Health Insurance Portability and Accountability Act (HIPAA)

Workplace Weight Loss and Wellness Programs

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Health Insurance Portability and Accountability Act (HIPAA)

A. Non-discrimination regulations on bona fide wellness programs

Under HIPAA,

> A group health plan, and a covered health insurance issuer may not establish rules for eligibility, (including continued eligibility), for an individual's enrollment under the terms of the plan based on any of the following health status-related factors in relation to the individual or a dependant of the individual:
>
> (a) Health status,
>
> (b) Medical condition (including both physical and mental illnesses),
>
> (c) Claims experience,
>
> (d) Receipt of health care,
>
> (e) Medical history,
>
> (f) Genetic information,
>
> (g) Evidence of insurability (including conditions arising out of acts of domestic violence), and
>
> (h) Disability.

42 U.S.C. §300gg-1(a). This means that employers are barred from preventing their employees from enrolling in a covered health plan based on health risks learned about in the course of a health risk assessment (HRA) or health risk reduction program (HRRP). Id.

A subsequent provision in the same statutory section of HIPAA renders actions by employer sponsored health plans to vary individual premium contributions, based on the health status of an employee or covered dependent, unlawful. 42 U.S.C.§300gg-1(b)(1). Yet nothing in the rule restricting the variation of individual premiums bars the employer from being charged more for group coverage, as long as the health insurance issuer does not commit unlawful group based discrimination. 42 U.S.C. §300gg-1(b)(1), (3).

For critical purposes of the present analysis, however, HIPAA also allows employers in the same statutory provision, to take certain actions. HIPAA states it should not be construed to bar a group health plan, and a covered health insurance issuer, from establishing premium discounts or rebates, or modifying otherwise applicable copayments or deductibles, in return for adherence to qualified wellness programs. 42 U.S.C. §300gg-1(b)(2)(B).

The federal regulations provide for the enforcement of the nondiscrimination HIPAA provision by the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services since the joint rules became effective on July 1, 2007. 71 Fed. Reg. 75014 (Dec. 13, 2006), codified at 26 CFR Part 54, 29 CFR Part 2590, and 45 CFR Part 146. The rules, which these three federal agencies are jointly tasked with enforcing, seek to procure nondiscrimination in wellness programs and health coverage in the group market. The following programs, discussed in the cited rules, need not satisfy the bona fide wellness program elements of the nondiscrimination HIPAA regulations so long as participation in such programs are made available to all similarly situated individuals:

1. A program that reimburses all or part of the cost for membership in a fitness center;

2. A diagnostic testing program that provides a reward for participation and does not base any part of the reward on outcomes;

3. A program that encourages preventive care through the waiver of a deductible or copayment requirement under a group health plan for the cost of, for example, prenatal care or well-baby visits;

4. A program that reimburses employees for the cost of smoking cessation programs, without regard to whether the employee actually quits smoking; and

5. A program that provides a reward to employees for attending a monthly health education seminar.

29 CFR §2590.702(f)(1).

However, more detailed regulations govern if the employee must satisfy conditions for obtaining a reward that involve meeting a standard connected to a health factor. In those circumstances, the following provisions must be met:

1. The reward for the wellness program, in this instance, a weight loss program, must not exceed 20% of the cost of employee-only coverage under the plan or, if dependents are also covered under the plan, 20% of the cost of the employee and any dependents covered under the plan. In other words, the coverage cost is determined based on the total amount of

employer and employee contributions for the benefit package under which the employee currently receives coverage. Moreover, every reward for participation can include a discount, rebate of a premium, or waiver of all or part of a cautionary mechanism such as co-payments and deductibles, subject to the 20% figure.

2. The program must be reasonably designed to promote good health or to prevent disease. Individuals must be given the chance to qualify for the reward under the program at least once a year, to show their eligibility, in order to establish that the program is reasonably designed to promote good health or to prevent disease.

3. The program must give individuals eligible for the program the opportunity to qualify for the reward under the program at least once per year.

4. The reward under the program must be available to all similarly situated individuals. Therefore, covered employees or individuals with documented medical conditions must receive an opportunity to qualify for the reward by alternative means.

5. The plan must disclose in all plan materials detailing the program, the availability of a reasonable alternative standard or waiver of the applicable standard. In such plan materials, an employer may provide language that details the availability of a reasonable alternative without specifying exact

terms. 29 CFR §2590.702(f)(2)(i)-(v). For example, such plans might provide the following:

> [If it is unreasonably difficult due to a medical condition for you to achieve the standards for the reward under this program, or if it is medically inadvisable for you to attempt to achieve the standards for the reward under this program, call us at [insert telephone number] or contact us at [e-mail] and we will work with you to develop another way to qualify for the reward.]

The above discussed regulations regarding reasonable alternatives will likely prove critical in administering a successful wellness weight loss program. Some affected employees, particularly in situations where health plans provide for significant reductions in employee premiums pegged on weight loss, may challenge the qualifying standard. Such employees may also question the time they are allotted to satisfy the weight loss standard and the method for determining whether they have met such standards and any rules regarding relapses.

