Eat Your Vegetables and Put Out That Cigarette!

The Employer as Health and Fitness Director

by:

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Rising health insurance premiums have caused employers, who are the principal providers of health insurance in the United States, to examine ways to reduce health care costs. Healthier employees mean fewer claims for health benefits, which should mean lower premiums for health insurance. The desire for a healthy workforce has prompted some employers and health plans to implement wellness programs. These are programs which reward healthful activities and behaviors through reduced premiums, lower deductibles and other incentives.

Wellness programs, by definition, require review and use of information pertinent to the health of employees. A number of laws govern when an employer and health plan can collect such information, and how they may use it.

NEW WELLNESS PROGRAM REGULATIONS

The Heath Insurance Portability and Accountability Act ("HIPAA"),[1] sets limits on who may obtain health information, and how that information may be used. Three of the federal agencies responsible for administering and enforcing HIPAA recently adopted final regulations governing wellness programs.[2]

Notably absent from the list of agencies adopting these regulations is the Equal Employment Opportunity Commission. In fact, the EEOC made a point of submitting comments on the new regulations to the effect that compliance with them may not excuse violations of the

Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964. The regulations expressly acknowledge that covered entities must still comply with other laws.[3]

Some wellness programs are not affected by the new regulations. A wellness program must link the receipt of a benefit to the measurement of a health condition to trigger the regulations. So, for example, a wellness program that reimburses the cost of membership in a fitness center, or that pays for participation in a smoking cessation program, would not be regulated. These and similar programs reward employees without measuring the actual impact of the program on their health.

Wellness programs that link the receipt of a benefit to the measurement of a health condition are regulated by the new rules. For example, a program which reduces an employee's premium contribution based on the employee's body mass index would be regulated.

Such programs must meet five requirements. First, the benefit offered must not exceed 20 percent of the cost of individual or family coverage. So, if a program offered to reduce premiums based on achieving a certain body mass index, the reduction could be no more than 20 percent of the average cost per employee for providing insurance. The reason for this is to avoid making health insurance unreasonably expensive for the people who do not meet the program's health standard. If everyone got free health insurance if they met a certain body mass index, for example, only the obese would end up paying premiums. This would likely cause people with unhealthy body mass index results out of the health plan, for they would have to bear a disproportionate amount of the cost.

The second requirement is that the program be reasonably designed to promote health. The preamble to the regulations states that this standard should be easily met. The health effects of the program need not be supported by scientific evidence. The regulations use as an example

a program that offers a benefit to those who undergo aromatherapy. The idea here is to encourage creativity. Truly bizarre, suspect or illegal programs may not meet this requirement. For example, a health plan that offered a financial inducement to use cannabis to relieve stress and lower blood pressure likely would not meet the requirement that the program be reasonably designed to promote health.

The third requirement is that employees must be eligible to join the program at least once per year.

The fourth requirement is that the program must be available to similarly-situated employees. The regulations do not take a legalistic approach to defining who is similarly situated. Instead, this is driven by common sense classifications commonly found in places of employment. For example, the program may only be available to full-time, not part-time employees, or to employees who are members of a collective bargaining unit. It may be available to employees at one geographic location, but not another. If the classification is used for purposes other than administration of the health plan, then it is more likely to be a valid classification pursuant to this requirement.

Similarly-situated employees who cannot comply with the health standard because it is unduly burdensome or medically ill-advised must be offered an alternative means to become eligible for the benefit. So, for example, if the program rewards those who walk three miles per week by reducing their premium contributions, and an employee's doctor believes that this requirement is medically ill-advised for a particular employee, the plan must allow the employee to be eligible to receive the benefit by fulfilling some other medically appropriate requirement. Also, if the employee cannot physically meet the requirement, some reasonable alternative must be provided. So, if a person cannot walk three miles per week because they cannot walk at all,

the employer and health plan must allow the employee to engage in some other type of physical exercise which would substitute for walking.

