

TRIMMING THE FAT: IMPLEMENTING HEALTH-CONTINGENT WELLNESS PLANS

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Obesity rates continue to rise, and so are healthcare costs, workers' compensation claims, productivity losses, and employee time away from work. So what can an employer who is feeling weighed down by these expenses do to cut costs related to employee obesity? Many are implementing wellness programs that focus on healthy behaviors and attaining a healthy weight.

LIGHTENING THE LOAD

A 2013 report issued by RAND Health and sponsored by the U.S. Labor Department (DOL) and the U.S. Department of Health and Human Services finds that about half of all employers with 50 or more employees offer a wellness program. That figure increases to 85% for employers with 1000 or more employees. These programs may include:

- screening activities to identify health risks (e.g., measurement of body weight);
- preventive interventions to address manifest health risks (e.g., weight-reduction counseling); and
- health-promotion activities to further healthy lifestyles (e.g., healthy food options in cafeterias).

While these programs sound good in theory, employee participation can be low. The RAND report found that for employers offering weight-management programs, almost 90% of employers reported participation rates of 20% or less. Without sufficient employee participation, employers are unlikely to realize the cost-cutting benefits of these programs.

To increase participation, some employers are offering financial incentives to encourage employees to attain or maintain a healthy weight or penalizing employees who fall short. These sorts of plans are referred to as Health Contingent Wellness Programs, and are subject to compliance with HIPAA requirements. DOL regulations identify two kinds of Health-Contingent Wellness Programs: activity-based and outcome-based. Rewards or incentives offered by these programs may include discounts on health plan premiums or contributions, waivers of all or part of a cost-sharing mechanism, a cash payment, or any financial or other incentive. Penalties may include a premium surcharge and other financial disincentives.

THE DIFFERENCES BETWEEN PROGRAMS

Activity-based wellness programs require individuals to perform or complete an activity related to a health factor in order to obtain a reward, such as improving diet or exercising. The participating individuals *need not* attain any particular outcome. Recognizing that not all individuals are capable of participating in such a program, the regulations require that activity-based programs allow a reasonable alternative method for obtaining the reward for any individual medically incapable of participating in the program. If an employee claims to be medically incapable of participation, you may seek verification and require a doctor's note.

For outcome-based wellness programs, participation is not enough. Employees must attain or maintain a specific health outcome (such as a certain body-mass index) in order to obtain the reward. Outcome-based wellness programs generally must have two tiers. The first is a measurement, test, or screening that sets the initial healthy standard. Individuals who meet the initial healthy standard will receive the reward. In the second tier, individuals who do not meet the initial standard must be offered an alternative method of obtaining the reward, which may include educational courses or complying with a health-improvement plan. Because this alternative must be offered regardless of any medical condition or other health status, verification by the individual's doctor is not required.

HIPAA CONCERNS

To be HIPAA compliant, both activity-based and outcome-based wellness programs must meet the following five criteria:

- individuals must be provided with the opportunity to qualify for the reward under the program at least once per year;
- the program must be reasonably designed to promote health or prevent disease;

[1]

- the amount of the reward available if a health standard is satisfied by a participant cannot exceed more than 30% of the cost of employee-only coverage;
- the program must permit individuals to achieve the reward through a reasonable alternative standard; and
- the program must provide notice of availability of a reasonable alternative standard or of a waiver of that requirement in all plan materials describing the wellness program. This notice must also include plan contact information and a statement that the recommendation of an individual's personal physician will be accommodated.

Attempting to implement a health-contingent wellness program without meeting these requirements is at your peril. The provisions for wellness programs are exceptions to HIPAA's general prohibition against discriminating against individuals on the basis of a health factor, so non-compliance may make an employer vulnerable to litigation. There are statutory penalties for noncompliance as well.

The Internal Revenue Service may impose on the sponsoring employer an excise tax penalty of \$100/day of noncompliance for each affected individual. The DOL is also actively auditing plans for compliance and could bring a civil action against an employer to enforce these requirements.

[1] With respect to the "reasonable design" requirement, wellness programs may be limited to targeted groups of individuals with adverse health factors and, therefore, do not prevent the establishment of more favorable rules for eligibility or premium rates for individuals with an adverse health factor than for individuals without the adverse health factor.

At the same time, there is a trend toward recognition of obesity discrimination in the workplace, and the Equal Employment Opportunities Commission (EEOC) has not issued definitive guidance on what type of wellness programs might separately violate the Americans with Disabilities Act (ADA). While weight is not a protected class under federal anti-discrimination law, the EEOC has taken the position that morbid obesity (individuals who weigh 100% or more above the healthy weight range for their height) is a disability under the ADA. It is, therefore, possible that a wellness program might comply with HIPAA, but nevertheless be found to be in violation of the ADA.

BALANCING THE SCALES

While this area of the law is still evolving, many employers can't afford to wait for certainty before implementing cost-saving wellness programs. The best strategy in

implementing these programs is to comply with the current regulations and remain vigilant for what is to come.

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