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An Overview of Legal Considerations When Bringing Health Care "In-House"

SPECIAL REPORT

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An Overview of Legal Considerations When Bringing Health Care “In-House”

As employee health care costs continue to climb and the full impact of health care reform looms in 2014, many businesses are searching for alternative solutions to meet their employees’ needs. At the same time, businesses are realizing that more comprehensive approaches to disability and leave management can mitigate compliance and litigation concerns. For these companies, having a health care provider or health clinic on-site, also known as an occupational health clinic, can be an attractive option. While “in-house” health centers are not risk-free, they can, if carefully planned, reduce costs while boosting employee productivity and even morale. This paper discusses some of the benefits of on-site health clinics for both companies and their employees, as well as some of the compliance and other risks associated with such initiatives.

An Introduction to Occupational Health Clinics

According to a July 3, 2011 *L.A. Times* report, 15 percent of U.S. companies with 500 or more employees already have their own health centers (up from 11 percent in 2010); companies with 20,000 or more employees, according to the same report, are even more likely to have on-site clinics.¹

In fact, companies can provide a wide range of services through these on-site health clinics, as described in an article published by Kaiser Health:

Although some workplace clinics aim to function as their employees’ primary-care provider, most clinics supplement rather than replace their workers’ doctors. Some companies operate their own clinics, while others contract with others to do so. Services vary widely, from preventive screenings and nutrition and exercise counseling to routine physicals and disease management services for workers with chronic conditions. Prices for clinic services are usually lower than those at a community-based clinic; sometimes they’re free.²

Terms such as “on-site health clinic” or “occupational health clinic” refer to a wide variety of arrangements that make certain health care services available to employees at the workplace – ranging from a single nurse at a facility to a full-scale clinic staffed with physicians, nurses and others, which provides an array of health services. Whatever their form, workplace clinics could have a number of advantages for companies and their workers. For example, having on-site access to services such as mammograms and blood pressure checks may make it more likely that employees will get the care they need and avoid more costly problems down the road.³ With respect to worker productivity, employees will be back to work sooner if the traffic they fight coming from a doctor’s visit is in the hallway rather than on the highway. These clinics also can

¹ Duke Helfand, [More employers are offering on-site medical clinics](#), L.A. TIMES (July 3, 2011).

² Michelle Andrews, [Many On-The-Job Clinics Offer Primary Care](#), KAISER HEALTH NEWS (May 2011).

³ *Id.*

help reduce workers' compensation costs because the company can treat non-serious injuries on site, potentially reducing not only the overall medical costs of workers' compensation claims, but also the number of reported claims. Finally, wellness programs, which are becoming increasingly popular, generally are operated more effectively and efficiently when served on-site rather than off-site by various unknown providers.

When a company gets into the business of providing on-site health care services for employees, however, there are a number of compliance challenges and risks to consider. Some companies bring in third-party vendors to staff and operate the clinic, which adds a layer of complexity, including the need for a service contract. The service contract itself will need to address a range of issues, including the scope of benefits to be provided; claims determination processes; medical malpractice liability and insurance issues; privacy, storage, security, processing and exchange of medical information; and coordination with other benefit plans. In addition to service contract considerations, some of the more critical issues that companies must address when establishing on-site clinics are discussed below.

Employee Benefits Design and Compliance

Whether a company implements an on-site health clinic to supplement, replace or integrate with its current health plan for employees, it will need to consider the following key issues:

- **ERISA and Benefit Plan Design Issues.** In general, a plan, fund or program that is established or maintained by an employer for the purpose of providing medical, surgical or hospital care or certain other benefits is considered an employee welfare benefit plan, and, more specifically, a group health plan, subject to the Employee Retirement Income Security Act (ERISA). Thus, on-site health clinics that provide medical and mental health services to employees beyond basic first aid are typically considered welfare plans subject to ERISA. This generally means that many of the requirements applicable to the employer's group health insurance plan will apply to the benefits provided through the on-site clinic, such as:
 - Making COBRA continuation coverage available;
 - Furnishing a Summary Plan Description, which describes the benefits provided by the clinic, among other things;
 - Complying with complex claims and appeals procedures in response to adverse benefit determinations;
 - Determining who will be charged with making adverse benefit determinations; and
 - Ensuring the privacy of the health information of employees and their covered dependents receiving services at the clinic.

The on-site health clinic may also affect the company's overall benefit plan design. For example, employees cannot contribute to a health savings account (HSA) if they have medical coverage other than a qualified high-deductible health plan (HDHP). Thus, if the

company sponsors an HDHP/HSA for employees, and also makes the ERISA-covered clinic available to those employees, the employees may not be able to use the HSA option on a tax-favored basis. Employers should keep in mind, however, that employees can still utilize an HSA if the services provided by the clinic are not significant medical benefits, such as providing physicals, immunizations, aspirin and other nonprescription pain relievers, or treatment for worksite injuries.

