

# Post-HIPAA Implementation of Employee Wellness Programs: Practical Tips and Pitfalls

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# Types of Employee Wellness Programs

- Health Risk Assessments
- Health Promotion Programs, including annual physicals and goal setting
- Discounts on fitness club memberships
- Smoking cessation programs

# Incentives

- Monetary rewards
- Reduced health insurance premium contributions
- Gifts (gym bags)
- Reduced gym membership fees
- Raffles to win trips

## Is It a Group Health Plan?

- Is the wellness program connected to the health plan benefits?
- Is it being developed instead by the employer workplace health program?
- How has this employer treated such programs in the past?
- Employee privacy expectations

# Adequate Separation

- If a wellness program is considered part of the ERISA health plan, how can this program be structured to fit within the “adequate separation” standard under the HIPAA privacy regulations?
  - Key question: Will the plan/employer receive identifiable health information related to the wellness program?

## Vendors

- Health Risk Assessment companies
- Data warehousing companies
- Health benefits consultants
- Reward/incentive vendors
- Industry consortiums such as Bridges to Excellence and regional employer groups
- Mobile laboratories

# Vendor Agreements

- Understand the data flow
- Ask for the services agreement and business associate agreement as soon as possible
- Will vendors require three-way non-disclosure agreements when one vendor (PBM) discloses data to another vendor (data warehouse)?

# Consents for Information Flow

- Why require consent?
- Has the group health plan implemented a HIPAA compliance program, including required plan amendments?
- Who will have access to the identifiable health information?



# Role of Counsel

- Assistance of counsel is needed from the moment benefits professionals begin to contemplate development of wellness programs
  - Otherwise, wellness programs may be designed/resources expended before learning that the program must be restructured

# Communications

- Clear communication is crucial to smooth implementation of wellness programs
  - Brochures, flyers, emails must use the same language describing the program, incentives, and any exceptions
  - Privacy issues should be addressed up front by stating that vendors are required by contract to protect the confidentiality and security of health-related information

# Communications

- Employees nonetheless may raise privacy concerns and employers should be ready with Q&A's and other scripts to respond to such questions/concerns
- Communications should not guarantee the privacy of health information

# Bona Fide Wellness Programs

- HIPAA prohibits discrimination on the basis of “health status”
- ERISA permits a group health plan to establish a premium discount or rebate or to modify copayments or deductibles in return for adherence to programs of health promotion and disease prevention

# Bona Fide Wellness Programs

- DOL issued regulations interpreting this to mean that a group health plan with a cost sharing mechanism that requires a higher payment from an individual does not violate the statute if the payment differential is based on whether the individual has complied with a “bona fide wellness program”

# Bona Fide Wellness Programs

- 1/8/01: DOL, IRS, and HHS jointly issued a Notice of Proposed Rulemaking regarding BFWPs
  - Proposed regulations describe four requirements for BFWPs
  - Provides a “safe harbor” if a program fits
  - Regulations apply only to wellness programs providing rewards related to a health factor
  - Many wellness programs do not provide rewards related to a health factor

## BFWP Regulations Do Not Apply To:

- Voluntary testing for a health problem (e.g., high cholesterol) without a reward based on the outcome of a health assessment
- Encouraging preventive care by waiving co-payments for check ups
- Reimbursing employees for health club membership fees without regard to any health factors
- Reimbursing employees for the costs of smoking cessation programs, regardless of whether the employee stops smoking

# Bona Fide Wellness Programs

- Four requirements:
  - The total reward that may be given to an individual must be limited; the reward may not exceed a specified percentage of the cost of employee-only coverage under a plan



# Bona Fide Wellness Programs

- Program must be reasonably designed to promote good health or prevent disease
  - A program will not be considered “bona fide” if it involves a reward based solely on health factors present when the individual first enrolls, because individuals cannot qualify for the reward by adopting healthier behavior

# Bona Fide Wellness Programs

- Reward must be available to all similarly situated individuals; this means that the program must allow any individual for whom it is unreasonably difficult (due to a medical condition) to satisfy the standard an opportunity to satisfy a reasonable alternative standard

# Bona Fide Wellness Programs

- Plan materials need not describe specific reasonable alternatives, but if the program materials describe the general standard, they also must disclose the availability of a reasonable alternative standard

# Bona Fide Wellness Programs

- Proposed regulations have never been finalized
- Preamble notes that compliance with the proposed regulations constitutes good faith compliance with the statutory provisions relating to wellness programs
  - DOL website affirms this stance

# Bona Fide Wellness Programs

- Many questions are left unanswered, including:
  - Cap on total reward?
  - May dependents participate and may the reward be based on employee and dependent contributions?
  - How do you develop/permit a reasonable alternative standard without undermining the success of the program?

# Questions?

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