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**WELLNESS PROGRAMS—OVERVIEW OF
LAWS REGULATING WELLNESS
PROGRAMS INCLUDING THE RECENTLY
ISSUED PROPOSED EEOC REGULATIONS!**

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Overview

- > Wellness programs—while seemingly innocent and simple—are regulated by a whole host of various laws, such as:
 - ERISA,
 - COBRA,
 - Affordable Care Act (ACA) market reform rules,
 - ACA Cadillac Tax and Affordability,
 - HIPAA nondiscrimination,
 - Americans with Disabilities Act (ADA),
 - Genetic Information Nondiscrimination Act (GINA), and
 - Internal Revenue Code (IRC)

Overview

- ★ We will start with an overview of the various laws that regulate wellness programs and then focus on the new EEOC proposed regulations

ERISA

- ♦ To be considered an “employee welfare benefit plan” under ERISA, the wellness plan must meet these requirements from ERISA Section 3(1):
 - > There must be a plan, fund or program,
 - > That is established or maintained by the employer,
 - > For the purpose of providing medical, surgical or hospital care,
 - > To participants and their beneficiaries
- ♦ Generally, the issue is if the wellness program provides medical benefits
- ♦ The DOL has informally stated that one should look to the DOL rulings regarding EAPs as helpful guidance to determine if the wellness program is a group health plan under ERISA

ERISA

- ♦ In one DOL ruling, the program provided assistance in dealing with major personal problems affecting mental or physical health. Assistance was available for things such as drug and alcohol abuse, stress & anxiety. The vendor that provided the services used individuals trained in psychology and social work to counsel participants.
- ♦ This was considered a group health plan under ERISA

ERISA

- ✦ In another DOL ruling, the company had a program for employees to seek assistance for drug and alcohol abuse, personal & other health problems. The program provided referrals by means of two toll-free numbers listed in a booklet distributed to employees describing the program. One telephone number was staffed by an individual and that individual had no special training in counseling, psychology, social work, public health, or any other related discipline. The second telephone number connected the employees with a “hotline” provided nationwide at no charge by the National Institute for Drug Abuse (NIDA).
- ✦ This was not considered an ERISA group health plan

ERISA

- ✦ For wellness programs, there may not be medical benefits provided. Rather, the program may consist of educational programs only
- ✦ If the wellness program provides more than education, such as diagnosing a medical condition or providing physical examinations, that could cause it to be an ERISA group health plan
- ✦ If the wellness program provides counseling from trained professionals—which is very common—it is likely that it is an ERISA group health plan

COBRA

- ✦ If the wellness program is an ERISA group health plan, it is subject to COBRA
- ✦ Accordingly, when a wellness program participant terminates employment with the company and loses group health plan coverage, he or she must be given the right to continue wellness program coverage by electing COBRA
- ✦ The wellness program is not required to extend rewards such as premium reductions to COBRA qualifying beneficiaries who have elected to participate in the wellness program

COBRA

- ✦ Some practical ways to offer COBRA:
 - > Include it in the major medical coverage
 - > If the wellness program is offered to a broader group than those just in the major medical plan, offer the wellness plan for free to all terminated employees for the COBRA period
 - Not likely used much after termination of employment if cannot receive rewards
- ✦ Remember to update COBRA notices and forms

ACA—Market Reform Rules

- ★ The ACA market reform rules are a subset of the ACA rules and include such things as:
 - > Coverage of preventive health services at no cost (non-grandfathered plans)
 - > Coverage of routine costs associated with approved clinical trials (non-grandfathered plans)
 - > No pre-existing condition exclusion (all group health plans)
- ★ Excepted benefits are exempt from the ACA Market Reform Rules

ACA—Market Reform Rules

- ✦ EAPs are excepted benefits if:
 - > (1) does not provide any significant benefits in the nature of medical care,
 - > (2) the benefits are not coordinated with another group health plan as follows: (a) the participants in the other group health plan must not be required to use and exhaust benefits under the EAP before an individual is eligible for benefits under the other group health plan and (b) participant eligibility for benefits is not dependent on participation in another group health plan
 - > (3) no employee premiums or contributions are required as a condition of participation in the EAP
 - > (4) there is no cost sharing under the EAP

ACA—Market Reform Rules

- ♦ The preamble to the final regulations for excepted benefits contains the following statement:

“Some comments requested that EAPs be allowed to provide wellness and disease management programs, provided such programs do not provide significant benefits in the nature of medical care. However, treating wellness programs as excepted benefits by including them in an EAP would circumvent consumer protections contained in the statutory standards for wellness programs...This suggestion is not adopted in these final regulations.”

