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April 21, 2009

## **Federal Constraints on Healthy Behavior and Wellness Programs: The Missing Link in Health Care Reform**

### *Executive Summary*

- America faces health challenges that go far beyond health insurance reform. Helping people lead healthier lives is central to controlling the cost of health care for everyone—not just the unhealthy.
- In order to bring health care costs under control, America needs to take action to control the chronic disease and obesity epidemic in our country. According to the Centers for Disease Control (CDC), medical care costs of people with chronic diseases account for more than 75 percent of the nation's \$2 trillion in medical care costs.
- Employers provide health insurance to the vast majority of Americans, and they have taken the lead in implementing healthy behavior and wellness initiatives to help their employees take control of their health. The results are a more productive workforce and lower health care costs for employees and for businesses alike.
- Employers trying to do the right thing by setting up workplace programs to motivate healthy behavior and increase wellness currently have to navigate a maze of obstacles set up by the federal government.
- Federal laws like the Health Insurance Portability and Accountability Act (HIPAA), the Americans with Disabilities Act (ADA), the Employee Retirement Income Security Act (ERISA), the Consolidated Omnibus Budget Reconciliation Act (COBRA), federal tax law, and possibly the Genetic Information Nondiscrimination Act (GINA) make it more difficult for companies to implement the most effective programs.
- Greater participation in healthy behavior and wellness programs by employees and their family members could be encouraged by clarifying or revising the legal and regulatory restrictions that apply to these programs. This would be an important step towards controlling the epidemic of obesity and chronic disease in the country.

## **Introduction**

America faces health challenges that go far beyond health insurance reform. Helping people lead healthier lives is central to controlling the cost of health care for everyone—not just the unhealthy. Largely manageable or preventable chronic diseases, such as asthma, cancer, diabetes, and heart disease, are the leading causes of death and disability in the United States and account for the vast majority of health care spending.<sup>1</sup> In order to bring health care costs under control, America needs to take action to control the chronic disease and obesity epidemic in our country.

Unlike most viral infections, many chronic diseases are often aggravated by unhealthy behaviors that can be reformed with the right incentives. Employers provide health insurance to the vast majority of Americans, and they have taken the lead in implementing wellness initiatives to help their employees take control of their health. Companies as diverse as Safeway and IBM have implemented programs focused on weight loss, smoking cessation, and lifestyle-based management of diseases like diabetes. The results are a more productive workforce and lower health care costs for employees and for businesses alike.

However, employers trying to do the right thing by setting up workplace programs to motivate healthy behavior and increase wellness currently have to navigate a maze of obstacles set up by the federal government. Federal laws like the Health Insurance Portability and Accountability Act (HIPAA), the Americans with Disabilities Act (ADA), the Employee Retirement Income Security Act (ERISA), the Consolidated Omnibus Budget Reconciliation Act (COBRA), federal tax law, and possibly the Genetic Information Nondiscrimination Act (GINA) make it more difficult for companies to implement the most effective programs.

In order to address the epidemic of obesity and chronic disease, businesses need more flexibility in establishing programs to motivate healthy behavior and increase wellness. The government needs to provide more flexibility to employers to provide incentives for their employees to take control of their health without fear of legal action by federal agencies. Additionally, Medicare and Medicaid should become models for best practices and implement healthy behavior and wellness programs for their populations.

## **The Cost of Chronic Disease**

Statistics from the Centers for Disease Control (CDC) demonstrate the central role that chronic diseases play in driving up health care costs in our country.<sup>2</sup>

- The medical care costs of people with chronic diseases account for more than 75 percent of the nation's \$2 trillion in medical care costs.
- The direct and indirect cost of diabetes is \$174 billion a year.

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<sup>1</sup> Partnership to Fight Chronic Disease, Program Overview, available at: [www.fightchronicdisease.org/news/documents/Overview\\_Updated10-5.doc](http://www.fightchronicdisease.org/news/documents/Overview_Updated10-5.doc)

