



January 24, 2013

Department of the Treasury
Internal Revenue Service

Department of Labor
Employee Benefits Security Administration

Department of Health and Human Services

Re: Docket ID: ESBA-2012-0031 “Wellness Programs”
Incentives for Nondiscriminatory Wellness Programs in Group Health Plans

Introduction

The Rudd Center for Food Policy & Obesity at Yale University (the leading research institution and clearinghouse for resources that add to our understanding of the complex forces affecting how we eat, how we stigmatize overweight and obese people, and how we can change), The Obesity Society (the leading scientific society dedicated to the study of obesity), the Obesity Action Coalition (the only nonprofit whose sole focusing is representing individuals affected by obesity), the American Society for Metabolic and Bariatric Surgery (the largest non-profit medical organization in the world dedicated to metabolic and bariatric surgery) the Academy of Nutrition and Dietetics (the world's largest organization of food and nutrition professionals), Mental Health America (the leading advocacy organization addressing the full spectrum of mental and substance use conditions and their effects nationwide), and the American Institute for Cancer Research (the leading authority on the impact of diet, physical activity and weight on cancer risk) respond to the request for comments in the Federal Register Volume 77, Number 227, dated November 26, 2012, concerning proposed amendments to regulations consistent with the Affordable Care Act regarding nondiscriminatory wellness programs in group health coverage.

We urge the government to put in place clear legal protections against wellness plans penalizing employees in order to ensure that individuals affected by excess weight or obesity are not stigmatized or discriminated against because of their weight.

Increasing numbers of employers are implementing financial incentives for employees to lose weight. While the inclusion of obesity-related approaches in wellness programs that encourage healthful behavior is important, many of the specific approaches are objectionable. We recommend that wellness programs that use incentives to motivate employee health-behavior focus on encouraging employee health behaviors themselves, and eliminate the emphasis on physical markers such as body mass index (BMI).

Statement of the Problem and Supporting Studies

Many companies are facing increasing health insurance premiums because of potential health risks among employees affected by obesity. As a result of these rising health care costs, some employers have

begun to implement financial incentives to employees who can keep their body weight in a healthy range.¹ Other companies are imposing financial penalties such as charging overweight employees more in health care costs. As an example, Alabama has passed regulations in its state employees health plan which impose a surcharge on employees who have a BMI over 30 kg/m², and North Carolina's state employees health plan will soon deny access to the more generous coverage options if the employee's BMI exceeds certain limits.^{2,3} Other states are contemplating similar measures.⁴ Currently, as many as one-third of employers plan to offer financial incentive programs for the stated purpose of encouraging employees to reduce their BMI or to improve other biometric markers of health.⁵ These approaches are particularly distressing given that there is little evidence supporting the effectiveness of employer BMI and other biometric-based incentives on actually producing sustainable weight loss or lowering healthcare costs.⁶⁻⁸

First, applying financial penalties for obesity penalizes a condition that is not easily modified, while bypassing approaches aimed at directly modifiable approaches. BMI, and other biometric markers of health such as blood pressure and cholesterol, are influenced by genetics and environmental determinants that do not have equal effects across our population.⁹ Penalizing individuals with a BMI of 30+ ignores the complex genetic and environmental contributors of body weight that are largely beyond personal control. For example, in the case of people with mental health conditions, the medications they often take to address one illness can be a large contributor to another – obesity, as illustrated by the significant evidence regarding weight gain associated with anti-psychotics and mood stabilizing medications. Although it cannot be disputed that taking personal responsibility for health is necessary for the successful management of most chronic health conditions (e.g., hypertension, diabetes), it is also evident that personal responsibility alone is insufficient for the management of these conditions.