ACA—Market Reform Rules

- ★ Why does this matter? If the wellness program is not an excepted benefit AND not a grandfathered plan (i.e., it must have been in existence since March of 2010 and essentially the benefits have not been reduced and the cost of the coverage has not been increased), then it must meet the ACA market reform rules, such as covering preventive care at no cost
 - > This can be a real issue if the wellness program is not limited to just those employees who participate in the group health plan

ACA—Market Reform Rules

- ✦ Is there a possible argument that wellness programs are excepted benefits?
- ✦ Maybe could argue the EAP exemption, but that is not clear
- ✦ Not likely to be an IRS or DOL audit issue but a claim by a participant for benefits

Other ACA Rules—Cadillac Tax

- ✦ This is a non-deductible 40% excise tax on high-cost health plans
- ✦ It becomes effective in 2018 and applies to health benefits that cost more than \$10,200 for individual coverage or \$27,500 for non-individual coverage
 - > These costs are based on something essentially similar to COBRA premiums
- ✦ There are special rules and adjustments for retirees and certain other groups

Other ACA Rules—Cadillac Tax

- ✦ The Tax is imposed on the excess of the aggregate cost of the applicable coverage over the applicable dollar limit—but need to know how to calculate the aggregate cost
- ✦ Costs need to be calculated under rules similar to the rules for calculating COBRA premiums
- ✦ IRS issued Notice 2015-16 that gives us a first glimpse on the possible guidance for the rule
- ✦ This Notice asks for comments on the types of coverages that should be subject to the tax

Other ACA Rules—Cadillac Tax

- ✦ Included is group health plan coverage—major medical, Health FSAs, employer and employee pre-tax contributions to HSAs, governmental plans, on-site medical clinics, retiree coverage, multiemployer plans...
- ✦ IRS indicates in the Notice that executive physical programs and HRAs will be included
- ✦ Notice states, “Treasury and IRS are considering whether to exercise authority...to propose that EAPs that qualify as an excepted benefit...would be excluded from applicable coverage...”
 - > Hopefully that would also include wellness plans that are similar to the EAPs in the excepted benefits guidance

Other ACA Rules—Affordability Under IRC Section 4980H

- ✦ Coverage under an employer-sponsored plan is deemed affordable for an employee if the employee's required contribution to the lowest cost self-only coverage does not exceed a specified percentage of the employee's household income (9.5%)
 - > The IRS has announced three safe harbors that employers can use to assess affordability (W-2, Rate of Pay, or Federal Poverty Level)
- ✦ The IRS has proposed that the affordability of an employer-sponsored plan is determined by assuming that each employee fails to satisfy the requirements of a wellness program, except the requirements of a nondiscriminatory wellness program related to tobacco use

Other ACA Rules—Affordability Under IRC Section 4980H

♦ From the preamble to the proposed regulations:

“In many circumstances these rules relating to the effect of premium-related wellness program rewards on affordability will have no practical consequences...If, for example, the employee's household income was at least \$25,000, and the employee's required contribution for self-only coverage did not exceed \$2,375 (9.5 percent of \$25,000), the coverage would be affordable whether or not a wellness premium discount was taken into account to reduce the \$2,375 required contribution.”

HIPAA Nondiscrimination

- ★ HIPAA is divided into 2 main parts: (1) portability rules (which includes the nondiscrimination rules and wellness rules) and (2) administrative simplification rules (which includes HIPAA's privacy and security rules)
- ★ Certain excepted benefits are exempt from HIPAA's portability rules

HIPAA Nondiscrimination

- ★ HIPAA generally prohibits group health plans from using health factors to discriminate against individuals with regard to benefits, premiums or contributions
- ★ There is an exception for adherence to certain programs of health promotion and disease prevention, including wellness programs
- ★ There are 2 types of wellness programs—participatory and health-contingent based