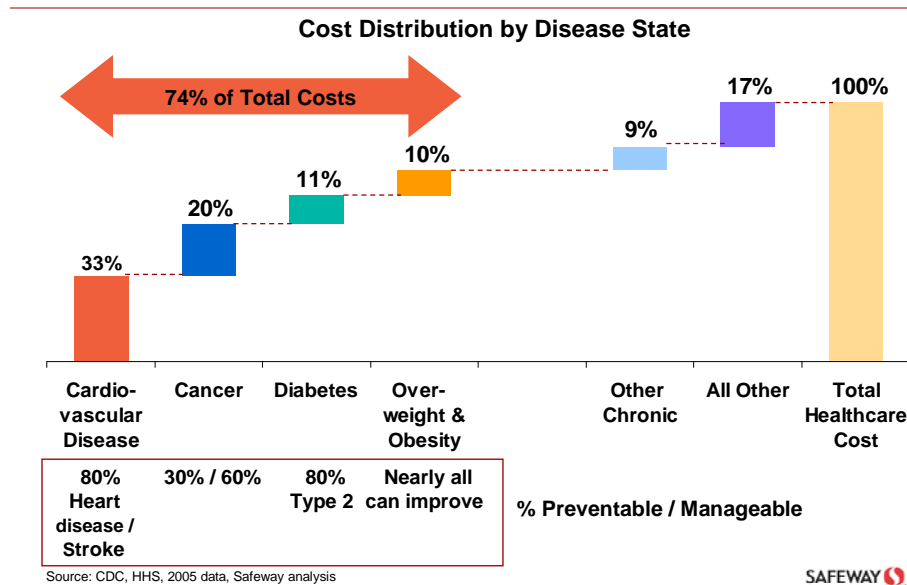
<sup>2</sup> Statistics available at: <http://www.cdc.gov/NCCdphp/overview.htm>

- The estimated direct and indirect costs associated with smoking exceed \$193 billion annually.
- Thirty-four percent of U.S. adults 20 years of age and older—over 72 million people—are obese.
- The estimated total cost of obesity was nearly \$117 billion in 2000.
- The percentage of young people who are obese has approximately tripled since 1980.

### The Example of Safeway

Like all major employers, increasing health care costs year after year posed a major challenge to Safeway and its bottom line. Under the leadership of CEO Steve Burd, Safeway undertook a comprehensive review of what was actually driving those costs. They found that 70 percent of their health care costs were driven by behavior.<sup>3</sup> Four chronic conditions (cardiovascular disease, cancer, diabetes, and obesity) accounted for 74 percent of health care costs, and obesity was a major factor in all four chronic conditions.<sup>4</sup> As a result, Safeway started its optional “Healthy Measures” program that gives employees a reduction in their insurance premiums if they meet benchmarks on four common medical risk factors—smoking, obesity, blood pressure, and cholesterol. Those who do not meet the benchmarks initially can earn their discount by making improvements on the benchmarks they did not meet.

### Four Chronic Conditions Comprise 74% of Costs



<sup>3</sup> Safeway, “Health Care Solutions that Work,” Presentation to the World Healthcare Congress, April 14, 2009.

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The company instituted additional measures to help employees take control of their health. These include a free fitness center and a cafeteria that promotes healthier options by posting information about calories, cholesterol, and fiber—and subsidizing the healthy options rather than the unhealthy choices. Safeway also adopted a consumer-directed insurance model that gives employees more incentive to control their health care spending. The Market-Based Health Care program provides a Health Reimbursement Account (HRA) for which Safeway provides the first \$1,000 of annual health care coverage, the employee covers the next \$1,000, and the company pays 80 percent of any additional costs until the employee reaches the out-of-pocket limit (which is \$4,000). Safeway covers 100 percent of costs over the out-of-pocket limit. Preventative care is fully covered. Safeway data shows that they have reduced health care costs by more than 30 percent over three years by implementing these comprehensive programs. While Safeway has been successful in beginning to control costs, legal obstacles stand in the way of building on what is working and providing even more incentives for healthy behaviors.

### **Federal Laws Create Barriers to More Effective Wellness Programs**

Despite the success of wellness programs demonstrated by Safeway and others, an assortment of federal laws limits employers' ability to improve and expand these programs. While the government should be doing everything it can to encourage better health, many federal laws actually limit the ability of businesses to implement certain effective wellness programs.

Consider the following wellness program that a hypothetical employer might implement. An employer offers a health insurance plan with a \$1,000 per month insurance premium for a family. New hires must undergo a fitness evaluation to determine how healthy they are and what they can do to improve. As part of its wellness program, the employer will give \$250 per month off the cost of the health insurance premium if the employee meets a body mass index (BMI) target. As part of the wellness program, employees are encouraged to stop smoking, and they are given an IPOD at the end of the year if they can prove that they have gone smoke free. To encourage employees to take care of any illness, an on-site health clinic is provided that offers free care.

This may seem like a model program, but it is a model that would not be allowed under federal law. Below is a brief explanation of some of the potential legal obstacles.<sup>5</sup>

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<sup>5</sup> This list is designed to be illustrative rather than comprehensive, and the explanations provide only a brief description of the regulatory obstacles that these laws create. In addition, employers also need to consider the impact of state laws (for example, state laws that protect the ability of workers to smoke), the Age Discrimination in Employment Act (ADEA) (which prohibits discrimination against those age 40 or older), and Title VII of the Civil Rights Act (which protects against discrimination based on race and gender and which may be triggered by certain health standards—for example, women typically have a higher BMI than men so a uniform standard for both sexes could invite scrutiny). See Susan Relland, "Legal Compliance for Wellness Programs," *Employee Benefit Plan Review*, March 2008.

