

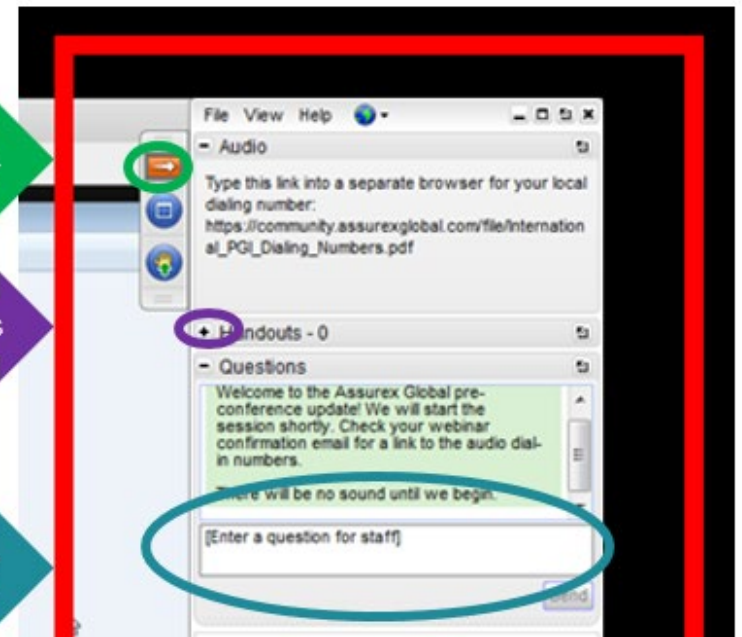
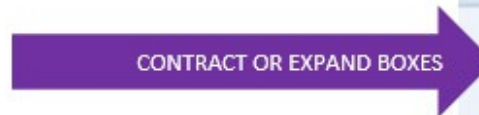
November 29, 2018

Tobacco-Related Wellness Programs

Benefit Comply

Tobacco-Related Wellness Programs

- Welcome! We will begin at 3 p.m. Eastern
- There will be no sound until we begin the webinar. When we begin, you can listen to the audio portion through your computer speakers or by calling into the phone conference number provided in your confirmation email.
- You will be able to submit questions during the webinar by using the “Questions” or “Chat” box located on your webinar control panel.
- Slides can be printed from the webinar control panel – expand the “Handouts” section and click the file to download.



November 2018

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- RHSB
- The Rowley Agency
- Starkweather & Shepley Insurance Brokerage
- Sterling Seacrest Partners
- Woodruff Sawyer

Agenda

- Background
 - Wellness Program Definition
 - HIPAA Wellness Rules
 - EEOC Wellness Rules
- Tobacco-Related Incentives

WELLNESS PROGRAM DEFINITION

- The term "wellness program" refers to programs and activities typically offered in association with employer-provided health plans as a means to help employees improve health and reduce health care costs

HIPAA Wellness Rules

HIPAA Wellness Rules

- **Applicability**
 - HIPAA wellness rules apply only when the incentive affects the group health plan (e.g. reduced premiums or cost-sharing)
 - HIPAA rules do not apply to wellness incentives that simply provide cash, gifts, etc., which do not impact the group health plan
- **Two types of programs under HIPAA wellness rules**
 - Participatory wellness programs
 - Health-contingent wellness programs

HIPAA Wellness Rules

- Participatory Wellness Programs
 - Incentive(s) not based on satisfying a standard that is related to a health factor
 - Only requirement is that it must be offered to “all similarly situated individuals”
 - No limit on incentives
 - Examples include:
 - Reduced copayment for participation in a biometric screening (incentive(s) are not based on screening outcomes or scores)
 - Medical premium reduction for attending a monthly, no-cost health education seminar

HIPAA Wellness Rules

- Health-Contingent Wellness Programs
 - Incentive(s) based on satisfying a standard related to a health factor
 - Two types of health-contingent wellness programs
 - Activity-only
 - Required to perform or complete an activity related to a health factor (e.g. walking, diet, or exercise programs)
 - Outcome-based
 - Required to attain or maintain a specific health outcome (such as not smoking or attaining certain results on biometric screenings)

HIPAA Wellness Rules

- 5 Requirements for Health-Contingent Wellness Programs
 1. Must be given annual opportunity to earn the incentive
 2. Maximum incentive cannot exceed 30% of the total cost of coverage, or 50% for tobacco-related programs
 - If dependents participate, incentive cannot exceed 30% (or 50%) of the total cost of the coverage in which an employee and any dependents are enrolled
 - Combined incentive for both tobacco and non-tobacco related standards may not exceed 50% (30% for non-tobacco related standards)
 3. Reasonably designed to promote health or prevent disease. Must not be overly burdensome or a subterfuge for violating discrimination laws
 4. Must be available to all similarly situated individuals and individuals who qualify by satisfying a reasonable alternative
 5. Must disclose the availability of a reasonable alternative standard in all plan materials describing the terms of the wellness program (model notice available)

