

Healthcare News

Kicking the Habit and Getting Fit Helps Employers' Bottom Lines

by: Laura Gerdes Long (llong@dmfirm.com)

Employee costs are the bottom line

The fact is that employee costs, and controlling those costs, are the "bottom line" for most employers. For years, employers have been struggling to control and minimize the rising costs of health care for their employees. Employers are increasingly forced to transfer health care costs to their employees through higher premiums, co-payments and deductibles. Only in the past few years have employers realized that they can assist their employees in improving their overall wellness, while at the same time potentially reducing the employers' health care costs. The methods that employers have begun experimenting with include implementing wellness programs, offering health risk assessments, and education.

Hard, Cruel Facts

Since 2000, U.S. healthcare cost increases have exceeded the overall inflation rate by a factor of two to five times. (National Coalition on Healthcare, *Economic Cost Fact Sheets*, at www.nchc.org).

At the same time, employees' contributions to employer-provided health insurance have increased an average of 143%, with their out-of-pocket costs, including co-payments and deductibles, also increasing an average of 115%. *Id.*

Countless studies have shown that certain conditions impact employers' costs, overall, and not only for health care.

- ◆ For example, survey findings recently reported in the Archives of Internal Medicine found that obese employee medical claim costs were seven times higher than average and those employees missed 13 times more work days. (Ostbye T., et al., *Obesity and*

Workers' Compensation, 167 Arch Intern. Med. 766-773 April 23, 2007).

- ◆ A study conducted by the Centers for Disease Control found that the cost increase for obese employees, combining medical costs and absenteeism, range from an additional \$460 to \$2,500 per employee. (www.Forbes.com, 10/05/2006, *U.S. Companies Embrace Wellness Programs*).
- ◆ Some estimates put the annual medical costs of smoking and the illnesses that link to it, such as cancer and heart disease, at \$150 billion or more. (September 2007, HR Magazine, 115).

How wellness programs can help employers

With all of this bad news, what is an employer to do? Final federal regulations have been released for wellness programs and may provide one approach for improving employee health and potentially reducing health care costs. (71 Fed. Reg. 75014 (Dec. 13, 2006); 45 C.F.R. Part 146). These new, final rules and guidelines are detailed in the *Health Insurance Portability and Accountability Act's (HIPAA)* non-discrimination and wellness program rules. These HIPAA regulations were issued, and will be enforced, by the IRS, the Department of Labor, and the Department of Health and Human Services.

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What is a wellness program?

A *wellness program* is defined as “any program designed to promote health or prevent disease.” (71 Fed. Reg. at 75035; 45 C.F.R. at § 146.121(f)). The wellness plan must make participation in the program available to all similarly situated individuals, and cannot condition a reward on an individual satisfying a standard based on a health factor. *Id.*

For example, an employer can provide a waiver of co-payments for preventive care; reimbursement for participation in a smoking cessation program, without regard to success; rewards for attendance at monthly health education seminars; a diagnostic testing program that provides a reward for participation and does not base any part of the reward on outcomes; and reimbursement of fitness center memberships. *Id.*

What are employers doing?

Wellness programs take a myriad of forms. Some wellness programs include employers providing educational materials about health choices, health risk assessments or free gym memberships. Other plans integrate a variety of elements, including nutritional counseling, screenings, use of health data to target high cost diseases, and incentives to motivate physical activity.

Recently, Guardian Insurance, in conjunction with Healthways' Whole Health Networks, started offering programs, including complimentary nutrition coaches, tai chi, yoga and pilates, and membership fees at gyms such as Bally's Total Fitness, in addition to discounts for weight loss programs, Jenny Craig and Weight Watchers (www.forbes.com/2007/05/29/pilates-yoga-taichi-lead-manage-ex).

Some of the nitty gritty (the regulations, a/k/a, “boring lawyer stuff”)

Under the HIPAA prohibition against discrimination on the basis of health status, there exist eight health factors:

1. health status
2. medical condition (both physical and mental)
3. claims experience

4. receipt of health care
5. medical history
6. genetic information
7. evidence of insurability
8. disability

What this means is that employees cannot be denied eligibility or charged a higher premium based on one or more of those health factors.

It is essential that the employer be aware that the HIPAA non-discrimination rules generally prohibit group health plans from discriminating against individuals based on certain health factors. In other words, a plan cannot penalize an employee who is unsuccessful in ending their nicotine habit after attending a smoking cessation program. Similarly, an employer cannot charge greater premiums to employees with a body mass index over 25.

If a wellness program conditions a reward on satisfying some standard, based on such health factors, then the regulations require the program to meet five criteria (71 Fed. Reg. at 75036; 45 C.F.R. § 146.121(f)(2).):

1. the value of the reward must not exceed 20% of the cost of employee-only coverage (or 20% of the cost of the coverage in which any employee and any dependents are enrolled);
2. the program must be reasonably designed to promote health or prevent disease;
3. the program must give individuals an opportunity to qualify for the reward under the program at least once per year;
4. the reward must be available to all similarly situated individuals, including a reasonable alternative which must be offered to those individuals for whom it is unreasonably difficult or medically inadvisable to participate; and

5. the health plan must disclose the availability of the alternative standard in any plan materials describing the terms of the wellness program.

As for the fifth criteria, a wellness program must include some sort of alternative standard for employees who cannot reach a particular target. Sometimes employers have to fashion alternative standards on a case-by-case basis. For example, a premium discount may be offered to employees who walk five miles per week, but there must be an alternative, such as teaching a class about cardio fitness, instead, or offering swimming opportunities. Employers may also pay for employees' gym memberships or nutritionist services, or give policy discounts to employees who lower their cholesterol. But if an individual is genetically predisposed to having high cholesterol, and provides verification from a doctor, that individual cannot be penalized.

