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The Implications of COBRA for Wellness Programs

Paul M. Hamburger

July 24, 2010 — As employers focus on managing health care costs, they often turn to alternative wellness programs. In theory, if not in practice, by encouraging employees' healthy behaviors, employers are able to keep their employees healthier and lower medical costs over time. That is, healthier employees use less of their health plan costs than otherwise. Over the past several years, various wellness programs have been developed and put into use. This trend is likely to increase now that health care reform has affirmatively endorsed these programs. As employers implement these wellness programs, however, they cannot overlook their legal implications — particularly their COBRA implications.

What Are Some Typical Wellness Programs?

Before considering the COBRA implications of wellness programs, consider the various types of programs available. Some employers will maintain on-site athletic facilities to encourage healthier lifestyles. Separately, or even as part of those facilities, employers might also offer nutrition counseling with registered dieticians. In other cases, employers may establish on-site medical facilities staffed by doctors, nurses and/or medical practitioners who are able to provide basic check-ups, simple screenings, blood tests or other diagnostic procedures. Finally, another common wellness program offering consists of free or subsidized opportunities for employees to participate in programs like tobacco cessation or weight loss programs.

In some cases, employers simply offer these programs on a purely voluntary basis. In other cases, employees can earn wellness "rewards" in terms of lower health care premiums by participating in the programs. Other employers might impose "penalties" in the form of increased premiums or other costs if employees fail to take advantage of the programs.

All of these programs must be analyzed under a number of legal requirements, including ERISA, HIPAA and the Americans With Disabilities Act (ADA). Separately, employers need to confirm the tax treatment of some of these programs. This column focuses solely on the COBRA implications of offering various types of wellness programs.

COBRA Overview

COBRA requirements attach to group health plans maintained by employers for the benefit of their employees. Health care is treated as provided under a plan whether it is provided directly or through insurance, reimbursement or otherwise, and whether or not it is provided through an on-site facility. In addition, such a plan is considered to be maintained by an employer if it is any plan of, or contributed to (directly or indirectly) by, the employer.

Under the IRS COBRA regulations, a group health plan is maintained by an employer, even if the employer does not contribute to it, if plan coverage would not be available at the same cost to an individual but for the individual's employment-related connection to the employer. As we will see below, this could be an important concept to consider in evaluating the COBRA implications of wellness programs. Note that one possible implication of this regulatory standard is that if coverage *would* be available at the same cost to an individual

without regard to his or her employment-related connection to the employer, it might not be considered to be maintained by the employer and, therefore, not subject to COBRA.

The COBRA regulations also include rules that apply more specifically to on-site facilities and other general wellness programs. Under these rules, if an employer maintains a program that furthers general good health, but the program does not relate to the relief or alleviation of health or medical problems and is generally accessible to and used by employees without regard to their physical condition or state of health, that program is not considered a program that provides health care — so it is not a group health plan.

Example 1. If an employer maintains a spa, swimming pool, gymnasium or other exercise/fitness program or facility that is normally accessible to and used by employees for reasons other than relief of health or medical problems, that facility does not constitute a program that provides health care; thus, it is not a group health plan subject to COBRA coverage requirements.

Example 2. On the other hand, if an employer maintains a drug or alcohol treatment program or a health clinic or any other facility or program that is intended to relieve or alleviate a physical condition or health problem, the facility or program is considered to be the provision of health care and so is considered by the IRS regulations to be a group health plan.

Finally, the regulations include a limited exception to the COBRA requirements for certain on-site first-aid type facilities. According to these rules, the provision of health care at an on-site facility does not constitute a group health plan if:

1. the health care consists primarily of first aid that is provided during the employer's working hours for treatment of a health condition, illness or injury that occurs during those working hours;
2. the health care is available only to current employees; and
3. employees are not charged for the use of the facility.

Analyzing COBRA Implications For Wellness Programs

Employers offering wellness programs often question the need to offer COBRA coverage rights for these programs. Let's start with some basic rules. If all that an employer offers is a first-aid type facility otherwise excluded from COBRA coverage, the issue is easy. No COBRA needs to be offered for these types of arrangements.

However, if the program is more than the first aid contemplated by the exception, and constitutes a "group health plan" maintained by an employer, it is generally going to be subject to COBRA's requirements. There is no getting around that legal truism.

There are two basic problems with this conclusion, however:

1. Many of these programs are conducted on-site at an employer's facilities. Employers typically resist the requirement to open up their facilities to former employees, divorced spouses of employees or other non-employee qualified beneficiaries.
2. Even if an employer is willing to extend COBRA coverage rights to certain wellness programs, problems arise in determining how to value these programs for COBRA premium purposes.

