FAQ on Senate HIPAA Provisions on Financial Incentives

(The Patient Protection and Affordable Care Act, H.R. 3590, Section 2705)

Q. ***Do the HIPAA financial incentives provisions in the Senate bill impose any restrictions on programs that simply require participation in a wellness program?***

A. Under current federal regulations, there are virtually no limitations on employers who want to provide rewards or penalties to employees based solely on participation in worksite wellness programs and the Senate provisions do not alter this.[1] The only change to current federal regulations provided for in the Senate language concern programs that are based on the achievement of a specific health status target (e.g., maintaining a certain BMI). The Senate bill would increase the currently allowed amount an employee can be rewarded or penalized for meeting a health status standard from 20% to as much as 50% of the total cost of the employee's health coverage.

Q. ***What's the harm in giving people larger financial incentives for losing weight, quitting tobacco use, or getting their cholesterol, blood sugar, or high blood pressure under control? How would such rewards or penalties create financial hardships for those who don't meet the standards?***

A. Under current HIPAA regulations and the proposed provisions in the Senate bill, discounts paid to healthy employees can be financed through penalties or surcharges on those who are less healthy. This is contrary to other provisions in health care reform that strive to abolish insurance discrimination based on health status. These surcharges and penalties can be steep – making coverage unaffordable to those most vulnerable, including low income individuals or older Americans who already face cost differences related to their age. And there is limited independently evaluated or peer reviewed research that shows that varying health insurance premiums or deductibles has an impact on health outcomes. There is, however, abundant research indicating that patients are less able to manage chronic conditions such as hypertension or diabetes when their costs related to insurance coverage are too high.[2,3,4]

Current regulations allow employers to vary the costs of coverage by 20 percent of the total cost of the employee's coverage for programs that require participants to meet a certain health standard. This regulation has been in effect since 2006. The rationale for holding the variation at 20 percent as stated by the Departments of Labor, Treasury, and Health and Human Services in the final rule was that: "The 20 percent limit on the size of the reward in the final regulations allows plans and issuers to maintain flexibility in their ability to design wellness programs, while avoiding rewards or penalties so large as to deny coverage or create too heavy a financial penalty on individuals who do not satisfy an initial wellness program standard that is related to a health factor."[5]

Concerns were expressed when the regulations were created about the real potential for cost shifting from healthy to sick employees and from employers to employees. Comments and explanations that accompanied the final rule noted that: "Possible outcomes include a shifting of costs to plan sponsors from participants who satisfy wellness program standards, from plan sponsors to participants who do not satisfy the standards, from participants who satisfy the standards to those who do not, or some combination of these."[6] Clearly there were concerns then that penalties or rewards greater than 20 percent would result in significant financial burden and denial of coverage – concerns that are just as valid today.

A fundamental and near universally held goal and belief is that health care reform should give all Americans access to quality, affordable health care, regardless of pre-existing conditions. Penalizing workers who do not meet certain health targets by charging them higher premiums perpetuates the status quo by making health coverage unaffordable for those who need it most.

Q. ***How much would the premium variation be for the average individual or family?***

A. The percentages apply to both the costs of coverage paid by employer and employee – so in reality it is a significant dollar amount, especially for those with limited incomes. The table below shows the average costs of coverage in 2009 and the amount of the discount or penalty that could be charged for individuals and families.

HIPAA Premium Variation Under 20%, 30% and 50% Scenarios				
	Total Cost of Employer Sponsored Coverage	Amount of Incentive/Penalty		
		20%	30%	50%
Individual	$4,824	$965	$1,447	$2,412
Family	$13,375	$2,675	$4,013	$6,688

Source: Average premiums as paid by employer and employee for family coverage in 2009 based on Kaiser/HRET annual survey of health plans.

Current regulations allow companies to vary costs by $2,675 based on the average family coverage. The Senate bill takes that percentage up to 30 percent – or $4,013 for the average family coverage and potentially up to 50 percent, which would total $6,688.

Q. ***But aren't these workplace programs completely voluntary?***

A. Both outcomes-based and participation-based programs must be "voluntary," but nonparticipation or failure to meet outcomes can result in paying much higher premiums under both types of programs. So, practically speaking, opting out can result in employees paying much more for their health care or not being able to afford it all. According to the EEOC's *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees*, a wellness program is only considered "voluntary" if the employer neither requires participation nor penalizes employees for non-participation in the program.[7]

Q. ***Aren't financial incentives a proven way to change behavior and reduce health care costs?***

A. In a comprehensive analysis of financial incentives to encourage healthy behaviors commissioned by the Agency for Health Care Research and Quality (AHRQ), Dudley and colleagues found that by far the most widely studied areas are programs related to incentives to quit smoking or lose weight.[8] In studies of such programs, the report found that the impact of smoking cessation and weight loss incentives has been small. Although they do boost participation, according to the report, they usually have little lasting impact on actual smoking cessation rates or weight loss. The authors suggest that the more effective approach may be to empower lifestyle changes for those employees who are the most interested in participating by reducing barriers and making programs readily accessible.

