

Employee Relations

LAW JOURNAL

Employee Benefits

Wellness Programs: What's Permitted?

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Television viewers are familiar with programs like the "Bulging Bride," and "The Biggest Loser," in which contestants are challenged, harassed, and encouraged to lose weight and improve their appearance and, as a side benefit, their health. Many employers faced with rising health care costs have taken an interest in directing their own reality health and fitness challenges with various incentives for their employees. But while such programs may have noble origins, employers need to make sure that the contest rules do not run afoul of rules prohibiting discrimination due to health status. Recently the US Department of Labor issued a convenient set of guidelines explaining how employee incentive programs can be used as part of an employer group health plan. This article discusses that guidance and other issues employers should consider when implementing a wellness program.

Background—Wellness Programs and Nondiscrimination Rules

Wellness programs have become an increasingly popular employee benefit. One study by Aeon Consultants in 2008 found that of the 1,100 companies surveyed, 64 percent had an employee health awareness/workplace wellness program. These included smoking cessation programs, promotion of physical activity, disease management, health risk appraisals, biometric screening, and telephone health care coaching. Employers with such programs need to be aware of the legal requirements that must be followed when they are implemented.

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The basic rules that describe permissible employer incentives for a healthy lifestyle are found in the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law Number 104-191, enacted in 1996. HIPAA amended the Internal Revenue Code (Code), the Employee Retirement Income Security Act (ERISA), and the Public Health Service Act (PHS Act) to provide increased portability and continuity of health coverage. HIPAA also added Code Section 902, ERISA Section 202, and Section 2702 of the PHS Act to prohibit discrimination in health coverage on the basis of a health factor.

Wellness programs that are based on certain health factors can nonetheless exist despite these nondiscrimination rules if they meet certain criteria specified in the regulations. Proposed and interim rules provided employers with some guidance on these nondiscrimination rules, including their application to wellness programs. In December 2006, the three agencies published final rules which clarified some of the proposed rules.¹ The final rules apply to group health insurers and group health plans beginning on the first day of the year beginning on or after July 1, 2007. So for calendar year plans, they apply in 2008.

In February 2008, the Department of Labor (DOL) issued a helpful Field Assistance Bulletin (FAB 2008-02) which explains (1) what types of lifestyle programs or disease prevention programs offered by a group health plan must comply with the Labor Department's wellness program regulations, and (2) how such plans comply with the regulations. The Bulletin uses a checklist for the purpose.²

Programs Covered Under the HIPAA Rules

The DOL checklist focuses first on whether the employer's program is even subject to the nondiscrimination rules. A program covered under the HIPAA rules is a "wellness program" that is part of a "group health plan." Wellness programs can be any type of arrangements that promote health or prevent disease. These can include flu shots, an on-site clinic, health fairs, weight loss programs, preventive care plans, smoking cessation programs, or meeting certain set targets (weight, cholesterol level, nicotine use, or blood pressure).

A wellness program that is part of a group health plan is subject to the HIPAA rules. A group health plan is any arrangement sponsored by the employer that provides medical coverage or medical benefits to employees. Usually, wellness programs become subject to the HIPAA rules when they involve discounts or rebates with respect to the costs of the plan that are paid by the employee. The DOL notes that while not every "incentive" to promote wellness is part of a group health plan covered by HIPAA, some disincentives could be prohibited under other laws. For example, a rule that every employee with a heart condition will be fired may not be covered under the HIPAA rules since it does not

involve a group health plan, but it could violate other state or federal law, such as the Americans with Disabilities Act discussed below.

Discrimination Based on Health Factors

A plan discriminates based on a health factor if it requires an individual to meet a standard based on a health factor in order to gain a reward. Examples of health factors include cholesterol levels, body-mass index, blood pressure, drug addiction, and tobacco use. The reward can be a discount, rebate, absence of a surcharge, or the value of a benefit that would otherwise not be part of a plan. An example given by the DOL indicates that merely completion of a health risk assessment would not be a *health factor*, but requiring a participant who has certain risk factors to take steps to reduce those factors in order to receive plan benefits, would be discrimination based on a health factor. An example of a standard that discriminates based on a health factor would be a program that provides a rebate only to persons with a weight or cholesterol level below a stated minimum.

The DOL guidance also notes that discrimination in *favor* of a person with a health factor is permissible. For example, a plan could grant only participants with diabetes a waiver of the annual deductible if they attend disease management classes. This is called “benign discrimination” because it is offering a reward based on an adverse factor. By contrast, a plan would be considered to be discriminatory if it required people with diabetes to meet a standard related to a health factor (like a particular body mass index (BMI)) to receive a reward. In that case, discrimination does exist.

The regulations provide examples of other programs that are *not*-subject to the HIPAA rules because they do not provide incentives or rewards based on satisfying a health factor if participation is made available to all similarly situated individuals. These include:

- Payment of fitness center fees;
- A diagnostic testing program where the reward depends only on participation and not outcome;
- A program that encourages preventive care by paying certain fees (well baby visits);
- A program that reimburses the cost of smoker’s cessation class regardless of whether the participant stops smoking; and
- A program that provides a reward for all who attend a health awareness seminar.

