Wellness Programs, 2013 Benefit Limits, and Lost Participant Letter-Forwarding Program Ends

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WELLNESS PROGRAMS UNDER THE HEALTHCARE REFORM LAW

Ever since the passage of HIPAA, employers have been able to incentivize healthy behavior of their employees as long as the incentives fit within certain parameters. If the employee has to satisfy a particular health-related standard, this is called a "health-contingent wellness program." In general, the HIPAA parameters for health-contingent wellness programs are that the incentive for meeting the standard cannot exceed 20% of the premium cost (the full premium paid by the employer and the employee), and alternatives must be provided for those employees who cannot attain a desired health status for medical reasons. Typical health-contingent wellness programs provide incentives to encourage employees to stop smoking, maintain a healthy weight, and keep blood pressure and cholesterol readings at acceptable levels.

The Patient Protection and Affordable Care Act of 2010 (PPACA) permitted employers to incorporate even greater incentives for health-contingent wellness programs. These new incentives will take effect starting in the 2014 plan year of the health plan. On November 26, 2012, in the *Federal Register,* Volume 77, Number 227, the IRS, Department of Labor, and Department of Health and Human Services (referred to as the "Joint Agencies") issued proposed regulations on how the new incentives are to be structured. While these are only proposed regulations and they may be changed before they are finalized, they do provide valuable insight into the thinking of the government and how healthy behavior can be encouraged under PPACA.

Here are the proposals of the Joint Agencies:

- The health-contingent wellness program incentive can be raised to 30% from the current 20%; and in the case of a wellness program designed to help employees stop smoking (or never start), the incentive can be up to 50%. The incentive can be awarded to family members as well as the employee but further guidance needs to be issued on how the rewards would be allocated among family members. Here is an example from the regulations that shows how both the 30% and 50% incentives can be coordinated:

  (i) Facts. An employer sponsors a group health plan. The annual premium for employee-only coverage is $6,000 (of which the employer pays $4,500 per year and the employee pays $1,500 per year). The plan offers employees a health-contingent wellness program focused on exercise, blood sugar, weight, cholesterol, and blood pressure. The reward for compliance is an annual premium rebate of $600. In addition to the $600 reward for compliance with the health-contingent wellness program, the plan also imposes an additional $2,000 tobacco premium surcharge on employees who have used tobacco in the last 12 months and who are not enrolled in the plan's tobacco cessation program. (Those who participate in the plan's tobacco cessation program are not assessed the $2,000 surcharge.)

  (ii) Conclusion. The program satisfies the requirements of this paragraph (f)(3)(ii) because both: the total of all rewards (including absence of a surcharge for participating in the tobacco program) is $2,600 ($600 + $2,000 = $2,600), which does not exceed 50 percent of the total annual cost of employee-only coverage ($3,000); and, tested separately, the $600 reward for the wellness program unrelated to tobacco use does not exceed 30 percent of the total annual cost of employee-only coverage, $1,800.

- As mentioned above, all wellness programs under PPACA must offer an alternative standard for those employees who cannot attain the desired objective for valid medical reasons. Obviously just a personal decision by an employee not to participate does not constitute a

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valid medical reason. An example of a valid medical reason relating to a smoking cessation reward would be an addiction to nicotine. The alternative must meet several requirements such as:

1. There must be prominent communication of the availability of the alternative standard. Sample language has been included in the regulations, which reads as follows:
   Your health plan is committed to helping you achieve your best health status. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at [insert contact information] and we will work with you to find a wellness program with the same reward that is right for you in light of your health status.
2. An employer does not have to offer an alternative if it chooses instead to just waive the requirement for those unable to meet the wellness standard for medical reasons.
3. The alternative does not have to be one-size-fits-all; therefore, customization is permitted. The regulations do note that just because an employee has failed a previous alternative standard does not mean the employer does not have to continue to offer an alternative. For example, even though a smoker was not able to give up smoking after attending a smoking cessation class, he or she still has to be offered another opportunity to qualify under an alternative standard.
4. An educational alternative, such as a class on how to stop smoking, must be paid for by the employer. In addition, the employer must identify the educational alternative. It is not acceptable for an employer just to tell an employee to go out and find an educational program. Likewise, a weight reduction class as an alternative would need to be paid for by the employer but any food that must be purchased as part of the class is an employee's, not an employer's, responsibility.
5. An employer can still request that the employee's treating physician certify that the wellness standard cannot be met for medical reasons if such a request is reasonable in light of the circumstances.
6. If the employer concludes the employee does not qualify for an alternative standard, the employee has to right to appeal that decision (including external review) under the plan's claims procedures.

While the Joint Agencies have issued guidance on the proper way to structure wellness programs, another agency, the Equal Employment Opportunity Commission (EEOC), still must issue its guidance on wellness programs. In the past, the EEOC informally has indicated wellness programs must be totally voluntary, and an employee cannot be punished for not participating. This view is problematic if it permits an employee who does not participate to receive the same premium incentive as those employees who actively participate in a wellness program including an alternative standard. It is hoped the EEOC position will support and not conflict with the guidance contained in these proposed regulations.

NEW DOLLAR LIMITS FOR 2013

The IRS in Information Release 2012-77 announced the limits for qualified retirement plans that will be in effect during 2013:

- 401(k) Deferrals: $17,500;
- 401(k) Catch-up deferrals: $5500 (unchanged);
- Annual contribution limit for defined contribution plan: $51,000;
- Annual benefit limit for defined benefit plan: $205,000;
- Maximum compensation recognized: $255,000;
- Compensation for determining key employee: $165,000 (unchanged);
- Compensation for determining highly compensated employee: $115,000 (unchanged); and
- Limit for SIMPLE retirement account: $12,000

The reason the limits have barely changed and in some cases have not changed is that they are tied to cost of living increases, which in the current economy have been minimal.

FORWARDING PROGRAM DISCONTINUED BY IRS

The IRS announced in Revenue Procedure 2012-35 that it will no longer forward letters from employers to former employees who may still have a right to benefits under the employer's retirement plan. Employers had turned to the IRS in those situations where an employee who terminated employment many years ago still had a right to a benefit under the retirement plan and the employer wanted to start distribution. In particular, this is an issue if the employer wants to terminate a retirement plan or the former employee has attained age 70 1/2 and distributions must commence under IRS rules.

In light of the IRS announcement, employers will need to turn to the Social Security letter-forwarding service (with a fee of $35 for each letter forwarded) or else engage the services of a private search firm. For defined benefit plans, there is still the option of the Pension Benefit Guaranty Corporation missing participant program that employers can utilize.

The above discussion is intended to briefly summarize certain recent legal developments in employee benefits, but is not intended to be legal advice and must not be relied upon as such. All readers are urged to raise any concerns they may have based on matters discussed in this column with experienced benefits legal counsel.