

Wellness Incentive Restrictions – Is There Really a Loophole?

Employers across the country are adopting group medical plans that include employee incentives for meeting various wellness goals (quitting smoking, for example). The federal government recently issued restrictions on incentive programs to prevent discrimination against people who may be unable for medical reasons to meet wellness goals. Now, some wellness consultants believe they have found a loophole that may allow employers to avoid these restrictions. This *Alert* reviews the loophole – and the reasons employers should be cautioned against exploiting it.



The Wellness Trend

In response to the unsustainable year-over-year increases in the costs associated with employee-sponsored health plans, many employers have shifted an increasing portion of the cost burden to employees. As a result, employees and employers increasingly share an incentive to reduce healthcare utilization. One way to do this is by decreasing the need for healthcare, and to this end employers are developing wellness programs with several aims.

- Help enrollees avoid serious illness (or receive early treatment) by getting preventive care
- Prevent costly acute care interventions by keeping chronic illnesses under control
- Help healthy employees avoid chronic conditions associated with poor diet, lack of exercise, smoking, etc. by encouraging them (and, in

some cases, their dependents) to lead healthier lifestyles

To encourage behavior changes, most wellness programs include incentives employees can earn by meeting wellness goals. Those incentives often take the form of reduced premiums, copayments and/or deductibles. For example, an employer might offer a discounted premium for health plan coverage to nonsmokers or for people with BMIs under 30.

HIPAA Nondiscrimination Regulations

Federal law prohibits certain types of discrimination based on health factors by group health plans and insurers providing group health plan coverage. The Departments of Treasury, Labor and Health & Human Services issued joint final regulations late last year implementing the nondiscrimination requirements of the Health Insurance Portability and Accountability Act

(HIPAA). Those regulations are applicable to group health plans for plan years starting after July 1, 2007 (January 1, 2008 for calendar-year plans).

The new rules directly address wellness programs and are discussed in detail in Willis' *Employee Benefits Alert*, Issue 94, "Final Nondiscrimination Regulations: How Do They Affect Wellness Programs?"

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If a wellness program includes incentives based on any health measure or behavioral standard, the program must meet several conditions.

- The program must limit any incentive to no more than 20 percent of the cost of the applicable coverage under the plan. The incentive can be in the form of a discount or rebate of a premium or contribution, a waiver of all or part of a cost-sharing mechanism (such as deductibles, co-payments or coinsurance), the absence of a surcharge, or the value of a benefit that would otherwise not be provided under the plan.
- The program must be reasonably designed to promote health or prevent disease. A program satisfies this requirement if it:
 - Has a reasonable chance of improving health or preventing disease
 - Is not overly burdensome
 - Is not a means of discriminating based on a health factor
 - Is not highly suspect or illegal (While this is not defined specifically, we believe it precludes unusually bizarre, extreme or otherwise suspect methods of promoting health or preventing disease.)
- The program must give participants the opportunity to qualify for the incentive at least once per year.
- The incentive must be available to all similarly situated individuals.

- The program must allow a reasonable alternative standard for obtaining the incentive for any individual for whom it is unreasonably difficult or medically inadvisable to attempt to satisfy the standard.
- The plan must disclose the availability of the alternative standard.

Some employers object to the requirement for an alternative standard because it enables individuals who do not actually meet a wellness standard to obtain the same incentives as those who do meet the standard. For example, an employer that adopts smoker/nonsmoker rates for its health plan must provide an alternative standard so that a person who smokes can pay the nonsmoker rate if it is unreasonably difficult for that person to quit smoking due to nicotine addiction. Many employers believe this requirement undercuts the viability of a wellness program.

Employers also object to the limit on the total incentive that any individual can receive for meeting all of a plan's wellness standards. They think that limiting incentives to 20 percent of the individual coverage (or other applicable coverage tier) cost premium (less the two percent administration fee) does not amount to an effective incentive. (In many cases employers determine the 20 percent by measuring against the comparable COBRA rate not including the two percent administrative fee. COBRA is a useful yardstick for calculation as it represents the full, unsubsidized cost of health coverage.)

