Morgan Lewis

Legal Perspective: The Details Involved in Building Your Incentive Program

Employer-Driven Health Incentives Summit
Institute for International Research
March 18, 2008
Scottsdale, AZ

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How To Construct An Incentive Plan

- *P P V*
  - *P*ositive
  - *P*rivate
  - *V*oluntary
- Adherence to these three principles will solve or diminish most legal issues created by incentive (or wellness) plans

Legal Background

- HIPAA enacted in 1996
- A veritable font of Code, ERISA and Public Health Service Act requirements and complications:
  - Nondiscrimination rules
  - Special enrollment provisions
  - Portability rules
  - Pre-existing condition exclusion limitations
  - Privacy rules
  - Security rules……etc. etc. etc.

Final Rules Now Effective

- First proposed in 2001, final wellness program rules published 12/13/2006
- Final rules effective for plan years beginning on and after 7/1/2007—basically 1/12008
- Rules a joint effort of Treasury, Labor and HHS

Fundamental Principles

- Group health plans and insurers cannot discriminate against participants on the basis of any health factors
- Discrimination encompasses:
  - Eligibility
    - *Enrollment, effective date, waiting periods, benefits*
  - Premiums or contributions
    - *Including discounts, rebates or differential mechanisms*
- But wellness plans are an exception…..

Fundamental Principles (cont.)

- Why should you care?
- Violations of HIPAA nondiscrimination rules can result in:
  - Code-based excise taxes of $100 per day per person per failure
  - DOL audit and civil action to enforce rules
  - Private right of action under ERISA section 502 to enforce rules

Wellness Parameters: No Requirements

- Wellness programs that do not require satisfying a standard related to a health factor or do not provide a reward are O.K. if available to all similarly situated individuals
  - Fitness center costs
  - Diagnostic program where reward not based on outcomes
  - Waiving copay or deductible for prenatal care
  - Smoking cessation (even if not successful)
  - Reward for monthly health education seminar

Wellness Parameters: Requirements

- If reward is based on satisfying a standard related to a health factor:
  - Reward capped at 20% of cost
  - Reasonably designed and not a subterfuge
  - Qualify once a year
  - Reward must be available to all
    - *Must have reasonable alternative standard if unreasonable difficult or medically inadvisable*
  - Must disclose alternative standard

Common Designs v. Final Regulations

- Health risk assessment
  - Typically meets the “no requirement” wellness test
- Screenings for various conditions
- Paying for smoking cessation classes
- Exercise classes
- Smoker surcharge/discount
  - Will have to provide reasonable alternative and limit surcharge to 20% of cost
    - *Query—is 20% enough to drive behavior?*

Failings of Common Designs

- Programs that do not have a reasonable alternative standard
- Disease management that increases co-pay for failure to participate
  - Cannot guarantee that extra costs for disease-related expenses will remain under 20% of premium
  - Must limit increased co-pay to disease related costs
- Use of high deductible plan linked with supplemental coverage (recent DOL pronouncement)
- Violations of HIPAA Privacy rules

New DOL Wellness Program Analysis

- What incentive programs are subject to HIPAA wellness rules?
  - Cost-sharing for complying with a preventive care plan; a diagnostic testing program for health problems; and rewards for attending educational classes, following healthy lifestyle recommendations, or meeting certain biometric targets (such as weight, cholesterol, nicotine use, or blood pressure targets).
  - Is the wellness program an employment policy separate from the group health plan?

New DOL Wellness Program Analysis (cont.)

- **Does the program discriminate based on a health factor?**
- **Is it benign discrimination?**

- **See the details at:**
  - **http://www.dol.gov/ebsa/regs/fab2008-2.html**

Federal ADA Rules

- Section 102(d)(4)(B) of the Americans with Disabilities Act requires that employee wellness programs, one of the limited exceptions to the ADA's restrictions on medical examinations and inquiries, be voluntary
- Does an incentive program violate the ADA?
  - Cannot discriminate against disabled individuals in terms of employment
    - *Query—is HIPAA 20% ceiling so high that it is not voluntary?*
    - *Results must remain confidential*
    - *EEOC is collecting design information…….*

State Law Issues

- Does the wellness program violate state law?
- Many states have smoker's rights laws and broader civil rights and privacy rules
  - Rodriguez v. The Scotts Co., LLC
    - *Raises State law issues and possibility that termination of employment due to breaking at-home no smoking rule violates ERISA section 510*

Other Considerations

- Are incentive rewards taxable?
  - Yes unless exempted or part of a cafeteria plan

P P V

- Remember to structure, and communicate, your incentive program to be:
  - *P*ositive (instead of punitive)
  - *P*rivate, and
  - *V*oluntary

Thanks!

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