Center for Health and Wellness Law, LLC

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July/August 2017 Newsletter

What Does the Failed "ACA Repeal and Replace" Effort Mean for Wellness?

With the latest failed attempt to repeal and replace the Affordable Care Act (ACA) or "Obamacare," some in the wellness industry may wonder what that means for the wellness incentive rules. It is important to note that at no time during the legislative process to enact either the House or Senate bills that the ACA incentive rules for group health plan wellness programs were at risk. Congress seemed to leave those rules alone. There was an attempt in March to introduce a separate bill, HR 1313, that would have eliminated most of the wellness rules under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA), but that bill has not moved any closer to becoming law. With talk by Congress moving onto other legislative items such as tax reform, it seems unlikely that HR 1313 will gain any traction anytime soon.

In sum, all the wellness incentive rules we have discussed in the past: ACA, ADA and GINA, are still intact. Please contact the Center for Health and Wellness Law, LLC, if your organization needs help with navigating those and other health and wellness laws to ensure your products and services are compliant.

What to do when Disaster Strikes Your Health Records

Many parts of the U.S. are experiencing extreme weather this summer. Wisconsin for example has been hit with flooding across the state. Other parts of the country may experience tornadoes, severe storms and other natural disasters. This extreme weather raises an important issue for those who work in the health and wellness industry: What do you do if the disaster affects your health records, particularly paper records? Some practitioners keep paper records that can be subject to water damage. Here is some insight.

Federal and state laws require certain records to be maintained for a certain number of years, depending on the type of record. If your organization has a record retention schedule, you should rely on that when determining whether the damaged records will impact the retention schedule. Otherwise, the chart in the following link is a helpful guide for record retention time periods:

http://library.ahima.org/doc?oid=107114#.WWlUn9PyvOR

Health and wellness practitioners should do their best to recover as many records as possible that are still within the retention period. To the extent that you can reconstruct the record from other sources (such as copies that may have been given to others for payment purposes or perhaps even to the patient), you should attempt to do so. Affected organizations may hire

an outside company to help with restoration of records. In that case, you should ensure that there is a HIPAA Business Associate Agreement in place, as HIPAA privacy and security rules still apply even to records that may have been affected by natural disaster. Even though your paper records may be damaged, you should strive to protect the privacy and security of those records. Also under HIPAA privacy rules, patients have the right to access their own records. So, a provider must do what they can to restore damaged records (assuming there are no backup copies) in the event a patient requests access to those records in the future.

That National Archives has some good tips for restoring records affected by water damage:

http://www.loc.gov/preservation/emergprep/dry.html

To the extent that a health and wellness provider is unable to restore or reconstruct the records, the provider should document the date, the information lost, and the event that caused the loss of the health information. The provider should also create a list of patient records lost, recovery efforts undertaken and the outcome of such efforts. That way, if the charts are requested for any reason down the road, the documentation of recovery efforts and loss can be sent in response. The provider should then dispose of the damaged records in accordance with their document destruction policy, which should include shredding so that the information cannot be used to identify patients.

If the provider bills Medicare or Medicaid, those programs may ask for documentation to support requests for reimbursement. That documentation may be part of the damaged records. The Centers for Medicare and Medicaid Services (CMS) has established a process for providers affected by natural disasters to attest that the records were destroyed by a natural disaster. That process is outlined here: https://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/PERM/downloads/PERMLostDocPolicy.pdf and here: https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/downloads/SE0547.pdf.

Frequently Asked Question: I am an employer thinking about offering my employees a telemedicine product, regardless of whether my employees are enrolled in the company group health plan. If I offer the product, will the company need to comply with ERISA, COBRA and ACA benefit rules?

Response: Whether the product will need to comply with ERISA, COBRA and ACA benefit rules depends on whether the offering qualifies as a "group health plan."

ERISA defines "group health plan" as "an employee welfare benefit plan to the extent that the plan provides ***medical care*** and including items and services paid for as medical care to

employees or their dependents directly or through insurance, reimbursement or otherwise." ERISA § 733(a) (emphasis added). An "employee welfare benefit plan," in relevant part, is a plan, fund or program that is ***established or maintained*** by an employer for the purpose of providing participants through the purchase of insurance or otherwise "medical, surgical or hospital care or benefits." ERISA § 3(1) (emphasis added).

