



Legal Alert: DOL Releases Wellness Program Checklist

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In an effort to help control escalating health care costs, many employers have begun offering various types of programs designed to encourage employees to engage in a healthier lifestyle. These efforts range from offering healthier choices in vending machines and reimbursing gym membership fees to providing reduced health insurance premiums for employees who stop smoking or have a certain cholesterol level. If an employer's wellness program is in any way connected to an ERISA covered group health plan, it must comply with the HIPAA nondiscrimination provisions.

In 2006, the Departments of Labor, the Treasury, and Health and Human Services published joint final regulations on the HIPAA nondiscrimination provisions, which included guidance on the implementation of wellness programs. The regulations apply to plan years beginning on or after July 1, 2007. On February 14, 2008, the DOL issued a field assistance bulletin that includes a Wellness Program Checklist. The Checklist is in the form of a series of questions designed to help determine whether a plan offers a program of health promotion or disease prevention that is required to comply with the DOL's wellness program regulations and, if so, whether the program is in compliance with the regulations. The field assistance bulletin is available from the DOL's web site at: <http://www.dol.gov/ebsa/regs/fab2008-2.html>. Additionally, a copy of the bulletin is available by clicking [here](#).

HIPAA's nondiscrimination provisions generally prohibit a group health plan or group health insurance issuer from denying an individual eligibility for benefits based on a health factor and from charging an individual a higher premium than a similarly situated individual based on a health factor. Health factors include:

- health status;
- medical condition (including both physical and mental illnesses);
- claims experience;
- receipt of health care;
- medical history;
- genetic information;
- evidence of insurability (including conditions arising out of acts of domestic violence); and

- disability

Generally, wellness programs that do not provide a reward based on health factors do not discriminate based on a health factor. For example, a reward that is based on *participation* in a program (such as gym membership or attending nutrition classes) rather than outcome generally does not violate HIPAA's nondiscrimination provisions. Additionally, the regulations permit benign discrimination – that is a program that offers a reward to individuals based on an adverse health factor. An example of benign discrimination would be offering to waive the annual deductible for diabetic participants if they enroll in a disease management program that consists of attending educational classes and following their doctor's recommendations regarding exercise and medication.

However, where a program offers a reward (such as reduced insurance premiums) to employees who achieve a health-related goal (such as weight loss, reduction of BMI, or not using tobacco products or not smoking), it must meet the criteria set forth in the regulations to comply with HIPAA's nondiscrimination provisions. The criteria include:

- The total amount of the reward offered cannot exceed 20% of the applicable cost of coverage;
- The program must be reasonably designed to promote health or prevent disease;
- Individuals eligible to participate must be given the chance to qualify at least once a year;
- The reward must be available to all similarly situated individuals;
- The program must have a reasonable alternative standard for obtaining the reward for any individual for whom, for that period: 1) it is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard; or 2) it is medically inadvisable to attempt to satisfy the otherwise applicable standard; and
- The program must disclose the availability of the reasonable alternative in all plan materials describing the program.

Employers considering implementing wellness programs should consult with experienced benefits counsel to ensure that the program complies with HIPAA nondiscrimination provisions and any other relevant federal or state laws. If you have questions regarding this issue or other benefits related issues, please contact the Ford & Harrison attorney with whom you usually work or Penny Wofford, a partner in our Spartanburg office at pwofford@fordharrison.com or 864-699-1131.