

Wellness Plans: HIPAA, the ADA and the EEOC

Wellness benefits are gaining in popularity as employers face escalating health care costs and seek to encourage employees to not only use their health care more wisely, but use health care services less because workers are healthier. These programs encourage employees to engage in healthy lifestyles in order to control illnesses.

Although these programs are becoming more prevalent in the workplace, they come with legal pitfalls and factors that must be considered before implementing such a plan. In addition, though many plan sponsors are aware of the HIPAA nondiscrimination regulations concerning “bona fide wellness programs” and the rules they must follow so as to avoid discrimination based on an individual’s health status, employers must also be concerned with the *Americans with Disabilities Act (ADA)*.

The Joint Committee on Employee Benefits of the American Bar Association (ABA) recently issued an informal report on its Q/A session with the EEOC legal staff in regards to the application of the ADA to wellness programs. The EEOC was questioned about two common components of employer-sponsored wellness programs: health risk assessments and punitive triggers. Although the EEOC’s comments are informal and nonbinding, they highlight the importance of analyzing wellness program design features under both the HIPAA nondiscrimination rules and the ADA.

HIPAA Nondiscrimination Issues

HIPAA’s nondiscrimination rules prohibit employers from conditioning or varying eligibility, continued eligibility, or premiums for health coverage based on an individual’s health status. Wellness programs that provide a *reward* or any financial differential based on the ability of an individual to meet a standard that is related to a health factor would conflict with HIPAA. HIPAA does provide an exception for these kinds of wellness programs if they meet certain requirements. Programs that meet the rules set forth in the proposed wellness regulations are deemed to satisfy the good faith standard requirements regarding wellness programs. The requirements for a bona fide wellness program are as follows:

- **Maximum Reward Level:** The reward for the wellness program, when combined with any other applicable rewards for other wellness programs associated with the plan that require satisfaction of a health factor standard, must not exceed 10-, or 15-, or 20-percent of the unsubsidized cost of employee-only coverage under the plan. (As mentioned above, the regulations have not been finalized and therefore do not prescribe a specific percentage amount.) A reward can take the form of a discount, a rebate of a contribution, or a waiver of all or part of a cost-sharing requirement (such as deductibles or co-

payments). The selected percentage limit of unsubsidized employee-only coverage applies even if the employee affected by the program has family coverage. Future guidance, following a review of comments from the public on the regulations, is expected to stipulate a required percentage level for determining the maximum program reward.

- **Good Health Component:** Program must be reasonably designed to promote health or prevent disease.
- **Annual Qualification:** Program must give individuals the opportunity to qualify for the reward at least annually.
- **Reward Availability:** Program reward must be available to all similarly-situated individuals. According to the DOL, the program must have a reasonable “alternative standard” for any individual to get the reward. A person with a medical condition that makes it unreasonably difficult for them to secure the reward can use the alternative means. The same must be true for any individual for whom it is medically inadvisable to attempt to satisfy the reward standard.
- **Adequate Disclosure:** All program materials must disclose the availability of an accommodation by using the reasonable alternative standard.

ADA Discrimination Issues

In addition to the HIPAA nondiscrimination rules, employers seeking to implement a wellness program need to consider their obligations under the *Americans with Disabilities Act* (ADA). The ADA prohibits discrimination against an individual because of the individual's disability. With more than 40 percent of employers sponsoring wellness programs concentrating on dietary and life management, a recent American Management Association survey indicates that many employers may not recognize that three common wellness plan designs could violate the ADA:

- Mandating wellness program participation;
- Using information obtained in the program in a way that violates ADA confidentiality requirements;
- Using information gained through the wellness program to discriminate against employees who are not as physically fit as management thinks they should be.

ADA compliance issues arise when wellness programs offered by the employer do not offer a reasonable accommodation for employees with known disabilities and when an employer inappropriately inquires about medical conditions. Employers are permitted to require medical examinations or inquiries, provided they are related to the employee's job functions and are not used to discriminate on the basis of a disability.

Persons who are considered disabled are protected under the ADA. For purposes of the law, disability is defined as a physical or mental impairment that substantially limits one or more major life activities; additionally, the definition includes anyone who had such an impairment in the past (for example, someone who has recovered from cancer); or someone who is merely thought to have a disability (e.g., someone who was misdiagnosed with a serious illness).

Disabled employees, who can perform the "essential functions" of a job, must be accommodated by the employer if the employer can make reasonable accommodations for such employees. The ADA also indirectly applies to employees with disabled dependents, because the employees are protected from discrimination based on their association with a disabled person.

