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

DOL Issues Guidance on Wellness Programs

In 2006, the Departments of Labor, Treasury, and Health and Human Services issued final nondiscrimination regulations under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). These regulations contain an important exception applicable to "wellness programs." Consequently, there have been numerous questions concerning what types of arrangements constitute a wellness program and how the regulatory exception is to be applied.

Recently, the Department of Labor ("DOL") issued a Field Assistance Bulletin on wellness programs. The Bulletin includes a checklist with tips on how to determine whether the HIPAA nondiscrimination regulations apply to particular wellness programs. The Bulletin also describes five compliance criteria.

The Bulletin reminds employers to ignore labels, because many different types of programs may constitute wellness programs, including disease management, smoking cessation, and case management programs. The DOL also noted that sometimes wellness programs are operated separately from a group health plan (e.g., an employer institutes a policy that employees who smoke will be fired), and the wellness program rules will not apply, although other laws may apply, including ERISA and the Americans with Disabilities Act.

The DOL provided examples of how employers should review all their wellness program rewards to ensure that the total reward offered under the programs is limited to 20% of the applicable cost of coverage (e.g., 20% of the cost of employee-only coverage). For example, if an employer offers a 10% discount for employees who complete a health risk assessment, a

10% discount for meeting a body mass index target, and a 10% reward for meeting a cholesterol target, this will meet the 20% limit because the 10% reward for completing the health risk assessment does not require individuals to meet a standard related to a health factor.

The Bulletin also reminds employers that the requirement to make rewards available to all similarly situated individuals means that the program must offer a reasonable alternative standard. Programs may request verification, such as a statement from the individual's physician, that a health factor makes it unreasonably difficult or medically inadvisable for the individual to satisfy or attempt to satisfy the otherwise applicable standard. The DOL also reiterates that employers must disclose the availability of a reasonable alternative standard in all materials *describing* the programs. The DOL also explained that the disclosure does not have to state what the reasonable alternative standard is in advance—the program may tailor the standard for each individual on a case-by-case basis. If program materials merely mention that the program is available without describing its terms, this disclosure is not required.

The Bulletin also notes that wellness programs that do not comply with the wellness program regulations may be violating both the general benefit discrimination rule, as well as the general premium discrimination rule.

In a separate Field Assistance Bulletin issued at the end of 2007, the DOL indicated that a certain wellness program structure designed to avoid compliance with the wellness program rules would not avoid such compliance

requirements. In particular, the DOL explained that supplementary coverage issued by an employer (designed to fill gaps in primary coverage such as coinsurance or deductibles) also must be nondiscriminatory or such a plan will not fit into the excepted benefits safe harbor. Among other things, supplemental coverage (e.g., Medicare supplemental coverage known as "Medigap") must not differentiate among individuals in eligibility, benefits, or premiums based on any health factor of the individual (or any dependent of the individual).

The press reports almost daily regarding wellness programs instituted by companies in various industries. Wellness programs, moreover, are becoming more complex, with different levels of rewards for achievement of health goals (e.g., smoking cessation) and attending wellness seminars. This trend toward

increased complexity and penalties for non-compliance (as opposed to just rewards for achievement of health-related goals) likely will continue as employers test various options and determine which options have the most impact on employee health and plan costs. The DOL's issuance of the two Field Assistance Bulletins indicates that it is fully aware of the pervasiveness of wellness programs and that enforcement actions possibly may follow.



If you would like to discuss your group's health plan wellness program, please call the Dechert attorney with whom you regularly work or any of the attorneys listed below.

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/employeebenefits or www.dechert.com/health.

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