DESIGNING AND IMPLEMENTING WELLNESS PROGRAMS: LEGAL ISSUES

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I. HIPAA Nondiscrimination Requirements

A. The Health Insurance Portability and Accountability Act (HIPAA) prohibits employer-provided group health plans and insurers from discriminating against an employee on the basis of the employee's (or a family member's) adverse health factors, including:

1. Health status (*e.g.*, high cholesterol, high blood pressure, obesity).
2. Medical condition (including both physical and mental illness).
3. Medical claims experience.
4. Receipt of health care.
5. Medical history.
6. Genetic information (including information regarding carrier status and information derived from genetic testing, physical examinations, or family histories).
7. Evidence of insurability (including conditions arising from acts of domestic violence and participation in activities such as skiing and motorcycle riding).
8. Disability.

B. HIPAA prohibits discrimination based on health factors in each of the following areas:

1. Eligibility to enroll or to remain enrolled in a health plan (including waiting periods and ability to change benefits or disenroll).
2. Eligibility for benefits (including coverage of specific conditions, benefit packages, and cost-sharing mechanisms such as deductibles and copayments).
3. Premiums or contributions (including discounts, rebates, and payments in kind).

C. Coverage and benefits generally must be provided on the same basis to all similarly-situated individuals.

1. An employer may provide different health benefits to different classifications of employees or dependents.

(a) Employees. The group receiving (or not receiving) particular health benefits must be an employment-based classification consistent with the employer's usual business practice (*e.g.*, salaried vs. hourly, union vs. non-union, full time vs. part time, current vs. former, different business units, different geographic locations, date of hire, length of service).

(b) Dependents. Distinctions among dependents can be based on the employee's classification, the dependent's relationship to the employee, the dependent's age, or any other factor that is not health-related.

2. The group health plan may apply restrictions and exclusions to particular benefits, as long as they apply in the same way to all similarly-situated individuals.

(a) Source-of-injury exclusions. A group health plan may deny coverage based on the source of an injury.

(i) For example, although an employer may not exclude an individual from enrolling in a group health plan, or charge an individual higher premiums, solely because the individual participates in sky diving, the plan may exclude from coverage any injuries a participant sustains while sky diving.

(ii) A special exception to this rule prohibits a plan from applying a source-of-injury exclusion to injuries that result from a medical condition (*e.g.*, self-inflicted injuries resulting from depression) or from acts of domestic violence.

(b) Pre-existing condition limitations. A group health plan may apply a pre-existing condition limitation that complies with HIPAA's portability requirements, provided that the limitation applies uniformly to all similarly-situated individuals.

3. A group health plan may apply a higher overall premium or contribution rate to all participants because of the plan's adverse claims experience. The plan may not, however, charge higher premiums to an individual participant, based on the adverse claims experience of that participant.

4. A group health plan may require an individual to begin work for the employer before the individual becomes covered under the employer's group health plan, as long as this requirement applies regardless of the reason for the absence. Apart from this exception, however, a group health plan generally may not condition an individual's eligibility for coverage on a requirement that the individual be "actively at work," that the individual not be hospitalized, or similar factors.

D. The HIPAA nondiscrimination requirements apply to employment-based group health plans and insurers. A health-related financial incentive that is provided outside a group health plan is not subject to the HIPAA nondiscrimination requirements (although it might violate other federal or state laws).

1. An incentive is part of a group health plan if it affects eligibility to participate in the plan, the cost of participating in the plan (premiums or contributions), the benefits provided under the plan, or the plan's cost-sharing structure (deductibles, co-payments, etc.)

2. An incentive that does not affect the design or operation of the group health plan may be provided without regard to the HIPAA nondiscrimination requirements.

(a) For example, if an employer provides an additional vacation day to any employee who completes a physical fitness program, the incentive is provided outside the group health plan.

(b) In contrast, if a group health plan waives the deductible for any employee who completes a physical fitness program, the incentive is part of the group health plan.

E. HIPAA does not prohibit "benign discrimination," in which individuals with adverse health factors are treated more favorably than healthy individuals.

1. For example, a group health plan may offer continued health coverage to a disabled dependent who exceeds the dependent age limit.

