Client Advisory Seminar Series
Fall Semester 2013

An Apple A Day:
Health Reform Turbocharges Corporate Wellness Programs

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Agenda

• Types of Wellness Programs Generally
• The Collision of Wellness and the Law
• Analyzing Wellness Programs
• A Word About Incentives
• Wellness Programs and Health Reform
• Miscellaneous Wellness-Related Issues
Types of Wellness Programs and the Issues They Pose
Types of Wellness Programs

• Reactive
  – E.g., disease management, Employee Assistance Programs (EAPs)

• Proactive
  – Health screens
  – Preventive care
  – Smoking cessation, weight loss, cardiovascular improvement, etc.
The Collision of Wellness and the Law
Wellness programs—*depending on what they seek to do*—exist at the intersection of a variety of federal and state laws...
The Collision of Wellness and the Law

• The violence of the collision of the program and those laws depends on what the wellness program is trying to do, and how it’s attempting to do it...
The Collision of Wellness and the Law

Wellness Program

- PPACA
- GINA
- ADA
- COBRA
- ERISA
- Mental Health Parity
- HIPAA Privacy
- State Laws

ERISA
ERISA Imposes a variety of obligations, including fiduciary, reporting & disclosure obligations, on benefit programs supplying health care.

Wellness programs often supply health care
The Collision of Wellness and the Law

COBRA Imposes coverage continuation rights on benefit programs supplying health care.

Wellness programs often supply health care.
ADA Prohibits discrimination in terms and conditions of employment – including benefits – based on a protected disability; bars “medical inquiries” unless “voluntary.”

The ADA Amendments Act of 2008 significantly expanded the universe of protected disabilities.
GINA

Prohibits a health plan from discriminating on the basis of someone’s genetic information, or using genetic information—including “family medical history”—for “underwriting.”

GINA regulations largely prohibit collection of “family medical history”
Mental Health Parity

For six benefit classifications, a health plan cannot have more restrictive financial requirements or treatment limits for mental health/substance abuse than for medical/surgical care.

Creates issues where EAP is gate for accessing health plan’s MH/SA benefits, or where smoking cessation benefits have special cost sharing.
HIPAA privacy and security rules limit uses and disclosure of protected health information.

Can create issues where wellness vendors need to share certain information with the employer.
The Collision of Wellness and the Law

State Laws

State laws regarding disability discrimination, smoker’s rights, medical privacy, etc.

Can create issues for wellness programs not shielded by ERISA preemption
HIPAA Prohibits a health plan from discriminating in eligibility, benefits or premiums based on health condition, claims history, etc.

Classic example: Smoker / Non-Smoker Rates
The Collision of Wellness and the Law

Codifies the HIPAA nondiscrimination/wellness program rules. Adds wrinkles related to affordable and minimum value coverage.

Incentives might make “affordable” coverage “unaffordable,” and vice versa.
Analyzing Wellness Programs
STEP 1: Drop the Program into the Correct Bucket

• The Rules Vary Dramatically...
  – Contemporary programs will have components in multiple buckets...break the program into pieces for purposes of analysis...
STEP 2: Consider the Issues

• Non-Plan Related Programs
  – Examples:
    • “Biggest loser” contests, reward unrelated to health plan
    • “Walk a mile a week at lunch” or similar programs; reward unrelated to the health plan
    • Complete a health risk assessment; reward unrelated to the health plan
  – Rules:
    • No HIPAA/PPACA nondiscrimination, but...
    • Be sure everyone can play, regardless of disability...
STEP 2: Consider the Issues

• Participation-Based Programs
  – Examples:
    • Complete a health risk assessment, biometric screening or health risk questionnaire...
    • ...In exchange for a plan-related reward or penalty, such as premium or other cost-sharing discount or surcharge
STEP 2: Consider the Issues

• Participation-Based Programs
  – Rules:
    • Make available to “similarly situated individuals”
      – Who are they?
    • Watch for ADA, GINA and other issues
      – “Penalties” under the ADA, and the *Broward County* case
      – Conditioning coverage on participation: the EEOC’s informal view
      – GINA issues: Requests for “family medical history” in exchange for an incentive, or at open enrollment
STEP 2: Consider the Issues

• Activity and Outcomes-Based Programs
  – Examples:
    • Participate in an activity, where participation depends on health status...
      – E.g., participate in an exercise program
    • ...OR demonstrate a particular health status or outcome...
      – E.g., non-smoker, weight within normal limits, cholesterol within normal limits
    • ...All in exchange for a plan-related reward or penalty
      – E.g., premium or cost-sharing discount or surcharge
STEP 2: Consider the Issues

• Activity and Outcomes-Based Programs
  – Rules:
    • More complicated, but not overwhelming....
STEP 3: Jump Through 5 Hoops

- Activity and Outcomes-Based Programs
  - 5 Requirements...

