

Mobile Mental Health Apps: Employers Need to be Mindful of Legal Traps When Offering Telemental Health Benefits

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Employers offer a variety of wellness programs to address issues of stress management, productivity, and the overall health and wellbeing of employees—both in and out of the workplace. In an effort to accommodate employees' desire for flexibility and convenience in accessing health and wellness services, many of these outreach efforts are being provided through mobile technologies.

The marketplace has responded to this need by developing a host of mobile applications that can guide individuals through mindfulness and meditation exercises, provide information and recommendations on health and nutrition, and drive behavior modification. In some cases, these mobile apps can even provide users with direct access—through phone, email chat, or video conferencing—to health coaches and other mental health care professionals, often referred to as telemental health benefits.

A host of legal issues can arise when a mobile health app is offered by an employer to its employees and the app includes access to the services of a licensed therapist or psychiatrist. A threshold issue is whether the telemental health benefit is subject to ERISA as an employer-sponsored health plan. If the mobile health app provides access to mental health counseling services and treatment, i.e. medical care, and those services are funded by the employer, the benefit is likely a group health plan subject to ERISA. To satisfy ERISA's reporting and disclosure requirements and ease COBRA administration, the benefit can be wrapped into the employer's existing medical plan as a participating benefit. However, if an employer offers the telemental health benefit outside of the medical plan to all of its employees, the benefit may be treated as a separate ERISA plan with separate COBRA administration and, if not integrated with a medical plan, may not comply with all of the requirements under the Affordable Care Act (ACA) that apply to group health plans.

Telemental health benefits may also be structured as part of the employer's employee assistance program (EAP). If properly designed, the EAP/telemental health benefit can be carved out of many of the legal requirements applicable to group health plans under the ACA. However, in order to meet this exception, the program would have to meet several requirements, including that it not provide "significant" medical benefits or be coordinated with benefits under another group health plan and employees may not be charged any premiums, contributions, or cost-sharing to participate. Telemental health programs that offer more robust counseling and mental health treatment services will be hard-pressed to meet this exception, thus other benefit design workarounds will need to be explored.

Another concern for employers is how the telemental health benefit integrates with other benefits the employer makes available to its employees, such as Health Savings Accounts (HSAs). Individuals are not eligible to contribute to an HSA, or have contributions made on their behalf, if they are covered under any “disqualifying coverage,” which is generally health coverage that reimburses for expenses under the high deductible health plan (HDHP) deductible and is not otherwise permitted insurance (such as per diem or specific disease or illness coverage) or excepted benefits (such as stand-alone dental or vision benefits and certain employee assistance programs (EAPs)). Employers can avoid this issue by charging employees who are enrolled in the HDHP a fair market value charge for telemental health services until the deductible under their HDHP is met.

Telemental health benefits also implicate HIPAA and other state privacy laws. Employers will need to assess whether the telemental health benefit is a group health plan subject to HIPAA (which may require a business associate agreement with the telemental health vendor) and whether licensed therapists and psychiatrists providing services through the app have any legal obligations under HIPAA or more stringent state laws that apply to mental health records or the provision of services via electronic means. For example, many states require that providers obtain informed consent from patients before administering telehealth services.

Finally, employers need to address certain legal issues in the licensing and services agreement with telemental health providers, such as corporate practice of medicine, provider licensing requirements, compliance with state telehealth and privacy laws, restrictions on on-line prescribing of medication, insurance, indemnification, data privacy and security, and disclaimer of employer liability for clinical advice rendered via the mobile application.

Promotion of mental and behavioral health is an important part of an employer’s approach to the general productivity, health, and well-being of its workforce. In adopting emerging technologies to address these needs, employers should take care to ensure that legal requirements are met and contractual protections are in place.

For more information, contact the author or a member of the Winston & Strawn Employee Benefits Practice.

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