Q. ***Doesn't the law set strict standards for the kinds of workplace wellness programs they offer to employees? Do the programs have to be evidence-based or reflect best practices?***

A. The provisions in the Senate bill and the current regulations set a minimal standard for what constitutes a "reasonably designed" worksite wellness program. The three agencies that set the standard intended it

"to be an easy standard to satisfy."[9] In addition, there does not need to be a scientific record that the method promotes wellness to satisfy the standard. For example, the regulations state that the plan or issuer could satisfy this standard by providing rewards to individuals who participated in a course of aromatherapy.[10]

In addition, the Senate bill also creates a demonstration program that would extend this practice to the individual market where there is no employee/employer relationship. This is a workplace wellness program without a workplace in which to provide any means to improve health. In this context, wellness "programs" can be little more than bare premium adjustments based on health status, which are indistinguishable from medical underwriting.

Q. ***Doesn't the Senate language require employers to offer an alternative standard for obtaining the reward or avoiding the penalty for employees who may find it difficult to meet the standard?***

A. The Senate language and current federal regulations allow alternative standards or the waiver of standards only for individuals with a "medical condition" that makes it unreasonably difficult or medically inadvisable to attempt to meet the target (no definition of the term "medical condition" is provided). However, employees can be required to provide verification of their condition. This requirement raises significant and legitimate concerns for those who would prefer not to share their personal health records, or those of their family, with anyone other than their primary care physician. In addition, there is no allowance for those who face barriers to participation for non-medical reasons – such as a second job or family responsibilities.

Q. ***Will these programs have a disproportionate impact on low income or minority workers?***

A. Low-income individuals are at a disadvantage when employers tie the cost of insurance to the ability to meet certain health targets because they are more likely to have the health conditions wellness programs target and face more difficult barriers to healthy living. These barriers may be work-related including higher levels of job stress, job insecurity, long working hours, work scheduling issues, and shift work. Or, just as likely, the barriers are outside of work, rooted in employees' daily lives, including unsafe neighborhoods, lack of access to healthy foods, financial burdens, or lack of time to exercise.[11,12] Racial and ethnic minorities, low income, or less educated employees will also be disproportionately impacted because they suffer higher rates of hypertension, high cholesterol, diabetes, and other risk factors.

Q. ***Are your organizations opposed to all forms of workplace wellness programs?***

A. Our organizations have long advocated for comprehensive workplace wellness initiatives as an important means of addressing the increasing prevalence of chronic disease and escalating health care costs in the United States. We believe that it is essential that these programs address the needs of all employees regardless of gender, age, ethnicity, culture or physical or intellectual capacity. Worksites can offer a wide array of health promotion services that are considered best practices, such as easy access to smoking cessation programs, fitness centers, weight loss programs and exercise classes on-site in addition to time off during the work day to exercise. Wellness programs should also include modifications to the worksite environment that promote healthy eating and physical activity throughout the day.

The most significant barrier that employees note for not engaging in healthy lifestyle behaviors are lack of time to exercise before, during, and after work; and lack of convenience and location of programs, screenings and exercise facilities. The Senate bill does nothing to address these barriers.

Q. ***Are there workplace wellness provisions in the House and Senate bills that you do support?***

A. Our organizations support Section 112 in the Affordable Health Care for America Act (H.R. 3962) that provides financial incentives to small employers that offer comprehensive, evidence-based workplace wellness programs. There is strong evidence that evidence based comprehensive programs produce a return on investment for employers and employees.[13] We also support Section 3143 of the same bill that provides support for research on providing incentives for proven healthy behaviors and for the inclusion of effective incentive programs in the essential benefits package or in community prevention and wellness programs. In the Patient Protection and Affordable Care Act (H.R. 3590) we support section 4304 that calls for a study to evaluate best employer-based wellness practices and provides for an educational campaign and technical assistance to promote the benefits of worksite health promotion to employers. Our hope is that the evolving evidence-base on these programs will shape future public policy and employee incentives program design.

Q. ***I work out and take care of my health. Why should I pay more for my health insurance because of those who make no attempt to watch what they eat?***

A. Americans should be encouraged to take care of their health, and our organizations and others promote a healthy diet and an active lifestyle and comprehensive worksite programs that make these lifestyle behaviors possible. However, the causes of obesity, hypertension, and high cholesterol are many, and vary between individuals. For instance, genetic predisposition is an important factor in many conditions. Therefore, penalizing individuals for their risk factors sometimes means penalizing them for their genetic makeup which is beyond their control. Even health factors that are theoretically controllable in the best of circumstances may be vastly more difficult to control for those who are: (1) low income; (2) working more than one job; (3) working parents; (4) dealing with chronic mental or physical conditions; or (5) caring for sick parents, children or other family members. There are also important environmental influences that may impose barriers to healthy lifestyles. For example, living in a neighborhood with poor public transportation, no safe walking or other exercise areas, and a food supply dominated by fast-food outlets and/or high-priced convenience stores creates significant barriers to healthy living.

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