the reward under the program is available to all similarly situated individuals and accommodates individuals for whom it is unreasonably difficult due to a medical condition, and 5) includes within all the plan materials a disclosure describing the availability of a reasonable alternative standard.

Therefore, the premium discount is permissible as a wellness program because it satisfies the five standard-based wellness program requirements.

Example 3
A group health plan provides for a waiver of the plan's annual $250 deductible (which is not more than 20 percent of the cost of employee-only coverage) for individuals who, shortly before the beginning of the plan year, have a body mass index within a specified range. The program provides that individuals who are medically unable to meet the standard or for whom it is medically inadvisable to attempt to meet the standard may obtain the waiver by walking 20 minutes three times a week. The program permits individual accommodations for individuals for whom the walking alternative is unreasonably difficult due to a medical condition or for whom it is medically inadvisable. The plan materials describing the terms of the program include disclosure that alternative standards (or waiver of the otherwise applicable standard) are available.

The program 1) complies with the limits on rewards under the program, 2) is reasonably designed to promote health or prevent disease, 3) allows participants eligible for the program to qualify for the reward at least once per year, 4) ensures the reward under the program is available to all similarly situated individuals and accommodates individuals for whom it is unreasonably difficult due to a medical condition, and 5) includes within all the plan materials a disclose describing the availability of a reasonable alternative standard.

Therefore, the waiver of the deductible is permissible as a wellness program because it satisfies the five standard-based wellness program requirements.

5. What are some examples of standard-based wellness programs that would not meet HIPAA requirements?

Standard-based wellness programs that fail to meet any of the five HIPAA requirements are not in compliance with the interim final regulations. The following examples are standard-based wellness programs that do not meet the five HIPAA requirements:

Example 1
A discount of 25 percent of the cost of employee-only coverage for individuals who achieve a specified body mass index or who meet an alternative standard would not be acceptable because the reward is too high. However, for plan years beginning on or after Jan. 1, 2014, this limit generally will be increased to 30 percent of the cost of coverage, so the discount would be acceptable at that time.

Example 2
A plan provides for separate discounts of 20 percent of the cost of employee-only coverage for 1) a cholesterol level below 200, 2) a body mass index within a specified range and 3) walking at least 20 minutes three times a week, with no upper limit on the total discount. An individual who meets all three of the standards would get a discount of 60 percent. Since this is more than both the 20 percent limit in the interim final regulations and the 30 percent limit available for plan years beginning on or after Jan. 1, 2014, this would not be an acceptable plan design.

Example 3
A discount of 20 percent of the cost of employee-only coverage for individuals who take an illegal hallucinogen at least once a week would not be acceptable. This is because such a plan design is not reasonably designed to promote health or prevent disease.

Example 4
A plan provides for a discount of 20 percent of the cost of employee-only coverage for individuals who, when they first enroll, have cholesterol levels below 200 or meet an alternative standard. An individual who does not qualify for the discount upon first enrolling cannot later qualify. This would not be an acceptable plan design, because there is not an opportunity to qualify at least once a year for the reward.

Example 5
A plan provides for a discount of 20 percent of the unsubsidized cost of employee-only coverage for individuals with cholesterol levels below 200, with no reasonable alternative standard for obtaining the discount. This would not be an acceptable plan design, because there is no reasonable alternative standard for obtaining the discount for those whom it is medically inadvisable to do so.

6. Can an employer charge a higher premium, i.e., a surcharge, for employees who smoke?

An employer wanting to charge different premiums for smokers and nonsmokers should do so through a wellness plan. As discussed above, HIPAA prohibits a health plan from charging individuals different premiums based on a health status or standard. However, a standard-based plan design that rewards nonsmokers would be permitted if it complies with the five requirements contained in HIPAA's interim final regulations (see Question 3). That would include making a "reasonable alternative standard" available to any individual for whom it is unreasonably difficult to meet the standard due to a medical condition, or for whom it is medically inadvisable to attempt to meet the standard.

In addition, there are state considerations. See Wellness Programs and State Laws for more information.

7. Can an employer require that an employee pass an annual physical to be eligible to enroll in or to stay enrolled in the group health insurance?