EEOC Wellness Rules

EEOC Wellness Rules

- **Applicability**
 - EEOC wellness rules apply when an incentive is tied to (i) an employee participating in disability-related inquiries or medical examinations; or (ii) a spouse providing information about current and past health status (the manifestation of a disease or disorder)
 - Examples:
 - Health risk assessment (HRA) that includes disability-related questions
 - Biometric screening programs, which are medical examinations
 - Medical testing to determine tobacco use

EEOC Wellness Rules (For Now)

- EEOC Requirements:
 - Must be Voluntary: Cannot be denied employer group health plan coverage or be subjected to any adverse employment action, coercion, or intimidation
 - Information collected about a spouse's current or past health status must not be used for any employment decision in regard to the employee
 - Reasonable Design: Must be reasonably designed to promote health or prevent disease. Must not be overly burdensome or a subterfuge for violating discrimination laws
 - Required Notice: Must provide employees with notice that includes a description of the medical information collected, who will have access to it, and how it will be used and kept confidential –*model notice available on EEOC's website*
 - Must obtain written consent from the spouse for the collection of health information after disclosing what will be collected, how it will be used, and how the information will be protected

EEOC Wellness Rules (For Now)

- EEOC Requirements (continued):
 - Confidentiality: Information collected provided only in aggregate form that is unlikely to disclose the identity of specific individuals except as necessary to administer the plan. Information must be collected on separate forms, maintained in separate files, and treated as a confidential medical record
 - Reasonable Accommodation: Reasonable accommodation is required if a disability or medical condition prevents an employee from participating or earning an incentive
 - Reasonable alternative for spouses - Must waive the requirement or provide an alternative if a disability or medical condition prevents a spouse from participating or earning an incentive
 - Other: Individuals may not be required to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information (except as permitted to carry out activities related to the wellness program), or to waive confidentiality protections available under the ADA or GINA as a condition for participating or receiving an incentive

EEOC Wellness Rules (For Now)

- EEOC Requirements (continued):
 - Incentive Limits: Maximum incentive cannot exceed 30% of the total cost of employee-only coverage
 - Applies regardless of whether incentive affects the group health plan
 - Applies regardless of whether program is participatory or health-contingent
 - Total cost of coverage includes both employee and employer contributions
 - If both the employee and spouse qualify for the incentive, maximum incentive limit is 2 X 30% of the total cost of employee-only coverage

Tobacco-Related Incentives

Tobacco-Related Incentives

- Common Incentives
 - Cash or gift cards
 - Entry into a prize drawing
 - HSA/HRA/FSA contributions
 - Decrease in medical plan contributions (i.e. tobacco surcharge)

Which Rules Apply?

- Does the wellness program incentive affect the group health plan (e.g. reduced premiums or cost-sharing)?
 - If Yes, then HIPAA rules apply
- Does the wellness program involve medical testing or disability-related questions?
 - If Yes, then EEOC rules apply
- Does the wellness program ask about the manifestation of a disease or disorder of the spouse?
 - If Yes, then EEOC rules apply
 - NOTE - Information about a spouse's tobacco usage, even if medical testing is involved, is not asking about the manifestation of a disease or disorder

Cash – Gift Card – Prize Drawing

- HIPAA wellness rules
 - Not applicable because the incentive is not tied to a group health plan
- EEOC wellness rules
 - Applicable only if medical testing (e.g. blood or saliva test) is used to determine tobacco/nicotine use)

HSA Contribution

- HIPAA wellness rules
 - Not applicable because the incentive is not tied to a group health plan
 - HSAs are typically not considered group health plans as they are individually-owned accounts
- EEOC wellness rules
 - Applicable only if medical testing (e.g. blood or saliva test) is used to determine tobacco/nicotine use)

HRA/FSA Contribution

- **HIPAA wellness rules**
 - Applicable because the incentive is tied to a group health plan (HRAs and FSAs are both considered group health plans)
- **EEOC wellness rules**
 - Applicable only if medical testing (e.g. blood or saliva test) is used to determine tobacco/nicotine use)

Tobacco Surcharge

- **HIPAA wellness rules**
 - Applicable because the incentive is tied to a group health plan (reduction in the employee contribution toward major medical coverage)
- **EEOC wellness rules**
 - Applicable only if medical testing (e.g. blood or saliva test) is used to determine tobacco/nicotine use)

HIPAA Wellness Rule Considerations

- Reminder – HIPAA Wellness Rules
 - Annual opportunity to qualify
 - 50% incentive limit
 - Reasonably designed and uniformly available
 - Reasonable alternative available (e.g. smoking cessation classes/counseling or supplies) and notice of such alternative

HIPAA Wellness Rule Considerations

- Incentive Limit = 50%
 - Maximum incentive cannot exceed 50% of the total cost of coverage
 - If dependents participate, incentive cannot exceed 50% of the total cost of the coverage in which an employee and any dependents are enrolled
 - Examples:
 - Monthly premium = \$450/month for single, \$1200/month for family
 - Tobacco users could be charged an additional \$225/month (50% of \$450) for single, or \$600/month (50% of \$1200) for family
 - Employee contribution = \$150/month for single, \$600/month for family
 - Incentive available only to employees – tobacco users could be charged up to \$375/month for single (\$150 + \$225), or \$825/month for family (\$600 + \$225)
 - Incentive available to employees and spouses – tobacco users could be charged up to \$375/month for single (\$150 + \$225), or \$1200/month for family (\$600 + \$600)