This "alternative method" is a common sense approach, which HIPAA requires by using a "reasonably designed" standard to balance the needs of employers to experiment with various programs to provide employees incentive to participate, while at the same time, protecting employees from plans that are mere subterfuge for discrimination. Many examples of such alternatives and the kind of language that may be used to satisfy these requirements are included in the comments to the Federal Rules at 71 Fed. Reg. at 75036-75038.

Summary

Wellness Programs allow for a lot of experimentation by employers while, at the same time, providing employees an opportunity to receive an offered reward for their efforts at maintaining a healthy lifestyle. Of course, other laws may intersect with various provisions of the regulations, such as the Americans With Disabilities Act (ADA). Generally, to comply with the ADA, the incentives should be voluntary, and any medical information gathered in connection with the incentive should be kept confidential and separate from the employees' personnel records.

By following a few simple rules and sometimes thinking "outside the box" in terms of developing a program to assist your employees with creating and maintaining a healthy lifestyle, employers may gain a group of employees who are healthier, less likely to become sick, and who are, hopefully, happier. Definitely, a win-win situation for both employees and employers.

Caveat: As usual, these rules can be complicated stuff. They are not all inclusive or applicable in all contexts and, although the author is a lawyer, she is not *your* lawyer. So, enjoy the article, but if you are ready to jump onto the wellness parade, please consult a lawyer qualified to advise you on these matters relative to your specific situation.

George Clooney and HIPAA

by: Laura Gerdes Long (llong@dmfirm.com)

A recent entertainment news story involving celebrity medical records is an example of the problems associated with employee activities and reminds us of the need for continuous vigilance in protecting sensitive medical data. This story highlights that it is a good time for additional training of workforce members on these issues.

Following a motorcycle accident involving George Clooney and his girlfriend, they were seen at the Palisades Medical Center in New Jersey for their injuries. More than two dozen employees were suspended for a month, without pay, for allegedly accessing Clooney's confidential medical records. A union representing seven of the suspended nurses said that the employees, although they looked at Clooney's records, did not divulge any confidential information.

The interesting thing about this case is that it shows the tight link between the HIPAA Privacy and Security Rules. Due to the number of employees who allegedly, inappropriately accessed his records, it is likely that it was done by looking at electronic information—a security breach by “inside employees.” Fortunately, it appears that the hospital's audit practices, which are required under the Security Rule, caught the breach. Unfortunately, it appears that the staff was not trained well enough to keep from inappropriately accessing the information in the first place, and apparently were not aware they could be caught and disciplined.

The case also illustrates some of the differences between privacy risks posed by paper versus electronic records. Electronic records can lead to a breach of a patient's privacy without even having physical access to the health records. And, after a patient's privacy is breached electronically, it can never be recovered.

Punitive Damages for Breaches of Medical Privacy

A case out of New York also serves as a cautionary tale with regard to the monetary damages that may be awarded for breaches of medical privacy.

In *J. v. Long Island Surgi-Center* (N.Y.A.D. 2nd Dept., September 25, 2007), a 20 year-old, unmarried woman who lived with her parents decided to terminate her pregnancy at the Long Island Surgi-Center. Since her parents disapproved of pre-marital sex and were implacably opposed to abortion, she was determined to keep her decision from them.

When she first contacted the clinic to arrange for the procedure, she provided her cell phone number and gave specific instructions never to call her at home. The day after her abortion, nevertheless, one of the clinic's nurses telephoned the young woman's home and spoke with the person she knew to be her mother. In the course of the conversation, the nurse revealed information sufficient to allow the mother to conclude that her daughter had had an abortion.

On appeal, the Court of Appeals held that, in the young woman's subsequent action to recover damages for wrongful disclosure of confidential medical information under New York's Public Health Law, the trial court was “not in error” to submit the issue of punitive damages to the jury.

Missouri's Cafeteria Plan Mandate: Effective January 1, 2008

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As part of the "Missouri Health Insurance Portability and Accountability Act" (§§ 376.350 to 376.454), Missouri passed new legislation joining other states in requiring certain employers to establish cafeteria plans, meeting Section 125 of the Internal Revenue Code.

All cafeteria plans let employees pay for health coverage with pre-tax dollars, which effectively lowers the cost of coverage and may make it more affordable for employees.

Missouri House Bill 818 (new Missouri Revised Statute § 376.453) applies to employers who provide and contribute to insured health coverage. The law, however, does not apply to employers who offer health insurance through any self-insured or self-funded group health benefit plan. No penalty for non-compliance has been described in the law. Thus, any other employer providing insured health coverage, and pays any portion of the premium, must now establish a premium-only section 125 plan.

Unfortunately, state regulators have not issued any guidance yet, and the law is fairly ambiguous. There are open questions as to the size of employer affected, the application of the law to employers that are headquartered outside of Missouri, and to employers that provide both insured and self-insured plans.

Employers are cautioned to watch for State regulations and communications from their insurance carriers.

A second provision in the Missouri law, which is also unclear, permits small employers (without specifically defining "small employer") to contribute through a cafeteria plan to the individually underwritten health benefit plan of an employee who is eligible for coverage under the employer's plan.

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The vast morass of HIPAA Regulations can appear overwhelming, as can the planning and preparation that goes into complying with them. Without a complete understanding of the regulations, determining necessary policies, procedures, and forms can be a time-consuming and costly task. Laura assists your business with performing a gap assessment of your business, HIPAA readiness and compliance, policy and procedure development, staff training, business associate agreement analyses, and developing HIPAA forms. Since the implementation of the HIPAA Privacy Rule, Laura has been on the ground floor in aiding clients with HIPAA compliance, training, and development.