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Bona Fide Wellness Programs Under HIPAA

by Barry Hall

Proposed HIPAA regulations[1] provide guidance that enables employer-sponsored wellness programs to aggressively promote and reward healthy behaviors using significant financial incentives. This article outlines the features of a "bona fide wellness program" as defined by HIPAA guidelines.

Background

A key portion of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) contains provisions that prohibit group health plans and insurers from discriminating against individuals based on health factors. In 1997, the agencies with governing power under HIPAA (the IRS, and Departments of Labor and Health and Human Services) published interim rules that interpret the HIPAA nondiscrimination provisions and introduce the concept of a "bona fide wellness program" as it relates to the nondiscrimination provisions. In 2001, proposed regulations were issued, providing more detailed guidance on permissible health incentives under bona fide wellness programs.

HIPAA's nondiscrimination provisions are designed to prohibit a medical plan from discriminating, in eligibility or premiums, based on health factors of individuals. As the proposed regulations clarify, however, they do allow the use of wellness incentives to encourage participants to participate in health promotion and disease prevention programs and to attain specific outcomes. The bona fide wellness program provisions, in fact, define specific situations where it is perfectly permissible to provide discounts, rebates or modifying otherwise applicable co-payments or deductibles in return for adherence to wellness and disease management programs.

Although these regulations have been around for a few years, a large number of benefits professionals remain unaware of their relevance. Because they can be critical to the design and management of health benefits, it is important to observe these guidelines in the plan design process.

Employers today are turning to health improvement programs as key components of multi-pronged strategies to introduce consumerism while addressing escalating health care costs. Research estimates that approximately 70% of all health care costs are due to preventable illness.[2] These preventable conditions relate to a reasonably standardized and well-researched set of modifiable health risk factors that include nutrition, weight control, exercise, cholesterol, blood pressure, safety, and mental well-being. Programs that help individuals reduce these risk factors have been demonstrated to significantly reduce health care costs and workplace absenteeism. Furthermore, these programs can improve workplace safety and employee productivity. The positive, measurable ROI (return on investment) of workplace wellness programs has increased employer interest and stimulated the adoption of a variety of incentive strategies designed to reward employees for making healthy lifestyle choices.

Some wellness incentives are *activity*-based; that is, they reward employees for performing certain activities, such as completing a health risk survey or attending a smoking cessation class. Other incentives are *achievement*-based. These rewards are contingent on an employee's attainment (or maintenance) of a specific health standard, such as a body mass index below 30 or being tobacco-free for a year. It is largely this latter type of incentive that HIPAA addresses as a

potential source of discrimination. The guidelines state, "The requirements for bona fide wellness programs apply only to a wellness program that provides a reward based on the ability of an individual to meet a standard that is related to a health factor, such as a reward conditioned on the outcome of a cholesterol test."

Prior to HIPAA, there was very little regulation or guidance related to employer- sponsored wellness programs (apart from a few state laws such as restrictions on targeting tobacco usage). The proposed regulations under HIPAA provide some of both. They define a "safe harbor" that enables an employer-sponsored wellness program to confidently utilize significant financial incentives to promote healthy behaviors.

Definition of a Bona Fide Wellness Program

The term "bona fide" implies that something is genuine, or characterized by good faith. As such, a bona fide wellness program is intended to be one that genuinely strives to improve the health and wellness of employees. The proposed HIPAA regulations[3] define such a program as one that adheres to the following four requirements:

1. **The total reward that may be given to an individual under the plan for all wellness programs must not exceed a specified percentage of the cost of employee-only coverage under the plan.** The proposed regulations specify three alternative percentages: 10%, 15% and 20%. This percentage would be applied to the total cost of employee-only coverage under the plan, which is defined to include both employee and employer contributions. The governing agencies have sought input to determine which percentage to use for the final regulations. There is some question as to whether a larger amount might be appropriate for wellness programs that include participation by family members.