HIPAA Nondiscrimination

- ★ Participatory wellness programs—If none of the conditions for obtaining a reward under a wellness program are based on an individual satisfying a standard that is related to a health factor (or if the wellness program does not provide a reward), the wellness program is a participatory program
 - > Examples include a program that reimburses for the cost of a membership in a fitness program and diagnostic testing program that provides a reward for participation and does not base any part of the reward on the outcomes

HIPAA Nondiscrimination—Health Contingent Program

- ✦ Health-contingent wellness program—is a program that requires an individual to satisfy a standard related to a health factor to obtain a reward. A health-contingent wellness program may be an activity-only program or an outcome-based wellness program
 - > Activity-only wellness program requires an individual to perform or complete an activity related to a health factor in order to obtain a reward but does not require the individual to attain or maintain a specific health outcome.
 - Examples are walking, diet, exercise programs

HIPAA Nondiscrimination—Health Contingent Program

- > Outcome-based—is a program that requires an individual to attain or maintain a specific health outcome in order to obtain the reward
 - Examples include not smoking or attaining certain results on biometric screening

HIPAA Nondiscrimination—Health Contingent Program (Activity-only & Outcome-based)

♦ There are 5 requirements:

- > (1) Frequency of Opportunity to Qualify,
- > (2) Size of the Reward,
- > (3) Reasonable Design,
- > (4) Uniform Availability and Reasonable Standards and
- > (5) Notice of Availability

HIPAA Nondiscrimination—Health Contingent Program

- ✦ Frequency of Opportunity to Qualify (Requirement #1)
 - ✦ Activity-only—provide eligible individuals the opportunity to qualify for the reward under the program at least once a year
 - ✦ Outcome-based—same

HIPAA Nondiscrimination—Health Contingent Program

★ Size of the Reward (Requirement #2)

- > Activity-only—cannot exceed 30%, but level can be 50% of employee-only coverage to the extent the additional percentage is in connection with a program designed to prevent or reduce tobacco use. If in addition to employees, any class of dependents may participate, the reward cannot exceed the applicable percentage of the total cost of the coverage in which an employee and any dependents are enrolled. The cost is based on the total amount of employer and employee contributions.
- > Outcome-based—same

HIPAA Nondiscrimination—Health Contingent Program

★ Reasonable Design (Requirement #3)

- > Activity-only—the program must be designed to promote health or prevent disease. Meets this if has a reasonable chance of improving health of, or preventing disease in, participating individuals. Cannot be overly burdensome, a subterfuge for discriminating based on a health factor, or highly suspect in the method chosen to promote health or prevent disease
- > Outcome-based—same plus a reasonable alternative standard to qualify for the reward must be provided to any individual who does not meet the initial standard based on a measurement, test or screening that is related to a health factor

HIPAA Nondiscrimination—Health Contingent Program

◆ Uniform Availability & Reasonable Alternative Standards (RAS) (Requirement #4)

> Activity-only

- (A) the full reward must be available to all similarly-situated individuals
- (B) meet (A) above if the program (i) allows for RAS (or waiver) for any individual for whom it is unreasonably difficult due to a medical condition to meet the standard, (ii) allows for RAS (or waiver) for any individual for whom it is medically inadvisable to attempt to satisfy the standard

HIPAA Nondiscrimination—Health Contingent Program

- (C) All facts and circumstances are taken into account in determining whether a plan has furnished a RAS
 - Time commitment is reasonable
 - If RAS is a diet program, the plan is not required to pay for the cost of food, but must pay for any member or participation fee
 - If the individual's personal doctor states the plan standard is not medically appropriate for the individual, the plan must provide a RAS that accommodates the recommendations of the doctor
- (D) If the RAS itself is an activity-only wellness program, that second-level program also must meet the activity-only rules or if the RAS is outcome-based it must the outcome-based rules

HIPAA Nondiscrimination—Health Contingent Program

- (E) If reasonable, the plan may seek verification, such as from the individual's doctor, that a health factor makes it unreasonably difficult for the individual to satisfy, or medically inadvisable for the individual to attempt to satisfy, otherwise-applicable standard of an activity-only wellness program
- > Outcome-based—Very different. Not the same! See next slide

HIPAA Nondiscrimination—Health Contingent Program

★ Uniform Availability & Reasonable Alternative Standards (RAS) (Requirement #4)