If an employee claims that a health standard is medically ill-advised, the employer and health plan can require verification of this from the employee's doctor.

The fifth and final requirement for covered wellness programs is that the documents describing the program notify participants of the availability of alternative means to meet the program's health standards. The regulations do not require that the plan documents provide detailed information regarding alternative means to meet the health standards. In fact, the regulations provide an example of specific language to include in the wellness program documents. It is sufficient for the plan document to notify the employee that alternative means for meeting the health standards may be available, and that the employee should call a certain telephone number to receive more information.

MANDATORY OR VOLUNTARY

The regulations governing wellness programs are framed in anticipation of employers and health plans offering incentives to employees to meet health standards intended to lower health insurance costs. What of the employer which has had a voluntary reward program for years and is dissatisfied with the results? Can the employer implement a mandatory program which penalizes employees who fail to meet health standards? The regulations do not explicitly prohibit this approach. There are a few legal and practical considerations, however, which may make using the stick instead of the carrot a risky endeavor.

As a practical matter, an employer which penalizes employees who fail to meet certain health standards will meet resistance from those employees. Such a program may foster resentment, and could contribute to employee turnover.

There is also the problem of finding people to enforce the standards. Human resource directors may find that it is an unpleasant and difficult task to compel employees to submit to medical testing and measurements which the employees may regard as an invasion of their privacy.

ADA Compliance

There is also the matter of whether such a mandatory approach may violate other laws. The Americans with Disabilities Act restricts the ability of an employer to request medical information from employees, and then restricts how the employer may use the medical information once it has acquired it. Generally, the ADA requires an employer to gather medical information only to determine if the employee can perform the essential functions of a job. The regulations adopted by the EEOC create some limited exceptions for this, generally for the purpose of allowing an employer to plan for the provision of first aid care and assistance in emergency evacuation of facilities for employees with disabilities. The regulations do permit employers to conduct voluntary medical examinations and activities, including voluntary collection of medical histories, if those activities are part of an employee health program.[4] If an employer tells an employee that the employee's failure to submit to medical testing or provide a medical history will result in a financial penalty, it is doubtful that the EEOC would regard such a program to be voluntary. As a consequence, an employer which implements a mandatory program runs the risk of an enforcement action by the EEOC.

Common Law Privacy

Employees also have a reasonable expectation that medical information will be treated as private and confidential. Courts in Ohio have found that the provision of medical information to third parties constitutes an invasion of privacy.[5] In one case, the court found that an employer

which disclosed medical information to a supervisor who did not need to know the information, and which also disclosed the information to the employee's husband, invaded the privacy of the employee.[6] While an employee might expect that an employer and a health plan will use medical information for the purpose of setting premium rates and administering a health insurance program, the use of that information for other purposes may be contrary to the employee's expectation that the information be treated as private and confidential.

CONCLUSION

Employers and health plans which encourage employees to engage in healthful activities should be applauded for their efforts. They are not only contributing to the control of costs of health care and health insurance, they are also contributing to the health and welfare of their employees. A mandatory and punitive approach, however, may harbor resentment among employees, contribute to turnover, and put the employer at risk for liability claims. As with so many aspects of the employment relationship, encouraging and rewarding good behavior is preferable to mandating it.

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[1] 42 U.S.C. 1320(d) et.seq.
[2] The regulations adopted by the Department of the Treasury can be found at 29 CFR Part 54, those adopted by the Department of Labor can be found at 29 CFR Part 2590, and those adopted by the Department of Health and Human Services can be found at 45 CFR Part 146.
[3] See 45 CFR § 146.121(h).
[4] See 42 U.S.C. §12112(d)(3)(B)(iii); 29 C.F.R. § 1630.14(b)(1)(iii).
[5] Biddle v. Warren General Hospital (1999), 86 Ohio St.3d 395.
[6] Levias v. United Airlines (1985), 270 Ohio App. 3d 222.