Employee Benefits Alert

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DOL Closes a Loophole in Requirements for Wellness Programs

The Department of Labor (DOL) has closed a loophole used by some health insurance vendors to offer wellness programs that they claimed were exempt from federal non-discrimination rules in the Health Insurance Portability and Accountability Act (HIPAA). These vendors structured policies to fit within HIPAA's exemption for "supplemental" insurance coverage that is "similar" to Medigap and certain other supplementary coverage. Some employers purchased these supplemental policies and, with the understanding that the coverage was exempt from HIPAA, implemented wellness programs with elements that did not comply with HIPAA. Last week, the DOL issued an interpretation of the HIPAA regulations that severely limits the coverage that can qualify as "similar supplemental insurance," effectively closing the loophole.

Background

Wellness programs often provide incentives for employees to meet wellness goals (e.g., cholesterol below 200 or blood pressure below 140/85). The incentives frequently involve health plan premium discounts or benefit enhancements. Under HIPAA's nondiscrimination rules, such health plan incentives are prohibited unless they are offered through a wellness program that meets several conditions, including:

- Offering alternative wellness goals to individuals whose health conditions make meeting the health standards medically inadvisable or unreasonably difficult
- Limiting the maximum incentive

Some employers object to the requirement for alternative standards, because it enables individuals who do not meet a wellness standard to obtain the same incentives as those who do meet the standard. For example, an employer that offers lower rates for nonsmokers must provide the same rate to smokers who meet an alternative standard if quitting is unreasonably difficult due to nicotine addiction. Many employers believe this rule undercuts the viability of a wellness program.

Employers also object to the limit on the total incentive that any individual can receive for meeting all of a plan's wellness standards. In most cases, the rules limit health plan incentives to 20 percent of the COBRA premium for individual coverage (less the two percent administration fee usually added to COBRA premiums). Many employers believe that this limited incentive is not sufficient to modify behavior. For more background, see Willis' *Employee Benefits Alerts, Issue 113*.

The Problems for Employers

The restrictions on wellness programs do not apply to coverage that is exempt from the HIPAA nondiscrimination rules. One of the exemptions from the rules applies to insurance policies providing benefits that supplement Medicare or TRICARE (the healthcare plan for US military personnel and their dependents). This exemption also applies to "similar supplemental coverage provided to coverage under a group health plan." The regulations explain that, in order to qualify for this exemption, supplemental coverage must be specifically designed to fill gaps in group health plan coverage. Some experts concluded that an insurance policy would qualify for this exemption if it paid benefits solely to cover the deductibles and coinsurance under a group health plan. That conclusion led to the supplemental insurance loophole. Being exempt, such a supplemental policy would not violate HIPAA if it varied individuals' eligibility, premiums and benefits based on health factors, including achievement of health standards.

To exploit this loophole, an employer would adopt a group medical plan with a very high deductible ($1,000 or more). There would be no wellness incentives attached to that plan. Wellness incentives would apply to coverage under a separate insurance policy that would pay benefits solely to cover the deductibles and coinsurance. For example, smokers might be charged for coverage under this supplemental coverage, while nonsmokers would have the supplemental coverage paid for by the employer.

As we noted in our *Alert*, these "loophole programs" were almost certain to raise compliance issues. The new DOL guidance confirms that prediction.

Closing the Loophole

The DOL issued a field assistance bulletin in order to address "concerns about whether all of the coverage that is being marketed as similar supplemental coverage actually qualifies as such." The DOL guidance establishes a safe harbor rule: programs that meet the safe harbor criteria will be exempt from the HIPAA nondiscrmination requirements, while programs that do not "may be subject to enforcement actions."

Safe Harbor Requirements

Four requirements must be met for supplemental insurance to qualify for the safe harbor.

- **Independent of Primary Coverage.** The supplemental coverage must be provided under a separate policy, certificate or contract of insurance that is issued by an entity that does not provide the primary coverage. An insurer's subsidiaries and controlled group affiliates are not considered separate entities for this purpose.
- **Supplemental for Gaps in Primary Coverage.** The supplemental insurance must be specifically designed to fill gaps in the primary coverage, such as coinsurance or deductibles. Insurance that becomes secondary or supplemental only under a coordination-of-benefits provision does not meet this safe harbor condition.
- **Supplemental in Value of Coverage.** The cost of the supplemental coverage must not exceed 15 percent of the cost of the primary coverage. Cost for this purpose is the COBRA premium (less the two percent administration fee).
- **Similar to Medicare Supplemental Coverage.** The supplemental insurance must not vary eligibility, premiums or benefits based on any health factor of an employee (or any dependent of the employee).

The fourth requirement – nondiscrimination – is a masterpiece of circular reasoning. To qualify for the the safe harbor exemption from the HIPAA nondiscrimination rules, supplemental insurance coverage must, essentially, comply with the nondiscrimination rules. The DOL justifies this requirement by noting that the "similar" in "similar supplemental coverage" refers to a Medicare supplement. Since issuers of Medicare supplemental coverage generally are subject to "prohibitions against discrimination based on enrollees' or potential enrollees' health status," similar supplemental coverage must be subject to such prohibitions in order to be exempt.

Effect of DOL Guidance

The DOL issued this guidance as a field assistance bulletin – essentially an explanation of the DOL's enforcement position – and it is not necessarily law. In addition, only one of the four safe harbor requirements (the requirement that coverage be specifically designed to supplement group health plan coverage) actually appears in the regulations. The other three items are DOL interpretations of the term "similar supplemental coverage."

The DOL notes in its guidance that the Treasury and Health and Human Services Departments (the other agencies responsible for HIPAA implementation) will be issuing similar guidance on the supplemental insurance exemption.

Cautious employers will respond to this guidance by eliminating any loophole-based programs that they currently maintain and ensuring that their wellness programs meet the requirements of the HIPAA nondiscrimination rules. For more on the HIPAA requirements for wellness programs, see Willis' *Employee Benefits Alert, Issue 94*.

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