> Outcome-based

- (A) the full reward must be available to all similarly situated individuals
- (B) meet (A) above if the program allows a RAS (or waiver of the other applicable standard) for obtaining the reward for any individual who does not meet the initial standard based on measurement, test or screening
- (C) a RAS must be furnished by the plan upon the individual's request or the condition for obtaining the reward must be waived

HIPAA Nondiscrimination—Health Contingent Program

- (D) Same general rule about process if RAS is itself activity-only or outcome-based. However, if RAS for outcome-based wellness program is an outcome-based wellness program, that second level wellness program must ensure that:
 - (i) RAS cannot be a requirement to meet a different level of the same standard without additional time to comply (such as first RAS was to have BMI of less than 30, and second RAS cannot be BMI of less than 31 on the same day)
 - (ii) individual must be given opportunity to comply with recommendations of individual's doctor as a second RAS, but only if doctor joins in the request
- (E) Never reasonable to seek verification that a health factor makes it unreasonably difficult to satisfy, or medically inadvisable to attempt to satisfy

HIPAA Nondiscrimination—Health Contingent Program

★ Notice of Availability (Requirement #5)

- > Activity-only—must disclose in all plan material describing the terms of the wellness program the availability of the RAS to qualify for the reward (and, if applicable, possibility of waiver of standard). Include contact information for obtaining a RAS and a statement that recommendations of an individual's doctor will be accommodated
- > Outcome-based—same, except also included in any disclosure for an individual who did not satisfy an initial outcome-based standard

ADA—EEOC Proposed Regulations

- ★ FINALLY WILL DISCUSS THE EEOC PROPOSED REGULATIONS!
- ★ SO EXCITING! YOU HAVE BEEN WAITING FOR THIS MOMENT!

ADA—EEOC Proposed Regulations

- ✦ Proposed regulations (referred to as proposed rules by the EEOC) published in the Federal Register on April 20, 2015
- ✦ Title I of the ADA prohibits discrimination against individuals on the basis of disability in regards to employment compensation and other terms and conditions of employment
- ✦ Also requires the employer to provide reasonable accommodations to enable individuals with disabilities to have equal access to fringe benefits offered to individuals without disabilities
- ✦ Restricts employers from obtaining medical information from employees by generally prohibiting them from making disability-related inquiries or requiring medical examinations

ADA—EEOC Proposed Regulations

- ✦ The first exception to that rule permits voluntary medical examinations and medical histories that are part of an employee health program available to employees at the work site
 - > Employee health programs includes wellness programs
 - > EEOC previously stated (BEFORE the issuance of these proposed regulations) that a wellness program was voluntary as long as an employer neither required participation nor penalized employees who did not participate
- ✦ There is a second exception for bona-fide benefit plans safe harbor—which we will discuss later

ADA—EEOC Proposed Regulations

- ✦ The exception that permits voluntary medical examinations and medical histories that are part of an employee health program available to employees at the work site has FIVE requirements:
 - > #1—Reasonably designed
 - > #2—Voluntary
 - > #3—Limits on incentives offered
 - > #4—Confidentiality
 - > #5—Reasonable accommodation

ADA—EEOC Proposed Regulations

- ✦ Requirement #1—Reasonably Designed
- ✦ An employee health program, including any disability-related inquiries and medical examinations that are a part of such program, must be reasonably designed to promote health or prevent disease
- ✦ Applies regardless of whether the program is a part of a group health plan
- ✦ Meets this standard if:
 - > has a reasonable chance of improving health of, or preventing disease in, employees
 - > is not overly burdensome
 - > is not a subterfuge for violating the ADA or other laws prohibiting employment discrimination
 - > not highly suspect in the method chosen to promote health or prevent disease

ADA—EEOC Proposed Regulations

★ Requirement #1—Reasonably Designed— Examples

- > Conducting a HRA and/or biometric screening for purposes of alerting employees to health risks of which they may not be aware meets this standard as well as use of aggregate info from employee health risk assessments to design a health plan
- > Collecting information without providing employees follow-up advice or not using it for plan design would not be reasonably designed to promote health
- > Not reasonably designed if exists mainly to shift costs from the plan to the employees based on their health

ADA—EEOC Proposed Regulations

- ✦ Requirement #2—Voluntary
- ✦ An employee health program that includes disability-related inquiries or medical examinations (including disability-related inquiries or medical examinations that are part of a health risk assessment) is voluntary as long as a covered entity meets numerous requirements (listed on next slide). These rules apply regardless of whether the wellness program is part of a group health plan.

