Recent Wellness Program Litigation and the Cadillac Tax

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New Perspectives on Wellness Strategies

As plan sponsors grapple with rising claims cost, many have turned to wellness programs to not only reduce costs, but also to improve the well-being of their plan participants. With the impending Cadillac Tax threatening a 40 percent excise tax on high-cost health coverage, wellness programs could be a key element in plan sponsors' strategies to reduce claims cost and the overall cost of coverage.

For self-funded plan sponsors, the total cost of health coverage as regulated by the Cadillac Tax is primarily driven by (1) the unit cost of each claim and (2) the number of units consumed by plan participants. Many pundits suggest heading off this tax by increasing plan participant cost sharing, but not all plan sponsors are in a position to take such a step, and the plan sponsor will likely still retain the lion's share of the costs. Moreover, shifting premium cost sharing has no direct impact on the total cost of coverage.

Thus, plan sponsors evaluating the ROI of wellness programs must carefully review wellness programs as they present one of only a few means to potentially reduce the number of units of health care consumed by their plan participants.

Whether a plan sponsor has a robust or fledgling wellness program in place or has just begun considering one in light of the Cadillac Tax, recent litigation attacking wellness programs has given many plan sponsors pause. This article will provide a brief regulatory overview of the Health Insurance Portability and Accountability Act (HIPAA) wellness program regulations, as amended and promulgated by the Affordable Care Act (ACA); a summary of the recent Equal Employment Opportunity Commission (EEOC) litigation; and plan sponsor best practices.

Understanding how to construct a sound wellness program, compliant with the laws and regulations, is not only crucial to avoiding a complaint from the EEOC but also integral to the program's success and longevity.

Regulatory overview

The ACA categorizes wellness programs as either participatory or health-contingent depending on the program's standards for receiving a reward. While all programs are generally prohibited from discriminating against plan participants based on a health factor, a program's classification dictates the size of the reward a plan sponsor may make available to the plan participant and if it must offer a reasonable alternative standard (RAS).

Under a participatory program, such as incentivizing a participant's completion of a health risk assessment or reimbursement for a gym membership, the reward is not contingent upon satisfaction of a standard related to a health factor. These programs are not related to a health factor as there is no requirement that participants perform any physical activity or achieve a health-related outcome. A participatory program may offer an unlimited reward, but the plan sponsor should be aware of any potential tax implications of such program to the plan sponsor and plan participant.

Unlike participatory programs, health-contingent programs are strictly regulated by the ACA because under these programs the reward is contingent upon a participant satisfying a standard related to a health factor. Generally, health-contingent offerings must provide an RAS, and plan participants must be given an opportunity to qualify for the reward at least once every year. Health-contingent programs must also be reasonably designed to promote health or prevent disease. The size of the reward is limited to 30 percent of the total cost of coverage under such programs, but programs that involve a tobacco cessation component may increase the total reward to 50 percent.

Health-contingent programs are further divided into two subcategories: activity-only and outcome-based. An activity-only program, such as walking 30 minutes a day, requires the individual to complete an activity related to a health factor but does not require any specific health outcome. Activity-only programs must offer an RAS to individuals for whom it is medically inadvisable or unreasonably difficult due to a medical condition to participate. Plans are permitted to require physician verification of the need for an RAS under activity-only programs, but only if such request is reasonable under the circumstances.

An outcome-based program, such a maintaining a BMI of less than 25, requires a plan participant to attain or maintain a specific health outcome. Interestingly, the requirement that a plan participant not use or discontinue the use of tobacco products falls under this category. Outcome-based programs must provide an RAS to any individual who does not meet the initial standard or who requests an alternative. Plan sponsors must include a notice of the availability of the RAS in all materials describing the program. An example of this notice released by the Department of Labor (DOL) can be found on the DOL website.

Pending EEOC litigation

In 2014, the EEOC filed lawsuits against three employers claiming that the employers' wellness programs violated the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). Due to these actions, it's important that plan sponsors are cautious when structuring wellness programs to ensure compliance with other federal laws.