2. The group health plan may charge a higher premium for coverage provided to an individual with an adverse health factor if the individual otherwise would not have coverage. For example, a group health plan that extends COBRA coverage from 18 months to 29 months for disabled individuals may charge 102% of the applicable premium for the first 18 months of coverage and 150% of the applicable premium for the extended coverage, since the individual would not receive the extended coverage if the individual were not disabled.

3. Even if a reward is offered only to individuals with an adverse health factor, the plan may not require the individual to meet a second health-related standard in order to receive the reward.

(a) If a plan grants a lower deductible to individuals with diabetes who enroll in a disease management program, this is an example of "benign discrimination": the reward (a lower deductible) is available only to individuals with an adverse health factor (diabetes), and they do not have to meet a health-related standard to receive the reward (they merely have to enroll in a disease management program).

(b) In contrast, if a plan grants a lower deductible to individuals with diabetes who maintain a certain body mass index (a health-related standard), the requirement to maintain a certain BMI is an example of "intervening discrimination" that is not permissible under the "benign discrimination" rule (although the plan might be able to qualify for the wellness program exemption described in H., below).

F. HIPAA does not prohibit wellness programs that provide coverage for activities intended to promote good health, but that do not reward individuals for taking advantage of the coverage (or punish individuals for failing to take advantage of the coverage).

1. For example, a group health plan that reimburses health club dues or waives deductibles for preventive care for all similarly-situated individuals would not violate HIPAA's nondiscrimination rules.

2. A group health plan that covers the cost of smoking cessation programs (without regard to whether a participant actually stops smoking) also would not violate HIPAA's nondiscrimination rules.

G. HIPAA does not prohibit wellness programs that make rewards uniformly available to all individuals without regard to health factors.

1. For example, a group health plan that reduces premiums for participants who receive annual physicals (without regard to whether the participants are in good physical condition) would not violate HIPAA's nondiscrimination rules.

2. Similarly, a program that provides a reward to any participant who attends a monthly health education seminar would not violate HIPAA's nondiscrimination rules.

3. In contrast, if a participant must lose weight, lower cholesterol, reduce blood pressure, complete an exercise program, or meet another health-related standard in order to receive the reward, the wellness program must meet the five conditions of the wellness program exemption in H., below, in order to satisfy HIPAA's nondiscrimination rules.

(a) Nicotine addiction is treated as a health factor. Accordingly, a group health plan must satisfy the wellness program exemption (including the requirement to offer a reasonable alternative) in order to charge higher premiums to smokers.

(b) In some cases, behavior modification is a health-related standard (although it is not always clear when this is true). For example, a requirement to eat a low-cholesterol diet probably would be regarded as a health-related standard, even though the employee is not required to achieve a particular cholesterol level.

H. Wellness Program Exemption. A wellness program that provides a reward and requires an individual to satisfy a health-related standard in order to receive the reward ordinarily would violate HIPAA's non-discrimination rules. However, the HIPAA regulations creates a special exception for wellness programs that satisfy five requirements:

1. Reward Limit. The reward must not exceed 20% of the total annual cost of employee-only coverage under the group health benefit package in which the employee participates. (If dependents are allowed to participate in the wellness program, the reward may be 20% of the cost of the coverage in which the employee and dependents are enrolled.)

   (a) A "reward" can be a discount or rebate in the group health plan premium or contribution, a reduction in cost sharing (for example, a lower deductible or copayment), or a benefit that would not otherwise be available.

   (b) A "reward" can also take the form of avoidance of a penalty, such as the absence of a surcharge.

   (c) Non-financial benefits, such as information on nutrition and pre-natal care, are not "rewards."

   (d) If an individual can earn more than one reward under the group health plan for meeting different health-related standards, the 20% limit applies to all awards in the aggregate.

2. Reasonable Design. The program must be reasonably designed to promote health or prevent disease.

   (a) In order to meet this condition, the program may not be overly burdensome.

   (b) The program also may not be a subterfuge for discriminating based on a health factor.

   (c) It is sufficient that the program have a reasonable chance of improving the health of participants: the employer does not have to develop a scientific record demonstrating that the program actually improves health.

3. Offered Once Per Year. The program must give eligible individuals the opportunity to qualify for the reward at least once a year.

