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Nondiscrimination in Health Care Plans Based on Smoking

Currently, the Health Insurance Portability and Accountability Act (HIPAA) allows a health care plan to offer a reward to nonsmokers up to 20 percent of the total cost of employee-only coverage under an employer-sponsored group health care plan. In 2014, the reward will be raised to 30 percent by the Affordable Care Act.

A rather obscure New Jersey statute – the "Smokers' Rights Act" - provides that no employer shall (a) refuse to hire any person, or (b) discharge an employee, or (c) take any adverse action against an employee with respect to terms and conditions of employment because that person smokes or uses other tobacco products, "unless the employer has a rational basis for doing so which is reasonably related to the employment, including the responsibilities of the employee or prospective employee."

However, the statute expressly does not preclude an employer-sponsored health care plan from requiring hire contributions to premiums from smokers. See Senate Labor, Industry and Professions Committee Statement to Assembly Bill No. 4699, N.J.S.A. 34:6B-1. Such is the case because the Employee Retirement Income Security Act (ERISA), which was amended by HIPAA, preempts state laws that purport to govern ERISA plans, ie: an insured employer-sponsored group health care plan. Thus, there is no conflict between HIPAA and the Smokers' Rights Act.

HIPAA amended ERISA, the relevant section of the IRS Code, and the Public Health Service Act (PHS Act) to add, among other things, provisions prohibiting discrimination in eligibility, benefits, or premiums based on a health factor. An exception to the general rule is provided for certain wellness programs that discriminate in benefits and/or premiums based on a health factor. In 2006, the Departments published final regulations implementing these nondiscrimination and wellness provisions (HIPAA nondiscrimination regulations). See 71 FR 75014, December 13, 2006.

The final regulations generally divide wellness programs into two categories. First, programs that do not require an individual to meet a standard related to a health factor in order to obtain a reward are not considered to discriminate under the HIPAA nondiscrimination regulations and therefore, are permissible without conditions under such nondiscrimination rules ("participatory wellness programs"). Examples in the regulations include a fitness center reimbursement program, a diagnostic testing program that does not base rewards on test outcomes, a program that waives cost-sharing for prenatal or well-baby visits, a program that reimburses employees for the cost of smoking cessation aids regardless of whether the employee quits smoking, and a program that provides rewards for attending health education seminars.

The second category of wellness programs under the final rules consists of programs that require individuals to satisfy a standard related to a health factor in order to obtain a reward ("health-contingent wellness programs"). Examples include a program that requires an individual to obtain or maintain a certain health outcome in order to obtain a reward (**such as being a non-smoker**, attaining certain results on biometric screenings, or exercising a certain amount). Although such a premium or benefit reward may discriminate based on a health factor, an exception outlined in paragraph (f)(2) of the final rules permits such programs if the program provides the following safeguards:

1. The total reward for such wellness programs offered by a plan sponsor is limited to 20 percent of the total cost of employee-only coverage under the plan. (However, if any class of dependents can participate in the program, the limit on the reward is modified so that the 20 percent is calculated with respect to the total cost of coverage in which the employee and any dependents are enrolled);
2. The program must be reasonably designed to promote health or prevent disease. For this purpose, it must: have a reasonable chance of improving 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 method.;
3. The program must give eligible individuals an opportunity to qualify for the reward at least once per year;
4. The reward must be available to all similarly situated individuals. For this purpose, a reasonable alternative standard (or waiver of the original standard) must be made available to individuals for whom it is unreasonably difficult due to a medical condition to satisfy the original standard during that period (or for whom a health factor makes it unreasonably difficult or medically inadvisable to try to satisfy the original standard); and
5. In all plan materials describing the terms of the program, the availability of a reasonable alternative standard (or waiver of the original standard) is disclosed.

The Affordable Care Act added a new section 2705 to the PHS Act regarding nondiscrimination and wellness. Section 715(a)(1) of ERISA and section 9815(a)(1) of the Code incorporate section 2705 of the PHS Act by reference. PHS Act section 2705 largely incorporates the provisions of the Departments' joint final regulations with a few clarifications and changes the maximum reward that can be provided under a health-contingent wellness program from 20 percent to **30 percent.** This change is effective in 2014.

Relevant federal agencies intend to propose regulations that use existing regulatory authority under HIPAA to raise the percentage for the maximum reward that can be provided under a health-contingent wellness program to 30 percent before the year 2014. The agencies are also considering what accompanying consumer protections may be needed to prevent the program from being used as a subterfuge for discrimination based on health status.

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