



Remarks

By

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The ERISA Industry Committee

For

Meeting on Incentive-Based Worksite Wellness Programs

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Remarks for Meeting on Incentive-Based Worksite Wellness Programs

Panel 2: *Standards for “reasonably designed” wellness programs*

Thank you for the opportunity to speak today on behalf of the ERISA Industry Committee to address the standards for “reasonably designed” wellness programs. I am Gretchen Young, ERIC’s Senior Vice President for Health Policy.

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, and welfare benefit plans of America’s largest employers. ERIC’s members sponsor group health plans that provide comprehensive health benefits directly to some 25 million active and retired workers and their families.

ERIC members have taken the lead in developing wellness programs that are designed to improve the health of employees and their families and to reduce the health care costs that employers and employees share. Wellness programs developed by these companies are a prime source of innovation for the rest of the country.

Large employers view wellness programs as an effective way to partner with their employees to encourage healthier lifestyles, and yes – we are aware of the effect on our “bottom line” – to reduce healthcare costs. Large employers are not sponsoring wellness programs to penalize or cull employees from their health plans. To the contrary, it is in everybody’s interest – employers, employees, state governments, federal governments – to encourage individuals to lead healthier lifestyles.

In many respects, large employer-sponsored health plans are at a crossroads. The costs of these plans continue to increase year-by-year at a significant rate. While some provisions of the Affordable Care Act may ultimately diminish some health plan costs, that decrease is many years off.

The immediate effect of such portions of the Act as adding adult children to their parents’ policies at no expense, making preventive care available at no charge to plan participants, and adding new claims and appeals procedures to plans, while laudable in many respects, has added new layers of cost and

administrative complexity to our plans. The result is that the Act has added potentially significant new costs in the short run, while offering only the *possibility* of cost decreases over the longer term.

A notable exception in this vein has been the Act's acknowledgement of the central role played by workplace wellness programs in curbing health costs and keeping Americans healthy. Among other things, the Act codifies and expands the regulatory exemption for workplace wellness programs. Further, the Act raises the incentive for meeting a health-related standard from 20% of the annual cost of coverage to 30% in 2014 and authorizes HHS, DOL, and Treasury to increase this limit to 50% if they deem it appropriate.

While we are encouraged by this public recognition of the value of wellness programs, including supportive remarks by the president as well as members of his Administration, we continue to be concerned by the treatment of wellness programs in the regulatory arena over the last couple of years and worry about the focus of regulators now as they create new rules.

For example, as we gather today to talk about wellness programs, the questions posed appear to be negative in focus - that is, that programs not be "overly burdensome", a "subterfuge for discriminating based on a health status factor", or "highly suspect in the method chosen to promote health or prevent disease".

Although we recognize that the statute incorporates these standards, they should be placed in the larger context of provisions that are designed to support and encourage the development of wellness programs.

While we certainly believe that no program should be used to facilitate illegal or inappropriate behavior, we believe it is more productive to sponsor public discussions aimed at how to ease the way for employers and employees to support and participate in productive and effective wellness programs.

Thus, I will focus on what gives a wellness program a "reasonable chance" of improving health or preventing disease in participating individuals. Toward this end, I would like to borrow from the Hippocratic Oath, completely out of context, and say: "Abstain from doing harm".

In this context, “abstain from doing harm” means giving employers the latitude they need to establish wellness and prevention programs that are tailored to the needs of that employer’s workforce. Flexibility is key.

Some employers are at the early stages of sponsoring a wellness program and may just be beginning to offer healthy eating choices in the company cafeteria or buying pedometers for their employees. Others, with years of such programs under their belts, are now setting rewards for employees who meet certain health-related goals and not just for participating in these programs.

As with all workplace practices, employers who discriminate against employees in a health-related sphere, as in any other, must not be tolerated. This should not, and need not, however, be the central focus of regulatory efforts.

What is important is that employers not be discouraged from offering serious wellness and prevention programs that are effective in encouraging employees to pursue healthier choices and achieve healthier life styles.

In addition to this recommendation for restraint in rule-making – a proposition supported by the president in his recent executive order and op-ed in the Wall Street Journal - I would like to take this opportunity to mention key regulatory concerns of ERIC members that seriously hamper our ability to offer “reasonably designed” wellness programs.

First is the inability of wellness programs to offer an incentive to employees to provide family medical history as part of an HRA. Family medical history is a critical piece of information; the absence of this information seriously undermines the effectiveness of health risk assessments, depriving workers and their families of a potentially valuable tool for improving their health. Most of our ERIC member companies today have eliminated the FMH section from the HRA rather than sacrifice use of the financial incentive.

Second, even if plans did not give their participants a financial incentive to complete an HRA, they would not be able to use any FMH gleaned from the HRA to guide these individuals into disease management programs. Experience has shown that without the encouragement of a health professional, many participants who would benefit from participation in a disease management program will never enroll.

We urge you to clear away any regulatory obstacles that would prevent a program from incentivizing participants to provide FMH on an HRA and

from using FMH as one basis for identifying participants eligible for a disease management or similar voluntary program.

Finally, we note our concern that the EEOC may find a wellness program to violate the ADA if the program provides a financial incentive to participate, even if the program fully complies with the 20% or 30% limit on incentives and other HIPAA requirements.

Since Congress has determined that a 30 percent incentive does not prevent a wellness program from being voluntary for purposes of HIPAA, the EEOC should acknowledge that the same incentive does not prevent a wellness program from being voluntary for purposes of the ADA.

This is not an idle concern. There currently is a class-action lawsuit pending in federal district court in Florida that challenges a wellness program on ADA grounds, arguing that the program is not “voluntary” because a \$40/month surcharge was added to the health insurance premiums of employees who failed to complete a biometric screening and health risk assessment.

In conclusion, we underline our strong support for the wellness principles expressed in the Affordable Care Act. We reiterate, however, that future regulatory guidance must emphasize ways in which worksite wellness programs may be broadened and deepened in order to fully capture the potential for encouraging participants and their families to become healthier and more productive workers and that enables employers to continue their existing programs and develop new, more effective approaches.

Wellness programs are one of the few remaining avenues to help rein in spiraling healthcare costs, and it would be a shame if this avenue were narrowed to the point where it no longer would constitute an efficient use of employer resources.

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