With these contrasting concerns and objectives kept in mind, employers should remain aware of specific issues that may arise from their administration and formulation of their weight loss wellness programs.

1. Given the maximum permissible reward of 20% of the health plan cost, and the ever rising nature of health plan costs, will some employees perceive the substantial incentive as something else, specifically a

financial figure forcing them to participate even though a substantial incentive to participate in the program is expressly permissible?

2. Nevertheless, employers should understand that a good faith standard governs the determination of whether the wellness program is reasonably designed to promote health and to prevent disease, meaning that absent discriminatory or other unlawful actions, some deference is given to the actions of plan sponsors in formulating a weight loss wellness program.

3. Employers must also consider whether simply providing an alternative method for qualifying for a reward that satisfies the HIPAA regulation also complies with the ADA and the GINA amendments to the Civil Rights Act.

4. As part of HIPAA, Congress directed the Secretary of Health and Human Services to promulgate standards for privacy of individually identifiable health information, and these standards are generally known as the "privacy rule." 45 CFR Parts 160, 164 (2005). The intent behind the HIPAA privacy rule is to both provide for more efficient health claims processing through standard electronic transactions while simultaneously protecting the privacy of patients' health information conveyed in such electronic transactions. Id. However, the privacy rule governs only three types of covered entities: healthcare providers, health clearinghouses, and health plans. 45 CFR §160.102. The privacy rule does not apply to employers, life insurers, schools or other persons that may have health

> information unless they perform functions of a covered entity, such as providing and billing for health services. [Remember – the GINA amendments impose separate privacy obligations on employers, etc.]

Nevertheless, whether the privacy rule applies to an employment situation is not always a simple answer. As stated, employers are not covered entities under the HIPAA privacy rule. Yet employer sponsored health plans are covered by the privacy rule. 45 CFR §160.103. As a result, employers must separate their covered functions such as health benefits, from non-covered functions, such as human resources. To do so requires separately maintaining and compiling health claims information apart from personnel data. 45 CFR §164.504(c)(2). Employers should stay mindful that even though the Department of Health and Human Services has not yet aggressively filed numerous enforcement actions under the privacy rule, some employers may fail to appreciate or understand the care they should take to separately maintain such data and records. Moreover, employers must stay aware of the potential for abuse of their databases that can cause unauthorized access to or mixing of such covered records and non-covered records.

Perhaps the most significant aspects of the privacy rule for employers is the recent revision in this area promulgated in §13404 of the American Recovery and Reinvestment Act of 2009. Pub. L. 111-5 (2009). In the cited Act, Congress broadened the privacy rule to cover business associates of covered entities. This amendment has significance since many contracts between vendors and employers are even titled as a "business associate" contracts whereby the employer sponsored health plan obtains wellness program services pursuant to a written agreement whereby the vendor promises to comply with the HIPAA privacy rule. As first issued, the privacy rule did not cover business associates. 45 CFR §164.5.1(e)(1). Now, with the cited 2009 legislation, Congress compels covered entities to monitor the actions of their

business associates and insists that they correct practices that violate the HIPAA privacy rule. The practical effect of the 2009 Congressional legislation is that employers may need to consider methods of evaluating their vendors' compliance with the HIPAA privacy rule through means such as technological audits to be paid and provided by the employer or vendor as part of such contracts. Indeed, as a result of the HIPAA amendments contained in the Health Information Technology for Economic and Clinical Health Act, (the "HITECH Act"), the discussed heightened privacy and security standards of HIPAA apply both to covered entities and their business associates. 42 U.S.C. §§17931, 17934.

Records generated as part of the process of running an employee wellness program should be treated as confidential material. The Seventh Circuit affirmed a trial court ruling quashing a subpoena served by the U.S. Department of Justice that sought various redacted abortion proceeding records from a Chicago hospital on the grounds of protections afforded by HIPAA and the more stringent Illinois privilege afforded medical records, even when certain data was redacted. *See, Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923, 924-25 (7th Cir. 2004), citing, 42 U.S.C. §1320d-2, Note, 45 C.F.R. §§160.202(6), 160.203(b), and 735 ILCS 5/8-802.

In addition, employees may exercise their right to stop release of their medical information pursuant to a revocable HIPAA release. If the doctor or healthcare provider of the employee has not released any protected information in reliance on a previously signed release, then there has been no waiver of the HIPAA privilege. *See, Koch v. Cox*, 489 F.3d 384, 391-92 (D.C. Cir. 2007). The *Koch* plaintiff also successfully argued that he had not put his depression at issue because he made no claim for recovery of damages based on his mental or emotional

state in his multiple employment claims lawsuit that alleged violations of the Age Discrimination in Employment Act, the ADA, and other laws. *Id.* at 391.