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A legal update from Dechert's Employee Benefits and Executive Compensation and Health Law Groups

Implementing Employee Wellness Programs: Pitfalls and Practical Tips

Employers who sponsor health plans for their employees are searching for new ways to control health care costs. Many of these employers are frustrated that traditional health plans have not focused enough resources on preventive care for the general population. In particular, traditional health plans have not yet reigned in enough savings from the health plan costs attributable to treatment of chronic disease and ailments stemming from unhealthy lifestyle choices.

Even health maintenance organizations and other managed care plans with disease management components are not wringing out the types of savings employers desire as they see their health plan costs skyrocket. Consequently, many employers increasingly are creating wellness programs to keep employees healthy and reduce costs. Sometimes these wellness programs focus on employees with specific health problems such as heart disease and diabetes. In other instances, an employer wants to incentivize employees to get a physical examination or participate in a health risk assessment.

Implementing a wellness program post-HIPAA can be complicated, however, and requires knowledge of several regulatory schemes. Dechert LLP can help you navigate through this complex web of regulations.

Types of Wellness Initiatives

Health Risk Assessments

Several vendors have developed complex questionnaires that employees may complete to determine whether they are at risk for certain types of dis-

eases or injuries. Employees answer various questions concerning their lifestyle (e.g., exercise, smoking habits), current health, and blood test results (cholesterol). Some of these programs may be coupled with the availability of on-site mobile laboratories to run laboratory tests.

Employees then are given a report outlining their health risks with recommendations to discuss with their physicians. Sometimes a health risk assessment ("HRA") is coupled with a "coaching" program where employees classified as high risk (e.g., smokers, diabetics) are called by coaches and encouraged to adopt a healthy lifestyle, stop smoking, start exercising, etc. HRAs may be tied to incentives, including reduced premiums for taking the HRA.

Health Promotion Programs

Some companies have instituted programs encouraging employees to see their physicians for an annual physical. One way employers are encouraging such annual physicals is by designing the group health plan so that there is no copayment, coinsurance, or other cost to the employee for this visit. Other companies have taken this further, encouraging employees to work with their physicians to set goals for the following year. If these goals (e.g., losing weight, quitting smoking) are achieved, employees may earn an incentive. Examples of incentives include monetary rewards, reduced health insurance premiums, trips, and reduced gym membership fees.

As it turns out, incentives can have a significant affect on employee participation in wellness programs. Quoting a Hewitt Associates source, *The Wall Street Journal* reported that, "[W]hen no in

centive is offered, our clients have a participation rate of 20% or lower. . . . If they do offer some kind of incentive, or penalty, they see far more participation, sometimes as high as 90% or more.”¹

Legal and Structural Issues

As previously indicated, implementing one of these types of wellness initiatives raises a number of issues, some of which are outlined below.

Is it a Group Health Plan?

Are these initiatives considered part of the group health plan or part of the employer’s health services/workplace health program?

Adequate Separation

To the extent that the wellness initiative is considered part of the employer’s ERISA health benefit plan, how can this program be structured to fit within the fire-wall required by the “adequate separation” provisions of the HIPAA privacy regulations?

Incentives

If employees are given some type of incentive to participate in the wellness or disease management program, does the incentive structure need to be designed to comply with the proposed HIPAA Bona Fide Wellness Program Regulations discussed below?

Vendors

What vendors will be involved in the wellness initiative? Employers may engage a number of different vendors when undertaking to provide a wellness program. These may include, without limitation:

- Health Risk Assessment vendors
- Data warehousing vendors
- Health benefits consultants
- Reward/incentive-related vendors
- Mobile laboratory vendors

Employers also may work with industry consortiums such as Bridges to Excellence and other regional business consortiums.

Agreements with Vendors

With respect to each vendor, employers must analyze the data flow and determine whether for HIPAA purposes the vendor will be a business associate of the group health plan. Even if it is determined that a vendor is not a business associate, to the extent that it will receive identifiable health information, the employer should consider entering into a confidentiality agreement with the vendor in order to safeguard the employee health information.

Legal Compliance

The key to successful and smooth development of wellness initiatives is for employers to determine at the earliest point possible the applicable legal requirements. Uncomfortable situations may arise if, after implementation, a program must be restructured to comply with ERISA, HIPAA, COBRA, or the Bona Fide Wellness Program regulations.

Communications/Marketing Material

Once a wellness program has been structured to fit within the applicable regulatory schemes, careful attention must be paid to how this program is described to employees. Even the most carefully structured program may raise privacy and other concerns from employees.

Bona Fide Wellness Programs

In addition to protecting the privacy and security of individually identifiable health information, HIPAA prohibits discrimination against participants in group health plans on the basis of “health status.” Under this prohibition, a group health plan “may not require any individuals . . . to pay a premium or contribution which is greater than such premium or contribution for a similarly situated individual enrolled in the plan on the basis of any health-status related factor. . . .” The statute lists the following eight health status-related factors: health status; medical condition; claims experience; receipt of health care; medical history; genetic information; evidence of insurability; and disability.

¹ T. Cullen, “More Firms Pressure Workers to Adopt Healthier Lifestyles,” *The Wall Street Journal* (October 27, 2005).

ERISA section 702, however, permits a group health plan to establish a “premium discount or rebates or to modify otherwise applicable co-payments or deductibles in return for adherence to programs of health promotion and disease prevention.” The Department of Labor has issued regulations interpreting this provision to mean that a group health plan with a cost sharing mechanism that requires a higher payment from an individual does not violate the statute if the payment differential is based on whether an individual has complied with the requirements of a “bona fide wellness program.”

On January 8, 2001, the Departments of Labor, the Internal Revenue Service, and Health and Human Services (“HHS”) jointly issued proposed regulations regarding Bona Fide Wellness Programs. The proposed regulations describe four requirements of a “bona fide wellness plan” under ERISA section 702, and would provide something of a “safe harbor” for employers seeking to comply with the requirements of that section.

It is important to note that these regulations only impose restrictions on wellness programs providing rewards that would otherwise discriminate based on a health factor. In particular, the regulations would apply only to a wellness program that provides a reward based on the ability of an individual to meet a stan-

dard that is related to a health factor, such as a reward conditioned on the outcome of a cholesterol test. Many types of programs that promote health and prevent disease therefore are not covered/regulated by these proposed regulations.

Although these regulations have not been finalized, the preamble to the regulations notes that “compliance with the provisions of these proposed regulations constitutes good faith compliance with the statutory provisions relating to wellness programs.” In addition, the Department of Labor has issued a set of Frequently Asked Questions which provide that “the departments [Labor, IRS, and HHS] will not take any enforcement action against a plan or issuer that complies with a good faith interpretation of the statutory provisions relating to wellness program provisions” and that “compliance with the proposed regulations constitutes good faith compliance with the statutory wellness program provisions.”



As indicated above, human resources/benefits professionals need to become sensitized to the many legal issues relating to implementing employee wellness programs. Dechert LLP can help you navigate these issues and assist you in implementing employee wellness programs. Please contact Beth Rubin at +1 215 994 2535.

Practice group contacts

If you have questions regarding the information in this legal update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/employeefbenefits or www.dechert.com/health.

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