ERISA defines "medical care" as amounts paid for:

A. The diagnosis, cure, mitigation, treatment or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body.
B. transportation primarily for and essential to medical care referred to in subparagraph (A).
C. insurance covering medical care referred to in subparagraphs (A) and (B).

ERISA § 733(2).

Thus, there are two relevant components to determine whether a product is a "group health plan": 1) is it established or maintained by an employer; and 2) does it provide "medical care?"

Is the Product Established or Maintained by an Employer?

If an employer pays for or otherwise endorses a product for employees, the government may view the plan as established or maintained by the employer. See e.g., 69 Fed. Reg. 78719,78733 (Dec. 30, 2004). However, if the product is offered to an employer under the following "safe harbor" criteria, the product may not be a group health plan:

1. No contributions are made by the employer;
2. Participation in the program is completely voluntary for employees;
3. The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer; and
4. The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions.

29 CFR § 2510.3-1(j).

Thus, if an employer merely allows a third-party to market its product to employees, and the employees can choose whether to purchase the product, then the product may not be a group

health plan. This would mean that the product would not need to comply with ERISA, COBRA or ACA requirements.

It should be noted that the safe harbor is not a "bright line" rule. Rather, to determine whether an employer truly falls within the safe harbor criteria above, the government would look at the particular facts and circumstances surrounding the extent of the employer's involvement. 69 Fed. Reg. 78719, 78733 (Dec. 30, 2004). Hence, it is possible that an employer who selects a certain plan for employees to consider could be deemed to be involved enough in the plan to make the plan a "group health plan."

Does the Product Provide "Medical Care?"

"Medical care" involves the "diagnosis, cure, mitigation, treatment or prevention of disease." It is possible that a telemedicine product will diagnose and/or treat conditions. Such actions arguably fall within the "diagnosis, cure, mitigation, treatment" portion of the "medical care" definition.

Because it is possible that the product meets both prongs of the definition of "group health plan" (a plan established or maintained by an employer that provides "medical care"), an employer that purchases the product for its employees may need to comply with ERISA, COBRA and ACA requirements applicable to "group health plans." Of course, it is always recommended to check with legal counsel to consider the specifics of your situation. Please contact the Center for Health and Wellness Law, LLC for assistance with these types of questions.

Hurry!! There is Still Room for the One-Day Workplace Wellness Compliance Intensive Training on Monday, August 28, 2017!

Barbara J. Zabawa and JoAnn Eickhoff-Shemek, authors of the book Rule the Rules on Workplace Wellness Programs, will be leading a one-day training on workplace wellness compliance. The learning objectives are:

Objective 1: Attendees will understand basic legal principles and the relationship of law to workplace wellness program compliance. These laws include certification and licensing requirements, mental health laws, particularly as applied to EAP activities, and the need for codes of conduct and standards of practice.

Objective 2: Attendees will be able to identify compliance red flags and requirements when employing incentives in workplace wellness programs. Legal requirements covered include HIPAA, ADA, GINA and tax laws. Attendees will apply concepts in group discussions and problem solving.

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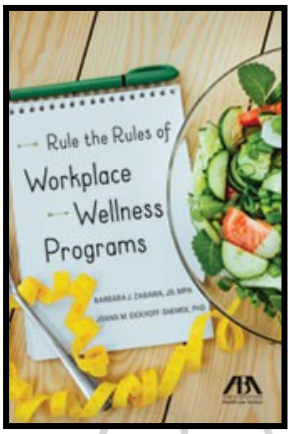
Objective 3: Attendees will be able to address data privacy and other compliance concerns when implementing wellness programs that collect health information. Health data collection laws include HIPAA privacy & security, FTC Act, CLIA, and FDA. Attendees will apply concepts through problem solving and group discussion.

To register for the one-day intensive and the WELCOA 2017 Summit, click here.

Have you ordered Rule the Rules of Workplace Wellness Programs yet?



The first comprehensive book regarding workplace wellness program compliance is now available for purchase. Please fill out the order form and get yours today! Discount is available until the end of December 2017!