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## Employee Benefits

A Littler Mendelson Newsletter

### DOL Checklist Offers Key to the Mysteries of Wellness Program Identification

*By Steven J. Friedman and Andrea Jackson*

Certain health promotion or disease prevention programs offered by a group health plan – commonly known as wellness programs – must comply with Health Insurance Portability and Accountability Act (HIPAA) wellness program regulations. However, it is not always clear to employers whether they sponsor a wellness program subject to the regulations and, if so, how to apply the rules to the program. The U.S. Department of Labor (DOL) recently issued Field Assistance Bulletin (FAB) No. 2008-02, which includes a Wellness Program Checklist, in response to questions concerning what types of programs must be in compliance with the final regulations. The DOL's Wellness Program Checklist takes some of the uncertainty out of this process.

The final regulations on HIPAA's non-discrimination provisions, published December 13, 2006, included guidance on the implementation of wellness programs. FAB No. 2008-02 now provides guidance in the form of a simple, straightforward checklist that will assist a plan sponsor in determining (1) whether a group health plan offers a program of health promotion or disease prevention that is required to comply with the final regulations and (2) whether that program is in compliance with the final regulations. The checklist consists of several questions along with examples and tips that serve to clarify the intent and purpose of those questions.

The first five checklist questions establish the period used as the plan year, whether there is a wellness program in place, whether it is part of a group health plan and whether the program discriminates on the basis of a health factor. A "yes" or "no" answer to each of these questions will determine whether or not a wellness program is subject to the final rules.

Employers next are guided through a series of questions relating to whether the wellness program offers a reward to a participant based on a health factor, and, if so, whether the wellness program discriminates on the basis of a health factor. While the final regulations permit some discrimination based on health factors, the FAB makes clear to employers that their program must meet either a "benign discrimination" exception or offer a reasonable "alternative standard" in order to comply with the final rules.

Permissible "benign discrimination" may be found under a "participation-based" wellness program. This type of program will offer a reward, which is based solely on participation in the program and does not condition the reward on achievement of a specific health-related outcome. Therefore, although the wellness program may "discriminate" in mandating that only certain employees will be required to participate in a particular program (i.e., you must be a smoker to participate in a smoking

cessation program), there is no goal that must be met to procure the reward.

The FAB also clarifies how a reasonable “alternative standard” may be required under a program that requires that a particular goal be met in order for a reward to be given. This means that although a reward may only be available to those who meet a certain standard (e.g., the attainment of cholesterol target), there must be an alternative standard (e.g., nutrition counseling sessions) that are made available to those for whom it is (1) unreasonably difficult due to a medical condition, or (2) medically inadvisable to satisfy the otherwise applicable standard. A “standard-based” program must satisfy five specific requirements in order to comply with the final HIPAA regulations. The requirements include:

1. The reward offered under the program must be limited to 20% of the applicable cost of coverage.
2. The program must be reasonably designed to promote health or prevent disease.
3. Individuals must be eligible to qualify to participate in the program at least once per year.
4. The reward must be available to all similarly-situated individuals.
5. The wellness program must have a reasonable alternative standard and disclose the availability of the alternative standard in all program materials that describe the program. It need not identify a specific alternative standard, however.

If the wellness program fails to meet any of these requirements, it is impermissibly discriminating in benefits and/or premiums based on a health factor and is in violation of the final HIPAA rules.

The final HIPAA regulations are effective January 1, 2008 for all calendar year plans. Plan sponsors currently offering wellness programs to their employee participants are encouraged to review FAB No. 2008-02 so that they may make any changes necessary to bring the programs into immediate compliance.

You may view the FAB at: <http://www.dol.gov/ebsa/regs/fab2008-2.html>.

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