ADA—EEOC Proposed Regulations

★ Requirement #2—Voluntary

- > (1) does not require employees to participate
- > (2) does not deny coverage under any of its group health plan or benefit packages within a group health plan for non-participation, or limit the extent of benefits (other than as permitted by this rule) for employees who do not participate
- > (3) does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten employees (e.g., threatening to discipline an employee who does not participate or who fails to achieve certain health outcomes)

ADA—EEOC Proposed Regulations

- > (4) where a health program is a wellness program that is part of a group health plan, employer must provide employees with a notice that:
 - (A) is written so that the employee from whom medical information is being obtained is reasonably likely to understand it,
 - (B) describes the type of medical information that will be obtained and the specific purposes for which the medical information will be used, and
 - (C) describes the restrictions on the disclosure of the employee's medical information, the employer representatives and other parties with whom the info will be shared and the methods that will be used to protect the information (including whether it complies with HIPAA privacy rules)

ADA—EEOC Proposed Regulations

- ★ Requirement #2—Voluntary—EEOC Comments
 - > In the preamble, the EEOC asks if this notice requirement should include a requirement that employees provide prior, written and knowing confirmation that their participation is voluntary

ADA—EEOC Proposed Regulations

- ✦ Requirement #3—Limits on Incentives Offered
- ✦ For wellness programs that include disability-related inquiries and/or medical examinations—and are part of a group health plan
 - > The use of incentives in an employee wellness program, whether in the form of a reward or penalty, together with the reward for any other wellness program that is offered, will not render the program involuntary if the maximum allowable incentive under the program—WHETHER A PARTICIPATORY PROGRAM OR HEALTH-CONTINGENT PROGRAM—does not exceed **30%** of the total cost **EMPLOYEE-ONLY COVERAGE**

ADA—EEOC Proposed Regulations

★ Requirement #3—Limits on Incentives Offered— EEOC Comments

- > A BIG ISSUE IS THE 30% LIMITATION BASED ON EMPLOYEE-ONLY COVERAGE
 - There is no increase permitted if the employee enrolls in family coverage and where dependents participate in the wellness program— Very different—and more limiting—than the HIPAA nondiscrimination rules
- > EEOC comments state that it applies to a health-contingent program that require participants to satisfy a standard related to a health factor
- > Applies to participatory programs—and not just health-contingent programs—if there is a disability-related inquiry and/or medical examinations

ADA—EEOC Proposed Regulations

★ Requirement #3—Incentives Offered—EEOC Comments

- > “A smoking cessation program that merely asks employees whether or not they use tobacco (or whether or not they ceased using tobacco upon the completion of the program) is not a program that includes disability-related inquiries or medical examination...Therefore, a covered entity would be permitted to offer incentives as high as 50% of the cost of employee coverage for that smoking cessation program...By contrast, a biometric screening...that tests for the presence of nicotine...is a medical examination. The ADA financial incentives rules...would therefore apply.”

ADA—EEOC Proposed Regulations

★ Requirement #3—Incentives Offered—EEOC Comments

- > The EEOC asks for comments on if incentives in a wellness program that asks employees to respond to disability-related inquiries and/or undergo medical examinations may not be so large as to render health insurance coverage unaffordable under ACA and therefore in effect coercive for an employee

ADA – EEOC Proposed Regulations

★ Requirement #4—Confidentiality

- > Medical records must be maintained in a confidential manner and must not be used for any purpose in violation of the ADA
- > Information obtained regarding the medical information or history of any individual must only be provided to an ADA covered entity (the employer) in aggregate terms that do not disclose, or are not reasonably likely to disclose, the identity of the employee. This applies regardless if part of a group health plan or if the incentive is available
- > “A wellness program that is part of a HIPAA covered entity likely will comply with its obligation...by complying with the HIPAA Privacy Rule.”