Recognizing the reality of these key problems, how should an employer evaluate the COBRA implications of various wellness programs? The key questions are: (1) whether the program offers medical care; and (2) if it does, then what?

Does the Program Offer Medical Care?

The starting point is to determine whether the wellness program in question is offering medical care at all. The IRS regulations clearly provide that a wellness program is not considered a program that provides health care and so *is not* a group health plan if:

- it is something that is for the employees' general good health;
- it does not relate to the relief or alleviation of health or medical problem; and
- it is generally accessible to and used by employees without regard to their physical condition or state of health.

The regulatory examples of these types of programs include spas and fitness centers. Nevertheless, the theory underlying the exception also could apply to typical wellness programs like nutrition counseling, weight loss and maybe even tobacco cessation programs. Tobacco cessation programs are less clear because they are generally treated as medical-related expenses for purposes of the income tax rules. On the other hand, they are typically available to participants without regard to specific physical conditions or state of health. Certainly, employers need to evaluate their facts carefully in connection with their specific wellness programs, but this exception could help minimize COBRA's reach.

If the Program Offers Medical Care, Then What?

Suppose a wellness program is treated as offering medical care. In that case, it is likely that the program will be treated as established by the employer in the sense that the employer likely subsidizes all or part of the program cost. At that point, COBRA considerations clearly come into play. In considering whether and how to offer COBRA coverage for these programs, the following key issues should be thought through very carefully: *Is the Wellness Program or Facility Available to All Employees or Only Those Employees Otherwise Covered by the Employer's Group Health Plan?*

If the coverage under the wellness program is such that only employees otherwise covered by the employer's general group health plan can participate, COBRA compliance might be a little easier than otherwise. This is because the employer might be able to bundle the general group health plan with the wellness program as one group health plan for COBRA purposes. That way, only those qualified beneficiaries who elect COBRA coverage for the entire program need to be offered the wellness features. If the program cannot be bundled with the general employer-sponsored group health plan, COBRA compliance is trickier because the issue of offering COBRA on the wellness program alone becomes more relevant.

If the Wellness Program Is Available on the Employer's Premises, Is There a Way to Limit Access for Qualified Beneficiaries?

Providing access for former employees or other non-employee qualified beneficiaries to an employer's worksite is often a troubling issue for employers. In considering this issue, it is important to remember that the right to continued coverage under COBRA is not necessarily a right to receive that coverage at a particular location on the employer's worksite (putting aside on-site HMOs or typical on-site medical facilities maintained by independent providers). That is, in some cases, there may be a way to structure the availability of COBRA coverage for the wellness program without opening up the employer's entire facility to access for non-employees. For example, if an employer's wellness program consists of medical examinations and treatments for simple illnesses, perhaps the COBRA obligation could be met by having the clinic provider offer another location where qualified beneficiaries could go to get the same treatment. If not, and access to the employer's worksite is the only alternative, perhaps a separate special entrance could be used that would be monitored to ensure that only qualified beneficiaries had access and their ability to "roam" the worksite would be limited.

Is the Wellness Program Otherwise Fully Available to Qualified Beneficiaries at Their Own Cost Directly From the Vendor?

That is, the program is subsidized for covered employees and, for that reason, is employer-maintained. However, suppose the vendor would also make the program available at the exact same full cost to any

individual who walked in off the street, without regard to employment. In that case, an offer of COBRA would be an offer for the qualified beneficiaries to pay up to 102 percent for something that could otherwise be purchased by the individual at 100 percent and without any COBRA limitations (such as limited duration of coverage).

Applying a traditional COBRA analysis in such cases may not make much sense. COBRA coverage is typically offered because the qualified beneficiaries would not otherwise be able to obtain the same group coverage at the same cost on their own. If they could, there would seem to be no need for COBRA.

Review Programs for COBRA Implications

Future guidance on wellness programs would certainly help clarify these rules. In the meantime, employers and administrators should carefully review their wellness programs with benefits advisors to consider the various COBRA requirements and possibilities for COBRA compliance. The programs are very fact specific and employers need to consider the relevant facts in light of the available COBRA guidance.

Paul M. Hamburger, Esq., is a partner in the Washington, D.C., office of the law firm Proskauer Rose LLP. He is a member of Thompson's Health Plan Advisory Board, and is author and contributing editor of the COBRA Guide, *the* Pension Plan Fix-It Handbook *and the* Guide to Assigning and Loaning Benefit Plan Money, *all published by Thompson Publishing Group.*
