CONNER STRONG

A LEADING INSURANCE, RISK MANAGEMENT AND EMPLOYEE BENEFITS BROKERAGE AND CONSULTING FIRM.

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ENSURING COMPLIANCE OVER HEALTH AND WELLNESS PLANS

Wellness Plans

Over the past several years health and wellness programs have become increasingly popular with employers as a way to address the rising cost of health care. Similar to control and safety plans commonly used under property and casualty insurance plans, properly designed wellness plans can influence cost, quality, and ultimately, productivity in the workplace. Several provisions exist under current federal laws that create the framework to ensure wellness plans comply with the various federal requirements. More recently changes enacted under federal health insurance reform further address and provide a pathway for continued growth in the area of health and wellness plans. Recognizing the growing significance of such plans, Conner Strong has prepared this bulletin to help employers and plan sponsors understand the various requirements and obligations related to creating such plans.

Wellness Programs Defined

There are generally two types of wellness programs permissible under the law: 1) programs that provide a reward based on a participant attaining a specific health goal or result (e.g., achieving a certain cholesterol level or reaching a set body mass index) and 2) programs where a participant is rewarded based on general participation.

Programs with Health-Specific Goals

If the wellness program provides a reward based on an employee reaching a specific health goal (e.g., all employees who lower their blood pressure to a normal level will receive a financial reward), the program must comply with the following requirements under current federal law:

1. The reward may not exceed 20% of the cost of coverage. Effective Jan. 1, 2014, for calendar year plans, this percentage limit on the reward could increase to 30% percent and possibly up to 50% depending on an increase by federal regulators. The cost of coverage is based on the combination of the employee and employer contributions toward the cost and the employee portion of the cost of coverage can also include the cost of covering dependents if the wellness program allows dependents to participate. If

dependents are not permitted to participate, the reward can only be calculated on the basis of the cost of employee-only coverage.

2. The program must be reasonably designed to promote health or prevent disease, such as by reimbursing all or a portion of the cost of membership in a smoking cessation program, weight loss program, or by encouraging preventative care based on waiving the program's copayment or deductible for such expenditures (e.g., annual physical, prenatal care visits, etc.).

3. The program must give eligible individuals the opportunity to qualify for the reward at least once a year.

4. The reward must be made available to all similarly situated individuals. In addition, if it is difficult for an individual to satisfy an applicable standard because of a medical condition or if it is medically inadvisable to attempt to satisfy the standard, the employer must offer a reasonable "alternative" to qualify for the reward. The alternative standard does not need to be established before the program commences. It can be determined once the participant makes it known it is unreasonably difficult or medically inadvisable for him/her to attempt to achieve the standard.

5. The wellness plan must disclose the availability of a reasonable "alternative" standard in all plan materials that describe the terms of the program.

Participation-based plans are increasing in their popularity as employers look to create robust plans and incentives that engage employees in features that can drive outcomes and savings.

Participation-Based Programs

Programs that do not require an individual to meet a health-related goal but still provide a reward will not have to comply with the five elements previously mentioned. These programs will only need to make participation available to all similarly situated individuals.

Examples of participation programs include a biometric testing plan that provides a reward based on participation rather than on test results, a value-based style feature that encourages preventative care based on waiver of the plan's copayment or deductible (e.g., annual physical); or a feature that reimburses employees for the costs of smoking-cessation efforts without requiring the employee to actually quit smoking. Participation style plans are the most common and can be designed in such a way that they can still create measurable and favorable outcomes.

Compliance

When employers and benefit professionals establish cost-saving programs for wellness or preventive care, they must also ensure those programs are compliant with a variety of existing laws. Below are the primary compliance-related items an employer or plan sponsor must consider and comply with:

- *The Health Insurance Portability and Accountability Act (HIPAA)* privacy rules permit a plan to require an individual to complete a healthcare questionnaire to enroll in the plan, but stipulates the information may not be used to deny, restrict or delay eligibility or benefits, or to determine an individual's premiums.
- *The Americans with Disabilities Act (ADA)* limits an employer's ability to ask disability-related questions, which may impact the type of questions asked on a wellness program's health-risk assessments.

- *The Genetic Information Nondiscrimination Act of 2008 (GINA)* also sets forth information-gathering limitations that prohibit a wellness program from providing rewards to an individual for completing a health-risk assessment, including family medical history, when the information being requested is for underwriting purposes. When implementing a wellness program, it is important for an employer to understand which questions are not permitted by GINA and to ensure that any questionnaire or assessment omit questions regarding GINA-protected information if the assessment is necessary to become enrolled with the plan.