4. Availability. The reward must be available to all similarly-situated individuals.

   (a) As explained above in C. 1., the employer may separate employees and dependents into reasonable classifications that are not based on health factors, and may treat only the individuals in a particular classification as being "similarly situated."

   (b) Accordingly, for example, a group health plan could offer a wellness incentive to employees but not to dependents; to full-time employees but not to part-time employees; and so on.

   (c) A reward does not meet the availability requirement unless the program offers a reasonable alternative standard to any individual for whom it is unreasonably difficult, due to a medical condition, to satisfy the original standard, or for whom it is medically inadvisable to attempt to satisfy the original standard.

      (i) For example, if employees are required to achieve a cholesterol count under 200 in order to receive a premium rebate, some employees might be unable to achieve this goal in spite of adhering to a healthy diet. The program might offer an alternative standard under which an employee can earn the premium rebate by taking a cholesterol-lowering medication prescribed by a doctor.

      (ii) Instead of developing an alternative standard, the plan may simply waive the original standard and provide the reward to the participant.

(iii) The group health plan may require verification, such as a doctor's certificate, that a health factor makes it unreasonable or medically inadvisable for the individual to satisfy the original standard.

5. Disclosure of Alternative Standards. The group health plan must disclose, in all material describing the terms of the wellness program, the availability of a reasonable alternative standard.

(a) The disclosure does not have to describe the alternative standard. Instead, the disclosure may include a general statement such as the following: "If it is unreasonably difficult due to a medical condition for you to achieve the standards for the reward under this program, or if it is medically inadvisable for you to attempt to achieve the standards for the reward under this program, call us at [phone number] and we will work with you to develop another way to qualify for the reward."

(b) As the preceding paragraph implies, the alternative standard can be custom-designed to reflect the circumstances of a particular individual: the alternative standard does not have to be the same for every individual who is unable to meet the original standard.

I. The penalties for violating the HIPAA nondiscrimination rules are as follows:

1. Under § 4980D of the Internal Revenue Code, if an employer's group health plan violates the HIPAA nondiscrimination rules, the employer must pay an excise tax of $100 per day for each individual affected by the violation, until the violation is corrected.

(a) The excise tax does not apply to a violation if the violation is due to reasonable cause and not to willful neglect, and the violation is corrected within 30 days after the employer knew of the violation (or would have known if it had exercised reasonable diligence).

(b) The maximum excise tax in any taxable year for violations that are due to reasonable cause is the lesser of 10% of the plan's benefit payments during the year or $500,000.

2. Plan participants and the Secretary of Labor may sue under ERISA to enjoin any violation of the HIPAA nondiscrimination rules, and (perhaps) to obtain any benefit that would have been available if the violation had not occurred.

J. HIPAA does not affect other laws. Accordingly, a wellness program that satisfies HIPAA's nondiscrimination requirements still might violate the Americans With Disabilities Act, the Family and Medical Leave Act, state insurance laws, or other federal or state laws.

K. The principal sources of guidance on the HIPAA nondiscrimination rules and the exception for wellness programs are:

1. IRC § 9802 (nondiscrimination requirements); IRC § 4980D (excise tax); Treas. Reg. § 54.9802-1.

2. ERISA § 702; 29 C.F.R. § 2590.702.

3. Department of Labor Field Assistance Bulletin No. 2008-02 (Feb. 14, 2008).

II. GINA Nondiscrimination Requirements

A. The Genetic Information Nondiscrimination Act of 2008 ("GINA") prohibits discrimination on the basis of genetic information by health plans, health insurers, and employers.

1. "Genetic information" means information about an individual's genetic tests, the genetic tests of the individual's family members, and the diseases and disorders of the individual's family members. It also includes any request for or receipt of genetic services by an individual or an individual's family member.

2. GINA prohibits group health plans and insurers from requesting, requiring, or purchasing genetic information about an individual for purposes of underwriting. Accordingly, group health plans and insurers may not use genetic information to determine eligibility, set premiums, apply pre-existing condition exclusions, or establish, renew or amend health insurance or benefits.

3. GINA also prohibits group health plans and insurers from requesting or requiring that an individual undergo genetic testing.

B. GINA prohibits employers from requesting, requiring, or purchasing genetic information about a job applicant or employee (or an applicant's or employee's family member), with limited exceptions.