****Combined incentive for both tobacco and non-tobacco related standards may not exceed 50% (30% for non-tobacco related standards)*

HIPAA Wellness Rule Considerations

- Reasonable Alternative Standard
 - *“The full reward under the outcome-based wellness program must be available to all similarly situated individuals....a reward under an outcome-based wellness program is not available to all similarly situated individuals for a period unless the program allows a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual who does not meet the initial standard based on the measurement, test, or screening”*
 - Acosta v. Macy’s (August 2017)
 - Department of Labor (DOL) brought action against Macy’s for its tobacco surcharge program
 - Must provide reasonable alternative standard, and must provide the same incentive for those who satisfy the reasonable alternative standard
 - Cannot require individuals to actually quit smoking

HIPAA Wellness Rule Considerations

- Choosing a Reasonable Alternative Standard
 - Employer can choose the reasonable alternative standard, and it does not necessarily have to be set in advance
 - The following guidelines should be followed:
 - Educational programs - must make the program available or assist the employee in finding such a program, the plan may not require an individual to pay for the cost of the program
 - Time commitment required must be reasonable. For example, requiring attendance nightly at a one-hour class would be unreasonable
 - Diet programs – individuals cannot be required to pay for the cost of food, but could be charged for any membership or participation fee
 - If a personal physician states that a plan standard is not medically appropriate, the plan must provide a reasonable alternative standard that accommodates the recommendations of the individual's personal physician with regard to medical appropriateness. Plans may impose standard cost-sharing under the medical plan for medical items and services furnished pursuant to the physician's recommendations

HIPAA Wellness Rule Considerations

- Reasonable Alternative Standard (Continued)
 - Common Reasonable Alternative Standards
 - Smoking cessation classes/programs/counseling
 - Must generally be provided at no cost to the participant
 - Some states offer programs at little to no cost
 - Smoking cessation products
 - Coverage may be available under the major medical plan
 - Not Acceptable
 - Additional time to quit smoking
 - Requirement to quit smoking after satisfying the reasonable alternative standard

HIPAA Wellness Rule Considerations

- Reasonable Alternative Standard (Continued)
 - Employer should provide a period of time for completion of the reasonable alternative standard and then provide the full incentive to those who satisfy the requirement
 - Example – Allow 90 days to complete counseling or use smoking cessation products
 - Options to Avoid Retroactive Contribution Adjustments
 - Require completion of the reasonable alternative standard prior to the beginning of the plan year (at least for those already employed)
 - Provide the lower rate and then increase it if the reasonable alternative standard is not completed

EEOC Wellness Rule Considerations

- IF MEDICAL TESTING IS INVOLVED, Reminder – EEOC wellness rules:
 - Participation must be voluntary
 - 30% incentive limit
 - Reasonably designed
 - Reasonable accommodation available if a disability or medical condition prevents an employee from participating or earning an incentive
 - Confidentiality notice required

Enforcement for Tobacco-Related Incentives

- Handling Misrepresentations
 - Have a clear policy stating requirements and consequences of misrepresentation that is stated on an employee affidavit/attestation
 - Provide a definition of a tobacco use (e.g. does it include e-cigarettes?)
 - Clarify whether the employee is indicating tobacco use currently, for the previous 12 months, that it will not be used for the next 12 months, or all three
 - Provide repercussions of falsification (e.g. surcharge and/or termination of coverage (retrospectively/prospectively))
 - Consider general employment law (HR) requirements (e.g. some states have laws prohibiting employers from considering employee actions outside of work)
 - Alternatively, the employer could impose medical testing, but then would have to also comply with EEOC wellness rules

Tobacco Surcharge

- Affordability under §4980H(b)

- If the wellness incentive affects monthly employee contribution for medical coverage, affordability is generally based off the non-wellness rate (the higher rate). HOWEVER, when the incentive is tobacco-related, affordability is based off the non-tobacco rate

- Examples:

- Not Tobacco-Related

- Required monthly employee contribution is \$250/month
 - Wellness incentive reduces employee contribution to \$150/month

- Coverage is “affordable” so long as \$250 does not exceed 9.86% (in 2019) of employee’s household income. \$250.00 should be entered on Line 15 of Form 1095-C, regardless of whether individual satisfies program requirements*

- Tobacco-Related

- Required monthly employee contribution is \$250/month
 - Wellness incentive reduces employee contribution to \$150/month

- Coverage is “affordable” so long as \$150 (not \$250) does not exceed 9.86% (in 2019) of employee’s household income. \$150.00 should be entered on Line 15 of Form 1095-C, regardless of whether the individual is a tobacco user*

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