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Revisiting Wellness Incentive Programs under Healthcare Reform

By Jill Pedigo Hall

With the Supreme Court's recent decision upholding the Patient Protection and Affordable Care Act ("PPACA"), employers now know the final version of the law that they must analyze and deal with. Perhaps among the less-publicized elements of the new healthcare law is the law's codification of and emphasis on an increasingly popular subject: wellness incentive programs.

Employer wellness incentive programs take a variety of forms, ranging from employer-provided direct incentives, such as pedometers or discounted health club memberships (participation only programs) to group health plan incentives that link healthcare discounts to meeting certain health targets, such as cholesterol or blood pressure standards (standard-based programs). The codified support for employer wellness programs in the PPACA demonstrates Congress's intent to encourage these programs and, thus, enhance and encourage public wellness. The effectiveness of wellness programs is not established, however, and legitimization of wellness programs through the PPACA does not provide employers immunity from other established nondiscrimination considerations. The need for further study of wellness programs is even recognized within the PPACA, which requires the Departments of Labor, Health and Human Services, and Treasury to evaluate and report to Congress by 2013 on:

- The effectiveness of the wellness programs in promoting

health and preventing disease;

- The impact of wellness programs on access to care and the affordability of coverage; and

- The impact of premium-based and cost-sharing incentives on behavior.

One way the PPACA encourages wellness initiatives is by expanding the exception to prohibitions on group health plan discrimination found in the Health Insurance Portability and Accountability Act ("HIPAA"). HIPAA generally prohibits group health plans from charging employees different premiums based on their health status, but if a plan meets certain requirements, HIPAA allows employers offering those health plans to establish premium discounts or provide other financial incentives for employees who participate in participation programs or standard-based programs. Specifically, under HIPAA regulations, standard-based programs are allowed if they meet all of the five following requirements:

1. The reward for the program cannot exceed 20% of the cost (combined employer and employee payment) of employee-only coverage under the plan;

2. The program must be "reasonably designed to promote health or prevent disease";

3. The program must give employees the opportunity to qualify for the reward at least once per year;

4. The reward must be available to all employees, and a "reasonable alternative standard" must be available to any individual for whom it is unreasonably difficult to meet the standard due to a medical condition, or for whom attempt to meet the standard is "medically inadvisable"; and,

5. The plan must disclose the "reasonable alternative standard" in its written materials.

The PPACA in effect codifies these HIPAA standards but raises the employee reward or penalty cap to 30% beginning January 1, 2014, thus strengthening an employer's position to influence employee healthy lifestyles.

However, whether offered as part of a health plan program subject to HIPAA or the PPACA extension, or as a separate employer program or policy not subject to HIPAA or the PPACA, wellness programs are still generally bound by federal, state and local nondiscrimination and privacy laws, such as the Americans with Disabilities Act ("ADA"); Genetic Information Nondiscrimination Act of 2008 ("GINA"); Title VII of the Civil Rights Act of 1964, as amended ("Title VII"); and the Age Discrimination in Employment Act. Employers contemplating penalty or reward wellness programs should consider that few, if any, cases have addressed the application of these nondiscrimination laws to the wellness program penalty and reward provisions. Moreover, standard-based programs almost

inevitably involve the collection of protected medical information from participants. Thus, it is recommended that employers vet proposed wellness penalties or rewards for discriminatory effects.

For example, under HIPAA and beginning in 2014 under the PPACA, employees may ask for a waiver from a standard-based reward or penalty program if they can show that they have a medical condition that makes it unreasonably difficult or inadvisable to attempt to meet the standard. The law allows employers to require verification of the employee's condition. Obtaining this verification may implicate ADA and GINA prohibitions and, thus, should be carefully structured. The ADA prohibits employers from discriminating against disabled individuals and limits the circumstances under which employers can require medical examinations or responses to medical inquiries. GINA dictates that an employer may collect genetic information as part of a wellness program only if that collection meets criteria that prohibit the employer from obtaining individually identifiable genetic information.

As another example, and no different than any other facially neutral policy or program, an employer should monitor the effect of any standard-based wellness penalty or reward on groups protected by anti-discrimination laws - such as women, the elderly, and minorities. If an employer sets health target penalties that result in making coverage unaffordable for a particular protected population, it is unlikely that the PPACA will protect against a finding of a discriminatory disparate impact under Title VII.

Despite PPACA's clear legislative support for wellness efforts, employers fashioning penalty and reward wellness programs must consider nondiscrimination and privacy implications of such provisions. When structuring a program, it is suggested that employers do the following:

- Do nondiscrimination testing prior to launching the program and periodically thereafter to ensure it does not negatively impact a protected group;
- Obtain the assistance of disability or medical consultants to ensure a sufficient variety of alternatives are available for those employees unable to attain program standards; and
- Impose financial penalties on a very limited basis and only after consideration of whether a reward alternative could accomplish the same wellness goal.

Finally, as the remainder of the PPACA is implemented through regulations and guidance over the next few years, employers should regularly seek information and guidance on the act's mandates -- not only for compliance, but also to ensure they receive all possible benefits under the law.

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