1. One exception allows employers to provide genetic services, including services provided through wellness programs.

2. The exception applies only if the employee submits prior written authorization and the employer does not receive individualized results of genetic testing.

C. GINA also safeguards the confidentiality of genetic information acquired in the workplace. If an employer acquires genetic information about an employee, it must treat the information as a confidential medical record.

D. GINA's effective dates are:

1. The first plan year beginning after May 21, 2009, in the case of the provisions applicable to group health plans.

2. November 21, 2009, in the case of the employment discrimination provisions.

III. ADA Nondiscrimination Requirements

A. The Americans With Disabilities Act (ADA) prohibits discrimination against a qualified individual with a disability in any aspect of employment. (A "qualified individual" is one who is able to perform a job with or without reasonable accommodation.)

1. The ADA prohibits an employer from denying employment-related benefits, or providing benefits on a less favorable basis, because of an individual's disability. The Equal Employment Opportunity Commission (EEOC) has stated that a group health plan might violate the ADA if the plan treats particular disabilities (*e.g.*, diabetes) or groups of disabilities (*e.g.*, kidney diseases) less favorably.

2. The ADA also requires an employer to provide reasonable accommodation to qualified individuals with disabilities. This requirement includes accommodations that would enable a disabled worker to participate in a wellness program.

B. The ADA imposes strict limits on the circumstances in which an employer may require medical examinations or gather medical information about current or prospective employees.

1. A job applicant may not be asked to undergo a medical examination before the applicant receives a job offer. The employer may make a job offer that is conditioned on the applicant's passing a medical examination, provided that (among other things) the results are not used to disadvantage qualified individuals with disabilities.

2. An employer may require current employees to submit to medical examinations or to provide information about disabilities only to the extent that the examinations or inquiries are job-related and consistent with business necessity.

3. An employer may offer voluntary medical examinations or voluntary medical histories that are part of an employee health program, provided that the results are kept confidential and are not used to discriminate against qualified individuals with disabilities.

(a) The EEOC issued enforcement guidance in July 2000 interpreting the medical information rules. The guidance confirms that wellness programs can qualify for the exception for voluntary programs.

(b) The guidance explains that a wellness program is "voluntary" as long as an employer neither requires participation nor "penalizes" employees who do not participate.

(c) It is not clear in what circumstances denying a benefit (such as participation in a group health plan) or withholding a reward that satisfies the HIPAA 20% limit would be considered a penalty that would make a wellness program involuntary for purposes of the ADA.

C. Some wellness plan designs might violate the ADA. For example, the following provisions could create a risk of an ADA violation:

1. Requiring employees to submit to medical examinations or diagnostic tests.
2. Requiring employees to complete health risk assessments as a condition of enrolling in the employer's group health plan.
3. Asking for individual medical information in wellness surveys.
4. Charging higher premiums to employees who refuse to take annual physical exams.
5. Using health-related information obtained through the wellness program to influence employment decisions (promotions, salary, hiring and firing, etc.)

D. The ADA is enforced by the EEOC or by employee lawsuits.

IV. Other Legal Requirements

A. If a wellness program is part of an employment-based group health plan, it generally will be subject to the requirements of ERISA (unless it is eligible for a specific exemption, such as the exemptions for governmental plans and church plans). Accordingly, for example, the wellness program:

1. Must be described in the summary plan description.
2. Must be included in the benefits offered as health care continuation coverage under COBRA.
3. Generally will not be not subject to state law, unless it is offered as part of an insured group health plan.

B. A wellness program that is part of a group health plan is subject to the HIPAA privacy requirements.

1. The HIPAA privacy requirements generally prohibit a group health plan from disclosing individually identifiable health information, except in certain narrowly-defined circumstances.
2. Accordingly, the group health plan administrators must ensure that any personal health information gathered as part of the wellness program is kept confidential in accordance with the HIPAA privacy requirements.

C. If a wellness program is offered as part of an insured group health plan or HMO, state insurance law might impose requirements or restrictions on the design of the program.

D. If a wellness program is not part of a group health plan, it might be subject to state or local laws prohibiting discrimination on the basis of disability or other health-related factors.

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HIPAA Nondiscrimination Rules for Wellness Programs