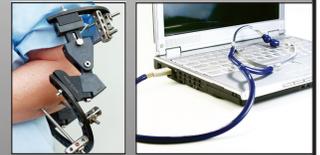


Health Care Law



A SPECIAL REPORT

Employers turn to on-site clinics, but there are legal considerations

BY LORI THAYER OLIPHANT AND CHERYL CAMIN MURRAY

With the passage of health care reform legislation, companies are fervently seeking ways to decrease their health insurance costs. Wellness, disease management and prevention are the buzzwords circulating among employers who want to see results in reducing health care costs.

In particular, on-site clinics are a proposed means of achieving these goals. These clinics are intended to provide cost savings to the employer and complement the employer's wellness, disease-management and preventive-care programs.

Historically, on-site clinics largely dealt with occupational injuries or minor conditions. However, today on-site clinics are designed to offer comprehensive health care services, similar to what one expects during a visit to a primary-care physician or even an urgent-care center or emergency room. The employee can return

to work without the need to travel long distances to a doctor's office — an encouragement to higher participation in such employer-sponsored services.

An employer considering building an on-site clinic should take into consideration many factors, including the legal implications. Depending upon the services provided, the clinic may have to comply with various licensure requirements (e.g., physician licensure, pharmacy licensure and clinical laboratory requirements).

If the clinic accepts Medicare, Medicaid or reimbursement from any government payor, then the clinic will need to ensure that its compensation arrangements and contractual matters comply with various federal regulatory laws. For instance, the Anti-Kickback Statute, 42 U.S.C. 1320a-7b, contains a criminal prohibition against payments in any form made to induce or reward the referral or generation of federal health care program business.

The Stark Law, 42 U.S.C. 1395nn, prohibits referrals by physicians who

have a financial relationship with an entity (for the furnishing of designated health services) for which payment otherwise may be made under Medicare, unless an exception applies. Depending upon the structure of the clinic, these laws may or may not apply. Likewise, from a private-insurance perspective, the clinic will need to negotiate and comply with the terms of various managed care contracts.

STATE LAW CONCERNS

In addition to federal law, there could be state law concerns. Some states have strong corporate-practice-of-medicine doctrines or fee-splitting laws that could pertain to employer-sponsored clinics. The corporate practice of medicine prohibits a lay corporation from employing a physician or controlling a physician's practice of medicine. To avoid a violation of the corporate-practice-of-medicine doctrine, the clinic can independently contract with or hire a nurse practitioner or physician assistant to provide

the majority of the services and, pursuant to an independent-contractor agreement, contract with a physician to oversee these services.

The corporate-practice-of-medicine doctrine (which varies in each state) does not typically apply to nurses and physician assistants, so these individuals may be employed. However, it may be advantageous to maintain an independent-contractor relationship with these professionals, to reduce the likelihood that the clinic will be held vicariously liable for their actions. The clinic may contract directly with these professionals or via a staffing company. However, the clinic may not be able to avoid claims of malpractice, negligence or other forms of liability based on the services provided by these health care professionals.

Operating an on-site clinic also implicates privacy issues the employer needs to consider. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule and Security Rule, 45 C.F.R. parts 160 and 164; and Health Information Technology for Economic and Clinical Health Act, Title 13 of the American Recovery and Reinvestment Act of 2009, contain specific requirements for how health information should be safeguarded and protected by health care providers and health plans, which are referred to as "covered entities." In particular, in order for a health care provider to be a covered entity required to comply with HIPAA, the provider must transmit any health information in electronic form in connection with a transaction covered by HIPAA.

An example of such a HIPAA transaction would be electronically billing insurance claims. Depending upon how the clinic is structured, it most likely will be subject to HIPAA as a covered-entity health care provider (especially if it electronically files insurance claims) and may even be a covered-entity health plan, as explained in more detail below.

In addition to health care laws, an

on-site clinic may implicate a number of employee benefit laws. For example, an on-site clinic that provides services beyond treatment of minor illnesses or injuries to employees, or first aid for workplace injuries, or that permits spouses, dependents or former employees access to the clinic, will constitute an "employee welfare benefit plan" for purposes of the Employee Retirement Income Security Act of 1974 (ERISA). 29 U.S.C. 1002(l).

In short, this means that the employer is required to adopt a written plan describing the services available at the clinic and the costs of those services, and satisfy applicable reporting and disclosure requirements, as well as fiduciary responsibility rules. Similarly, an on-site clinic that provides comprehensive medical services will be a "group health plan" subject to the continuation-coverage requirements under the Consolidated Omnibus Budget Reconciliation Act of 1985. 26 U.S.C. 4980B.

Currently, however, an on-site clinic appears to qualify as an "excepted benefit" for purposes of the portability, privacy and security requirements prescribed by HIPAA, although some practitioners expect that this will change in the future. Please note, however, as referenced above, that the clinic is likely subject to HIPAA privacy and security requirements in its capacity as a "health care provider."

Finally, the benefits (i.e., the services available at the clinic as well as the amount of reimbursement available for the cost of such services) will constitute a self-insured medical-expense reimbursement plan subject to the nondiscrimination requirements of the Internal Revenue Code of 1986. Failure to satisfy the applicable requirements thereunder can result in adverse tax consequences to the employer's officers and other highly compensated individuals.

On-site clinics are not necessarily the right decision for every employer. Depending on the employer's objectives, an employer with high rates of

absenteeism due to illness, low rates of utilization of preventive-care services and long employee commutes for medical care may benefit from on-site clinics. In addition, an on-site clinic may prove a necessary component of an employer's wellness and disease-management programs, which themselves are intended to manage health care costs and improve long-term employee health.

Due to the financial commitment and legal ramifications of operating an on-site clinic, an employer interested in this alternative definitely should consider consulting with members of its own finance, benefits and legal departments, as well as an outside consultant and attorney. A complete analysis of the employer's existing health care costs and objectives, as well as a feasibility study to determine the cost and scope of the services to be provided at the clinic, are imperative. An attorney experienced in the laws implicated by the on-site clinic can ensure that a company will get the most out of this innovative concept in employee health care..

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