



Background

- The Patient Protection and Affordable Care Act of 2010
 - Amended by the Health Care and Education Reconciliation Act of 2010 (Reconciliation)
- Jointly referred to as the "Affordable Care Act" (ACA)
- Flood of regulatory guidance
- Labor and Employment Webinar (November 2012)
 - http://www.morganlewis.com/index.cfm/fuseaction/publication.detail/publicationID/9fe6cd46-d3fa-4c63-90ce-02d3d108f254

Overview

- Wellness programs are becoming far more prevalent, and encompassing far more designs, than 5-10 years ago
 - Any program designed to promote health or prevent disease
- Spider's web of legal considerations and issues can snare the simplest of wellness programs
 - Significant resistance from disability advocates
- A single changed design element can significantly raise, or lower, legal risks

Overview

- Adhering to "PPVH" design approach can diminish legal concerns
- PPVH stands for:
 - Positive
 - Private
 - Voluntary
 - Health Plan

Background: Wellness Programs & HIPAA

- Discriminating in a group health plan on the basis of a health factor is impermissible unless:
 - One of two HIPAA wellness approaches is satisfied:
 - Participation based
 - Few detailed rules; available to all
 - Outcome based
 - Many facets such as:
 - » Annual opportunity
 - » 20% of COBRA cost cap
 - » Reasonable alternative; clearly communicated

Background: Wellness Programs & HIPAA

- HIPAA privacy rules also come into play
 - Use an independent third party to administer, evaluate, and operate wellness program
 - Treat the third party as a HIPAA Business Associate, sign a Business Associate Agreement, and *never* seek or accept individually identifiable data from the vendor
 - Probably acceptable to receive payroll-specific enrollment data associated with delivering incentives through premiums
 - Consider masking related paystub codes

Background: Wellness Programs & ACA

- Codifies in ERISA, IRC, and PHSA what previously existed only on the level of regulations
 - Significant development that strengthens viability of HIPAA wellness rules and pressures EEOC
- Will kick 20% of COBRA cost cap to 30% in 2014
 - Smoking cessation up to 50%
 - Penalty or incentive
- Numerous wellness grants/subsidies

Final Wellness Regulations: Participatory & Health Contingent

- Final wellness regulations issued (June 3, 2013)
 - Apply to plan years after January 1, 2014
 - Apply to grandfathered plans
- Participatory wellness program
 - Based on participation
 - No conditions for obtaining reward
 - Available to all similarly situated individuals regardless of health status

Final Wellness Regulations: Participatory & Health Contingent

- Participatory wellness program
 - Examples:
 - Reimbursing gym membership
 - Paying for smoking cessation (whether quit or not)
 - HRA (without further action)

Final Wellness Regulations: Participatory & Health Contingent

- Health-contingent wellness program
 - Requires an individual to perform or complete an activity related to a health factor in order to obtain a reward
 - Two types:
 - Activity-based wellness programs
 - Outcome-based wellness programs

Health-Contingent Wellness Programs

- Activity-based wellness program
 - Reward based on activity related to a health factor but does not require the individual to attain or maintain a specific health outcome
 - Examples:
 - Walking programs
 - Diet programs
 - Exercise programs

Health-Contingent Wellness Programs

- Outcome-based wellness program
 - Requires an individual to attain or maintain a specific health outcome in order to obtain a reward
 - Examples:
 - Attaining a specific BMI
 - Stop smoking
 - Cholesterol
 - Blood pressure
 - Glucose level

Five Requirements for All Health-Contingent Wellness Programs

- All health-contingent wellness programs must meet five requirements:
 - 1. Frequency of opportunity to qualify
 - Once per year
 - 2. Size of reward
 - Up to 30% cost of coverage
 - Tobacco cessation (up to 50%)
 - 3. Reasonable design
 - To promote health

Five Requirements for All Health-Contingent Wellness Programs

4. Uniform availability and reasonable alternative standard

- Must be available to all similarly situated individuals (allow reasonable standard or waive the standard)
- Reasonable alternative standard need not be determined in advance
- Full reward must be uniformly available even if an alternative standard is satisfied later during the year
- If wellness standard is not medically appropriate must provide standard that accommodates recommendation of an individual's personal physician

Five Requirements for All Health-Contingent Wellness Programs

- 5. Notice of availability of reasonable alternative standard
 - Must be disclosed in all plan materials describing terms of health-contingent program
 - Must provide contact information for individuals to request reasonable alternative standard
 - Sample language provided and also woven into regulation examples

Activity-Based/Outcome-Based Distinctions

- Activity-based wellness program
 - Must provide reasonable alternative for individuals if standard is unreasonably difficult due to a medical condition or if it is medically inadvisable
 - May seek verification from an individual's personal physician that health factor makes it unreasonably difficult or medically inadvisable
 - Waiver as an alternative

Activity-Based/Outcome-Based Distinctions

- Outcome-based wellness program
 - Must provide reasonable alternative for any individual who asks
 - Waiver as an alternative
 - Reasonable alternative required regardless of medical condition
 - However, must provide another reasonable alternative (or waiver) if standard is unreasonably difficult due to a medical condition or if it is medically inadvisable

Activity-Based/Outcome-Based Distinctions

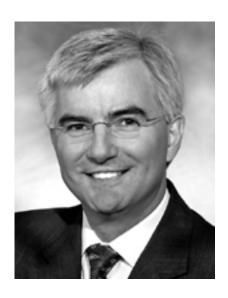
- No physicians' notes necessary
 - Unless reasonable alternative is activity based
- Special rule if reasonable alternative is also outcome based
 - Must provide additional time to comply
 - Must allow individual to request that the reasonable alternative comply with recommendation of personal physician

Action Steps

- Effective for plan years after January 1, 2014
- Evaluate wellness programs before 2014
- EEOC guidance?
 - Recent hearing

Questions?

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