Wellness programs that do not depend on a participant's satisfying health standards may provide incentives without coming into conflict with the regulations. For instance, programs that provide health club discounts, or incentives for visiting a health fair or attending smoking cessation classes, irrespective of the individual's actual health status, are not subject to the wellness requirements in the regulations. By contrast, if the program does impose rules mandating that participants achieve prescribed health status goals, then, to be lawful, the program must meet HIPAA regulatory standards.

The "Loophole"

The HIPAA regulations include an exemption for certain benefits provided under a separate policy, certificate or contract of insurance. Benefits falling into this category include:

- Medicare supplemental health insurance, also known as Medigap or MedSupp insurance
- Coverage supplemental to TRICARE coverage

- “Similar supplemental coverage provided to coverage under a group health plan”

Similar supplemental coverage is defined as coverage specifically designed to fill gaps in primary coverage, such as coinsurance or deductibles, and it is here that some wellness consultants believe they have found a loophole in the rules that circumvents regulatory restrictions while placating employer concerns.

To exploit the loophole, an employer would adopt a group medical plan with a very high deductible (\$1,000 or more) and no wellness incentive attached to it. Then, under a separate policy, the employer would adopt a plan that pays only for deductibles and coinsurance under the group medical plan. This separate plan, however, would have some wellness incentive attached to it. For example, smokers might be charged something for coverage under this second plan while nonsmokers would have the coverage paid for by the employer.

Would It Work?

Although the scenario described above may fall technically within the letter of the law, would it survive government scrutiny? Would the government reject the argument entirely and assert that the separate plan was really part of the original plan and not a supplemental plan at all? The problem centers on determining what is meant by the terms “similar” and “supplemental.” To qualify as “similar” must the supplemental coverage be only supplemental to federal government coverage? May the underlying coverage be other private coverage, but as comprehensive as those programs? These questions remain largely unanswered.

Although the [loophole] described above may fall technically within the letter of the law, would it survive government scrutiny . . . [or] would the government reject the argument entirely?

Analysis by Willis’ Legal & Research Group suggests that such programs are unlikely to withstand scrutiny from the federal agencies that monitor HIPAA compliance. If programs appear to be designed solely to bypass applicable regulations by setting up supplemental coverage in a manner that undercuts regulatory intent, we anticipate that government agencies would reject them. In the case of a plan with a \$1,000 deductible coupled with a supplemental policy, the problem may not be obvious. However,

under this logic, it would be possible to create a plan with very large deductibles, say \$10,000 or more, and a supplemental plan to pay the deductible. In such a program, few employees could afford coverage without complying with the requirements of the exempt supplemental plan, effectively depriving most plan participants of HIPAA’s protections.

Conclusion

It is unlikely that a program exploiting this supposed loophole would withstand the scrutiny of a government regulator. We urge any employer that may be considering the supplemental plan loophole to be cautious and review such a strategy with counsel before proceeding. We also suggest that, even if HIPAA’s nondiscrimination restrictions are unavoidable, employers can still reap many significant benefits from wellness programs.

Willis Wellness Survey 2007 Edition

According to our annual *Willis EB Wellness Survey*, wellness programs have been successful by several measures.

Willis is gathering responses for the 2007 edition of the survey. This year’s survey highlights wellness benefits. Your insights, coupled with information from other companies, will be extremely helpful to organizations that sponsor such programs or that are contemplating adding wellness benefits. Please invest a few minutes of your time and share your experience with us. We are interested in your response whether or not your company sponsors a wellness program.

In appreciation of your response, we will provide you with an electronic copy of the full survey report.

To participate, click on this link:

<http://www.zoomerang.com/recipient/survey-intro.zgi?p=WEB226K4B4BA2Z>

(Please copy and paste the link into the address line in your web browser if you encounter any difficulties with the direct link.)

Responses must be received by **July 24**.

For more information on the survey, contact Ginny Beck, ginny.beck@willis.com.

Key Contacts

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