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Department of Labor Issues Guidance on Compliance for Wellness Programs and Safe Harbor for Deposit of Employee Contributions

The Department of Labor recently issued guidance on two issues that will help many employers navigate its regulations.

Checklist for Wellness Programs

This guidance will assist any employer who has or is considering implementing a wellness program. The guidance, Field Assistance Bulletin No. 2008-02 (February 14, 2008), provides a checklist-type analysis to assist employers in determining what types of health promotion or disease prevention programs offered by a group health plan must comply with the DOL's wellness program regulations, and what such a program must do to comply with the regulations.

Under the Health Insurance Portability and Accountability Act (HIPAA), a group health plan may not deny an individual eligibility for benefits based on a health factor or charge an individual a premium higher than the premium for a similarly situated individual based on a health factor (including health status or medical condition). However, plans are permitted to vary benefits and premiums or contributions based on whether an individual has met the standards of a wellness program that complies with the final regulations. The checklist provides further guidance on how to comply with the regulations, and is effective for plan years beginning on or after July 1, 2007 (January 1, 2008, for calendar year plans).

Each employer who has or is considering adopting a wellness program should answer the following questions from the Field Assistance Bulletin checklist:

Part A. Does the employer have a wellness program that is required to comply with the DOL's regulations?

1. Is the program a wellness program?

A wellness program is a program to promote health and prevent disease, and may be called many things other than "wellness program." Disease management programs, smoking cessation programs, and case management programs are all wellness programs.

2. Is the program part of a group health plan?

The wellness program is only subject to Part 7 of ERISA if it operates as part of a group health plan and not an employment policy separate from a group health plan.

3. Does the program discriminate based on a health factor?

A program discriminates based on a health factor if it requires an individual to meet a standard related to a health factor in order to receive a reward, such as a discount or rebate of premium or contribution, a waiver of all or part of deductibles, copayments, or coinsurance, or any other benefit that would not otherwise be provided under the plan. If the program does not discriminate based on a health factor, the plan does not maintain a program subject to the wellness program regulations.

4. If the program discriminates based on a health factor, is the program saved by the benign discrimination provisions?

A wellness program may discriminate in favor of an individual based on a health factor. For example, a health

plan may grant participants who have diabetes a waiver of the plan's annual deductible if they enroll in a disease management program. If the program only discriminates in favor of individuals based on a health factor, the program does not have to follow the compliance criteria in Part B of the guidance, summarized below.

Part B. If the employer has a wellness program that is required to comply with the regulations' criteria, it must be able to answer yes to all five of the following criteria:

1. Is the amount of the reward offered under the program limited to 20 percent of the applicable cost of coverage?

The 20 percent limit applies to all wellness programs that require individuals to meet a standard related to a health factor. If a reward is offered under a program that is not based on a standard related to a health factor, such as completing a health risk assessment, the reward is not counted toward the 20 percent limit.

2. Is the wellness program reasonably designed to promote health or prevent disease?
3. Are individuals who are eligible to participate given a chance to qualify at least once per year?
4. Is the reward available to all similarly situated individuals? Does the program offer a reasonable alternative standard?

The program must have a reasonable alternative standard (or permit a waiver of the applicable standard) for receiving the reward for any individual for whom, for that period, it is (a) unreasonably difficult to satisfy the applicable standard due to a medical condition, or (b) medically inadvisable to attempt to satisfy the applicable standard.

5. Does the wellness program disclose the availability of a reasonable alternative in all plan materials describing the program?

The following sample language may be used to satisfy this requirement: "If it is unreasonably difficult due to a medical condition for you to achieve the standards for the reward under this program, call us at [insert telephone number] and we will work with you to develop another way to qualify for the reward."

Proposed Safe Harbor for Deposit of Employee Contributions to Small Plans

On February 29, 2008, the Department of Labor proposed to amend the definition of "plan assets" in the ERISA plan assets regulation to provide a safe harbor for plans with less than 100 participants. Such small plans will be deemed to comply with the plan asset regulation if employee contributions are deposited with the plan by the seventh business day following the day the amount is received by the employer or withheld from pay.

The ERISA plan asset regulation provides that amounts which a participant pays to, or has withheld by, an employer for contribution to an employee pension plan (including 401(k) plans and contributory pension plans) become plan assets for purposes of ERISA and the prohibited transaction rules as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets, but in no event later than the 15th business day of the month following the month in which the contributions are received by the employer or would otherwise have been payable to the participant in cash. This rule has caused uncertainty for plan administrators, and is the leading compliance issue for applications under the DOL's Voluntary Fiduciary Corrections Program.

Under the proposed safe harbor, participant contributions to a pension plan with fewer than 100 participants on the first day of the plan year will be deemed to have been made to the plan on the earliest date on which such contributions could reasonably be segregated from the employer's general assets if such contributions are deposited to the plan by the seventh business day following the day on which the amount was received by the employer or would otherwise have been payable to the participant in cash. The safe harbor will also cover contributions to a welfare benefit plan. Participant contributions will be considered deposited with the plan when they are placed in an account of the plan, without regard to whether they have been allocated to specific participant accounts.

The proposed regulation also clarifies the plan asset regulation to include amounts a participant pays to an employer or has withheld from wages for the repayment of plan loans. Thus, plan loan repayments would become plan assets according to the same rule as participant contributions, and would likewise be included in the seven-day safe harbor for small plans.

The proposed rule will be effective on the date the final regulation is published in the *Federal Register*. Before the effective date, the DOL will not assert a violation of ERISA based on the general plan asset regulation as long as participant contributions or loan repayments to a plan with less than 100 participants are deposited to the plan in accordance with the seven-business-day safe harbor. Accordingly, employers with small plans may rely on the safe harbor now.

The proposed safe harbor does not apply to plans with 100 or more participants. In the preamble to the proposed regulation, the DOL explains that data gathered in its investigations suggest that smaller plans typically need more time than larger plans to segregate participant

contributions from their general assets, and that comments on the need for a safe harbor for larger plans are requested. ❂

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