2. **The program must be reasonably designed to promote good health or prevent disease. Individuals must have the opportunity to qualify for any reward at least once per year.** A program that genuinely promotes good health will seek to enable less-healthy individuals to improve their health and qualify for a reward.
   In other words, a program cannot base its rewards or penalties on health factors that are present when an individual first enrolls, without providing an opportunity, at least annually, for individuals to re-qualify.

3. **The reward under the program must be available to all similarly situated individuals.** If, under the wellness program's design, an enrollee is unable to attain a program standard due to a health factor, then the program does not qualify as a bona fide wellness program. However, to address this issue, plans may make individualized adjustments to their programs to address the health factors of individuals for whom it is unreasonably difficult to qualify for the benefits. This can be accomplished by offering a reasonable alternative standard in order to obtain the reward to any individual for whom the program's standard is unreasonably difficult due to a medical condition (or for whom it is medically inadvisable to attempt).

   For example, consider a wellness program that offers a premium discount to individuals who maintain a cholesterol count below 200. For some individuals this requirement could be unreasonably difficult or medically inadvisable. In order for this program to qualify as a bona fide wellness program, it must make available a reasonable alternative standard for those individuals, such as compliance with a low-cholesterol diet.

   The reasonable alternative standard must take into account the specific health factor of the individual who requires it. The alternative standard does not need to be determined before the program is implemented. It is sufficient for the program to determine a reasonable standard once a participant has informed the plan that it is unreasonably difficult for him or her to meet the standard due to a medical condition (or it is medically inadvisable for him or her to attempt to meet the standard).

4. **All plan materials describing the terms of the plan must also disclose the availability of a reasonable alternative standard.** Employers must try to ensure that individuals are aware of the reasonable alternative standards described in the third requirement. However, the specific details of the alternative standards are not required to be disclosed in all plan materials – merely the disclosure of their availability. Furthermore, if the plan materials merely mention the program and do not describe the general standard, they are not required to disclose the availability of an alternative standard.

Implications for Smoking Provisions

Recent actions of some employers indicate a growing trend toward a tougher stance on smoking. However, the proposed regulations provide specific examples that indicate that wellness programs will not be able to require employees to be nicotine-free in order to receive an incentive reward. This implication also appears to impact any program that offers nonsmoker discounts. These proposed regulations indicate that nicotine addiction is considered a medical condition by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM IV). It further cites a Surgeon General's report that indicates that nicotine is a powerfully addictive drug. Therefore, presumably a smoker could claim, under the third requirement above, that due to a medical condition it is unreasonably difficult for them to satisfy a program standard that would require them to quit smoking. As a result, the plan must accommodate the individual by offering a reasonable alternative standard, such as attending a smoking cessation program (but not necessarily quitting).

Blessing or Curse?

Although it is possible to look at the "alternative standard" provision as eviscerating an employer's health improvement initiative by releasing individuals from program requirements, it can also be considered a benefit. In the absence of the alternative standards provision, employers would be required to devise universal program requirements capable of being readily achieved by *all* employees, in order not to run afoul of discrimination requirements. This might even include considerations based on age, disability, and other factors governed by the ADEA (Age Discrimination in Employment Act), the OWBPA (Older Workers Benefit Protection Act), and the ADA (American with Disabilities Act).

In most cases this would require that any achievement-based standards be set very low. HIPAA's proposed alternative standards provision gives wellness plans increased flexibility by allowing them to "raise the bar," with downward adjustments permitted for individuals for whom those standards would be unreasonably difficult.

Timeframe

Although written comments on the proposed rules were due on April 9, 2001, no final rules have been promulgated. As a result, the period for good faith compliance with these provisions continues until further guidance is issued.

Endnotes

1. Prop. Treas. Reg. § 54.9802-1(f); Prop. DOL Reg. § 2590.702(f); 45 CFR § 146.121(f)
2. Fries, J.; Koop, C.E.; Beadle, C.E.; et al. "Reducing health care costs by reducing the need and demand for medical services." The New England Journal of Medicine, 329: 321-325 (July 29), 1993.
3. Prop. Treas. Reg. § 54.9802-1(f)(1)(i); Prop. DOL Reg. § 2590.702(f)(1)(i); 45 CFR § 146.121(f)(1)(i))

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