Wellness Programs
Structure, Risks, and Benefits
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Why Wellness Programs?
- Wellness or disease-management programs can be a valuable way to try to control health care costs
  - Reduce health coverage claims
  - Increase productivity
  - Reduce accidents
  - Reduce absenteeism
  - Attract and retain employees
  - Improve employee relations and morale
- If not designed correctly...
  - Can raise legal compliance issues
  - May not achieve desired goals

Towers Watson Survey
- Employers with successful wellness programs report:
  - Annual health care cost savings of more than $1,000 per employee
  - Fewer lost days due to unplanned absences and disability
  - Reductions in some health risks (tobacco use, physical inactivity)
What is a Wellness Program?
- Can take many forms
- Can include...
  - Health-related communications and education
  - Health risk assessments or screenings
  - Goal achievement programs (for instance, weight loss or smoking cessation)
  - Vaccinations
  - Payment of health club dues
  - Rewards (or penalties)
- Can cover only employees, or family members too

Legal Compliance Issues
- Taxation of rewards
- Cafeteria plan and health FSA rules
- HSA eligibility and discrimination rules
- HIPAA
- COBRA
- ERISA
- GINA
- ADA
- ADEA
- FLSA

Taxation of Rewards
- Health benefits provided under a wellness program, such as diagnostic tests, are likely to be tax-free
- Some rewards are not taxable
  - Premium discounts
  - Employer contributions to health FSAs, HRAs, or HSAs (although these could raise nondiscrimination issues)
- Other rewards are taxable
  - Cash or cash equivalents (withholding requirements apply)
  - Gift cards or gift certificates
  - Reimbursement of health club dues (unless to treat disease)
**Cafeteria Plan and Health FSA Rules**
- Cafeteria plan rules restrict the timing of elections and permissible mid-year election changes.
- Election change issues can arise when employees qualify for rewards during the cafeteria plan year.
  - Structure program so that eligibility for reward in cafeteria plan is determined before open enrollment.
  - Permitted changes to cafeteria plan elections for significant increase or decrease in cost of coverage.
  - Offer rewards that do not affect cafeteria plan elections.
  - Rewards in the form of cafeteria plan benefits can raise discrimination issues.

**HSA Eligibility and Discrimination**
- Participation in a wellness program will not cause loss of HSA eligibility, so long as the wellness program does not provide significant medical benefits and is not considered a health plan.
- Rewards that take the form of HSA contributions can raise discrimination or comparability issues.
  - HSA contributions made through a cafeteria plan may raise eligibility or benefits discrimination issues.
  - HSA contributions made outside of a cafeteria plan may raise comparability issues.
  - All non-collectively-bargained employees must receive comparable HSA contributions.

**HIPAA Applicability**
- HIPAA portability rules for group health plans apply to most wellness programs.
  - Wellness programs that are part of exempt plans (for instance, limited-scope dental or vision) are exempt.
  - Stand-alone programs that do not provide medical care are exempt (for instance, reimbursement or information-only programs, or rewards unconnected to health plans).
HIPAA Considerations

- If subject to HIPAA rules, the wellness program must satisfy HIPAA wellness program regulations
- Generally, HIPAA prohibits health plan discrimination with regard to benefits, costs, or contributions that is based on a health factor, but exception for wellness programs that meet certain requirements
  - Standard-based programs must satisfy five requirements
  - Participatory programs must be available to all similarly situated individuals (not subject to other HIPAA requirements)

HIPAA Considerations (con't)

- Five requirements for standard-based programs:
  - Eligible individuals must have opportunity to qualify for the reward at least once per year
  - Reward may not exceed 30% of the cost of health coverage (50% for smoking cessation programs)
  - Program must be reasonably designed to promote health or prevent disease (must actually have a chance to improve health, not just a way to discriminate)
  - Full reward must be available to all similarly situated individuals (employment-based classifications)
  - Reasonable alternative standard for individuals who can’t meet the standard due to medical condition (see next slide)

HIPAA Considerations (con't)

- Program must allow a reasonable alternative standard (or waiver of the applicable standard) for obtaining the reward for an individual for whom it is either –
  - Unreasonably difficult to satisfy the standard due to a medical condition, or
  - Medically inadvisable to attempt to satisfy the standard
- Program may seek verification from a physician
**COBRA Considerations**

- If a wellness program provides “medical care” (for instance, physical exams, screenings, or immunizations), the program is subject to COBRA
- If a wellness program only provides general health information or benefits (for instance, seminars or reimbursement of health club dues), it is not subject to COBRA
- COBRA-qualified beneficiaries must be given the opportunity to elect and pay for the same coverage under each group health plan that he or she had before the qualifying event

**ERISA Considerations**

- Program is subject to ERISA if it provides medical services (e.g., diagnostic or preventive services)
  - Exception for referral-only or educational-only programs
- If a program is an ERISA welfare benefit plan, it must satisfy ERISA plan requirements
  - Plan document
  - SPDs and SMMs
  - Form 5500s
  - Claim procedures
- If a program is an ERISA group health plan, additional requirements apply
  - SBC

**GINA Considerations**

- GINA prohibits group health plans and employers from collecting genetic information for most purposes
  - May not collect or require genetic information for underwriting or enrollment purposes or for determination of premiums
- Wellness program exception allows employer to acquire genetic information
  - Must be voluntary and must give written consent
  - Information must be aggregated when provided to employer
  - May not make rewards or penalties contingent upon genetic information
ADA Considerations

- ADA prohibits employment discrimination against disabled individuals
  - Employer may not make disability-related inquiries or require medical examinations
- EEOC position: Participatory wellness programs may violate ADA if no alternative is offered in order to attain benefits
  - ADA also limits physical exam requirements
    - Participation in a program that offers medical examinations must be voluntary
    - Can't require participation or penalize non-participants
    - EEOC silent on financial incentives to participate
  - May not discriminate against employee based on disability-related information