ADA – EEOC Proposed Regulations

♦ Requirement #4—Confidentiality—Best practices suggested by EEOC:

- Individuals who handle medical information that is part of an employee health program should not be responsible for making employment decisions (hiring, termination, etc.)
- If employer uses a third party vendor, it should be familiar with vendor's privacy policies for ensuring the confidentiality of medical information
- Breaches of confidentiality should be reported to affected employees immediately and investigated

ADA—EEOC Proposed Regulations

- ✦ Requirement #5—Reasonable Accommodations
- ✦ The preamble to the proposed rules states that in general, programs must not discriminate against employees with disabilities
 - > “This nondiscrimination requirement includes providing reasonable accommodations that enable employees with disabilities to fully participate in employee health programs and earn any reward or avoid penalty offered as part of those programs.”

ADA—EEOC Proposed Regulations

- ✦ Requirement #5—Reasonable Accommodations—EEOC Comments
- ✦ The example given by the EEOC is if, “...an employer that offers a financial incentive to attend a nutrition class, regardless of whether they reach a healthy weight as a result, would have to provide a sign language interpreter so that an employee who is deaf and who needs an interpreter to understand the information communicated in the class could earn the incentive...”

ADA—EEOC Proposed Regulations

- ♦ Compliance with other federal rules
 - > Complying with these rules does not relieve an employer from the obligation to comply in all respects with other federal nondiscrimination rules
 - Title VII of the Civil Rights Act, the Equal Pay Act, the Age Discrimination in Employment Act, GINA, etc.

ADA—EEOC Proposed Regulations

- ✦ EEOC states that “While employers do not have to comply with the proposed rule, they may certainly do so. It is unlikely that a court or the EEOC would find that an employer violated the ADA if the employer complied with the NPRM until a final rule is issued. Moreover, many of the requirements explicitly set forth in the proposed rule are already requirements under the law.”
 - > NPRM means the Notice of Proposed Rule Making— which are these proposed rules

ADA—2nd Exception

- ✦ As stated earlier, the ADA restricts employers from obtaining medical information from employees by generally prohibiting them from making disability-related inquiries or requiring medical examinations
- ✦ The first exception to that rule that we already discussed was the voluntary medical examinations and medical histories that are part of an employee health program available to employees at the work site
- ✦ The second exception is for bona-fide benefit plans

ADA—2nd Exception

- ★ The ADA has a safe harbor that exempts insurers and bona fide benefits plans from many of the ADA's restrictions, so long as the safe harbors are not used as a subterfuge to evade the purposes of the ADA
- ★ This was the basis for the Seff v. Broward County case in 2011

ADA—2nd Exception

- ✦ In *Seff v. Broward County*, the County offered a wellness program that consisted of biometric screening and a health risk assessment
 - > County imposed a surcharge on health plan premiums for those employees who did not participate in the wellness program
 - > Plaintiffs brought suit arguing that the wellness program violated the ADA's prohibition on mandatory medical examinations and disability related inquiries
 - > District court granted summary judgment in County's favor based on its conclusion that the wellness program fell within the ADA's "bona fide benefit plan" safe harbor
 - Safe harbor exempts insurance plans from ADA's prohibition on required medical exams and disability inquiries
 - ADA "shall not be construed as prohibiting a covered entity from establishing, sponsoring...the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks..."

ADA—2nd Exception

- ★ The interesting facts in the Broward County case was that the insurance carrier administered the program
- ★ It was only offered to those in the insured plan
- ★ The employer only received de-identified information

ADA—2nd Exception

- ★ In a footnote to the EEOC proposed regulations regarding the first exception, the EEOC states that it does not believe the ADA’s “bona fide benefit plan” safe harbor applicable to insurance (as interpreted by the court in Seff v. Broward County) is the proper basis for finding wellness incentives permissible
- ★ Essentially, wellness program incentives must meet the first exception that we discussed earlier and this second exception—that was relied on in the Seff v. Broward County case—is not applicable

HIPAA Privacy and Security Considerations for Wellness Programs

- ★ The Office of Civil Rights (“OCR”) recently issued guidance clarifying that the application of the HIPAA privacy and security rules depends on the way the wellness program is structured
 - > If the wellness program is offered by an employer directly—and it is neither a part of the group health plan or a group health plan itself—the health information that is collected from employees is not protected by the HIPAA privacy rules
 - > As discussed earlier, many wellness plans are group health plans (or part of one) and subject to the HIPAA privacy rules
 - > Also remember the ADA confidentiality rules

HIPAA Privacy and Security Considerations for Wellness Programs

- ✦ If a wellness program is a group health plan, it is subject to the HIPAA privacy and security rules. It is a covered entity under the rules and it must take such steps as:
 - > Developing HIPAA policies and procedures
 - > Notice of Privacy Practices
 - > Identifying a HIPAA privacy official
 - > Entering into Business Associate Agreements with wellness vendors
 - > HIPAA training, etc.