- **Income Tax Issues.** In general, companies can provide medical benefits to their employees on a tax-free basis. However, just as with traditional group health plans, the services provided by clinics may not be tax-free to employees. For example:
 - Assuming the clinic is considered to be a group health plan, providing benefits in a way that discriminates in favor of highly-compensated individuals as to eligibility or utilization could create adverse income tax consequences for those highly-compensated individuals, and more complicated tax reporting requirements for employers.
 - Some clinics may provide services that are not medically necessary and not within the Tax Code's definition of what is a deductible expense. Such services generally would be taxable to all employees who receive them.

Employee Privacy

One of the biggest concerns with on-site health clinics is how to maintain the privacy and security of "individually identifiable health information" for employees, and possibly the employees' dependents if they are eligible for services. A tension frequently exists between the employer's desire for health information, particularly in a disability or leave situation, and the employee's right or expectation of privacy. This tension is exacerbated where the role of the on-site clinic is not made clear from the outset. Consider the following:

- **HIPAA.** If the clinic meets the requirements for a covered "health care provider" under the Health Insurance Portability and Accountability Act (HIPAA), it will be a "covered entity" subject to HIPAA's privacy and security regulations. This would be the case where the clinic provides health services and exchanges health information electronically in connection with certain covered transactions, such as billing and care coordination. In such situations, the clinic generally would not be permitted to disclose individually identifiable health information to the employer (e.g., human resources), absent an authorization from the employee or some other exception under HIPAA.
- **Occupational Health/Leave Management.** Many employers also utilize their clinics to assist with making leave determinations, fitness-for-duty evaluations and reasonable accommodation assessments. In these situations, the employer often believes it is entitled to receive certain employee health information. This right becomes clouded, however, when the clinic is a covered entity under HIPAA and, as discussed above, the clinic cannot release individually identifiable health information to the employer except as

permitted under HIPAA. (Additional considerations with respect to workplace safety and disability and leave management are discussed below.)

- **GINA.** The Genetic Information Nondiscrimination Act (GINA) places limits on when employers and health plans may acquire “genetic information.” Genetic information for this purpose includes, among other things, information about the manifestation of a disease in an employee’s family member (including the employee’s spouse). Acquiring and maintaining this information will need to be carefully considered for on-site health clinics.

GINA issues can arise, for example, when spouses and dependents are also eligible to receive services at the clinic. By collecting medical information from and about the spouse or the dependent, the clinic arguably would be collecting genetic information because the clinic would have both the employee’s medical information and the employee’s spouse’s medical information. Having certain medical information about the spouse, such as medical history, likely would constitute genetic information with respect to the employee.

- **State Law Privacy and Data Security Requirements.** Even if the HIPAA privacy and security rules do not apply to the on-site health clinic, because it is not a “covered entity,” there may be an applicable state law that requires the clinic (i) to limit uses and disclosures of certain information, (ii) to have reasonable safeguards in place to protect employees’ health information, and/or (iii) to notify individuals of inappropriate access to their information.

Disability, Leave and Health Management

Disability, leave and health management sits at the intersection of various federal and state laws – the ADA Amendments Act, Family and Medical Leave Act, Genetic Information Nondiscrimination Act, Pregnancy Discrimination Act, Age Discrimination in Employment Act and various state laws to name a few. As a result, compliance obligations find their way into nearly all employment or benefit programs designed to address the needs of injured or ill workers. Those include, for example, pre-employment physicals, Family and Medical Leave, short and long-term disability benefits, return-to-work programs, fitness-for-duty evaluations, reasonable accommodation assessments, wellness programs, medical surveillance, drug testing, workers’ compensation and paid sick leave programs. On-site health clinics often are charged with administering or at least supporting such programs. Managing these programs inevitably requires gathering personal and sometimes intimate health and other information about employees (and in some cases their families) and making judgments that often need to be based, in part, on the opinions of experienced medical professionals. This can become even more challenging when the medical professionals are employed by the same company as the employees they are assessing and the employer they are advising. At the same time, having medical professionals or an occupational or similar clinic on-site can be a valuable tool for addressing the complexities of disability, leave and health management.