ADA Considerations (con't)

- Exception to employment discrimination for “bona fide employee benefit plan”
  - Bona fide health plan
    - Terms based on underwriting, classifying, or administering risk and not a subterfuge for discrimination
    - EEOC: Still cannot require employee to take a health risk assessment to be eligible for coverage under group health plan
  - Consistent with state law

Status of the EEOC/Wellness Battle

- In 2014 The EEOC filed several court cases challenging various types of employer wellness programs
  - EEOC v Honeywell
  - EEOC v Orion Energy
  - EEOC v Flambeau
EEOC Wellness Battle

- EEOC has not fared well with the Courts
- Honeywell – TRO Denied
- EEOC drew criticism from administration and other agencies as well.
- EEOC issued proposed regulatory guidance on April 20, 2015
  - New guidance was more aligned, but not completely, with the tests applied by other agencies.
  - Criticisms from all sides
  - Final rule has not been issued

EEOC Wellness Battle

- Flambeau – Summary Judgment for Employer 12/30/2015
  - Employer required health risk assessment and biometric test as condition of participating in employer’s plan
  - Requirements were written part of employer health care plan
  - Employees who declined could elect COBRA
  - Court found these did not amount to an unlawful medical examination requirement
  - “Safe Harbor” exclusion for bona fide medical plans

Flambeau – What does it mean?

- Criteria for benefit plan safe harbor:
  - Wellness program requirement must be a term of the benefit plan
  - Employees must receive adequate notice
  - Requirement must be based on underwriting risks, classifying risks, or administering risks
  - Wellness program must not be mandatory
  - Requirement cannot be a subterfuge for discrimination
Flambeau – What does it mean?

- This is a narrow ruling – concerning whether plan violated ADA
- No claim regarding compliance with HIPAA, other laws
- District court ruling
- The facts in Flambeau occurred prior to the implementation of ACA's Employer Shared Responsibility Provisions
- What would be the impact of a plan like this under the ACA?

ADEA Considerations

- Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating against employees and job applicants on the basis of age
- ADEA could affect a wellness program if program rewards or penalties are based on age, or if the program otherwise discriminates against any employee or group of employees age 40 or older
- Disparate impact claims are a particular concern

FLSA Considerations

- Fair Labor Standards Act (FLSA), among other things, establishes rules regarding overtime pay
- If participation in a wellness program is mandatory, time spent participating in the program could be considered compensable time.
- State wage and overtime laws also are a consideration
Affordable Care Act

- ACA added new coverage mandates that may apply to wellness programs if programs affect the cost or value of other group health plan coverage
  - No annual limits on the dollar value of benefits
  - Preventive services may not utilize cost-sharing
- Stand-alone wellness programs may be “group health plans” under ACA if they provide health care
  - If so, must follow availability and reporting requirements
- ACA modified HIPAA nondiscrimination standards for health-contingent rewards (covered earlier)

Designing a Wellness Program

- Reward to encourage participation or the attainment of a wellness goal
  - Reduce or waive medical plan premiums, copays or deductibles
  - Giveaways or gift cards
  - Reimbursement of health club dues
- Qualification for reward
  - Standard-based (e.g. stop smoking or lower cholesterol)
  - Participation-based (e.g. attend class or weekly exercise)
- Education-only
  - Screenings or information sessions

Coordination with other Benefit Plans

- Can bundle wellness program with medical plan
  - Connected program (for example, nutrition advice in connection with medical care)
  - Financial rewards under medical plan for wellness program participation or wellness program goals
  - Screenings under wellness program can lead to medical referrals
- Can coordinate wellness program with FSAs, HRAs, or HSAs
  - Employer contribution to accounts for participation in wellness program or wellness program goals
Designs to Comply with HIPAA

- Reasonable alternative standard requirement – provide individually tailored adjustments to the standards to qualify for the reward
  - Alternative method of qualifying for the reward that does not involve a health factor
  - May request evidence, such as a statement from a physician, that an individual cannot meet the standard due to a health factor
  - Program must disclose that alternative standards are available
- Safe harbor programs
  - 20% premium discount for cholesterol below 200
  - Waiver of deductible based on BMI

Designs to Comply with GINA and ADA

- GINA
  - Do not require family medical history
- ADA
  - Do not condition employment or participation in health plan on completion

Wellness Program Trends

- Increase in financial penalties for employees not participating
- Rules for earning rewards becoming more stringent
  - Requiring employees to complete activities
  - Reward based on achievements
  - Inclusion of spouses and dependents
Wellness Program Ideas

- Look for fun and engaging ways to improve health
- Improve nutrition
- Increase physical activity
- Quit harmful behaviors
- Incentives work!
  - But, may have limited impact on changing behavior long term

Wellness Program Ideas (con't)

- Participatory programs tie incentives to participation in wellness activities
  - Activities: exercising, eating healthy foods, losing weight
  - Rewards: gift cards, water bottles, jump ropes
  - Wellness bingo
  - “Biggest loser” contests
- Goal-based programs tie incentives to outcomes
  - Activities
    - BMI at specified level
    - Bad cholesterol counts at specified level
  - Rewards
    - Employer contribution to FSA, HRA or HSA
    - Lower premium

Wellness Program Ideas (con't)

- Popular programs
  - Health risk assessment
  - Biometric screenings (blood pressure, BMI, cholesterol)
  - Disease management program
  - Smoking cessation program
  - Weight management program
  - Education
  - Worksite activities (yoga, walking programs)
  - Team challenges