In the first two suits, employer premium contributions were contingent upon the employee's participation in the plan's wellness program. These programs included a biometric screening and health risk assessment. In each case, if an employee failed to participate in the program for any reason, the employee was responsible for paying the entire premium. The EEOC asserts each program was not voluntary because of the significant penalty triggered for not participating and, citing the ADA, states that employers cannot require medical examinations or seek disability-related information from employees unless such an inquiry is part of a voluntary wellness program.

Although these cases are still pending, it is clear that the structure of these programs does not comply with ACA requirements and were seemingly low hanging fruit for the EEOC to challenge.

The EEOC filed its third suit, which was not decided on the merits, against Honeywell alleging violations of both the ADA and GINA. Plan sponsors should take specific note of this suit as this program appears to comply with ACA requirements and appears to be reasonably structured. Honeywell's program levied surcharges on employees who refused to participate in the wellness program. Among other components, the wellness program included a biometric screening for all plan participants including spouses if they were enrolled in the plan. Failure to participate in the program resulted in ACA compliant surcharges of up to $2,500 and discontinuation of employer HSA contributions of up to $1,500.

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Citing the ADA, the EEOC alleged that this program was not voluntary because of the additional cost placed on the employees if they did not participate. The EEOC also cited GINA, stating that the employer's request for genetic information was not voluntary and broadly asserted that the employer, acting as the plan sponsor, was seeking genetic information for underwriting purposes. Also, because GINA defines genetic information to include current medical information of family members, including relatives by affinity (e.g., spouse), the EEOC also alleged that the program resulted in the unlawful request of genetic information as it related to the employee.

Best practices

Nuanced ACA rules and recent EEOC litigation should serve to reinforce the need to carefully and strategically construct a wellness program.

"As more regulations dictate what a wellness program can and can't do, there is the shifting of focus from establishing penalties for non-participation in activities to creating an overall healthy and productive environment for employees, which enhances individuals' overall state of well-being," said Traci Barry, MS, senior director, strategic health initiatives at Employers Health. "Helping employees with the multiple facets affecting health risk factors is proving to be the most effective use of resources in improving workforce health and organizational performance."

Plan sponsors should continue to embrace or explore wellness programs but should do so on firm legal footing. Employers utilizing health-contingent programs should carefully review and understand the requirements surrounding reasonable alternative standards including, but not limited to, notice requirements and when such alternatives must be provided. Even if a wellness program complies with the ACA, plan sponsors must be aware of the interplay of other federal bodies of law such as GINA and the ADA. Specifically, plan sponsors must consider: (1) the voluntary nature of the program, (2) the type of information collected, (3) how information is collected, (4) how information is used and (5) recent EEOC proposed regulations published April 20, 2015 regarding EEOC enforcement approaches and wellness program design requirements.

It can be argued that progressive initiatives, such as wellness programs, stand in contrast to compliance activities. Likely, in many organizations, there is a tension between ardent wellness program advocates and wellness program skeptics who foresee the compliance burdens of such a program. However, uniting as a team to avoid the excise tax may align these interests and create a positive result for the plan.

References

1. *Incentives for Nondiscriminatory Wellness Programs in Group Health Plans (Final Rule), 78 Fed. Reg. 33157 (June 3, 2013).*
2. *Americans with Disabilities Act of 1990 (Pub.L. 101 -336).*
3. *Genetic Information Nondiscrimination Act of 2008 (Pub.L. 110 -233).*
4. *EEOC v. Orion Energy Systems (Civil Action No. 1:14-cv-01019).*
5. *EEOC v. Flambeau, Inc., (Civil Action No. 3:13-cv-00638).*
6. *EEOC v. Honeywell International, Inc., (Civil Action No.14-cv-04517-ADM-TNL).*
7. *Amendments to Regulations Under the Americans With Disabilities Act (Proposed Rule), 80 Fed. Reg. 21659 (April 20, 2015).*

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