HIPAA Privacy and Security Considerations for Wellness Programs

- ✦ The HIPAA privacy rules have restrictions on the circumstances under which a group health plan may allow an employer as the plan sponsor to access PHI
- ✦ The group health plan (such as a wellness plan) may provide the employer as plan sponsor with access to PHI necessary to perform its plan administration functions, but only if the employer as plan sponsor amends the plan documents and certifies to the group health plan that it agrees to the applicable HIPAA privacy rules

HIPAA Privacy and Security Considerations for Wellness Programs

- ✦ Where the employer as the plan sponsor does not perform plan administration functions on behalf of the group health plan, access to PHI by the plan sponsor is much more circumscribed. In these cases, the HIPAA privacy rules generally would permit the group health plan to disclose to the plan sponsor only: (1) information on which individuals are participating in the group health plan and/or (2) summary health information if requested for purposes of modifying the plan or obtaining bids for coverage under the plan.

GINA Considerations

- ✦ Title I of GINA prohibits group health plans from requesting, requiring, or purchasing genetic information for underwriting purposes
- ✦ Genetic information includes information about the manifestation of a disease or disorder in the individual's family members (family medical history)
- ✦ Family member includes relatives by marriage—such as a spouse
- ✦ Underwriting purposes is defined to include rules for eligibility for benefits and the computation of premium or contribution amounts

GINA Considerations

- ★ Wellness programs offered under a group health plan that provides rewards for completing health risk assessments that request genetic information, including family medical history, violate the “underwriting purposes” rule

GINA Considerations

Example from the regulations:

- ★ *Facts.* A group health plan provides a premium reduction to enrollees who complete a health risk assessment. The health risk assessment is requested to be completed after enrollment. Whether it is completed or what responses are given on it has no effect on an individual's enrollment status, or on the enrollment status of members of the individual's family. The health risk assessment includes questions about the individual's family medical history.
- ★ (ii) *Conclusion.* ... the health risk assessment includes a request for genetic information (that is, the individual's family medical history). Because completing the health risk assessment results in a premium reduction, the request for genetic information is for underwriting purposes. Consequently, the request violates the prohibition on the collection of genetic information...

GINA Considerations

- ★ (i) *Facts*. A group health plan requests enrollees to complete two distinct health risk assessments (HRAs) after and unrelated to enrollment. The first HRA instructs the individual to answer only for the individual and not for the individual's family. The first HRA does not ask about any genetic tests the individual has undergone... The plan offers a reward for completing the first HRA. The second HRA asks about family medical history... The plan offers no reward for completing the second HRA and the instructions make clear that completion of the second HRA is wholly voluntary...
- ★ (ii) *Conclusion*. ...no genetic information is collected in connection with the first HRA, which offers a reward, and no benefits or other rewards are conditioned on the request for genetic information in the second HRA. Consequently, the request for genetic information in the second HRA is not for underwriting purposes, and the two HRAs do not violate the prohibition on the collection of genetic information....

GINA Considerations

- ★ Title II of GINA makes it unlawful for employers to discriminate against an individual on the basis of genetic information in regards to compensation and other conditions of employment
- ★ Title II makes it unlawful to request, require or purchase genetic information with respect to an employee or an employee's family members (which includes a spouse)
- ★ There is an exception for wellness programs, but there are many, many requirements that must be met

GINA Considerations

- ✦ One of the requirements is that the individual provides the information voluntarily
- ✦ Genetic information is not provided voluntarily if the individual is required to provide the information or is penalized for not providing it
- ✦ This requirement does not allow any financial inducements for providing genetic information
- ✦ Similar exception for health risk assessments as provided under Title I of GINA

GINA Considerations

- ✦ From the regulations:
- ✦ “A covered entity (such as the employer) may not offer a financial inducement for individuals to provide genetic information, but may offer financial inducements for completion of health risk assessments that include questions about family medical history or other genetic information, provided the covered entity makes clear...that the inducement will be made available whether or not the participant answers questions regarding genetic information.”
- ✦ “For example: A covered entity offers \$150 to employees who complete a health risk assessment with 100 questions, the last 20 of them concerning family medical history...The instructions...make clear that the inducement will be provided to all employees who respond to the first 80 questions, whether or not the remaining 20 questions concerning family medical history...are answered. This health risk assessment does not violate Title II of GINA.”

