

October 7, 2009

Health Plan Developments: Mental Health Parity Guidance Delayed; GINA and EEOC Present Issues for Employee Health Risk Assessments

The Health and Human Services Secretary issued a statement on October 2, 2009 indicating that employers awaiting guidance before implementing changes to medical plans required by the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (“MHPAEA”) should not expect regulations to be issued until January 2010 – after the law goes into effect for calendar year plans. Although the law required that regulations be issued by October 3, 2009, HHS and the Labor and Treasury Departments are still working to develop them. In the absence of regulations, plan sponsors should make a reasonable “good faith” effort to adhere to the law’s intent.

On the other hand, late last week, the U.S. Departments of Labor, Health and Human Services, and the Treasury issued final interim regulations in connection with the Genetic Information Nondiscrimination Act of 2008 (“GINA”). GINA prohibits discrimination in group health plan coverage based on genetic information, and is effective for plan years beginning after May 21, 2009 (January 1, 2010 for calendar year plans). The GINA regulations also may affect the administration of wellness programs and health risk assessments (“HRAs”). Open enrollment periods are beginning soon, or have already begun. Plan sponsors should act quickly to ensure compliance with the new guidance.

GINA Generally

The GINA regulations expand protections initially afforded to plan participants under HIPAA. HIPAA prevents a plan from imposing a preexisting condition exclusion based solely on genetic information, and also prohibits discrimination in individual eligibility, benefits, or premiums based on any health factor, including genetic information. GINA further prohibits group health plans or health insurance issuers from basing premiums on genetic information, and prohibits plans from requesting or requiring an individual to undergo genetic testing in most cases.

Rewards Prohibited

GINA prohibits plans from collecting genetic information (including family medical history) prior to or in connection with enrollment, or for underwriting purposes. “Underwriting” is broadly defined to include providing discounts, rebates, or other benefits. Thus, plans are generally prohibited from offering rewards (such as a premium reduction or reimbursement for health expenses) in return for collection of genetic information. Information collected, including an individual’s family medical history as part of a Health Risk Assessment (“HRA”), is considered “genetic information” under the GINA regulations. Therefore, any HRA that inquires about an individual’s family medical history would be subject to the GINA regulations, and cannot be used to support any type of underwriting adjustment. Also, an employer cannot condition enrollment in the plan upon completion of an HRA that includes genetic information.

The EEOC on HRAs

In other recently issued guidance, the EEOC issued an opinion letter stating that it regards disability-related questions contained in HRAs as potentially violating the Americans with Disabilities Act (“ADA”). The EEOC noted that employers may only ask disability-related questions if the questions are job-related and consistent

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with business necessity. Though the EEOC has not taken a formal position on the matter to date, the letter indicates that asking questions about depression or various medical conditions (i.e., asthma, cancer, heart disease) as a prerequisite to obtaining reimbursement for health expenses “does not appear to be job-related and consistent with business necessity.” Therefore, the simple fact that such questions are asked on a questionnaire that must be answered, regardless of the content of the answer, could run afoul of the ADA.

Compliance

To comply with GINA, group health plan sponsors should review their HRAs and other wellness programs, and modify them as necessary so that genetic information is not requested prior to or in connection with plan enrollment. Rewards should not be given for providing genetic information, including family history. Rewards may be provided for completing HRAs, so long as genetic information is not requested.

If a plan sponsor would like to collect genetic information for other purposes outside of underwriting or wellness rewards (for example, for wellness outreach), it might consider offering two HRAs, one that requests genetic information and one that does not. The one that requests genetic information should only be offered after enrollment, be completely unrelated to enrollment, and offer no reward.

To comply with the EEOC’s recent opinion letter, HRAs also may need to be redesigned to allow a participant to decline to answer any questions that are disability related. These would include not only questions seeking information on diseases but also questions regarding medication usage and alcohol consumption.

If you have any questions about how these new rules could affect your group health plan, or any other aspect of your company’s employee benefit plans, please contact a member of our Benefits Law Group.



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