Client Alert

pillsbury

Executive
Compensation &
Benefits

December 28, 2012

Wellness Programs: Keeping Up With the Times

By Christine L. Richardson, Thomas N. Makris and Marta K. Porwit

On November 20, 2012, the IRS, DOL and HHS jointly issued proposed regulations under the Affordable Care Act building on existing HIPAA regulations of wellness programs. The new proposed regulations provide clearer guidance and greater flexibility in some areas, but leave many questions unanswered. Earlier, the Eleventh Circuit Court of Appeals affirmed a decision that a wellness program surcharge is exempt under the ADA "bona fide benefit plan" safe harbor.

Increasing numbers of private employers are implementing wellness programs aimed at promoting good health and reducing costs of employer-sponsored health coverage. According to a recent survey by the U.S. Bureau of Labor Statistics, the percentage of private industry employers providing wellness programs increased from 23% to 31% between 2005 and 2010.

Frequently, these wellness programs include financial incentives for participating in health assessments, healthy lifestyle programs (e.g., smoking cessation programs), or biometric screening for potential health risks (e.g., blood pressure, cholesterol checks). Legal requirements of such programs can be complex – employers must navigate numerous laws including the Health Insurance Portability and Accountability Act ("HIPAA"), the Genetic Information Nondiscrimination Act ("GINA"), the Age Discrimination in Employment Act ("ADEA"), and Title VII of the Civil Rights Act, as well as contemplate state law implications. Additional compliance challenges are found in the Patient Protection and Affordable Care Act ("Affordable Care Act") and the Americans with Disabilities Act ("ADA") – two legal frameworks with recent developments in wellness program compliance.

The New Affordable Care Act Regulations

HIPAA provides employers with a wellness program exception to its general rule prohibiting group health plans from discriminating against individuals in eligibility, benefits or premiums based on eight enumerated health factors, specifically, health status, medical condition (including both physical and mental illnesses),

claims experience, receipt of health care, medical history, genetic information, evidence of insurability (including conditions arising out of acts of domestic violence), and disability.

The new proposed regulations implement the nondiscrimination provisions of the Affordable Care Act and in large part mirror the 2006 final HIPAA regulations, though with some significant changes. These proposed regulations, applicable to both grandfathered and non-grandfathered plans on the same basis, are effective for plan years beginning on or after January 1, 2014.

Participatory or Health-Contingent Wellness Programs. The compliance burdens continue to differ depending on which of two categories a wellness program falls into – participatory or health-contingent.

A participatory wellness program is one that is made available to all similarly-situated individuals, and either does not provide a reward or does not include a condition for obtaining a reward based on an individual satisfying a health factor-related standard. For instance, a program that reimburses employee gym memberships would be a participatory wellness program and, therefore, would not be subject to the more stringent requirements of a health-contingent wellness program.

Health-contingent wellness programs require that an individual satisfy a standard related to a health factor in order to obtain a reward, or require that an individual do more than a similarly-situated individual based on a health factor in order to obtain the same reward. For example, imposing a premium surcharge on smokers or requiring individuals with a cholesterol level outside of a specified range to participate in a healthy lifestyle program are both illustrations of health-contingent programs.

Under the proposed regulations, the form of reward under either a participatory or health-contingent wellness program remains unchanged. That is, the reward may be any of a variety of financial or nonfinancial incentives or disincentives including discounts, rebates, full or partial waiver of certain costs, surcharges or additional benefits that otherwise would not be provided under the group health plan.

Proposed Regulatory Requirements for Health-Contingent Wellness Programs. The five-regulatory requirements for health-contingent wellness programs, including the proposed changes, are as follows:

1. Individuals eligible for the program must be provided with the opportunity to qualify for the reward at least once per year.

2. The total reward amount is limited to a percentage of the total cost of the health care premium (so-called “applicable percentage”). The proposed regulations increase the percentage from the 20% limit under the current HIPAA regulations to 30%, and up to 50% for programs designed to prevent or reduce tobacco use. The applicable percentage is based on the total reward for all health-contingent wellness programs offered as compared to the total cost of employee-only coverage (calculated using both employer and employee contributions). If dependents are enrolled, then the applicable percentage is that of the particular coverage tier, for example, employee plus one or family coverage. Employers may expect further details with respect to apportionment of rewards in health-contingent wellness programs, as regulators specifically asked for comments in this regard. At this point, however, regulators have proposed that with respect to family coverage, any premium variation for tobacco use must be applied to the portion of premium attributable to each family member.

3. The reward must be available to all similarly-situated individuals. To meet this requirement, the employer must offer a “reasonable alternative standard” for obtaining the reward to any individual for whom it is either unreasonably difficult to meet the standard due to a medical condition, or

medically inadvisable to attempt to satisfy the standard. In designing a health-contingent wellness program, employers need not establish an alternative in advance, but must be able to provide one upon an individual's request.