Handling Wellness and Medical Information

When deciding how to establish a wellness program, it is also important to remember that HIPAA establishes standards for the use and disclosure of protected health information (PHI) by covered entities. Covered entities include group health plans that are sponsored by an employer. However, employers are not always covered entities. As a result, not all wellness programs will be governed by HIPAA. If the program is established by an employer on behalf of its employees and the program is not part of the employer's group health plan, HIPAA most likely will not apply. If the wellness program is part of the employer's or a group insurance company's group health plan, the program will be governed by HIPAA. For example, the HIPAA nondiscrimination rules prohibit "non-confinement clauses" – that is restrictions that deny an individual benefits based on the individual's confinement to a hospital or other healthcare institution at the time coverage would otherwise become effective. Note that in addition to HIPAA, the ADA requires that medical records acquired as part of a wellness program must be kept confidential and separate from personnel records.

Limitations on Participation and Incentives

The ADA requires that participation in a wellness program be voluntary. Thus, health-risk assessments conducted pursuant to voluntary wellness programs do not violate the ADA. However, the ADA prohibits penalties based on a disability and so the size of an incentive to participate in a wellness program cannot be so large that they are ultimately construed as a penalty. The Equal Employment Opportunity commission (EEOC), the agency charged with overseeing employer compliance with the ADA, has indicated that conditioning the availability of employer-provided health coverage on an employee's participation in a health-risk assessment program *might* render participation in the program involuntary.

In addition, EEOC staff members have indicated that conditioning the level of coverage on the employee's participation in a health-risk assessment program may similarly violate the ADA. Therefore, even though the EEOC has not formally taken a position on this matter, informal comments of agency representatives nevertheless provide an important consideration for employers. Employer and plan sponsors need to be mindful of these conditions and ensure that all wellness plans are created with consideration for the various legal and compliance issues.

The Taxation of Incentives

Wellness programs and incentives could have tax consequences for the participant. As a result, employers and plan sponsors need to create incentives that are tax-free or provide a taxable benefit. Examples of tax-free benefits and incentives include the use of on campus fitness facilities, on site health seminars or classes, coupons for healthy foods or smoking-cessation programs based on a physician's recommendation. Examples of taxable benefits and incentives include cash incentives over an insignificant dollar amount, awarding a participant fitness equipment, or awarding participants fitness memberships to a gym without a physician's diagnosis and recommendation.

Section 105 of the Internal Revenue Code generally permits an employer to reduce an employee's premium or group health plan contribution on a pretax basis when an employee successfully completes a compliant wellness program. The code also permits an employer to contribute to an employer to contribute to an employee's health-care flexible spending account on a pretax basis when an employee successfully completes a wellness program.

The Impact of Federal Health Insurance Reform

Federal health insurance reform also impacts wellness programs. While regulations have yet to be issued, effective Jan. 1, 2014 an employer or plan sponsor may an offer increased incentives such as rewards or penalties to employees for participation in a wellness program or for meeting certain health-status targets. These rewards can include premium discounts of up to 50% of the cost of coverage. Existing wellness regulations under HIPAA limit wellness incentives to 20% of the total premium provided certain conditions are met. In addition, the new law creates a $200-million, five-year program to provide grants to certain small employers (fewer than 100 employees) for comprehensive workplace wellness programs.

Conclusion

These are a number of considerations facing employers, plan sponsors and benefit professionals as they consider the introduction of health and wellness plans. A growing body of evidence exists that successful plans can have a material impact on health care costs. When implemented properly and embedded in one's health and welfare plan, the long term consequences can be significant. Wellness plans can help improve education, increase quality based care delivery, improve outcomes and ultimately create a healthier workplace which should reduce absenteeism and increase productivity.

Designing plans that comply with the various rules is as important as the features inside the plan. Conner Strong works with its clients every day in designing ROI driven plans and can help employers and plan sponsors install plans that not only change behaviors but are compliant with the law.

As additional information becomes available on this topic, Conner Strong will issue updates. Employers should check with their Human Resources office to ensure compliance with this unique aspect of the new law. For information related to national health insurance reform, please visit our compliance center on insurance reform at www.connerstrong.com/healthcare_reform. If you have questions, **please contact your Conner Strong account representative toll-free at 1-877-861-3220.**