The ADA does allow employers to conduct medical examinations and inquiries that are part of its wellness program without having to show that the examination or inquiry is job-related or consistent with business necessity if such examinations and activities are voluntary. The Equal Employment Opportunity Commission (EEOC) has stated that wellness programs

are "voluntary" as long as an employer neither requires participation nor penalizes employees who do not participate in the program. An employer having a wellness program that involves medical examinations or inquiries will need to determine whether its program complies with the ADA's requirement that the program be voluntary.

ABA Asks: EEOC Answers

Health Risk Assessments: Employers have begun to use Health Risk Assessments (HRAs) as part of their wellness initiatives for their plans. Given the difficulty in getting employees to complete and submit the HRAs, employers have begun to get more aggressive in their approach to getting employees to complete the HRA. One of the questions posed to the EEOC was whether an employer may require employees to complete the HRA as a condition of enrollment in the employer-sponsored health plan.

The ADA regulations have specific limitations with regard to an employer's right to make disability-related inquiries and require medical examinations of employees. A disability-related inquiry is a question or a series of questions likely to elicit information about a disability. A medical examination is defined as a procedure or test that seeks information about an individual's health. Given the types of questions on a health risk assessment and the likelihood that information about an individual's disability or health status will be disclosed, it is governed by the ADA.

An employer is not permitted to make disability-related inquiries or require a medical examination unless the examination or inquiry is shown to be job-related and consistent with business necessity. The ADA, though, specifically allows employers to make disability-related inquiries or conduct medical examinations if they are a part of their voluntary wellness programs. A wellness program is deemed to be voluntary so long as the employer does not mandate program participation or penalize employees who choose not to participate.

Tying completion of the HRA to enrollment in the health plan would not appear to violate the HIPAA nondiscrimination rules. However, in response to a question asked by the American Bar Association at a periodic Q&A session, the EEOC staff stated that such a practice "might well render participation in the assessment involuntary, making unlawful any disability-related inquiries or medical examinations that are part of the assessment."

Punitive Triggers: The EEOC was also questioned about punitive triggers in which employees who do not cooperate with the disease management program are

assessed higher costs. If the program requires employees to submit to medical exams or answer disability-related questions, then participation must be voluntary. The EEOC's response indicated that punitive triggers such as charging a higher premium or deductible could "amount to penalties for non-participation within the meaning of the EEOC guidance, thus rendering participation in the program involuntary."

Putting it All Together

In most cases, the key to the ADA or HIPAA acceptability of plan limits or exclusions seems to be that a limit is directed at a particular treatment or procedure rather than a particular illness or disability. Exclusions or caps that relate to a specific disability are questionable — especially in plans that place no similar caps on other serious diseases. The distinction between a neutral exclusion and one targeted at a specific disability may be subtle. For example, it's clear that a plan can limit or exclude treatment for blood transfusions, even though hemophiliacs may be hurt worse than others by the limitation. But excluding insulin coverage is not permitted because it would exclusively affect diabetics.

Despite numerous HIPAA restrictions on wellness programs, there are ways to structure HIPAA-compliant programs. The key is that group health plans subject to HIPAA must provide notice and alternatives that are available to all without regard to actual health factors when developing restrictive plan rules or imposing other coverage limitations.

Employers can minimize the possible conflict between wellness programs and the seemingly impossible standard the EEOC staff thinks is applicable under the ADA by focusing on employee education rather than achieving actual health standards. For example, the EEOC staff has stated that if a program simply promotes

a healthier lifestyle, but not does ask any disability-related questions or require medical examinations, it is not subject to the ADA's requirements concerning disability-related inquiries and medical examinations.

If an employer focuses on healthy lifestyles, but does not ask any disability-related questions, it avoids running afoul of ADA requirements concerning disability-related inquiries. Questions that elicit information on behavior rather than an individual's disability are likely permissible. Behavioral questions, such as asking the individual about their eating, exercise, or sleeping habits, are not likely to yield information about the nature or severity of a disability.

Employers must also be careful to avoid asking questions that would appear to provide a verbal "medical examination" of the employee, which an employee could claim was used by the employer for illegal discrimination.

Conclusion

Although the EEOC has not taken a formal position as to these issues and the answers provided at the Q/A session are both informal and non-binding — their comments are indicative of the how the EEOC might respond should it take a formal position on the matter. It also raises additional considerations for an employer considering implementing, or who has already implemented a wellness program.

Moreover, though group health plans may impose higher cost-sharing (such as deductibles or co-payments) on individuals with certain health factors who fail to comply with bona fide wellness programs without running afoul of the HIPAA noncompliance rules, the ADA has different rules and requirements. As such, a wellness program must be carefully analyzed under both laws.

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