- ADA:

One of the impediments to effective wellness programs most frequently cited by employers is the fear of lawsuits under the ADA. While intended to protect the disabled, the ADA has been distorted to protect unhealthy lifestyles that cause chronic disease. The ADA also leaves employers with significant uncertainty as to what is permitted.

The ADA limits an employer's ability to make disability-related inquiries or require medical examinations before, during, or after employment. However, guidance issued by the Equal Employment Opportunity Commission (EEOC) permits examinations of employees that are part of a voluntary wellness or health screening program.<sup>6</sup> A wellness program is "voluntary" as long as an employer neither *requires* participation *nor penalizes* employees who do not participate.<sup>7</sup> The EEOC indicated in separate guidance that employers could violate the ADA if they required employees who did not cooperate with disease management programs to pay higher premiums or deductibles. The EEOC said that such triggers could "amount to penalties for non-participation within the meaning of the EEOC guidance, thus rendering participation in the program involuntary."<sup>8</sup> This guidance is problematic because it allows employees to avoid a basic health screening that would provide critical information about their health without any showing that the information would be used for a discriminatory purpose.

Interpreting the ADA to prevent mandatory health screenings can harm those individuals who are most in need of a health assessment and disease management assistance. It also drives up the cost of health care for all of those insured under the employers' health plan. This cannot be the intent of the ADA. These interpretations should be clarified to allow employers to require participation in wellness screenings and disease management programs so long as the information obtained is not used as a basis for hiring or firing decisions.

- HIPAA:

HIPAA prevents an individual from being denied eligibility for benefits or charged more for coverage, including premiums, deductibles, or other cost sharing, because of a health factor. The Department of Labor issued guidelines clarifying that programs that do not require satisfying a standard related to a health factor (e.g. reimbursing for a gym membership, rewarding employees for attending a health education seminar, waving co-payments for prenatal care) are permitted. However, if the healthy behavior and wellness program ties a reward to meeting a standard related to a health factor (e.g. a BMI target), much more scrutiny is involved. Among other requirements, the total reward for all standard-based programs combined cannot exceed 20 percent of the cost of the total (employer plus employee) premium under the health

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<sup>6</sup> EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, September 27, 2000. Available at: <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>

<sup>7</sup> EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, September 27, 2000.

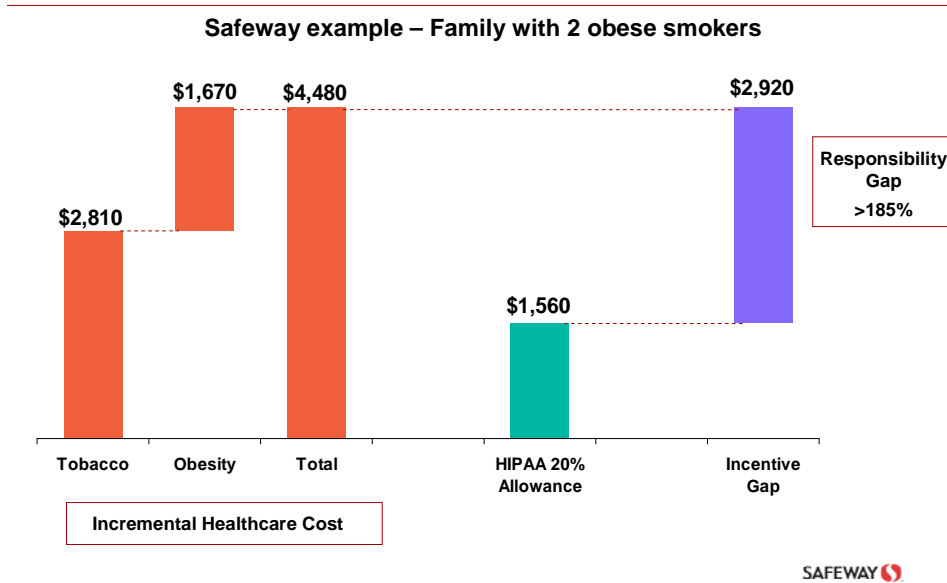
<sup>8</sup> Questions for the EEOC Staff for the 2006 Joint Committee of Employee Benefits Technical Session, May 4, 2006. Available at: <http://www.abanet.org/jceb/2006/EEOC2006final.pdf>

care plan.<sup>9</sup> This means that for a health care plan with a \$10,000 total premium for a family, the incentives provided in the healthy behavior and wellness program cannot exceed \$2,000.