No. A group health plan, or a health insurance issuer offering health insurance coverage in connection with a group health plan, is not allowed to establish eligibility rules that discriminate on the basis of a health factor. Under these nondiscrimination provisions, an employee (and any dependent of the employee) cannot be denied coverage under a group health plan or group health insurance coverage based on a health-status-related factor on or after the effective date of HIPAA. Further, the interim final regulations clarify that an employee or dependent cannot be required to pass a physical examination as a condition of enrollment even if the individual is a late enrollee.

Here is an excerpt from the DOL FAQs about the HIPAA nondiscrimination requirements:

Can a Plan Require Individuals to Pass a Physical Exam to Be Eligible?

No. This is at the core of the nondiscrimination rules, and even a late enrollee cannot be required to pass a physical exam in order to be eligible to enroll in the plan.

WELLNESS PROGRAMS AND GINA

GINA consists of Title I and Title II. Whether a wellness program is offered under a group health plan or outside of a group health plan governs which title applies to a particular wellness program.

Title I of GINA regulates the use of genetic information in health insurance and governs health plans and health insurance issuers. As it applies to a wellness program, Title I regulates wellness programs offered under a group health plan or in connection with health insurance coverage, and prohibits collecting genetic information for underwriting purposes or prior to or in connection with enrollment. "Underwriting purposes" is broadly defined to include rules for eligibility for benefits and the figuring of premium or contribution amounts.

Moreover, GINA defines genetic information as including family medical history. Consequently, wellness programs offered under group health plans that provide rewards (such as premium discounts or a waiver of a deductible) for completing health risk assessments that request genetic information (e.g., family medical history) violate the rule against collecting genetic information for underwriting purposes. This is the case even if rewards are not based on the outcome of the assessment.

Title II of GINA regulates the use of genetic information in employment matters and governs private and state and local government employers with 15 or more employees. It is also applicable when a wellness program is offered outside of a group health plan. Title II makes it unlawful for employers to discriminate against an individual on the basis of genetic information in regards to hiring, discharge, compensation, terms, conditions or privileges of employment. Further, requesting, requiring or purchasing genetic information with respect to an employee or an employee's family member is considered an unlawful employment practice.

As it relates to wellness programs, Title II says that an employer may only request genetic information as part of a voluntary wellness program as long as the individual provides the information voluntarily along with a written authorization, the individually identifiable information is provided only to the individual or family member and a licensed health care professional providing the services, and the information is only available for purpose of the services and is not disclosed to the employer, except in aggregate terms.

8. What is a health risk assessment?

Health risk assessments are often used by wellness programs to identify the individuals who can benefit the most from the programs and who represent the greatest opportunities for the plan to save money. In addition, health risk assessments can be used by plan participants and beneficiaries to identify areas of possible concern and to set health-related goals.

Health risk assessments take many forms. Some are questionnaires that ask for information about individual and family health history, daily activity and exercise, alcohol and tobacco use, and eating habits. Health risk assessments can also include basic screenings at the employee's worksite (e.g., blood pressure, cholesterol, body mass index, blood sugar and bone density) and complete physical examinations at a doctor's office or a hospital.

9. Can a health risk assessment ask questions about genetic information?

A health risk assessment may ask questions about genetic information as long as the request is not made prior to or in connection with enrollment in the plan. This concept is addressed in GINA Title I, which provides an example that would satisfy this rule. In the example, the health risk assessment is divided into two parts. The first part of the assessment requests no genetic information. There is also a financial incentive provided to all who complete it. The second part of the assessment requests genetic information and is given only after enrollment without any financial incentive for its completion.

10. Can a financial inducement for completion of a health risk assessment as part of a wellness plan be provided?

The wellness plan exception under GINA Title II allows financial inducements for completion of health risk assessments that include questions about family medical history or other genetic information as long as the employer makes it clear that the inducement will be made available whether or not the participant answers questions regarding genetic information (i.e., the reward is provided to all participants regardless of whether they answer the genetic information questions).

