HIPAA Just Might Getcha!

According to the National Association of Insurance Commissioners' Fall 2009 survey, the cost of insurance is expected to increase from an average of 11% to 16%.

Faced with rising costs and frequent prodding by insurance providers, employers are implementing employee wellness programs to reduce the cost of providing healthcare. Too often, however, employers are focusing on creating catchy acronyms or obtaining cool rewards than on the legal traps that could ensnare their efforts to improve the health of their workforce and drive down healthcare costs.

Anyone who has visited a doctor is familiar with the Health Insurance Portability and Accountability Act (HIPAA) which protects patient privacy and improves portability and continuity of health insurance coverage in the group and individual markets. HIPAA also prohibits discrimination in employee premiums or contributions for similarly situated employees on health-based factors, unless the variation of premium or contribution is based on whether the individual has met the standards of a wellness program that satisfies the requirements of HIPAA.

There are two types of employee wellness programs in the U.S.: those that fall under HIPAA; and those that do not.

An employee wellness program falls outside the scope of HIPAA if it is available to all similarly situated employees (i.e., all full-time employees) and the benefit or "reward" is:

- Unrelated to a healthcare plan or
- Is related to the healthcare plan but receipt of the reward is not contingent on achieving a goal or standard related to a "health status factor."

Health status factors include:

- Medical Conditions
- Claims Experience
- Medical History
- Genetic Information
- Disability or Evidence of Insurability

Typical wellness programs that fall outside of HIPAA include weight loss programs, subsidized gym memberships, flu shots, health risk assessments, or offering healthy food options at employer-sponsored events. Although employers may not see immediate financial returns, wellness programs that fall outside of HIPAA are generally easier to administer and avoid running afoul of HIPAA's non-discrimination rules.

Employee wellness programs that trigger HIPAA and mandate compliance with its non-discrimination provisions are programs that base a reward (i.e., lower premiums) on achieving a standard related to a health status factor (i.e., cholesterol level below 200).

HIPAA permits a wellness program to discriminate based on reaching certain health status goals, but only if five conditions are met.

1. The total reward for meeting the goal cannot exceed 20% of the total cost of coverage for an employee or family.
2. The program must be reasonably designed to promote healthy habits.
3. Eligible employees must have an opportunity to qualify for the reward at least once each year.
4. The reward must be available to all similarly situated individuals. This means that an employee who participates in good faith but cannot achieve the goal (or for whom the goal is unreasonably difficult because of a medical condition), must receive the reward or be provided with an alternative standard that is not unreasonably difficult to satisfy. The alternative standard must also be provided for those individuals who cannot or should not participate because of a medical condition.
5. Materials describing the wellness program must disclose the availability of an alternative standard to reach the health status goals for those who may need it.

As a result of these exacting standards, many employers avoid triggering the rules and rely on wellness programs that encourage healthy lifestyle choices but do not provide rewards related to the healthcare program offered to employees.

Remember, however, that avoiding HIPAA or adhering to HIPAA's non-discrimination rules does not excuse wellness programs that do not comply with other state and federal laws, such as the Americans with Disabilities Act (ADA) and Family Medical Leave Act (FMLA). For example, an employer might reward employees who exercise during the lunch hour for six months with an extra day of paid vacation. Unless the employer provides alternative ways for employees who cannot participate because of a disability, the wellness program could create risks under the ADA.

Bottom line, forget the catchy phrases and cool rewards and focus on one acronym that truly may impact your bottom line: HIPAA.

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