

Operational & Technical Track: Wellness Incentive Compliance

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Reasons to Consider Wellness Programs

- Rising Healthcare Costs:
 - Premiums for employer-based health insurance rose by 9.2 percent in 2005 -- The fifth consecutive year of increases over 9 percent.
 - Since 2000, employment-based health insurance premiums have increased 73 percent (inflation only 14%; wage growth only 15%).
 - The average employee contribution to company-provided health insurance plan has increased more than 143 percent since 2000.
 - The annual premiums for family coverage have now eclipsed the gross earnings for a full-time, minimum-wage worker (\$10,712).

Reasons to Consider Wellness Programs

- Poor Employee Health:
 - Obesity: In 2005, 60.5% of adults in the United States were overweight, 23.9% were obese, and 3.0% were extremely obese.
 - Smoking: 24% of adult males smoke; 19% of females smoke. Each year in the United States, approximately 440,000 persons die of a cigarette smoking-attributable illness, resulting in 5.6 million years of potential life lost, \$75 billion in direct medical costs, and \$82 billion in lost productivity.

Disease Management vs. Employee Wellness Programs

- Wellness Programs: Designed to improve general health of overall employee population before employees get sick.
 - Example: Weight Watchers
- Disease Management Programs: Designed to improve health of particular employees after they have developed chronic health conditions (e.g., asthma, diabetes, heart condition, hypertension, renal disease).
 - Example: Health coach to advise about options

Health Risk Assessments

- Health Risk Assessment: Series of medical and health-related questions aimed at obtaining “baseline” information about employees’ overall health to identify persons with chronic conditions or who are at risk for developing a condition.

Compliance Issues

- Practical and legal compliance issues may arise with Disease Management and Wellness Programs under . . .
 - HIPAA Nondiscrimination Requirements
 - Americans With Disabilities Act (ADA)
 - Age Discrimination in Employment Act (ADEA)
 - HIPAA Administrative Simplification (Privacy, EDI, and Security)
 - COBRA
 - ERISA
 - Income Tax
 - Plan Design/Integration Issues (e.g., HRAs and HSAs)
 - State law

Carrots and Sticks

- **Two Competing Approaches:**
 - Carrot:
 - Health club memberships
 - Reduced health care premiums
 - Smoking cessation programs
 - Weight loss programs
 - Free health examinations
 - Healthy eating programs
 - Stress reduction programs
 - Stick:
 - Refusal to hire
 - Disqualification from health care plan
 - Termination

HIPAA Implications for Wellness Programs

- Generally cannot vary benefit based on health status . . . but variation allowed for certain wellness programs
- Rule does not apply to programs that do not condition benefit on ability to meet health standard (i.e., a “Participation Based Wellness Program” – e.g:
 - Incentives to participate in testing (regardless of outcome)
 - Waiver of co-payment/deductible if participate in pre-natal program
 - Reimbursement of health club membership
 - Reimbursements for smoking cessation or weight reduction programs (regardless of outcome)
 - Compensation to fill out health risk assessment

Requirements for “Standard Based” Wellness Programs

- Any program that provides a “reward/penalty” based on the ability to meet a health standard must:
 - Limit reward/penalty to specified percentage 20 %
 - Be reasonably designed to promote health or prevent disease
 - Annual qualification requirement
 - Must be available to all similarly situated participants -- i.e., individually tailored adjustments to program may be required for individuals who cannot meet health standard
 - Notice of individual accommodations must be provided

Requirements for “Standard Based” Wellness Programs

- Example: Bonus for cholesterol levels below 200 must include notice allowing those medically unable to comply to discuss alternatives;
- Example: Bonus for body mass index might allow for qualification based on walking 20 minutes three times a week;
- Example: Bonus for “tobacco-free” employees might allow for qualification based on enrollment in smoking cessation program (Note: assumption that tobacco use addiction is a medical condition -- nicotine addiction)

Age Discrimination in Employment Act (ADEA)