  1. Reward capped at 20%, 30% or 50%
  2. Program must be bona fide
  3. Enrollees can try at least annually
  4. Reward the effort, allow alternatives
  5. Notify e’ees about alternatives
1. Reward limit: 20% of total cost of coverage
   - Single employee rate if only employee is eligible for wellness program; family or other tiered rate if dependents are eligible for wellness
   - Health reform changes for PYs after 2013:
     - 30% for non-tobacco-related programs
     - 50% for tobacco-related programs
     - 50% for joint programs, but non—tobacco-related portion of the incentive can’t exceed 30%
2. Program must be designed to enhance wellness
   - Cannot be a subterfuge to discriminate
   - Cannot be overly burdensome
3. Provide chance to qualify for award at least once each year
   – Would apply, e.g. to smoking cessation programs
4. Alternative standard available for those who cannot meet the award due to health factors
   - Provide alternatives for those who can’t participate in the activity, or fail the target standard, due to a health condition...and ensure the alternative standard complies with whatever bucket it is in!
   - You may require an MD’s note that it is unreasonably difficult for the person to participate in an activity-based program, before offering the alternative; not so, for outcomes-based programs
   - Employee’s MD may set the alternative standard
   - If alternative is completing an educational or diet program, the plan must pay registration fee
   - Examples
5. Communicate the availability of the alternative standards

- "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."

- Recently final regulations improve on this language...a lot
Department of Labor is auditing for compliance with wellness program rules
A Word About Incentives
Incentives

• Typical Incentives

– Cash and cash equivalents: *taxable*

– Cash equivalents

  • Gift cards, movie passes, gym fees, i-pods?
  • Taxable or *de minimis* fringe?
  • What’s the deal with “nontaxable” gift cards?
  • What if no Form 1099 is required?

– FLSA issues and “rate of pay” for computing overtime pay

  • Key: Is participation in the program *required*?

– Tropical vacations?
Typical Incentives

- Reduced co-pays, reduced premium cost
  - Non-taxable *per se*, but the increased cash in the employee’s pocket is taxable
- Variety of rewards based on points, accumulated through variety of activities and contests
- Other arcane issues:
  - Offering a choice of taxable or non-taxable prizes (constructive receipt?)
  - Carrying over points/rewards from one year to the next (constructive receipt, deferred compensation?)
Wellness Programs and Health Reform
• Health Reform
  – Effect on grandfathered status?
    • Increase participant’s share of total plan cost by more than 5% since March, 2010?
  – Effect on “affordability” calcs?
    • Programs unrelated to tobacco: Assume NOBODY wins the award or suffers the penalty (prevents employers using incentives/penalties to create “unaffordable” coverage for unhealthy employees, driving them to the Exchanges)
    • Programs related to tobacco: Assume EVERYBODY wins the award or avoids the penalty (hinders smokers from qualifying for Exchange-based subsidies)
Wellness Programs and Other Laws

• Health Reform
  – Effect on Affordability Calcs - Example:
    • $2,000 annual premium cost for single coverage
    • $200 reward for cholesterol screening, $300 reward for not using tobacco
    • “Deemed” premium for affordability purposes = $1,700, even though *actual* premium paid by employee could be between $1,500 and $2,000
    • Not an issue unless wellness incentives are large enough to create issues under affordability rules
  – Same concepts apply on “Minimum Value” calcs
    • E.g., where the incentive is a higher or lower deductible or other cost-sharing feature
Miscellaneous Wellness-Related Issues
• Health Savings Account Issues
  – Does wellness program participation make an employee ineligible to make HSA contributions?
Questions?