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Primer on Making Employee Wellness Programs Healthy for Health Care Providers

A growing number of private employers are implementing wellness programs aimed at promoting good health, reducing absenteeism and employee turnover, and decreasing costs of employer-sponsored health coverage. In fact, according to the 2012 Kaiser Family Foundation/Health Research & Educational Trust Annual Employer Health Benefits Survey, 63% of companies with three or more employees that offer health benefits also offer at least one wellness program. These programs oftentimes include financial wellness initiatives, including weight loss programs, gym membership discounts or on-site exercise facilities, biometric screening, tobacco cessation programs, personal health coaching, classes in nutrition or healthy living, Web-based resources for healthy living or a wellness newsletter.

In implementing their wellness programs, employers are looking to community health care providers to provide the individual wellness programs they offer to their employees. Health care providers interested in offering community wellness initiatives should have a clear understanding of the numerous highly complex federal and state laws that they, as well as employers implementing such programs, must navigate in structuring their offerings. The purpose of this article is to explain what the laws require with respect to wellness programs.

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HIPAA and the Affordable Care Act

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) regulates wellness programs through both its nondiscrimination provisions as well as its privacy and security rules.

Nondiscrimination. HIPAA's nondiscrimination provisions, which provisions apply only to insured and self-insured group health plans, generally prohibit group health plans from charging similarly situated individuals different premiums or contributions, or imposing different deductibles, copayments or other cost sharing requirements based on a health factor (e.g., health status, medical condition, medical history, claims experience, receipt of health care, genetic information, disability). However, there is an exception for wellness programs that adhere to certain requirements.

HIPAA's nondiscrimination provisions were adopted into statutory law, with some modification, as part of the Patient Protection and Affordable Care Act (Affordable Care Act), and the Department of Treasury, Department of Labor and Department of Health and Human Services have collectively issued proposed regulations regarding nondiscriminatory wellness programs. Under these laws, wellness programs are classified into two distinct categories, each of which has different requirements for compliance.

Participatory Wellness Programs. The first category is comprised of programs that do not offer any reward or that reward participation in the program regardless of the result (e.g., gym memberships or tobacco cessation programs without regard to whether the participants actually lose weight or stop smoking, or incentive for completing a health risk assessment). A wellness program that fits into this category is deemed to comply with HIPAA's nondiscrimination requirements provided that the program is made available to all similarly situated individuals.

Health care providers with wellness centers could offer employers various participatory wellness programs that may suit their needs. For example, health care providers may consider offering volume discounts for gym memberships or tobacco cessation programs at its own wellness facility or the employer's offices.

Health-Contingent Wellness Programs. The second category of wellness programs includes those programs that reward participants for achieving a goal or a particular result (e.g., lower premiums for non-tobacco users or waiver of deductibles for persons with acceptable weight). Wellness programs in this category must meet the following five conditions in order to comply with the nondiscrimination provisions:

- The total rewards offered under the program cannot exceed 20% (or 30% effective January 1, 2014) of the total cost (employer and employee portions) of individual employee (or family) health benefits coverage;
- The wellness program must be designed to improve health or prevent disease without being overly burdensome;
- Individuals must be given a chance to qualify for the reward or rewards on at least an annual basis;
- The reward must be available to all similarly situated individuals and there must be a reasonable alternative provided for those with a medical condition that makes it unreasonably difficult, or medically inadvisable, to satisfy the standard (if there is no reasonable alternative standard, the wellness program must

waive the requirement); and
- All materials that describe the terms of the wellness program must fully disclose that it is possible to satisfy the standard with a reasonable alternative and that it is possible to have the standard waived if there is no reasonable alternative standard.

The proposed regulations make several additional changes. First, the proposed regulations expand the application of the HIPAA nondiscrimination provisions to the individual health plan market. Moreover, the proposed regulations require that a program offer a different, reasonable means of qualifying for the reward(s) to any individual who does not meet the standard based on the measurement, test or screening provided. Finally, the proposed regulations increased the total allowed amount of wellness program rewards to 50% for programs designed to reduce or prevent tobacco use.

That being said, health care providers offering wellness programs should participate in active dialogue with employers to assist in determining appropriate reasonable alternative standards. The proposed regulations require that the employer actually make the alternative standard available to its employees, rather than requiring they go out on their own and find it. So, if an employer opts to offer an educational program in place of a requirement to maintain a healthy body mass index, health care providers could provide such programs, on behalf of the employer, to those employees who require the alternative standard. Health care providers should consider such reasonable alternatives when structuring their wellness offerings to employers.

Privacy and Security. All health plans must comply with HIPAA's privacy and security rules (*e.g.*, notice of privacy practices requirements and necessity to enter into business associate agreements with outside wellness program vendors). Employers must be careful to place a brick wall between the wellness program and the employer. While an employer may be interested in the fact that an employee drinks three or more alcoholic beverages a day, this information cannot be used to make employment decisions regarding the employee. Health care providers must be careful when disclosing health information obtained by employees pursuant to their wellness programs.

ADA

The Americans with Disabilities Act of 1990 (ADA) prohibits an employer from inquiring about an employee's medical condition unless the inquiries are both job

related and consistent with business necessity. Health risk assessments will generally be considered a medical examination under the ADA, although questions about behavior (e.g., exercise or eating habits) will likely not. The U.S. Equal Employment Opportunity Commission (EEOC) has suggested that a wellness program requiring a medical examination will not violate the ADA if: (1) it is a voluntary program; and (2) employee medical information is kept confidential and separate from employment records. A voluntary program is one in which the employer does not require participation nor penalize persons who do not participate (although nominal, non-cash rewards—such as t-shirts—for participation are acceptable).

GINA

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers from inquiring about an employee's genetic information. If a wellness program is a group health plan, or is within a group health plan, then the plan may not request genetic information before enrollment or at any other time if the purpose of the request is underwriting. A wellness program may request that an employee complete a health risk assessment that asks family medical history questions either: (1) post-enrollment if there is no incentive or reward given for completing the assessment; or (2) as part of a bifurcated health risk assessment (where the initial health risk assessment, for which a reward or incentive is given, does not ask family medical history questions but a second health risk assessment that is completely voluntary and has no reward attached, does).

If, however, a wellness program is outside of a group health plan, a health risk assessment may ask questions pertaining to family medical history, provided the following conditions are met: (1) the request is made as part of a wellness program; (2) the employee provides prior, knowing, voluntary and written authorization; (3) only the employee and the licensed medical professional receive individually identifiable information concerning the results; and (4) the individually identifiable information is available only for purposes of the program and is not disclosed to the employer except in aggregate terms that do not disclose the identity of specific employees.

Health care providers offering wellness programs should consider offering referrals to employees for genetic testing or genetic mapping, when appropriate, based on genetic information provided as part of a health risk assessment.

IRC

Employers must also consider the tax consequences of wellness programs under the Internal Revenue Code (IRC). Although health benefits (e.g., deductibles, cost of screening tests, cost of flu shots) are generally not taxable, non-health benefits (e.g., gym membership, cash, Weight Watchers, gift cards) are taxable. These tax consequences may affect the benefits employers are considering and health care providers offering wellness programs should consider structuring their offerings accordingly.