



DOL Provides HIPAA Compliance Checklist for Wellness Programs

The DOL recently issued a field assistance bulletin providing a checklist for determining whether a health promotion or disease prevention program is subject to the final HIPAA regulations on wellness programs and, if so, whether the program is in compliance.

Background

In late 2006, the Departments of Labor, Treasury, and Health and Human Services published final nondiscrimination regulations under the Health Insurance Portability and Accountability Act (HIPAA). The regulations include rules on implementing wellness programs and disease management arrangements, effective on the first day of the plan year beginning on or after July 1, 2007. (See our January 16, 2007 [For Your Information](#).) Since issuance of these final regulations, the DOL received many questions concerning the rules related to wellness programs.

Field Assistance Bulletin 2008-02

In [Field Assistance Bulletin 2008-02](#), the DOL provides a checklist designed to help determine which health promotion or disease prevention programs offered by a group health plan must comply with the HIPAA wellness program rules, and how to determine whether such programs comply with the rules. The checklist is provided in question and answer format and includes examples and tips on the applicability of the rules and, if they apply, the five compliance criteria that must be satisfied.

Compliance Issues

In the field assistance bulletin, the DOL asks a series of questions to assist in identifying if a particular plan or program is subject to the HIPAA wellness program rules –

- *Is the first day of the current plan year after July 1, 2007?* If not, the HIPAA wellness program rules do not apply.
- *Does the group health plan have a wellness program?* If not, the HIPAA wellness program rules do not apply. The DOL notes that there are a broad range of programs that “promote health and prevent disease,” but that are not always labeled as wellness programs. In determining whether a program is a wellness program, program labels should be ignored, and the focus should be on the substance of the program. Examples of wellness programs include programs that reduce an individual’s cost-sharing for

complying with a preventative care plan, diagnostic testing programs for health problems, and rewards for attending educational classes, following healthy lifestyle recommendations, or meeting certain biometric targets.

- *Is the wellness program part of a group health plan?* If not, the HIPAA wellness program rules do not apply. Although wellness programs that are operated as an employment policy separate from the group health plan are not subject to the HIPAA rules, these programs may still be subject to other provisions of ERISA or other applicable state or federal law.

BUCK COMMENT. For example, in [Rodrigues v. The Scotts Company, LLC](#), a federal district court judge refused to dismiss an ERISA claim brought by a newly hired employee who was terminated for violating the company's nicotine-free policy. The stated purpose of the policy was to save money on health insurance and promote healthy life styles of employees. The employee claims that the company's action violated ERISA Section 510 by preventing him from participating in the company's benefit plan. Regardless of the outcome of this case, it points out that even if a wellness program or employment policy is not subject to HIPAA's nondiscrimination rules, an employer may not violate other ERISA rules, such as those prohibiting interference with the attainment of benefits.

- *Does the program discriminate based on a health factor?* A plan discriminates based on a health factor if it requires an individual to meet a health standard to obtain a reward. Rewards include discounts or rebates of premiums or contributions, waivers of all or part of a cost-sharing mechanism (e.g., deductibles, copayments, or coinsurance), absence of a surcharge, or benefits not otherwise available under the plan.
- *If the program discriminates based on a health factor, is the program saved by the benign discrimination provisions?* Discrimination in favor of an individual based on a health factor is permissible. For example, a plan that waives the annual deductible for diabetic participants who attend a disease management program and follow their doctor's recommendations regarding exercise and medication results in "benign discrimination" because it offers a reward based on an adverse health factor. However, if the plan also requires the participant to meet a standard related to another health factor (such as body mass index) to get the reward, the program would not meet the "benign discrimination" test.

Compliance Criteria

If a plan or program is subject to the HIPAA wellness rules, then it must meet the five compliance criteria outlined below.

- *Is the amount of the reward offered under the program limited to 20% of the applicable cost of coverage?* If participation in the wellness program is limited to employees, the amount of the reward may not exceed 20% of the cost of employee-only coverage. If both employees and dependents are eligible to participate, the reward may not exceed 20% of the cost of employee and dependent coverage. In addition, if the employer has more than one wellness programs with standards related to a health factor, the maximum reward available for all such wellness programs is 20% of the cost of the applicable coverage.

- *Is the wellness program reasonably designed to promote health or prevent disease?* The program should have a reasonable chance of promoting health or preventing disease, not be overly burdensome, not be a subterfuge for discriminating based on a health factor, and not be highly suspect in the method chosen.
- *Are individuals who are eligible to participate given a chance to qualify at least once per year?*
- *Is the reward available to all similarly situated individuals? Does the program offer a reasonable alternative?* A component of being available to all similarly situated individuals is that there is a reasonable alternative standard for getting the reward. A reasonable alternative standard must be available to any individual for whom, for that period, it is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard, or it is medically inadvisable to attempt to satisfy the otherwise applicable standard. In this case, the program is permitted to seek verification from the individual's physician.
- *Does the program disclose the availability of a reasonable alternative in all materials describing the program?* This disclosure is not required if program materials mention its availability without describing its terms – the program may individually tailor the standard on a case-by-case basis. The following sample language may be used: “If it is unreasonably difficult due to a medical condition for you to achieve the standards for the reward under this program, call us at [insert telephone number] and we will work with you to develop another way for you to qualify for this reward.”

Conclusion

The DOL's roadmap is particularly helpful in light of the growing interest in the use of disease management and wellness programs to manage health care costs and promote health care quality.

Buck's consultants are available to assist you in reviewing or designing your wellness program or health promotion policy.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.