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Health Risk Assessments Face Bias Hurdle

Under IRS rules associated with the Genetic Information Nondiscrimination Act, employers are prohibited from collecting genetic information—defined as family medical history—in health risk assessments if that information will be used for ‘underwriting’ purposes. That includes offering employees discounts on their monthly premium contributions or lowering deductibles for completing a health risk assessment.

By Joanne Wojcik

Employers may have to scramble to comply with Internal Revenue Service rules implementing a genetic nondiscrimination law.

With many companies beginning their fall open enrollment for their health care plans, employers will have to make sure questions on family medical history are removed from any health risk assessments that they reward employees for completing.

The requirement is part of IRS rules issued recently to implement sections of the Genetic Information Nondiscrimination Act of 2008, which was signed into law May 21, 2008, and takes effect November 21, 2009.

Under the rules, employers are prohibited from collecting genetic information—defined as family medical history—in health risk assessments if that information will be used for “underwriting” purposes, which includes offering employees discounts on their monthly premium contributions or lowering deductibles for completing an HRA.

However, employer-sponsored group health plans still may collect such information after enrollment has closed, while providing medical treatment or in determining claims payment.

Employers could be fined at least \$2,500 for failure to comply with the act’s regulations, according to the rules. The maximum penalty for unintentional violations is capped at 10 percent of the amount paid by the employer for its group health plan during the prior year or \$500,000, whichever is less. There is no cap for violations resulting from willful neglect or intentional misconduct.

These interim final rules apply to group health plans with plan years beginning on or after December 7. The IRS is accepting comments on the new rules, as well as any requests for a public hearing, until January 5, 2010.

Because the rules were issued recently, benefit consultants and wellness program providers say they rapidly started working with employers that have begun or are about to begin open enrollment to ensure they will be in compliance.

“We’re telling employers to assess what information they’re collecting and how it’s being used, see what actions their HRA administrator can do—can they remove the questions at this late date?” says Rich Stover, a principal at Buck Consultants in Secaucus, New Jersey.

To ensure employer clients are in compliance, Debi Heck, wellness national practice leader at Aon Consulting in Houston, says she has “been talking with a lot of vendors who have family history questions in their HRAs, and they are quickly changing their tools so that these questions are no longer part of their HRA.”

Gregg Kamas, director of health risk management at broker IMA Financial Group Inc. in Denver, says he is “encouraging our clients to revise the tools they’re using or to revise the method they’re using to incent people to participate” in health risk assessments.

The impact of the new IRS rules could be widespread, benefits experts say, because more employers offer financial incentives to encourage employees to complete health risk assessments, which serve as the entry point for many wellness and disease management programs.

“This is one of the fastest-growing areas in health management strategy,” says Mike Thompson, a principal with PricewaterhouseCoopers in New York. In PwC’s 2009 Health & Well-Being Touchstone Survey of 694 employers, 64 percent said they offered incentives for completing health risk assessments, up from 57 percent last year.

Employers have stepped up the use of incentives because employees are more likely to complete an assessment if there is a reward.

“If employers don’t offer an incentive, maybe 50 percent take the HRA. But if they do, it goes all the way to 80 percent,” says Dr. Raymond Gavery, medical director at eCare Solutions Inc., a wellness program provider.

Moreover, the vast majority of health risk assessments include questions on family medical history because “many diseases are closely related to family medical history,” Gavery says. The Milwaukee-based company uses an algorithm that combines family medical history with personal health risks to generate a health risk score.

But many wellness experts say removing the handful of questions related to family medical history usually included in a health risk assessment will not render them totally ineffective.

“We consciously did not include family medical history because there’s nothing anyone can directly do to modify that,” says Mark Head, chief solutions officer at Viverae Inc., a wellness program provider based in Dallas. “And we know that we would be asking it in the supplemental questionnaire as part of the ongoing wellness program.”

Based on scenarios presented in the IRS rules, the latter step should be allowed, legal experts say.

“It is OK ... to ask these family medical history questions after enrollment, as long as there is no reward for completing the questionnaire,” says Sharon Cohen, group and health care benefits counsel at Watson Wyatt Worldwide in Arlington, Virginia.

In addition, “if it is being used for the provision of medical care or to pay a claim, it should be OK to collect family medical history,” Cohen says.

Some legal experts say it also may be permissible for employers to collect the information as part of fall open enrollment, as long as they do not pay a financial incentive after the 2010 plan year begins.

“Under one interpretation, collecting genetic information in 2009 prior to enrollment ... should still be permitted, as long as it is not used in connection with setting premiums or contributions after the law is effective,” says Amy Bergner, principal in the Washington Resource Group at consultant Mercer.

But other benefits law experts advise employers against collecting family medical history in health risk assessments with or without an incentive.

“Our advice is to be prudent,” says Ed Fensholt, senior vice president and director of compliance services at Lockton Benefit Group, based in Kansas City, Missouri. “We’re not going to advise clients that that’s a good idea.”

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