While all the facts and circumstances are to be considered in determining whether a reasonable alternative is offered, the proposed regulations detail the following with respect to how the alternative is designed:

- If an educational program is involved, the employer may neither require the individual to find such a program unassisted, nor require the individual to pay for the cost of the program.
- If the alternative is a diet program, the employer must pay any membership or participation fees, but it is not obligated to cover the cost of food.
- If compliance with the recommendations of a medical professional who is an employee or agent of the employer is required, and an individual's personal physician states that the medical professional's recommendations are not medically appropriate for that individual, then the employer must provide a reasonable alternative standard that accommodates the recommendations of that individual's physician with regard to medical appropriateness. Standard cost sharing may be imposed for any medical items or services furnished in accordance with the physician's recommendations.
- It is permissible for an employer to seek verification, including a statement from the individual's personal physician that a health factor makes it unreasonably difficult for the individual to satisfy, or medically inadvisable for the individual to attempt to satisfy, the applicable standard. The proposed regulations clarify that physician verification may be required if reasonable under the circumstances, but that it would not be reasonable to seek verification of a claim that is obviously valid based on the nature of the individual's medical condition that is known to the employer. The employer may seek verification of claims requiring the use of medical judgment to evaluate that claim's validity.

4. The proposed regulations also continue to require that health-contingent wellness programs be reasonably designed to promote health or prevent disease, not be overly burdensome, not be a subterfuge for discrimination based on a health factor, and not be highly suspect in the method chosen to promote health or prevent disease. All relevant facts and circumstances should be considered in determining whether the design of a health-contingent wellness program is reasonable; however, the proposed regulations specify that to the extent that a wellness program's initial standard for obtaining a reward is based on results of a measurement, test, or screening that is related to a health factor, the program must make available to all individuals who do not meet the initial standard of such a measurement, test, or screening, a different reasonable means of qualifying for the reward.

5. Finally, the availability of alternative means of qualifying for a reward must be disclosed in all program materials that describe the terms of the health-contingent wellness program. Materials that merely mention the existence of such a program do not require such disclosure. The proposed regulations offer new sample disclosure language.

While this November guidance was issued in the form of proposed regulations, and employers may expect changes by the time the final regulations are issued, employers should consider these regulations in light

of implementing new wellness programs or further refining existing wellness programs. Certainly, as noted in the ADA discussion below, the legal framework for wellness programs remains unsettled.

ADA

General Principles. The ADA prohibits disability-related inquiries and medical examinations, unless they are job-related and consistent with business necessity. The ADA allows employers to make such inquiries and examinations as part of a voluntary wellness program. But the U.S. Equal Employment Opportunity Commission ("EEOC") has thus far declined to adopt the percentage caps on financial incentives as a standard for determining whether a wellness program is "*voluntary*." Such percentage caps are contained both in the 2006 HIPAA regulations issued by the U.S. Department of Labor, as well as in the new proposed regulation under the Affordable Care Act issued by three U.S. agencies (but not the EEOC). This lack of clear guidance from the EEOC leaves employers at risk of litigation, in particular where participation is encouraged through negative inducements rather than rewards.

***Seff v. Broward County*: An Illustration.** The Florida federal district court case*, Seff v. Broward County*, illustrates the risk of litigation under the ADA with regard to wellness programs even in relatively favorable circumstances*. Seff v. Broward* was a class action brought by employees of Broward County, challenging a $20 per paycheck surcharge on individuals who failed to participate in a wellness program that included biometric screening and online health risk assessment. In April 2011, the district court ruled in favor of the county, but declined to weigh in on whether the wellness program was "voluntary" in light of the surcharge. Instead, the court based its decision on the "bona fide benefit plan" safe harbor exemption to the ADA limitation*. Seff v. Broward Cnty.,* 778 F. Supp. 2d 1370 (S.D. Fla. 2011).

To qualify for the safe harbor, the wellness program must be a "term[] of a bona fide benefit plan[] . . . based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law." Furthermore, the program may not serve as a "subterfuge to evade the purposes of" the ADA's limitation on such inquiries and examinations.

The district court found the county's wellness program to be such a "term" of a bona fide benefit plan because the program (i) was paid for and administered by the plan's insurer as part of the insurer's contract with the county, (ii) limited participation only to those enrolled in the county's health plan, and (iii) was described as part of the health plan in benefit materials given to employees. The district court found the wellness program to meet the underwriting risks portion of the safe harbor because the program provided the county with aggregate data that the employer could use in developing future benefit plans and was intended to ultimately reduce insurance costs by encouraging healthier habits. Addressing the third portion of the safe harbor, the court dismissed the possibility that the county was using the wellness program as a subterfuge stating that the program "is enormously beneficial to all employees."

On appeal, the Eleventh Circuit rejected the appellant's argument that the wellness program had to be a written term in the employer's actual plan document in order to meet the ADA's safe harbor, reiterating the district court's reasoning on this portion of the analysis. *Seff v. Broward Cnty*., No. 11-12217 (11th Cir. Aug. 20, 2012).

Practically speaking, the *Seff* decision is binding in the Eleventh Circuit, but only persuasive in other jurisdictions. Despite the employer-favorable ruling, pending further guidance from the EEOC with respect to what form of inducement would qualify as voluntary, employers must continue to carefully structure their wellness programs to conform to the ADA's "bona fide benefit plan" safe harbor.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Christine L. Richardson (bio)
San Francisco
+1.415.983.1826
crichardson@pillsburylaw.com

Thomas N. Makris (bio)
Sacramento
+1.916.329.4734
tmakris@pillsburylaw.com

Marta K. Porwit (bio)
San Francisco
+1.415.983.1808
marta.porwit@pillsburylaw.com