Employee Wellness Programs and Challenges to Health Information Privacy

Barbara J. Zabawa, J.D., M.P.H.
LaFollette Godfrey & Kahn
Madison, Wisconsin

Like many ideas in healthcare, employee wellness programs have been through hot and cold cycles. Employee wellness programs can range from offering financial incentives for joining local health clubs or for achieving a healthier lifestyle (such as quitting smoking, losing weight, or lowering cholesterol), to more comprehensive programs involving physical examinations, counseling, and laboratory testing to detect various biomarkers.  

In the past, employers hoped that these programs would save them healthcare costs. Unfortunately, many employers never witnessed those cost savings because of high employee turnover—achieving wellness and preventive medicine is a long-term endeavor that often extends beyond the patience of either employees or employers. Nevertheless, employee wellness programs are gaining interest again, but this time in a changing health coverage landscape.

Physicians are jumping into the employee wellness program fray because it offers them an avenue to earn extra income without any of the administrative burdens they often face with various insurers. “The compensation model for wellness programs generally is cash-based, paid directly by the employer or an individual.”

Health savings accounts (HSAs) are forcing employees to take more responsibility for their health and healthcare services. The Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA) authorized HSAs as tax-advantaged accounts that are paired with high deductible plans. The deductibles may range from $1,000 to $10,000 per family and also may have coinsurance obligations. Unlike Health Reimbursement Accounts (HRAs), in which a person’s employer owns the account, HSAs are owned by the employee who can transfer the funds to a new account upon changing jobs. Both employers and employees can deposit money into the account, tax-free. Employees can use this money to cover their deductible and coinsurance expenses and can roll over any money that is not spent in the account to the following year, increasing the value of the account.

Of note is that many preventive care services are excluded from the deductible requirement. Because employee wellness programs focus on offering preventive care services, such as health screenings, immunizations and tobacco or weight control programs, employees may find employee wellness programs as a means to acquire health services without paying a deductible. Employees may find the convenience of on-site preventive services convenient and an efficient way to maximize their participation in an HSA program.

Employee wellness programs, however, may raise certain privacy concerns of which employers and providers should be aware.

Employers who adopt employee wellness programs may face at least two privacy challenges. The first challenge is likely to derive from employee participants. Many employees may be uncomfortable participating in such programs for fear of an employer learning sensitive health information. Employee wellness programs that include blood tests may glean information regarding 250 different biomarkers, such as an employee’s risk of diabetes and other ailments.

Employers that gather employee health information as part of an employee wellness program must be wary of certain legal barriers, such as the Americans with Disabilities Act (ADA), which requires medical information that an employer collects from wellness examinations and inquiries to be treated as a confidential medical record, to be stored in separate medical files, and not to be used for any purpose inconsistent with the ADA. Employee participation in wellness program activities should remain “voluntary” to avoid violating ADA provisions.

A second privacy challenge employers may face when collecting employee health information is whether to participate in Regional Health Information Organizations (RHIOs) or similar information exchanges. RHIOs are regional and local entities and groups of healthcare stakeholders such as physicians, hospitals, insurers, patients, and community members that oversee and support the exchange of electronic information at the local level to support care. For example, Wisconsin has created its own RHIO or “WHIO,” which is a voluntary collaboration that brings together key healthcare stakeholders to develop a statewide warehouse of healthcare information that spans providers and systems. The goal of WHIO is to serve as a data repository for provider-specific healthcare claims data that can be used to track, analyze, and measure entire episodes of care. This information will become an increasingly vital tool for employers and consumers as they make more informed healthcare decisions.

Employers soon may face a decision as to whether they should participate in RHIO initiatives. Employers who maintain their own employee health information records likely will benefit from Employee Retirement Income Security Act (ERISA) preemption if they choose not to participate. Through ERISA’s “relate to” clause and “deemer clause,” state laws that relate to employee welfare benefit plans are preempted from state regulation. Therefore, until a federal law is passed that would require employer participation in RHIO efforts, employer participation will be voluntary.

But, even those employers that decide to participate should think of employee privacy concerns before divulging employee health information to RHIOs. To maintain employee morale and trust in the wellness program, employers may want to obtain employee authorizations for release of their health information to the RHIO.

