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Wellness Programs May Face Legal Tests

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By Victoria E. Knight

When it comes to health plans that penalize unhealthy workers, the Department of Labor has drawn a line in the sand.

Regulatory guidelines recently issued by the department are likely to curtail the ability of employers to motivate workers to kick unhealthy habits. In effect, the guidelines close a legal loophole that could have allowed employers to make health insurance more expensive for unhealthy workers than for their colleagues.

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In December, the department's Employee Benefits Security Administration issued guidelines to its national and regional offices on "supplemental coverage," a form of health insurance covering co-pays and deductibles in regular insurance. Supplemental coverage is generally used to fill such gaps in either Medicare or Tricare, the health-care plan for current and retired military members. But in recent years, some employers have incorporated a form of supplemental insurance into their wellness programs.

Under such programs, workers enroll in an employer-sponsored health plan with a high insurance deductible. They can offset the deductible by earning

"wellness credits" for meeting certain health benchmarks -- such as for cholesterol count -- issued under a separate supplemental policy.

Proponents liken the rewards to giving a good-driver discount, arguing 70% of health-care expenses are lifestyle-related. Exposure to higher out-of-pocket costs motivates employees to improve their health, which saves employers money.

But lawyers and consultants have voiced concerns that such programs could hurt employees with health problems. In some instances, unhealthy employees could face insurance deductibles more than \$1,000 higher than healthier co-workers'.

While uncommon, such incentive programs are gaining traction among smaller employers, who are the most at risk from rising health costs. They also are attracting the attention of larger employers seeking more new ways to reduce medical expenses and boost productivity.

In most states, people with health problems already pay more for health insurance in the individual market. But federal law -- the Health Insurance Portability and Accountability Act, or HIPAA -- requires all workers covered under the same employer-sponsored plan to pay the same

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premiums regardless of their health.

Last July, federal agencies finalized rules granting some exceptions from HIPAA to certain wellness programs. Under the rules, employers can offer financial incentives of as much as 20% of the cost of covering an employee. Popular are discounts to nonsmokers or contributions toward insurance premiums for workers who complete health-risk assessments or have their blood pressure checked.

Crucially, if an incentive is based on the satisfaction of a health standard -- say, not smoking -- a "reasonable alternative" way of earning the reward must be available to employees who can't achieve the goal, says of consulting firm Watson Wyatt Worldwide Inc.. A smoker addicted to nicotine (a medical condition) could avoid a surcharge by participating in a smoking-cessation program, she says.

Supplemental insurance is exempt from HIPAA, giving employers the potential to penalize or reward employees based on their health status.

But not all coverage "being marketed as similar supplemental coverage actually qualifies as such," the Department of Labor said in a release dated Dec. 7, setting out four standards that policies must meet to be exempt from HIPAA.

"The kicker" for wellness programs, say lawyers and consultants, is a requirement that a supplemental policy that is group health-insurance coverage "must not differentiate among individuals in eligibility, benefits or premiums based on any health factor of an individual." Health status, medical conditions and genetic information are considered health factors.

The Department of Labor said it may bring "enforcement actions" against rule breakers. It didn't name specific vendors or employers who might need to make changes.

"The DOL's release ensures that supplemental health coverage can't or won't become an end run around the HIPAA wellness rules," says , of counsel with law firm Morgan Lewis & Bockius and an expert in work-based health benefits.

Without the Department of Labor's release, carriers and consultants could have designed super-wellness programs that were more punitive or delivered greater incentives than permissible under the HIPAA wellness rules, he says.

In general, Mr. Anderson advises any employer who has or is thinking about offering supplemental health insurance to seek independent legal advice about whether it complies with the department's rules and the HIPAA wellness requirements.

Vital Measures is one wellness program where credits are issued under a supplemental policy. Launched in July by UnitedHealthcare, a unit of Inc., and BeniComp Group of Fort Wayne, Ind., the program is available to companies with 100 to 1,000 employees in Rhode Island, Pennsylvania, Colorado and Ohio.

Typically, employees sign up for a health plan with a \$2,500 deductible and can then participate in a free, confidential health screening for body-mass index, cholesterol, blood pressure and non-nicotine use. For each test workers pass, they earn a \$500 credit toward their deductible, issued under a supplemental plan, BeniComp Advantage. So far, three employers have signed up.

In the Vital Measures program, the earliest an employee failing a health test can earn the credit is the next year. However, there is an appeals process, and employees whose physicians say can't meet the standards for medical reasons will be offered alternative ways of earning credits.

"Activity or participation programs have always been available," says , a senior vice president at UnitedHealthcare, adding the program is "compliant" with all aspects of the HIPAA wellness rules, including the 20% threshold on rewards.

Outside its partnership with UnitedHealthcare, BeniComp provides supplemental coverage to about 60 employers.

, executive vice president of BeniComp Advantage, says the company "clarified certain aspects of its plan materials in 2005," after the Department of Labor and other federal agencies said they "may not view the BeniComp product as being exempt from [the HIPAA] nondiscrimination

[rules]," following a voluntary compliance review.

BeniComp has always allowed participants to appeal their test results when achieving a goal is medically inadvisable or unreasonably difficult as a result of a medical condition, and has offered alternatives, says Mr. Pshock. Since late 2005, BeniComp has included this information in communications to members, and the plan has been administered accordingly, satisfying the agencies' guidelines for compliance with the HIPAA wellness rules.

When the final rules became effective last July, the company "began to add this language to all plan materials, including new marketing materials," Mr. Pshock adds. However, "some statements on our Web site were overlooked during this initial review."

One oversight was language that seemed to suggest that participants who fail to meet health benchmarks as a result of a genetic predisposition wouldn't be eligible for an alternative.

Following the Department of Labor's release, Mr. Pshock said BeniComp received several calls about "these perceived inconsistencies between our printed materials and our Web site." In response, last month, the company changed the text on genetic predispositions to include language about the availability of alternatives.

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