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MILLER CHEVALIER

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Workplace Wellness Programs

I. Introduction - What is a Wellness Program and Why Do Employers Offer these Programs?

Wellness programs have been gaining attention and popularity with employers over the years and many employers now offer these programs as part of the group health plans[1] they offer to employees. A wellness program is designed to promote good health and prevent disease and includes, for example, a weight loss program or a smoking cessation plan. Wellness program supporters believe that they potentially enhance worker productivity and satisfaction, reduce absenteeism, and ultimately lower employer health care costs.

Skeptics are less sure about the efficacy of these programs in accomplishing these goals and see other potential drawbacks. First, wellness programs, because they are frequently tied so closely to employees' health conditions and health information, are subject to significant rules and regulations under the law. Consequently, employers wishing to implement such programs must ensure that they have the means to comply with these rules.

Second, depending on the structure of a wellness program, there is a concern that it may eventually cause worker dissatisfaction if, for example, an employee feels that the wellness program penalizes the individual for certain behaviors or characteristics or otherwise infringes on a privacy right.

This article summarizes a number of the legal rules and requirements that apply to wellness programs that are part of group health plans. Nonprofit organizations that are interested in adopting a wellness program should review the design of their proposed program and the applicable legal requirements with their counsel.

II. Legal Requirements under Federal Law – When May an Employer Differentiate on the Basis of an Employee's Health Status?

It is not surprising that an employer program that is designed to promote a healthy lifestyle (or penalize an unhealthy lifestyle) among employees might be subject to certain legal constraints. Congress has acted on a number of occasions to prevent employers from unfairly discriminating against an employee on the basis of the employee's health or a

[1] A group health plan generally means a plan sponsored by an employer to provide medical care (*i.e.*, the diagnosis, cure, mitigation, treatment or prevention of disease).

related health factor. Congress has also adopted rules relating to the permissible use of an employee's health information.

A. Permissible Wellness Programs under HIPAA

One of the primary laws regulating wellness programs is the Health Insurance Portability and Accountability Act ("HIPAA"), a comprehensive statute passed in 1996, which, in pertinent part, prohibits discrimination against group health plan participants and beneficiaries in eligibility, benefits or premiums based on a health factor.[2] Despite this general prohibition, HIPAA nonetheless allows an employer to reward participants and beneficiaries who participate in a qualifying wellness program that meets certain requirements.

In 2010, the Affordable Care Act (the "ACA") further modified the special exception for qualifying wellness programs in HIPAA and in June 2013 the federal agencies responsible for interpreting HIPAA issued regulations implementing the ACA's changes. These regulations spell out what types of wellness programs an employer may offer and the different requirements that apply to each.

- **Participatory Wellness Programs**

There are two types of qualifying wellness programs under HIPAA:

- Participatory wellness programs, and
- Health-contingent wellness programs.

A participatory wellness program is one that does not offer rewards[3] or, if it does offer rewards, does not require an individual to meet a standard related to a health factor in order to obtain a reward.[4] An example of a participatory wellness program is an arrangement under which the employer systematically rewards employees who simply participate in a health risk assessment ("Assessment").

An Assessment is a screening tool – such as a questionnaire - that generally evaluates an individual's health and wellbeing. The questionnaire may also be scored in order to measure an individual's health risk based on his or her answers to the questionnaire. Finally it may provide feedback to the individual that recommends certain steps he or she can take to minimize any health risk.

In this instance, the individual only needs to *participate* in the Assessment to qualify for the reward – the results of the Assessment are not taken into account for purposes of the wellness program.

Participatory wellness programs are the least regulated category of wellness programs under the HIPAA rules. However, if an employer decides to offer this type of program, it must ensure that it is available to all individuals who are "similarly situated." This means that while an employer may distinguish between groups of individuals based on certain permissible characteristics (*e.g.*, employees vs. dependents, full-time employees vs. part-time employees), it must offer the same benefits to all of the individuals within such group.

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[2] A health factor includes: health status; physical or mental health condition; claims experience; receipt of health care; medical history; genetic information; disability or evidence of insurability.