Employers who decide to provide on-site health clinics should, at the outset, consider the best way to train occupational health professionals on the compliance issues that arise in the programs they administer. They also should take steps to establish a strong working relationship between management and health care providers that allows the two parties to quickly reach sensible and defensible positions concerning leaves and accommodations. It is equally important that the company arrange for an appropriate exchange of information between management and the health care provider. The company also should be mindful of the potential for discrimination and other claims that can stem from the information management possesses (or is deemed to possess) as a result of health services being provided onsite, and by persons in the company's employ.

This process can be challenging. Take, for example, the actions of the in-house physician at a Maine company who disclosed to management an employee's alleged "lie" (or at least significant omission) made months earlier on a post-job offer medical questionnaire. The federal district court in that case held the disclosure violated the Americans with Disabilities Act's confidentiality provisions.⁴ In an earlier case, another company engaged in lengthy litigation with the associate director of its medical department who took the position that her professional ethical standards prevented her from disclosing certain medical information about employees to her at-will employer. New York's highest court held the company may fire its in-house physician for refusing to disclose the information.⁵ In each case, both the employer and provider could have benefitted from a clearer understanding of the provider's role and the purpose of that role: to assist management in making disability and accommodation determinations.

The following general guidelines can help employers with on-site health clinics reduce confusion and legal risk:

- Ensure the provider is aware of the general legal standards that apply under international, federal, state and local disability and leave laws, as applicable;
- Acquaint the provider with the applicable job descriptions and other necessary information to assist him or her in making determinations about fitness-for-duty and accommodations;
- Establish proper lines of communication between the provider and appropriate members of management and reach an understanding as to the nature and scope of information that needs to be made available to management to support appropriate decision making;
- Instruct the provider to avoid creating an inappropriate expectation of privacy with respect to the company's disability and leave management obligations; and
- Provide regular review and training on the items above.

⁴ *Blanco v. Bath Iron Works Corp.*, No. 2:10-cv-00429 (D. Me. July 6, 2011). See also <http://www.workplaceprivacyreport.com/2011/07/articles/ada/inhouse-physicians-disclosure-of-employee-medicalinformation-to-management-violates-ada-court-rules/>.

⁵ *Horn v. New York Times*, 100 N.Y.2d 85 (N.Y. Ct. App. Feb. 25, 2003).

General Risk Management

A critical issue from a risk management perspective for any person or entity delivering health services is medical malpractice. If there is a true medical clinic onsite, with nurses and/or doctors providing services, as opposed to a minor dispensary, the company could find itself vicariously liable for the medical malpractice of the practitioners. Of course, there are strategies to minimize this risk.

One method is to bring the practitioners on as independent contractors, rather than full-time employees. In this approach, careful attention to contract terms and insurance is critical to reducing risk:

- The medical professionals should be required to carry their own malpractice insurance at limits that are acceptable to the company;
- Contracts with these professionals should provide indemnification and hold harmless clauses in favor of the company;
- Employers may want to carry an entity medical malpractice insurance policy to address claims brought against the company. Such policies should be in excess of any valid and collectible insurance and indemnity held by the individual medical professionals.
- With respect to the employer's existing property and casualty policies, underwriters should be notified of the contemplated activity on the premises so that any contractual adjustments to the respective policies can be made. Depending upon the scope of the clinical services to be offered and the projected facility size, additional premiums may be due.

Another method is for the employer to bring the medical professionals on as employees of the company. In this case, entity malpractice becomes primary and, as such, more costly, and with a more strenuous underwriting process. This may be the case not only for any malpractice insurance the employer may want to carry, but this method may also affect existing and more traditional employment-related coverages, such as employment practices liability (EPL) insurance.

Under either method above, employers also should consider risks such as:

- Will their practitioners/clinic employees be involved in transport of patients, in which case automobile-related coverage would need to be addressed;
- If the clinic will invest in valuable medical and related equipment, the company would need to evaluate property limits to ensure the appropriate insured values, as well as equipment breakdown coverage; and
- Because some clinics will generate medical waste, the company may want to contemplate some kind of environmental coverage for pollution clean-up costs and related liabilities.

Labor Relations

The establishment of an on-site health clinic creates additional issues for unionized employers. Specifically, a unionized employer, depending on the particulars of its collective bargaining contract, may have an obligation to bargain with its unions over a number of related issues:

