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Update

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On-site health clinics require an ounce of legal prevention

Summary
Located in or near a workplace, on-site medical clinics offer employees – and sometimes retirees and dependents – convenient access to health services. Once limited to job-related services such as workplace injury treatment or legally required medical screenings, workplace clinics have expanded and sometimes provide primary, preventive and even chronic health care. Employers providing clinics can achieve attractive outcomes, but realizing these gains requires navigating a complex legal landscape. This *Update* addresses several of the common legal issues involved in setting up and sponsoring on-site health clinics.

What laws affect employer-sponsored on-site health clinics?
On-site clinics can curb health care costs, control absenteeism and improve job satisfaction, but employers must weigh these advantages against associated legal risks. Relevant laws include the Employee Retirement Income Security Act (ERISA), the Health Insurance Portability and Accountability Act (HIPAA), tax rules governing health savings accounts (HSAs) and employer-provided medical care, and the health coverage continuation rights under the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA). In addition, protections under the Americans with Disabilities Act (ADA) (see sidebar on page 2) and other federal and state laws (see sidebar on page 3) may come into play.

Is an on-site clinic an ERISA plan?
Health and welfare benefits covered by ERISA include any plan or program established by an employer – other than a church or governmental employer – to provide health, disability or certain other employee benefits. However, ERISA exempts workplace facilities that simply provide first aid after job accidents or treat minor injuries or illnesses. While some clinics may meet this first-aid exception, most offering broader services are ERISA plans. As a result, employers must satisfy ERISA's benefit, reporting and disclosure requirements.

Does COBRA apply to on-site clinics?

Like ERISA, COBRA's definition of a group health plan covers most employer-sponsored on-site clinics, except first-aid stations that provide free treatment of employee illnesses or injuries during work hours. Unless an on-site clinic fits the first-aid exception, any qualified beneficiary (QB) who had access to a worksite clinic may elect to continue receiving those services while on COBRA coverage – generally 18, 29 or 36 months (*Update*, May 12, 2006). This raises a number of issues that may influence an employer's decisions about the groups eligible for clinic services, the facility's physical location, the scope of benefits to offer and the administration of continuation coverage:

- **Clinic access.** COBRA QBs electing continued clinic coverage need physical access to the clinic. This may create challenges for employers that prefer not to grant QBs on-site access – especially if a layoff or misconduct led to termination – or that need to deny access because of federal or state limitations, such as security-clearance rules for certain government contractors.

- **Plan access.** COBRA QBs have the same annual enrollment rights as other similarly situated beneficiaries with regular coverage. So in some cases, a QB with on-site clinic COBRA coverage not only can elect that clinic coverage, but also may be able to elect other group health benefits offered similarly situated individuals during open enrollment.

Do HIPAA portability rules apply to on-site clinics?

HIPAA portability rules, which apply to almost all group health plans, limit exclusions for pre-existing conditions, impose creditable coverage and special enrollment requirements, and prohibit discrimination on the basis of health status (*Update*, June 2005). Although on-site medical clinics generally are exempt from HIPAA's portability rules, this exception doesn't apply if the clinic's services are benefits under an employer's group health plan.

> ***Example.*** *Participants* in an employer's group health plan receive free physicals and immunizations through an on-site clinic, but the plan pays only 80 percent of the cost if these services are obtained elsewhere. The physicals and immunizations offered through the clinic are part of the plan's benefits schedule and are subject to HIPAA portability rules. But if the employer simply offers *all employees* free physicals and immunizations through its clinic, the HIPAA portability rules would not apply to these benefits.

Do HIPAA privacy and security rules apply to on-site clinics?

HIPAA administrative simplification rules set out health data security (*Update*, April 13, 2007), privacy and standardization guidelines for "covered

How does ADA affect on-site health clinics?

Three ADA concerns generally are relevant to on-site clinics:

Discrimination. On-site clinics must avoid making disability-based distinctions. But programs targeting conditions shared by people with and without disabilities don't automatically violate ADA. For example, a program solely for employees with diabetes may violate ADA, while a program for employees who fail a fitness test may not. Employers also need to ensure that clinic services (and any incentives) don't treat individuals with disabilities less favorably than those without disabilities.

Accommodation. ADA's reasonable accommodation duties extend to benefit offerings. So the clinic site and services, such as educational materials, must be accessible to all employees, including those with vision, hearing, mobility or other impairments.

Medical exams, disability inquiries. ADA generally permits medical exams or disability-related inquiries only if job-related and consistent with business necessity. But these exams and inquiries are allowed under a wellness program if employees voluntarily participate and all medical information is kept confidential.

entities," including health plans and certain health care providers. The definition of group health plan exempts on-site clinics, and a HIPAA covered health care provider does not include any clinic that operates using only paper records or that maintains electronic records but doesn't electronically transmit data.

Clinics may be HIPAA covered providers, however, if they engage in transactions subject to the US Department of Health and Human Services (HHS) electronic data interchange standard. These transactions include health claims and attachments; plan eligibility, enrollment and disenrollment; health care payment and remittance advice; plan premium payments; first reports of injury; and referral certifications and authorizations. So health care providers that *electronically* transmit health information in any of these transactions are covered by HIPAA.

In addition, HIPAA privacy issues may arise when an on-site clinic coordinates wellness, disease management and other health initiatives under a group health plan. Identifying which plan participants would benefit from these initiatives often involves reviewing HIPAA-protected benefit claims. If the clinic and group health benefits are part of the same ERISA plan, then HIPAA appears to allow sharing these records. But if the clinic is a covered entity independent of the group health plan, then sharing data without participants' consent might not be permitted.

What tax issues are relevant to on-site clinics?

If an on-site clinic is part of the employer's overall health plan or qualifies as a stand-alone group health plan, employer-paid expenses for clinic-provided medical care generally are tax-free to employees. For example, the cost of immunizations, office visits and screenings may be excluded from taxation, along with certain incentives, such as smoking-cessation programs or nutritional counseling for employees with diabetes. However, clinic services that don't qualify as medical care – such as services that promote general well-being, cosmetic treatments, and cash or cash-equivalent incentives – are taxable to employees and subject to withholding.

Special issues for HSAs. IRS rules prohibit tax-favored HSA contributions if employees have medical coverage other than a qualifying high-deductible health plan (HDHP). IRS hasn't specifically addressed whether access to on-site care is considered non-HDHP coverage. However, the agency has provided guidance that an individual with coverage under an employee assistance, disease management or wellness program remains eligible for HSA contributions, but only if the program doesn't provide significant medical care or treatment. Employers sponsoring clinics with more extensive medical services may end up disqualifying clinic-eligible individuals from making or receiving HSA contributions (IRS Notice 2008-59, Q&A-10).

What other laws might apply to on-site clinics?

Depending on location, services and other factors, on-site clinics may have to meet additional laws. Some examples of the types of laws that may apply include the following:

- State and local clinic licensing and building laws
- State or federal medical confidentiality protections
- Occupational Safety and Health Administration standards
- State or local standards for sanitation and disposal of biohazardous waste (such as needles and blood)
- Federal and state laws regulating clinical labs and specimen handling
- Drug laws, such as rules for handling medications that require refrigeration or securing certain medications (like narcotics).

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For more information
For additional information, please contact your Mercer consultant.

*This **Update** is for information only and does not constitute legal advice; consult with legal and tax advisers before applying this information to your situation.*

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