For example: An employer offers $150 to employees who complete a health risk assessment with 100 questions, the last 20 of which concern family medical history and other genetic information. The instructions for completing the health risk assessment make clear that the inducement will be provided to all employees who respond to the first 80 questions, whether or not the remaining 20 questions concerning family medical history and other genetic information are answered. This health risk assessment does not violate Title II of GINA.

WELLNESS PROGRAMS AND THE ADA

The ADA generally protects employees with disabilities from employer discrimination, including discrimination in health benefits. ADA problems may arise with wellness programs when the employer conditions a reward on the outcome of a particular health test (such as a health risk assessment or a physical exam) or when the employer makes the wellness program mandatory. To avoid discrimination issues under the ADA, care must be taken to ensure that the wellness program allows individuals with disabilities equal access to the benefits of the program, and that the program does not impose greater obligations or additional requirements on individuals with a disability in order for them to attain a benefit level available to non-disabled individuals.

Additionally, if the employer is requiring physical examinations or answers to medical inquiries, to avoid discrimination under the ADA, employers are only allowed to conduct these inquiries as part of a voluntary program. While the EEOC enforcement guidance under the ADA notes that a wellness program is voluntary "as long as an employer neither requires participation nor penalizes employees who do not participate," the EEOC has not provided a detailed roadmap on how to determine whether a wellness program is "voluntary" for ADA purposes.

11. Can an employer ask an employee to participate in a voluntary medical examination?

Although the EEOC has not issued formal guidance, one letter issued by the EEOC stated that wellness programs are considered voluntary as long as employees are not required to participate and are not punished for failing to participate.

12. Can an employer require that every benefit-eligible person take a health risk assessment and/or submit to biometric screening?

This practice is generally not recommended, because it raises discrimination issues under the ADA. Though no formal guidance has been released, on at least two occasions, the EEOC has issued informal letters indicating that health risk assessments will violate the ADA if employees are required to take them to be eligible for a group health plan.

In a Joint Committee Session, the American Bar Association posed the following question:

> "Many group health plans now require potential participants to complete a health risk assessment before they may enroll in the employer's group health plan. Other group health plans only permit an employee who does not complete a health risk assessment to enroll in a plan with lesser benefits or only catastrophic coverage. We understand that some consulting firms are advising employers to adopt this approach. In prior Joint Committee on Employee Benefit meetings with the EEOC, EEOC staff indicated that both of these practices would likely not meet the voluntary requirements of the ADA. Has the EEOC's position on this changed? Does the EEOC have a concrete position on at what point requiring a health risk assessment will cease to be voluntary? Will the EEOC be issuing formal guidance on these issues anytime soon?"

The EEOC responded:

> "While the staff noted that the EEOC does not have a formal position on the health risk assessment issue, they would be concerned about voluntariness in a situation where a person does not receive coverage or only catastrophic coverage as a result of not completing a health risk assessment. Staff noted two informal discussion letters from the Office of Legal Counsel, which say that an employer may not condition receipt of health benefits on completion of a health risk assessment."

What is less clear is how the EEOC would view a situation in which the health risk assessment is tied to a financial reward (e.g., decrease in premium payment) instead of eligibility to participate in a health plan. Because the issue is one of voluntariness, the greater the reward for completing a health risk assessment, the less likely the program will be viewed as voluntary. See Question 14 for further discussion of this issue.

13. Can an employer ask employees to take a health risk assessment if it is voluntary?

An employer plan sponsor can request that participants complete health risk assessments or screenings, but completion must be voluntary. Chapter 6 of the Employment Technical Assistance Manual issued by the EEOC states:

> "An employer may conduct voluntary medical examinations and inquiries as part of an employee health program (such as medical screening for high blood pressure, weight control, and cancer detection) providing that: a) participation in the program is voluntary, b) information obtained is maintained according to the confidentiality requirements of the ADA, and c) this information is not used to discriminate against an employee."

If the consequence for not completing the assessment or screening is ineligibility for certain health plans or a greater out-of-pocket cost, is completion really considered voluntary? In other words, those not completing it are penalized, and these penalties may be determined to be so great that participation is no longer considered voluntary.

