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together

**Wellness Programs:
Are They on Life Support?
Responding to the Final Regulations**

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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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