[3] A reward includes an incentive (*e.g.*, discount or rebate of premiums) or the avoidance of a penalty (*e.g.*, the absence of a premium surcharge).

[4] Note that these programs may nonetheless be regulated under other rules discussed below.

- **Health-Contingent Wellness Programs**

The second type of qualifying wellness program is a health-contingent wellness program or a wellness program that requires an individual to meet a standard related to a health factor in order to obtain a reward.

Health-contingent wellness programs are further subdivided into:

- Activity-only wellness programs, and
- Outcome-based wellness programs.

An activity-only wellness program requires an individual to perform or complete an activity that is related to a health factor in order to obtain a reward. The individual does not need to attain or maintain a specific outcome. An example includes requiring an individual to participate in a weight loss or exercise program and rewarding the individual regardless of how well he or she performs.

On the other hand, an outcome-based wellness program requires an individual to attain or maintain a specific health outcome in order to obtain a reward. An example includes an arrangement requiring an individual to participate in an Assessment and only rewarding an individual if he or she does not smoke or maintains a Body Mass Index ("BMI") within a healthy range.

Because health-contingent wellness programs establish more hurdles than participatory wellness programs to obtain a reward, they are more heavily regulated under the HIPAA rules. Therefore the governing regulations require that, to qualify, health-contingent wellness programs must meet all of the following requirements:

- **Provide an annual opportunity to qualify**: A health-contingent wellness program must allow all eligible individuals an opportunity to qualify for the program's rewards at least once per year.

- **Limit size of reward**: Generally the reward under a wellness program cannot exceed 30% (or 50% if the wellness program relates to tobacco use) of the cost of coverage under the plan for the employee (and dependents, to the extent they are eligible to participate in the wellness program).[5]

- **Be reasonably designed to improve health**: The wellness program must have a reasonable chance of improving the health of, or preventing disease in, participants, and not be a subterfuge for discrimination.

  Further, if the wellness program is outcome-based, it must automatically provide a reasonable alternative standard ("Reasonable Alternative") for all individuals who fail to meet the program's initial standard.[6]

- **Provide a Reasonable Alternative on a uniform basis**: Depending on whether the wellness program is activity-only or outcome-based, in

[5] The cost of coverage includes both the employee and the employer's premium contributions.

[6] A Reasonable Alternative just as it sounds, is an alternative way an individual can participate in and qualify for the wellness program's full reward. For example, if the wellness program provides an Assessment that rewards individuals who maintain a healthy BMI – it must also provide an alternative standard (*e.g.*, offer individuals the opportunity to attend a weight loss class) to obtain the same reward.

certain situations, the plan must be structured to allow an individual to obtain the same full reward either by:

- providing a Reasonable Alternative to the general standard, or
- waiving the general standard.[7]

- **Provide notice of availability of a Reasonable Alternative**: If the wellness program is structured to include a Reasonable Alternative, the plan must disclose in all plan materials that describe the terms of the health-contingent wellness program that a Reasonable Alternative is available and how an individual may obtain it.

B. Non-Compliance – What Happens if an Employer Violates the Nondiscrimination Rules under HIPAA?

Generally, if a nonprofit organization decides to offer a wellness program and does not comply with the HIPAA nondiscrimination requirements, it could be subject to excise taxes under the Internal Revenue Code ("Code"), even though it is otherwise tax-exempt.

Under the Code, the potential excise tax penalty that an employer may have to pay is $100 per affected individual, per day of non-compliance - subject to a minimum and maximum excise tax amounts under certain circumstances.[8] As a general matter, nonprofit organizations also could be sued by covered employees or by the Department of Labor under the Employee Retirement Income Security Act ("ERISA") to enforce compliance with the HIPAA requirements.