Employers frequently argue that they need more express authority to provide sufficient incentives for their employees to participate in programs that call for adopting healthy behaviors and achieving improved wellness. For example, a healthy behavior and wellness program could violate HIPAA if it provided a 15 percent reduction in premiums for meeting a BMI target and a 15 percent reduction for not smoking.

Economists who have studied health policy, including President Obama’s Office of Management and Budget Director Peter Orszag, believe that incentives are essential to encouraging people to meet health goals.<sup>10</sup> Moreover, numbers from Safeway show that the incentives permitted by HIPAA are insufficient to account for the incremental costs related to the unhealthy behaviors that employers are trying to dis-incentivize. Cost estimates from Safeway show that under its health plan the additional cost to insure a family with two overweight smokers is \$4,480, but HIPAA only allows incentives of \$1,560. If we are going to be able to control health care costs and address the chronic disease epidemic, the HIPAA allowance for healthy behavior has to be increased to more closely reflect the actual cost of insuring people who refuse to take responsibility for unhealthy lifestyles and behaviors.

## HIPAA Incentive Allowance is Insufficient



<sup>9</sup> United States Department of Labor, Field Assistance Bulletin No. 2008-02, Wellness Program Analysis, Feb. 14, 2008. Employers must also provide participants with an alternative standard if they cannot meet the target due to health reasons.

<sup>10</sup> See Congressional Budget Office, “Health Care and Behavioral Economics,” May 29, 2008.

- IRS Rules:

Incentives provided by wellness programs may trigger tax implications for employees. The IRS provides that certain wellness benefits can be provided tax free, including reduced deductibles for health insurance premiums and free or subsidized access to gym facilities.<sup>11</sup> However, other common benefits tied to achieving wellness goals remain taxable to the employee. These include cash or cash equivalents (like gift cards), an IPOD or similar prizes, airline points, or trips.<sup>12</sup> Employees are unlikely to anticipate that these benefits are taxable to them, and the tax penalty will diminish the value of these rewards and the incentive that they provide.

- ERISA:

ERISA covers “employee welfare benefit plans,” which includes a program established by an employer to provide medical care. Wellness plans that make recommendations regarding health activities or that engage in disease management activities may qualify. An on-site wellness clinic could also be considered an employee benefit subject to ERISA. These wellness programs may therefore be subject to ERISA reporting obligations and add to the compliance cost of the programs.

- COBRA:

As with ERISA, COBRA may be implicated when an employer establishes an on-site wellness clinic for its employees. If COBRA does apply, employers may need to give former employees physical access to the on-site clinic. This could be problematic when the employer would not want former employees to have access to the employment site, such as with government contractors with access to sensitive information.

## **Conclusion: Areas for Reform**

Greater participation in healthy behavior and wellness programs by employees and their family members could be encouraged by clarifying or revising the legal and regulatory restrictions that apply to these programs. It should be noted that none of these changes would alter protections for those with genetic conditions or pre-existing conditions. These approaches could include:

- Providing more flexibility under HIPAA for employers to reward employees who meet behavior and wellness targets. The limits should at least allow employees to benefit from the actual cost savings to their health insurance that the employee generates by meeting targets.

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<sup>11</sup> Susan Relland, “Legal Compliance for Wellness Programs,” *Employee Benefit Plan Review*, March 2008.

<sup>12</sup> Susan Relland, “Legal Compliance for Wellness Programs,” *Employee Benefit Plan Review*, March 2008.

- Encouraging employees to participate in health risk assessments and wellness programs by allowing employers to make participation mandatory. Employers should be allowed to require participation in a risk assessment or, at a minimum, to require that employees engage in wellness program follow-up. Again, there should not be any rewards or penalties based on genetics or pre-existing conditions. The incentives should only be targeted at behaviors individuals can influence or control.
- Clarifying tax rules to make clear that any incentives provided in connection with wellness programs are not taxable income.
- The federal government should take the lead in demonstrating what works in healthy behavior and wellness programs by implementing them for federal employees. Many states have taken the lead in trying wellness programs.<sup>13</sup> The federal government should follow their lead by becoming a model of best practices to prove concepts developed in the private sector and to encourage innovative ideas. Employers should then be able to replicate these approaches without fear of legal penalties.

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RPC Staff Contact: Andy Chasin, 224-2769

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<sup>13</sup> For example, Alabama will charge employees who do not take a health assessment and take steps to start losing weight. If the screenings turn up serious problems with blood pressure, cholesterol, glucose, or obesity, employees will have a year to see a doctor at no cost, enroll in a wellness program, or take steps on their own to improve their health. If they show progress in a follow-up screening, they won't be charged. But if they do not, they must pay starting in January 2011. National Conference of State Legislators, "State Employee Health Benefits," March 31, 2009.