In an EEOC informal discussion letter dated March 6, 2009, the EEOC stated:

> "Disability-related inquiries and medical examinations are also permitted as part of a voluntary wellness program. A wellness program is voluntary if employees are neither required to participate nor penalized for non-participation. In this instance, however, an employee's decision not to participate in the health risk assessment results in the loss of the opportunity to obtain health coverage through the employer's plan. Thus, even if the health risk assessment could be considered part of a wellness program, the program would not be voluntary, because individuals who do not participate in the assessment are denied a benefit (i.e., penalized for non-participation) as compared to employees who participate in the assessment."

Therefore, an employer may request that an employee voluntarily participate in a health risk assessment, but it is not recommended that group health plan eligibility be tied to completion of that assessment because of interactions with the ADA.

WELLNESS PROGRAMS AND HEALTH CARE REFORM

The passage of PPACA added yet another federal law for wellness programs to consider.

First, PPACA created a grant program to assist employers with fewer than 100 employees who work 25 hours or more per week to provide comprehensive workplace wellness programs. The program has $200 million appropriated for employers that did not provide a workplace wellness program as of March 23, 2010. The law stated that eligible employers must submit an application to HHS that includes a proposal for a comprehensive workplace wellness program that meets the requirements developed by HHS. At this time, no guidance has been made available for eligible employers who wish to apply for a grant.

Also contained in the legislation was authorization for the Centers for Disease Control and Prevention (CDC) to provide employers of all sizes with Web portals and call centers for assistance with evaluating employer-based wellness programs. The director of the CDC must conduct a national worksite health policies and program survey to assess employer-based health policies and programs. This national wellness initiative was announced on Sept. 30, 2011, and up to 100 employers were selected to receive assistance implementing a "full-service" wellness program over a two-year period.

Finally, PPACA expanded HIPAA's wellness program exemption to allow employers to offer employee incentives of up to 30 percent, expandable to up to 50 percent with approval from the secretaries of the DOL, HHS and the Treasury, of the total cost of coverage for standard-based wellness programs.

WELLNESS PROGRAMS AND STATE LAWS

Some states enacted laws that prohibit discrimination in the workplace against employees who, during non-work hours, smoke or engage in otherwise legal activities. These are typically known as "lawful product" laws, and they may vary in breadth and scope from state to state. For wellness programs that are part of a self-funded group health plan and subject to ERISA, a compelling argument can be made that such state laws would be pre-empted by ERISA. However, when designing wellness programs, particularly in offering incentives for not smoking or participating in a smoking-cessation program, legal counsel should be consulted to review the applicability of individual state laws that may be at issue.

There are also situations in which a carrier actually charges a higher premium for employees who smoke than for nonsmoking employees. In these situations, the difference can potentially be passed on to the employee.

In New York, for example, an employer cannot discriminate against a smoker in terms of employment, including the cost of benefits. However, the employer may be permitted to charge smokers a different premium amount than nonsmokers if the insurance carrier charges higher premium rates for smokers. The employer may charge smokers the differential amount; however, the New York law requires the employer to provide a statement to the employees detailing the differential rates from the insurance carrier. Based on the complexities that must be considered in determining whether a surcharge is allowed and advisable, an employer that wants to implement such a policy should consult legal counsel before adopting it.

WELLNESS PROGRAMS AND TAX ISSUES

Tax issues can arise and should be reviewed when an employer implements a wellness program. As mentioned throughout this document, employers often provide rewards for participation in a wellness program. Although the health benefits provided under the wellness program itself (e.g., diagnostic tests) are likely to be tax-free, some of the rewards that employers provide to participants in these programs may be taxable.

Some rewards, such as lower major medical plan premiums or additional employer contributions to a health FSA, HRA or a health savings account (HSA), would be excluded from an employee's income and would not be subject to wage withholding or employment taxes provided that applicable nondiscrimination requirements are satisfied. Other rewards, however, such as cash or cash equivalents (e.g., gift cards or gift certificates), would be includable in an employee's income and subject to wage withholding and employment taxes.

Employers should consult knowledgeable payroll providers or their own accountants to properly determine taxable status of any item or premium discount offered under a wellness program.

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