Other Requirements under Federal Law

In addition to the HIPAA nondiscrimination requirements, wellness programs may also be subject to other federal laws including but not limited to:

- Plans subject to ERISA must satisfy a series obligations, including for example the requirement to have a written plan document and, unless exempted, file an annual report with the Department of Labor;
- ACA requirement to extend coverage to children up to age 26;
- COBRA continuation of coverage rules;
- Americans with Disabilities Act which generally prohibits an employer from requiring physical exams or disability-related inquiries unless job-related and consistent with business necessity with an exception for "voluntary" wellness programs;
- HIPAA privacy and security rules;
- The Genetic Information and Nondiscrimination Act which generally prohibits wellness programs and employers from discriminating against

[7] If a wellness program is an activity-only program, the plan must provide a Reasonable Alternative to the general applicable health standard if it would be unreasonably difficult due to a medical condition for an individual to satisfy the standard *or* medically inadvisable for an individual to attempt to satisfy the general standard.

[8] Employers do have some defenses: no tax will apply if the employer did not know, and having exercised reasonable due diligence would not have known, of the violation. No tax will also apply if the violation is due to reasonable cause and not willful neglect, and the error is corrected within a certain time period. Importantly, employers must self-report any violations of these rules. There is a three year statute of limitations that begins to accrue when this form is filed.

individuals on the basis of genetic information or from requesting, requiring or purchasing genetic information - subject to certain exceptions; and

- Whether employees should be compensated for time spent completing a wellness program under the minimum wage and hour laws.

You should consult counsel as to the potential implications of these statutes on your wellness program.

III. How Do State Laws Regulate Wellness Programs?

In addition to federal laws, an employer offering a wellness program may need to ensure that it complies with any applicable state law – which may be more (but not less) protective than the federal requirements.

In the case of the District of Columbia, D.C. law explicitly permits a health insurance issuer to establish premium discounts or rebates and modify copayments or deductibles pursuant to a wellness program that is part of a group health plan. However, it also bans discrimination against any individual, with respect to his or her compensation, terms, conditions, or privileges of employment on the basis of "personal appearance" and the "use of tobacco products."

Employers in the District of Columbia that are considering a wellness program that structures rewards or penalties on the basis of tobacco use or on the basis of factors related to personal appearance, such as weight loss, may need to consider whether they are permitted under D.C. law.

The prohibition against discrimination based on "personal appearance" does not apply to "bodily conditions or characteristics… [that present] a danger to the health, welfare or safety of any individual." However, it is not clear whether wellness programs that are designed to reduce health risks would qualify for this exception.

The courts have held that this exception generally applies to more immediate potential dangers to a person's health. For example, in one case the court determined that the fire department could not regulate the facial hair of its male employees because the evidence did not show that facial hair interferes with the seal on the Fire Department's self-contained breathing apparatus.

The resolution of this issue is further complicated because in some instances a state law may be prevented from applying if the wellness program qualifies as a group health plan governed by ERISA. Because ERISA is a federal law, in such cases, the federal law may take precedence over the state law. Employers will want to consult counsel as to the potential application of such state laws.

Things to Consider Before Implementing a Wellness Program

- Business decisions
  - What are your employees' needs (*e.g.*, stress maintenance, weight management, smoking cessation)?
  - What types of wellness programs will address those needs (*e.g.*, educational campaigns, counseling, smoking cessation programs)?
  - Should you purchase an insured wellness program "off-the-shelf" or should you work with a vendor to develop a customized program?
  - Will you administer the wellness program or will you use a third party to administer the wellness program?

  - How can you encourage your workforce to participate in a wellness program (*e.g.*, effective communication strategies, marketing techniques, and an encouraging workplace culture)?
  - How will you evaluate the effectiveness of your wellness program?

- Plan design
  - Will your wellness program be offered as part of a group health plan or on a stand-alone basis?
  - If offered on a stand-alone basis does the wellness program constitute a group health plan under ERISA (*e.g.*, by providing medical care)?
  - Will your wellness program incentivize participants through rewards or penalties?

- Legal
  - Does the wellness program comply with federal nondiscrimination requirements under HIPAA?
  - Does the wellness program comply with other federal laws (*e.g.*, ERISA, Americans with Disabilities Act, and the Internal Revenue Code)?
  - Does the wellness program comply with D.C. and state law (to the extent these laws are not preempted by ERISA)?

Resources:

- CDC: Wellness at Work
- Department of Labor: Workplace Wellness Programs Study