Second, imposing financial penalties based on body weight alone incorrectly assumes that all individuals should have a BMI less than 30 in order to be healthy. There are many individuals who are not overweight (e.g., with a BMI in the 'normal' weight range) who have chronic health conditions such as hypertension, hyperlipidemia, diabetes, or engage in other health risk behaviors. Conversely, there are people who are overweight who are in good health, have healthy nutrition and activity habits, and whose blood pressure and cholesterol are in the healthy range.¹⁰⁻¹²

Third, substantial scientific evidence indicates that it is unreasonable for employers to expect their employees to lose large amounts of weight and maintain significant weight loss over time, even with intensive treatment options.¹³⁻¹⁴ This means that many people who have a BMI over 30 will be unable to achieve or maintain a BMI of 30 despite legitimate efforts to do so. Among individuals who have a BMI greater than 35, even if they were able to initially reduce their body weight to a BMI under 30, biological factors make weight loss maintenance at that level unlikely.¹⁵⁻¹⁶ Moreover this approach ignores the considerable scientific research showing that small, achievable weight losses of 5-10% can produce important improvements in health, even when BMI is above 30.¹⁵⁻¹⁶ This evidence underscores the importance of focusing on health behaviors rather than absolute BMI levels.

Fourth, in many, if not most, instances, insurance plans do not cover professionally directed treatment for obesity. Imposing added charges for employees affected by obesity in these plans is even worse than simply penalizing them for a pre-existing condition; it is penalizing them for a pre-existing condition whose treatment the plan doesn't even cover.

Fifth, given substantial racial and ethnic disparities in the prevalence of obesity, insurance surcharges on employees affected by obesity will disproportionately target minorities, and incentives based solely on absolute BMI cut-offs will disproportionately be out of the reach of many minorities.

Sixth, employers mandating differential treatment of individuals based on BMI serve to institutionalize the already pervasive stigmatization of obese people. Employees affected by obesity face numerous inequities in the workplace, including barriers to hiring, lower wages, less potential for promotion, unfair job termination, and stigmatization from co-workers and employers.¹⁷ Imposing additional penalties will reinforce stigma and discrimination against individuals affected by obesity.

Finally, employers that enact discriminatory wellness policies may subject themselves to lawsuits pursuant to the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, Title VII of the Civil Rights Act (the provisions against disparate treatment), and the Health Insurance Portability and Accountability Act.¹⁸ By enacting legal protections for employees against penalized wellness plans, the proposed regulations can mitigate such legal actions.

Conclusion

We appreciate the attention that is currently being paid to excessive weight gain, and this opportunity to comment on these important issues. Much of this attention, however, has been focused in a manner that increases bias rather than increasing health. As such, we urge the government to put in place incentives for positive programs and also clearly impose legal protections against wellness plans that discriminate against people because of excess weight or obesity.

Based on the extensive research published on weight discrimination from scholars at The Rudd Center; the scientific and professional expertise of The Obesity Society and the American Institute for Cancer Research; and the patient perspective of the Obesity Action Coalition and Mental Health America, the following recommendations are suggested:

- Employer incentive programs should be structured to reward employees for engaging in healthy behaviors, such as taking steps to improve awareness of personal health indices, making measurable changes in health behaviors such as nutrition or exercise, or participating in an evidence-based weight management program.
- Employers should avoid using BMI as a basis for financial penalties or incentives, and should not make determinations about employee health based on body size alone without consideration of additional health indices.
- Health insurance plans should encourage wellness by covering responsible weight loss programs that use evidence-based interventions. Employers who choose to reward weight loss or penalize weight status are testifying to the fact that obesity is a significant medical condition but in so doing are acting in opposition to scientific evidence.
- Employers should position their health initiatives as a goal to achieve overall wellness for all employees, regardless of their body weight and avoid singling out or penalizing overweight and obese employees.
- Employers who offer incentive programs should ensure that they create a supportive workplace environment that provides opportunities for employees to be healthy and practice long-term healthy behaviors (e.g. healthy cafeteria and vending options, gym discounts, attractive stairwells).

Respectfully submitted,

The Rudd Center for Food Policy & Obesity, The Obesity Society, The Obesity Action Coalition,
The American Society for Metabolic and Bariatric Surgery, The Academy of Nutrition and Dietetics,
Mental Health America, and The American Institute for Cancer Research

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