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HEALTHCARE REFORM UPDATE 2015-6

PPACAAdvisor

WHAT EMPLOYERS NEED TO KNOW RIGHT NOW ABOUT HEALTH CARE REFORM

Proposed Rule on Wellness Programs Under the Americans with Disabilities Act

On April 20, 2015, federal agencies released a Proposed Rule to amend regulations and provide guidance on implementing Title I of the Americans with Disabilities Act (ADA) as it relates to employer wellness programs.

Title I of the ADA applies to employers with 15 or more employees, prohibits discrimination against people with disabilities, and requires equal opportunity in promotion and benefits, among other things. Under the Proposed Rule, wellness programs that are part of or are provided by a group health plan or by a health insurance issuer (carrier) offering group health insurance in conjunction with a group health plan are required to provide a notice and describe the use of incentives. In the Proposed Rule, "group health plan" refers to both insured and self-insured group health plans. All of the other proposed changes relate to "health programs," which include wellness programs regardless of whether they are offered as part of or outside of a group health plan or group health insurance coverage. The term "incentives" includes financial and in-kind incentives for participation such as awards of time off, prizes, or other items of value.

Rules for wellness programs have been in effect since 2007, with additional rules that went into effect for the 2014 plan year under the Patient Protection and Affordable Care Act (PPACA). Wellness programs are either "participatory" or "health-contingent." A participatory program is one that either has no reward or penalty (such as providing free flu shots) or simply rewards participation (such as a program that reimburses the cost of a membership to a fitness facility or the cost of a seminar on nutrition). As long as a participatory program is equally offered to all similar employees, no special requirements will apply to the program.

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Health-contingent wellness programs are either classified as "activity only" or "outcome based." Health-contingent wellness programs are programs that base incentives or requirements in any way on an employee's health status. Health status includes things like body mass index (BMI), blood glucose level, blood pressure, cholesterol level, fitness level, regularity of exercise, and nicotine use. A wellness program with health-contingent requirements must meet all of these requirements:

- Give employees a chance to qualify for the incentive at least once a year
- Cap the incentive at 30 percent of the total cost of employee-only coverage under the plan, including both the employee and employer contributions, with a 50 percent cap for tobacco cessation or reduction
- Be reasonably designed to promote health or prevent disease
- Provide that the full reward must be available to all similarly situated individuals with a "reasonable alternative" method of qualifying for the incentive for some individuals
- Describe the availability of the alternative method of qualifying for the incentive in written program materials

The ADA restricts employers from obtaining medical information from employees by generally prohibiting them from making disability-related inquiries or requiring medical examinations, with an exception for voluntary medical examinations for wellness programs. The Proposed Rule announced that federal agencies decided that allowing certain incentives related to a wellness program, while limiting them to prevent economic coercion that could make the program involuntary, is the best way to achieve the purposes of the wellness program provisions of both the ADA and HIPAA.

The Proposed Rule defines "voluntary" as meaning that a covered entity: (1) does not require employees to participate; (2) does not deny coverage under any of its group health plans or particular benefits packages within a group health plan for non-participation; and (3) does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees within the meaning of Section 503 of the ADA. Furthermore, employers must provide a notice that clearly explains what medical information will be obtained, who will receive that medical information, how the medical information will be used, the restrictions on its disclosure, and the methods the covered entity will employ to prevent improper disclosure of the medical information.

The Proposed Rule would permit the disclosure of medical information obtained by wellness programs to employers in aggregate form only, except as needed to administer the health plan. The Proposed Rule also underscored the importance of the 30 percent limit (in relation to the total cost of employee-only coverage under the plan, including both the employee and employer contributions) on incentives for wellness program participation, with the exception for tobacco cessation program incentives of 50 percent so long as they do not involve disability-related inquiries or medical examinations. Employee health programs that do not have disability-related inquiries or medical examinations, such as an education program, would not be subject to the incentive requirements under the Proposed Rule.

The Proposed Rule clarified that a smoking cessation program that only asks employees whether or not they use tobacco or whether they completed a cessation program is not an employee health program that includes disability-related inquiries or medical examinations, and therefore would not be subject to the incentive limitation of 30 percent. In contrast, a biometric screening or medical examination testing for nicotine is a medical examination, and would make the screening subject

to financial incentive rules, including the 30 percent limitation.

The Proposed Rule would protect individually identifiable health information collected from or created about participants in a wellness program that is part of a group health plan, under the HIPAA Privacy, Security, and Breach Notification Rules. When an employer is a health plan sponsor performing plan administration it would need to certify that it will not use or disclose information for purposes not permitted by its group health plan documents and the HIPAA Privacy Rule. As a best practice the Proposed Rule recommends individuals who handle medical information that is part of an employee health program should not also be responsible for making employment-related decisions such as hiring, termination, or discipline. Using a third-party vendor to handle medical information is noted as a way to reduce that risk. Employers who administer their own wellness programs should ensure they have adequate firewalls to prevent unintentional disclosure.

The Proposed Rule requested comments from the industry on wellness programs generally as well as providing a list of specific topics on which it seeks input.

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