Continued on page 6
Employers who contract with third parties, such as insurers or providers, to collect and maintain the employee health information may want to consider adding provisions in their contracts regarding RHIO participation. Again, to the extent that employee wellness programs are part of an employer’s welfare benefit plan, any state requirement that wellness program information be disclosed to RHIOs likely would be preempted by ERISA.

It is interesting to consider, however, the possibility that states may circumvent any ERISA hurdles by designating RHIOs as “public health authorities,” which are able to receive protected health information without an individual’s authorization under the Health Insurance Portability and Accountability Act (HIPAA).21 HIPAA allows covered entities to disclose protected health information without authorization for the purpose of preventing or controlling disease, injury, or disability. Employee welfare benefit plans are considered “covered entities” under the HIPAA privacy law and therefore are subject to its requirements.22 Therefore, organizations that offer employee wellness programs that are part of employee welfare benefit plans may disclose to public health authorities health information derived from employee wellness programs without first seeking employee authorization.23 Admittedly, the information gathered from employee wellness programs may be invaluable for public health surveillance purposes, but disclosure to these authorities may cause anxiety among employees wishing to keep their health information private and therefore may deter participation in wellness programs.

Employers that adopt employee wellness programs should incorporate various protections to allay employee privacy concerns. For example, employers should disclose the steps they will take to ensure that any health information collected through the wellness program will not be used in any employment decision and will not be shared in any manner inconsistent with the law. As RHIOs and other health information gathering efforts develop, it may be useful to educate employees on the importance of public health surveillance and how public health authorities use individual health information to prevent illness and disease.

In conclusion, interest in employee wellness programs is gaining ground by employers, employees, insurers, and physicians. These programs offer a convenient and attractive way to help employees adopt healthier lifestyles and live more productive lives. Since these wellness programs gather sensitive employee health information, employers, insurers, and providers must be aware of the special legal challenges that such information presents, particularly as those challenges apply to privacy concerns. As a result, before embarking on these exciting initiatives, employers, insurers, and providers should consult legal counsel to ensure compliance with privacy and other laws affecting employees.

Endnotes
2 Mike Norbut, Wellness Goes to Work, American Medical News, at 18 (June 5, 2006).
3 Id. at 17.
5 I.R.C. § 223(c)(2); Uwe Reinhardt, The Pricing of US Hospital Services: Chaos Behind a Veil of Secrecy, Health Affairs, at 65 (Jan./Feb. 2006).
7 I.R.C. § 223(a).
8 I.R.C. § 223(d)(2).
10 I.R.C. § 223(c)(2)(C).
11 The Bush administration wants to expand the use of HSAs to increase consumer involvement in healthcare decisions, hoping that the new plans will force consumers to shop for healthcare the same way that they shop for any other type of good—by comparative shopping and bidding on prices. David Wessel, Bush’s Cure-All for Healthcare Sidesteps Big Ills, The Wall St. J., at A2 (Jan. 26, 2006).
12 Norbut, supra note 2, at 18.
13 29 C.F.R. §§ 1630.14(d) & 1630.16(f).
14 Employee Benefits Institute of America, Inc., ADA’s Application to Wellness Programs Addressed by EEOC Staff, at 2 (Fall 2006).
15 Hospitals and Health Networks, A Primer for Building RHIOs, Insert (Feb. 2006).
17 Id.
18 Id.
20 It should be noted that a national collaborative consisting of 22 states has formed to develop problematic variations in privacy and security business policies, practices and state laws. Press Release, RTI International, 22 States Join National Health Information Privacy and Security Collaboration, May 23, 2006, available at www.rti.org. It is possible that through this collaborative’s efforts, a federal law may arise that addresses employer participation in health information sharing initiatives.
21 45 C.F.R. § 164.512(b).
To the extent that state health privacy laws are more stringent than HIPAA, those laws would also apply to information gathered from wellness programs offered as part of an insured product sold to employers, in which case the insurance company, which is subject to state regulation, is likely to possess the employee health information. 29 U.S.C. § 1144(b)(2)(A).

Editors' Note:
On December 13, 2006, after this article was submitted, the federal government issued final rules relating to employee wellness programs. 71 Fed. Reg. 239 at 75014 (Dec. 13, 2006). The new rules will apply for plan years beginning on or after July 1, 2007 and clarify what employee wellness programs will be exempt from the nondiscrimination provisions of the Health Insurance Portability and Accountability Act. For example, the rules prohibit employee wellness programs that base rewards on health factors from issuing rewards that exceed 20% of the cost of coverage.