GINA Considerations

- ✦ In EEOC vs Honeywell International, Honeywell employees and their spouses were to undergo biometric testing by a vendor, which screened for things like blood pressure and total cholesterol
- ✦ If not taken, the employee would lose HSA contributions and is charged a surcharge for the medical plan premiums

GINA Considerations

- ✦ EEOC said that this was in violation of Title II of GINA
- ✦ Honeywell offered a financial inducement to obtain medical information about the employee's spouse
 - > Medical information about the condition of a spouse is family medical history (genetic information under GINA)
- ✦ EEOC requested an immediate injunction, which was not granted
- ✦ However, this complaint filed by the EEOC made clear the EEOC position

GINA Considerations

- ★ The EEOC proposed rules under the ADA (discussed earlier in this presentation) states that, "This proposed rule also does not address the extent to which Title II of the Genetic Information Nondiscrimination Act...affects an employer's ability to condition incentives on a family member's participation in a wellness program. This issue will be addressed in future EEOC rulemaking."

Tax Considerations for Wellness Programs

- ✦ Remember that under Internal Revenue Code (Code) Section 61, all income is taxable, unless there is a specific provision under the Code that excludes it from taxation
- ✦ Generally, all income provided by the employer to the employee is W-2 income, subject to withholding
 - > This is true even if the employer has another entity provide that compensation to the employee

Tax Considerations for Wellness Programs

- ✦ The taxation of wellness program rewards should be evaluated
 - > Cash rewards (e.g., cash bonuses) or cash equivalents (e.g., gift cards) are taxable income—no matter the amount!
 - > Rewards that take the form of reductions in medical plan costs (e.g., medical plan premiums, co-payments or deductibles) are generally not taxable under Code sections 105 and 106
 - > Additional employer contributions to employee Health FSAs, HRAs, or HSAs are generally not taxable under Code sections 105 and 106
 - > Small merchandise provided to employees (e.g., caps, water bottles, t-shirts) could be excludible from employee income under Code section 132 as a *de minimis* fringe benefit
 - > Reimbursement for fitness center fees is considered an expense for “general good health” and is taxable income

Tax Considerations for Wellness Programs

- ★ In American Bar Association JCEB meetings, tax practitioners can propose questions to the IRS. The practitioner submits the question and a proposed answer. The IRS then provides its answer. One about the taxation of wellness incentives is provided on the following slide.
- ★ See Question 2 in this document:
http://www.americanbar.org/content/dam/aba/migrated/2011_build/employee_benefits/irs_treas_2008.authcheckdam.pdf

Tax Considerations for Wellness Programs

- ♦ Question. An employer hires Provider A to run a wellness program for its employees. The wellness program is distinct from the employer's group health plans. Under the wellness program, if an employee completes a health risk assessment, Provider A sends the employee a \$50 gift card. In addition, if the employee schedules a physical exam with the employee's physician, at which the physician discusses the health risk assessment with the employee and then sends it back to Provider A with the physician's signature, the employee receives a \$100 gift card. The employer may contract with Provider A to have Provider A run additional wellness programs that offer gift cards as incentives to participate. If an employee completes both actions, are the gift cards taxable income? If so, does the employer or Provider A need to report the gift cards as taxable income?

Tax Considerations for Wellness Programs

- ✦ Proposed Response: The gift cards are taxable income. Because Provider A is providing the gift cards to the employee, Provider A would report the gift cards on Form 1099-MISC... The gift cards are not compensation paid by the employer to the employee.
- ✦ **IRS Response**: **The Service representative agrees that the gift cards are taxable income, but disagrees that the gift cards should be reported on Form 1099-MISC. The Service representative stated that this is compensation that should be reported on Form W-2 by the original employer, not by Provider A who is acting as an agent in providing compensation to the employees.**

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