

Employee Benefit Plan Review

Ask the Experts

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WELLNESS INCENTIVES: HIPAA

Q Our company currently sponsors two group health plans. We are considering adding several new wellness incentives, including reduced premiums if certain wellness goals are met. We have received conflicting advice on whether our proposed wellness incentives will be subject to HIPAA. Are wellness programs subject to ERISA and, if so, would we need to enter into “Business Associate Agreements” with vendors that will help us administer the wellness incentives?

A Your company’s wellness incentives may be subject to the Health Insurance Portability and Accountability Act of 1996, as amended (“HIPAA”) if the incentives are deemed to be a health plan within the meaning of HIPAA or are offered as part of one of your company’s group health plans that is subject to HIPAA. The wellness incentives generally would not be subject to HIPAA if your company offers the wellness incentives directly and not as part of a health plan.

HIPAA sets forth certain privacy, security, and breach notification rules that are designed to protect an individual’s identifiable health information held by covered entities and their business associates. The information protected under HIPAA is generally referred to as “protected health information” or “PHI.” “Covered entities” are defined as health plans, health care clearinghouses, and health care providers that transmit PHI electronically. Business associates generally are persons or individuals (other than members of the covered entity’s workforce) that perform functions or activities on behalf of, or provide certain services to, a covered entity that involves access to PHI on a routine basis.

Under HIPAA regulations, a “health plan” is defined as an individual or group plan that provides, or pays the cost of, medical care (as defined in Section 2791(a)(2) of the Public Health Service Act¹). HIPAA regulations list specific types of plans that are subject to HIPAA, including group health plans, health insurance issuers, HMOs, Part A and Part B of Medicare, Medicaid, Voluntary Prescription Drug Benefit Programs under Part D of Medicare, Medicare supplemental policies, issuers of long-term care policies (excluding nursing home fixed indemnity policies), and certain other arrangements.

Although health plans are subject to HIPAA, in general, employers that offer the health plan and the plan sponsors are not subject to HIPAA. (Note that employers that administer self-insured plans generally are subject to HIPAA unless the plan covers fewer than 50 participants.)

If your company’s wellness incentives will be offered as part of your company’s group health plan (or other arrangement that meets the definition of a HIPAA health plan), HIPAA’s privacy and security rules would impose restrictions on when the plan could allow your company to access PHI without the wellness participant’s consent. If your company will administer certain aspects of the health plan and requires access to PHI as a result, the health plan may provide your company as plan sponsor with access to PHI necessary to perform its administrative functions if certain requirements are met. Specifically, your company as plan sponsor should amend its health plan documents and certify to the health plan that it agrees to, among other things:

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- Establish adequate separation between employees who perform plan administration functions and those who do not;
- Not use or disclose PHI for employment-related actions or other purposes not permitted by HIPAA's privacy; and
- Where electronic PHI is involved, implement reasonable and appropriate administrative, technical, and physical safeguards to protect the information, including by ensuring that there are firewalls or other security measures in place to support the required separation between plan administration and employment functions; and report to the group health plan any unauthorized use or disclosure, or other security incident, of which it becomes aware.²

If the wellness incentives will be offered as part of your company's group health plan and will be administered by a separate third party administrator, generally the plan would be required to enter into a Business Associate Agreement with the separate third-party administrator.

EXCEPTED BENEFIT HRAS

Q My company is offering Excepted Benefit Health Reimbursement Arrangements ("EBHRAs") starting in 2020. Are EBHRAs only available to employees who elect coverage under our company's group health plan? What benefits may be paid or reimbursed from EBHRAs?

A In June 2019, the U.S. Departments of Health and

Human Services, Labor, and Treasury issued final regulations that permit employers to offer EBHRAs beginning January 1, 2020.

To qualify as an EBHRA:

- Employees must be offered coverage under the employer's traditional group health plan. However, an employee may decline coverage under the traditional group health plan and instead participate in the EBHRA.
- Amounts contributed to EBHRAs may be used to fund or reimburse medical, dental, vision, and other expenses listed in IRS Publication 502, except premiums for individual, group health plan, or Medicare coverage. However, amounts contributed to EBHRAs may be used to pay medical, dental, vision, short-term and long-term disability insurance, COBRA, and other limited benefit premiums.
- Contributions to EBHRAs are limited to \$1,800 per year (for 2020). This amount is subject to adjustment for inflation in future years.
- Unused contributions may be carried over to the subsequent year.
- Benefits must be uniformly available to all similarly situated individuals regardless of health status. For this purpose, "similarly situated" is defined under HIPAA. HIPAA generally permits bona fide distinctions consistent with the employer's business classifications and cites examples such as classification based on

full or part-time status, occupation, date of hire, geographic location, collective bargaining agreement membership, and length of service.

Note that if your company also will be offering an Individual Coverage Health Reimbursement Arrangement ("ICHRA"), it may not offer both the ICHRA and EBHRA to the same employees.

Finally, EBHRAs are not subject to the special notification requirements that apply to ICHRAs. Instead, information regarding EBHRAs should be included in the operative plan document, summary plan description, and summaries of material modification, where applicable. 🌟

NOTES

1. 42 U.S.C. 300gg-91(a)(2).
2. See 45 CFR 164.314(b) and 164.504(f)(1)(i) and (f)(2).

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