- The establishment of a health care clinic is in essence the creation of a new benefit for employees. As such, it is a mandatory subject of bargaining imposing an obligation on the employer to, at a minimum, discuss the concept with an incumbent union.
- If unionized employees will be assessed a cost for access to the clinic—whether on a fee-for-service basis or a monthly access charge—the imposition of those costs are mandatory subjects of bargaining requiring good faith negotiations. Similarly, the ability of employee dependents to utilize the clinic and the fees, if any, are also mandatory subjects of collective bargaining.
- Eligibility for access to the clinic is also a mandatory subject of bargaining. For example, will part-time employees enjoy the same level of access and/or costs as full-time employees?
- Once established, future changes in the cost structure or eligibility requirements for access to the clinic must be negotiated with the union. If possible, employers that decide to establish on-site health clinics should negotiate contract language at the outset which enables the employer to modify costs, eligibility and even hours of operation unilaterally, without the need to seek union agreement on such changes.
- A unionized employer contemplating an on-site clinic also should be aware of the possibility that an incumbent union may claim that employees of the clinic are an accretion to the existing bargaining unit. Alternatively, an incumbent union may demand organizing rights or a neutrality agreement with respect to the clinic employees. Of course, there is always the possibility that clinic employees may seek to unionize. Accordingly, if consistent with the culture of the workplace, a preventive labor relations plan should be developed by the employer.

For the non-union employer, the creation of an affordable on site health clinic creates a significant opportunity to communicate its commitment to the well-being of its employees. An employer should ensure its employees know that a new and significant benefit has been established.

Workplace Safety

Companies also must consider the applicable workplace safety and health requirements that protect employees working at or visiting on-site health clinics, including federal standards issued by the Occupational Safety and Health Administration (OSHA). For many companies that operate their business in an office environment, establishing an on-site clinic would introduce new requirements with respect to worker safety and health. For example, employees working in a

workplace health clinic may be exposed to blood, needles or other sharps and hazardous chemicals for the first time. Companies that decide to establish on-site health clinics must, therefore, devote additional resources to safety and health issues and OSHA compliance.

Two OSHA standards that, in particular, may be applicable to clinics are:

- *Bloodborne Pathogens*: OSHA's Bloodborne Pathogens standard (29 CFR 1910.1030) applies to employers with employees who have occupational exposure to blood or other potentially infectious materials (OPIM). "Occupational exposure" is defined as "reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or [OPIM] that may result from the performance of an employee's duties." The standard is principally directed to health care facilities, where physicians, nurses, nurse practitioners, and other technicians face exposure as a result of their day-to-day activities. Health clinic employees may also have "occupational exposure," as defined in the standard. Clinics covered by Bloodborne Pathogens would need to, at a minimum:
 - Establish a written "Exposure Control Plan" that identifies the job classifications and tasks entailing occupational exposure and that sets forth how compliance with the standard will be met;
 - Implement engineering and work practice controls to reduce exposure, including the provision of hand washing facilities and sharps containers;
 - Provide appropriate personal protective equipment (gloves, gowns, face shields) at no cost to employees;
 - Provide bloodborne pathogens training; and
 - Offer exposed employees the Hepatitis B series vaccine.
- *Hazard Communication*: OSHA's Hazard Communication standard (29 CFR 1910.1200) helps "ensure that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees." Sometimes referred to as OSHA's "Right-to Know" rule, the Hazard Communication standard is one of the most important OSHA rules and, in 2010, was the third most cited standard by OSHA during compliance inspections.

For on-site clinics, compliance with the standard would be required to the extent employees in the clinics have exposure to certain hazardous chemicals under normal conditions of use or under foreseeable emergency conditions. If covered, employers would need to develop a written hazard communication program, collect and maintain Material Safety Data Sheets, ensure proper labeling for all chemicals, and educate employees on the hazards of the chemicals to which they may be exposed.⁶

⁶ OSHA has developed a free brochure that contains model bloodborne pathogen and hazard communication programs, which employers with occupational health clinics can utilize to assist with compliance with these standards.

There may, of course, be other applicable OSHA standards depending upon the scope of the services offered. Employers should conduct a thorough hazard assessment of their on-site health clinics and determine, based on this assessment, the full scope of their compliance obligations.

The above considerations apply to employees working in the health clinics. For employers that contract with others to “run” the health clinics, most of the compliance obligations would fall to those employers running the clinics. Both employers, however, should coordinate their respective safety and health programs to ensure that all employees are protected.

Finally, if any employee is injured as a result of visiting an on-site health clinic as part of a voluntary wellness program, that injury would not be OSHA-recordable. Injuries occurring as a result of a visit to a health clinic as part of a mandatory wellness program, however, would be considered work-related and recordable, provided other recordability criteria are met.

* * *

On-site health clinics can help control health care costs for businesses, while playing a valuable role in the delivery of health services to employees. They can also help employers manage leaves-of-absence and disability accommodations. The convenience factor alone could substantially increase utilization, particularly for those chronic conditions that require regular maintenance. However, the role a medical professional or on-site clinic should play within the company requires careful legal, administrative and practical consideration. If properly designed, these workplace health centers may be advantageous to both employers and employees.

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