How Wellness Plans That Are Based on Health Factors Can Comply

Many wellness programs *do* “discriminate” on the basis of a health factor, as they are designed to provide rewards to persons who work to improve or maintain a standard considered healthy. Such wellness programs can comply with the wellness program exception to the non-discrimination rules, however, if they meet certain criteria:

- The plan or program must be reasonably designed to promote health and wellness and cannot be a plan or subterfuge to discriminate based on a health factor, or unduly burdensome to the employee.
- Rewards must be available to all similarly situated individuals, and individuals must be given a chance to qualify for the reward or incentive at least once a year.
- There are limits on the amount of the reward. If only employees are eligible to participate, the amount of the reward must not exceed 20 percent of the amount of employee-only coverage of the plan. If the employee or any class of dependents is eligible to participate, the reward must not exceed 20 percent of the cost of coverage for the employee and dependents. The 20 percent limitation is aggregated to apply to all wellness programs that require individuals to meet a standard related to a health factor. For example, if the reward program gives a 20 percent reward for a BMI target and a 10 percent reward for meeting a cholesterol level, the factors must be reduced so that the total reward is a maximum of 20 percent. But if a program offers a 10 percent reward for a cholesterol level goal, a 10 percent reward for a BMI target, and a 10 percent reward for attending an educational seminar or completing a health risk assessment (without regard to individual health specific information), the rewards are acceptable because the rewards related to a health factor (the cholesterol level and BMI target) are maximized at 20 percent.
- The plan must provide a reasonable alternative for persons who cannot achieve the health goal due to a medical condition or if it is medically inadvisable to attempt to achieve that goal. The preamble underlying the HIPAA regulations makes it clear that an employer can require a statement from a physician that a health factor makes it unreasonably difficult or medically inadvisable to meet a particular standard. This alternative method for meeting the health goal must be disclosed

in the documents describing the program. An example of such situations are programs that require a level of exercise or activity that is dangerous for persons with a health condition. This alternative does not have to be described in detail, but there must be a procedure that provides for an alternative. For example, sample language suggested by the regulations and the DOL might say the following: "If it is unreasonably difficult due to a medical condition for you to achieve the standards for a reward under this program, or if it is medically inadvisable for you to attempt to achieve the standards for a reward under this program, call us at [provide number] and we will work with you to develop another way to qualify for the reward."

Impact of Americans with Disabilities Act

In addition to the HIPAA rules, employers need to consider the Americans with Disabilities Act (ADA) when designing wellness programs. The ADA applies not only to group health plans (as the HIPAA rules do) but also more broadly to the terms and conditions of employment. Government agencies such as the EEOC and the Department of Health and Human Services have made it clear that compliance with the HIPAA rules is not determinative of compliance with the ADA.

The ADA prohibits discrimination based on a person's disability. It prohibits employers from denying a disabled person with equal opportunities to participate in, or receive benefits under, programs or activities conducted by an employer. For this purpose, disability means (1) a physical or mental impairment that substantially limits one or more life activities; (2) a record (whether or not accurate) of such impairment; or (3) an individual's being regarded as having impairment (whether or not the impairment exists).³

In some cases, the wellness program will likely not be directly impacted by the ADA because the program may not discriminate against persons defined as "disabled" under the ADA. For example, a program that provides a rebate for smoking cessation is unlikely to discriminate on the basis of a disability since disability under the ADA is defined as a factor that limits basic life activities, and so far, smoking is not one of them. Employers can also design programs to comply with the ADA by making the alternative method of meeting the wellness program's goal that is required under HIPAA flexible enough to accommodate the needs of a disabled person. But employers do need to keep the ADA in mind when they set standards and procedures for wellness programs.

The ADA would be less likely to affect programs that are educational in nature, or that promote healthy lifestyles, rather than those that focus on a particular disease or health factor. Other wellness plan

design issues may be affected by the ADA. For example, the EEOC has informally stated that a plan is “voluntary” if an employer neither requires participants nor penalizes employees for failure to participate. This raises the question of whether certain types of *rewards* for meeting wellness goals comply with the ADA, even if they comply with HIPAA. Informal guidance from the EEOC indicates that if the rewards are so great that no reasonable employee would fail to participate, the program is not voluntary and therefore could violate the ADA.

In addition, the ADA (and HIPAA privacy rules) requires that any records kept in connection with these programs be confidential, and any information learned as part of the program cannot be used to discriminate against employees in other aspects of their employment.

Summary

Many employers have implemented wellness programs and this trend is likely to continue. The DOL Web site provides a helpful guide to follow for employers who are considering a wellness program, but employers need to consider other issues—such as the Americans with Disabilities Act—when designing these programs.

Notes

1. See 29 C.F.R. § 2590.702.
2. See www.dol.gov/ebsa/pdf/faw2009-2.pdf.
3. 42 U.S.C. §§ 12101 and 12112.

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