- ADEA prohibits employers from discriminating against individuals on the basis of age with regard to employment and the privileges of employment (e.g., benefits)
 - Generally can't reduce or terminate benefits due to age
 - May reduce benefits based on equal cost/equal benefit rule
 - Recent case (*Erie*) has indicated that the ADEA applies to retirees
 - Erie prevents employers from reducing benefits of retirees (e.g., at Medicare age) unless plan meets equal cost/equal benefit rule
 - Does not require employer to offer retiree benefits
 - ADEA impacts both
 - The ability to stop DM/Wellness program incentives /surcharges upon reaching a particular age and
 - Varying incentives/surcharge due to age
 - Imposing additional requirements for incentive based on age

HIPAA Administrative Simplification

- Are disease management, wellness programs subject to HIPAA Privacy/Security/EDI?
 - Only if
 - The DM/Wellness is part of a “Health Plan” or
 - The DM/Wellness vendor is a “Health Care Provider”
 - Most argue that DM/Wellness is part of a “health plan”
 - Facilitates information sharing with health care providers without authorization and marketing concerns
 - Enables VEBA/Trust funding

HIPAA Privacy

- In a nutshell
 - Covered entities are prohibited from using protected health information (PHI) without an authorization for any reason other than treatment, payment, or related health care operations. Specific authorization is required for any other use.
 - For example, use of PHI for “marketing” requires authorization
 - Be wary of PHI leakage outside of health plan

HIPAA Privacy

- In a nutshell . . .
 - Covered entities required to establish procedures to protect electronic PHI
 - Covered entities subject to EDI requirements if engaging in certain electronic transactions
 - Business associates (e.g., TPAs or “Vendors”) subject many of the same requirements via contract (the “Business Associate Agreement”)

COBRA

- Most “group health plans” are required to provide COBRA continuation coverage to qualified beneficiaries if coverage is lost as a result of certain qualifying events
 - “Group health plan” means a plan that provides “medical care” and is maintained by the employer
 - Will DM/Wellness programs provided by the employer be subject to COBRA?
 - If they provide “medical care”
 - General health not medical care

COBRA

- COBRA considerations:
 - Is Medical care offered?
 - What type of incentive is offered?
 - Impact of cash incentives/premium reductions?
 - Impact of HRA/HSA incentives?
 - Part of overall health program or stand alone arrangement?
 - Participation limited to plan participants or all employees?
 - What benefit must be provided?
 - What is cost of program?

Tax Issues

- Tax issues arise when
 - Employer pays for coverage that does not constitute “medical care”
 - General health and wellness programs
 - Weight reduction programs not limited to obesity
 - Membership in a gym
 - If not for medical care, the value of such programs must generally be included in gross income and subject to withholding?

Tax Issues

- Non-health incentives raise tax issues
 - Cash payments
 - Taxable and subject to withholding
 - Gift certificates
 - Likely taxable and subject to withholding
 - If paid through VEBA, could be a disqualified benefit
 - De minimis exception

Tax Issues

- Health related incentives
 - E.g., contribution to HRA or HSA or Health FSA
 - Generally non-taxable if health plan related
 - No tax exclusion for self-employed individuals
 - Health FSA
 - Possible change of election issues
 - Potentials for health benefit restricted debit card
 - HSA
 - Must be structured to be made “through the cafeteria plan”

State Law

- **Statutory Restrictions:**

- Smokers' Rights: 20 states, including Arizona, Connecticut, District of Columbia, Indiana, Kentucky, Louisiana, Maine, Missouri, Mississippi, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Virginia, West Virginia, Wyoming



- Example: “An employer may not ... require as a condition of employment, an employee or prospective employee to refrain from using; or ... discriminate against an employee with respect to the employee’s compensation and benefits or terms and conditions of employment based on the employee’s use of tobacco products outside the course of the employee’s or prospective employee’s employment.” Ind. Stat. 22-5-4-1



State Law

- **Statutory Restrictions:**

- Lawful Conduct / Lawful Products: 11 states, including California, Colorado, Illinois, Minnesota, Montana, Nevada, New York, North Carolina, North Dakota, Tennessee, and Wisconsin.
- NY Example: “It shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of: ... an individual’s legal use of consumable products prior to the beginning or after the conclusion of the employee’s work hours, and off the employer’s premises and without the use of the employer’s equipment or other property.”



