Wellness Program Developments, Telemedicine and Other Health Plan Thoughts

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Wellness Program Developments

Guidance seems to be falling everywhere this spring. Yesterday two different agencies released documents. One is guidance on wellness programs under the Affordable Care Act ("ACA") and the other the agencies thoughts in the form of proposed regulations on wellness programs under the Americans with Disabilities Act ("ADA") from the EEOC, the agency that has been pursuing enforcement actions on wellness programs under the ADA in recent months.

The U.S. Department of Labor, Department of Health and Human Services and the Treasury Department joined together to issue sub-regulatory guidance (FAQs) on wellness programs under the ACA. This guidance reminds us that a health-contingent wellness program in a health plan (I.e., programs in which the reward is obtained by achieving a health status or engaging in certain activities, such as attaining BMI of 26 or going to the gym 3 times a week) *must have a reasonable chance of improving health or of preventing disease*, not be overly burdensome, not be a subterfuge for discrimination based on a health factor and not be highly suspect in its method of promoting health or preventing disease. The program must not be designed to discourage persons with high claim experience or who are sick from enrolling in the group health plan. The above are reminders of existing rules, they expanded on their interpretations with the following addition.

If the program collects a substantial level of "sensitive personal health information" without assisting individuals to make behavioral changes (e.g., providing smoking cessation programs or diabetes management training) then the alleged wellness program may be treated as not meeting the requirement that it has a reasonable chance of improving health or preventing disease for the plan participants participating. This italicized language is a new expanded interpretation.

Health contingent wellness programs also must provide a reasonable alternative standard to enable persons who cannot meet the initial standard due to a health factor to qualify. This is not new, but the agencies were reminding employers that an outcome based or health contingent wellness program must be more than just a reward for hitting certain numbers and that it must actually promote wellness and health and prevent disease.

While wellness programs are not required to be accredited or evidence-based, the guidance was accompanied by the release of a study on workplace wellness programs by Rand Corporation and the FAQs referenced standards and practices on evidence based clinical standards in two government studies found at www.thecommunityguide.org/index.html and http://www.ahrq.gov/professionals/clinicials-providers/guidelines-recommendations/guide/ as methods of increasing the likelihood of wellness program success. These are references that may become more important as wellness programs are considered under other applicable laws because compliance with ACA is only one aspect of being a wellness program that is permissible .

The guidance also included reminders regarding federal income tax considerations in structuring the rewards for wellness programs. It is also important to remember that when a wellness program is part of a health plan it is subject to the HIPAA Privacy and Security regulations and Breach notification rules and the plan's information gathered is subject to the HIPAA Privacy disclosure restrictions, including the restrictions and requirements applicable to disclosures to the plan sponsor. The EEOC in its proposed regulations also reiterates the protected nature of this information and adds its own confidentiality and notice requirements.

The EEOC has recently pursued wellness programs in enforcement actions under the ADA. An ACA compliant wellness program is not necessarily compliant with the ADA and employers must consider the ADA's application to wellness programs in designing its wellness programs also. While there have been a few court decisions on wellness programs incorporated into health plans, there has been little information on the EEOC's interpretation of such programs under the ADA. Yesterday, the EEOC release proposed regulations. *Proposed regulations are not legal guidance until finalized*. The preamble includes a number of requests for comment on what is a "voluntary" program that require careful reading and may signal a need for submission of comments for consideration by the regulators.

These proposed rules if finalized in this format will only apply to wellness programs that include a disability-related inquiry or a medical examination. They would not apply to merely asking an employee if they smoked. However, if the program also tested for tobacco use, it is now subject to the ADA and health contingent.

Under the proposed rules, the maximum incentive for both health contingent and participatory wellness programs that include an inquiry or medical examination making them subject to the ADA is 30% of the total cost of employee-only coverage. An employer that currently has an ACA compliant participatory wellness program and a health-contingent wellness program, would currently under the ACA only see its health contingent wellness program subject to this 30% limit and not both programs combined. So employers maintaining both types of wellness programs will need to analyze if both of their wellness programs are subject to the ADA as well as the ACA and may need to adjust their reward/penalty system when these regulations are final.

The proposed regulations include additional confidentiality requirements for wellness programs subject to the ADA; however, for wellness programs that are part of a group health plan and subject to HIPAA Privacy, Security and Breach notification requirements, compliance with those requirements will suffice.

A wellness program subject to the ADA, assuming the proposed regulations are finalized, will only be voluntary if it does not require the employee to participate in the program, and it does not deny coverage or the opportunity to enroll in any particular benefit package or limit the extent of coverage based on participation and it may not take any adverse action or retaliate against, coerce, intimidate or threaten an individual to participate in the wellness program. As a threshold matter, a wellness program subject to the ADA will also not be considered voluntary unless a notice is provided explaining the medical information to be collected, how it will be used and who will receive it, the restrictions on its disclosure and the methods the plan will use to prevent improper disclosure of such information. (This notice for a wellness program that is part of a health plan may need to pick up the HIPAA Privacy notice contents on the protections of and restrictions on use and disclosure of the PHI.)

In a footnote, the proposed regulations also indicate that in any outcome based wellness program, that a reasonable alternative must be provided or a standard waived for any individual who does not meet the initial standard based on a measurement, test or screening as part of complying with the ADA to permit full participation in the program. If this is in the final regulations, it will expand the availability of the alternative standard beyond what is required under the ACA requirements.

The proposed regulation also indicates that compliance with its requirements does not mean that the program complies with any other employment nondiscrimination law. The web in which an employer can be caught continues to grow….

Telemedicine a Tool for Cost Reduction or Something Else?

Some employers have turned to adding telemedicine vendors to their health plans to give employees a lower cost alternative to running to the emergency room or an 24 hour doc-in-a-box or urgent care clinic. Recently the Texas Medical Board in response to requests from the telemedicine industry reconsidered its rule on the legality of telemedicine services to Texas residents. In an attempt to appear to be moving the ball, they decided that if the doctor first had a face to face in person meeting with the patient to establish a physician-patient relationship, that then the doctor could legally prescribe for such patient over the telephone without a subsequent in person visit to assess the patient. Since most telemedicine vendors staff their phones with their own contracted physicians, it is highly unlikely this change in the rule will enable Texas residents to use the telemedicine services being offered by most vendors currently because they are not likely to have had a face to face meeting with the telemedicine physician.

Employers with populations of employees in Texas need to be aware that the telemedicine service vendors may have issues when they provide services in Texas with the Texas Medical Board and such issues could preclude the vendor from providing services to your Texas employees. Employers considering telemedicine vendors should protect themselves when contracting for such services to consider the implications of needing to exclude certain populations from the service and communications related to such limitations on the service. Since the medical licensing and practice rules are directed towards persons practicing medicine and not toward the regulation of employee benefit plans, ERISA preemption is not likely to be the answer because ultimately the parties at risk from any action by the state are the health care providers. The Plan is left to deal with the impact on its relations with the employees unless expectations are managed.

Other Health Plan Thoughts

Much misinformation regarding the requirements under the employer shared responsibility penalty continue to be provided. When analyzing any issue under the employer shared responsibility tax or the "pay or play" tax, it is important to pay close attention to exactly what the statute, regulations and authoritative guidance says, when a penalty is imposed and why and what the reporting requirements require because all of the rules are interrelated. It is important to remember that the reporting from employers and the exchanges or marketplace and the reporting on the individual tax returns that will trigger the assessment of the penalty on the employer. It never hurts to ask for the cite to the authority supporting the person's claimed requirements or analysis in this area.