State Law

- Common Law Tort Claims
 - Wrongful Discharge in Violation of Public Policy
 - Invasion of Privacy / Intrusion into Seclusion
- Example:
 - *Rodrigues v. The Scotts Company* (Mass. Sup Ct.)
 - Facts:
 - Hired as lawn technician.
 - Never smoked on the job; only off the job.
 - Fired for drug screen that was positive for nicotine.
 - Law:
 - No statutory provision in Massachusetts
 - Violation of Right to Privacy
 - Unreasonable Search of his Person

State Law

- Thoughts/Conclusions:
 - Patchwork Effect – Practical Limitations
 - Legal compliance issues for national employers
 - Fairness issues for employees in different states
 - Administrative costs/burdens
 - Future Developments
 - More and more action from state legislatures
 - Lobbying by American Civil Liberties Union

Americans With Disabilities Act (ADA)

- Americans With Disabilities Act
 - Coverage: 15 or more employees
 - Substantive Provisions:
 - Non-discrimination / Accommodation
 - Restrictions on Medical Examinations
 - Confidentiality of Medical Information



Americans With Disabilities Act

- Non-Discrimination/Accommodation
 - Provisions only apply to “disabled” individuals
 - Definition: Physical or mental impairment that substantially limits one or more major life activities.
 - Most behaviors targeted by wellness programs do not rise to the level of a “disability” under the ADA
 - Smoking – No
 - Weight – Maybe
 - Alcohol Consumption – Yes
 - Beware: “Regarded As” Disabled Claims

Americans With Disabilities Act

- Non-Discrimination (cont'd):
 - Disparate Impact Claims:

“Using qualification standards, employment tests or other selection criteria that tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria ... is shown to be job-related for the position in question and is consistent with business necessity.”

Americans With Disabilities Act

- Medical Examinations and Inquiries:
 - Exams: ADA restricts manner and method of administering “medical exams” to both applicants and employees.
 - Medical Exams: Vision tests, blood, urine and breath analysis; blood pressure/cholesterol screens; x-rays
 - Questions: ADA also restricts asking “disability-related” questions of applicants and employees
 - Disability-Related Question: Any question likely to elicit information about a disability.

Americans With Disabilities Act

- Medical Examinations
 - Broad Coverage:
 - Rules apply to both applicants and employees.
 - Rules apply to both disabled and non-disabled.
 - Consequently, anyone can sue you.
 - Common Liability Scenarios:
 - Health Risk Assessments
 - Policing mechanisms for wellness programs

Americans With Disabilities Act

- Rules for Medical Examinations and Inquiries:
 - Applicants:
 - Pre-Offer: No examinations or inquiries allowed
 - Post-Offer: Examinations permitted, but must apply to all employees.
 - Employees: Must be “job-related and consistent with business necessity.”
 - Applies to all employees (whether disabled or not).
 - “Job-related” = Ability to perform essential job functions

Americans With Disabilities Act

- Voluntary Wellness Program Exception:
 - Statute: “A covered entity may conduct voluntary medical examinations, including *voluntary* medical histories, which are part of an employee health program available to employees at that work site.”
 - Regulation: EEOC has not promulgated any regulation about meaning of “voluntary.”
 - Enforcement Guidance: “Voluntary” means no penalty can be imposed for not participating; anything other than “de minimis” incentive is prohibited.

Americans With Disabilities Act

- Confidentiality Requirements:
 - Rule: Information regarding the medical condition or history of applicants/employees must be:
 - “collected and maintained on separate forms”; and
 - “in separate medical files”
 - Exceptions to Confidentiality:
 - Managers may be informed of restrictions/accommodations;
 - First aid and safety personnel for emergency purposes;
 - Government officials investigating ADA compliance.

Question & Answer

