

EMPLOYEE BENEFITS

Executive Physical Programs – Compliance Considerations

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Many employers have expressed concerns about ensuring their organizations' ongoing success in recruiting and retaining executives and managers and managing executive risk. To address these concerns, employers either have implemented or are considering implementing a variety of executive fringe benefits. One such executive perk that has been gaining popularity in recent years is an executive physical program. According to the International Foundation of Employee Benefit Plans (IEFBP)¹, 35% of employers surveyed indicated they currently provide an executive physical benefit to select executives and key employees.

With an executive physical program, a select network of "preferred providers" offers the program, typically for a negotiated price based on the spectrum of services the employer selects. When setting up the program, the employer contracts with a large hospital, health clinic or concierge medical service in the geographic region where executives live or work.

The executive physical program generally provides coverage for age and gender-appropriate preventive care services that go beyond screenings that are ordinarily covered by the employer's group health plan, which can lead to early detection and treatment of health conditions (thereby also potentially helping to stabilize the employer's costs under the major medical plan). Employers may be able to select from various packages, with costs varying widely based on the scope of services covered.

Typically, the program is financed by the general assets of the plan sponsor (employer). In some cases, if the employer's major medical plan covers some of the services, the provider will bill the health plan for those portions. In contrast, the employer pays the provider directly for any services beyond what's covered by the health plan.

An executive physical program is considered a "group health plan"². As such, it is subject to various applicable federal laws, including ERISA, COBRA, the Public Health Services Act (including specific ACA mandates) and the Health Portability and Accountability Act (HIPAA) portability, nondiscrimination, privacy and security regulations.



¹ International Foundation of Employee Benefit Plans (IEFBP) Employee Benefits Survey – 2022.

² A Group Health Plan is defined as follows: "The term "group health plan" means a plan (including a self-insured plan) of, or contributed to by, an employer (including a self-employed person) or employee organization to provide health care (directly or otherwise) to the employees, former employees, the employer, others associated or formerly associated with the employer in a business relationship, or their families." (Internal Revenue Code Sec. 5000(b)(1)).

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ERISA: The executive physical program typically falls within the definition of an “employee welfare plan.” It is a “plan, fund or benefit arrangement” established by the employer to benefit employees or former employees.³ Unless the plan sponsor is a governmental entity, church, association or convention of churches, ERISA applies to the program.

A top-hat exemption from ERISA reporting (Form 5500) and certain participant disclosure rules (such as the requirement to provide SPDs and various notices) may apply if the program is designed to provide benefits solely to select management and highly compensated employees. However, a plan document is generally required regardless of whether that exemption applies to the program. The plan sponsor must provide the DOL with a copy of the plan document upon request. Therefore, the plan sponsor should consider adopting a plan document establishing the executive physical program that includes information such as eligibility guidelines, covered benefits, and claims and appeal procedures.

TAX TREATMENT: The plan document also serves as the “plan” for tax treatment purposes. In general, the employer/plan sponsor may deduct the cost of group health plan benefits as business expenses on their income tax returns. In addition, benefits provided to employees for medical care⁴ are generally excluded from taxation under Internal Revenue Code (IRC) §105⁵. IRC §105 sets a framework for the provision of non-taxable benefits for employees, former employees and their covered spouses and dependents. Section 105(h) generally requires self-insured health plan sponsors to not discriminate in favor of highly compensated employees in terms of eligibility, contributions and benefits to preserve the plan’s tax advantages for highly compensated individuals. However, when the program provides only reimbursement for diagnostic procedures (e.g., preventive care), the Section 105(h) nondiscrimination rules do not apply.⁶

COBRA CONTINUATION: The executive physical program is typically considered an employer-sponsored group health plan, subject to COBRA continuation if a qualifying event triggers a loss of eligibility for coverage.

³ ERISA §3(1) defines “employee welfare benefit plan” and “welfare plan” to mean “any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 [29 USC §186(c)] (other than pensions on retirement or death, and insurance to provide such pensions).”

⁴ Medical Care: The IRS definition of medical care” includes “amounts paid for—
(A) the diagnosis, cure, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body,
(B) amounts paid for transportation primarily for and essential to medical care referred to in subparagraph (A), and
(C) amounts paid for insurance covering medical care referred to in subparagraphs (A) and (B).”

⁵ However, the benefit is not excludable from taxable income when it is provided to more-than-2% shareholders of a partnership or Subchapter-S corporation. Such individuals are not treated as employees under the Code. See [IRS Publication 15-B: Employer’s Tax Guide to Fringe Benefits](#).

⁶Treas. Reg. §105-11(g).

PHSA/ACA MANDATES: The program is subject to certain healthcare reform mandates that it likely cannot satisfy independently as a group health plan.

- Although the physical examination and diagnostic testing are considered preventive services, the program might not provide coverage for the full range of preventive care services required by healthcare reform (such as counseling related to smoking cessation, weight loss, depression and alcohol use, and the broad range of women's health services).
- Typically, there is a dollar cap on the value of covered services the program covers each year. Under the ACA, a group health plan that is not an excepted benefit⁷ cannot place a financial limitation on essential health benefits.

The program can be designed as an HRA integrated with the employer's group health plan to avoid the ACA's preventive care mandate and prohibition on lifetime/annual dollar maximums. The program may also be designed so that it is delivered through another group health plan sponsored by the employer that satisfies the healthcare reform mandates but is limited to a select group of employees.

HIPAA: Most executive physical programs are subject to HIPAA portability, nondiscrimination, privacy and security requirements.

- **HIPAA Portability⁸:** Individuals who have waived coverage under the plan because they have other group coverage have special enrollment rights when they lose other active employee coverage, exhaust COBRA continuation coverage under another employer's plan or experience a HIPAA special enrollment event.
- **HIPAA Privacy and Security⁹:** The executive physical program is a HIPAA-covered entity, which confers obligations on the employer as a plan sponsor when the plan is self-insured, as most executive physical programs are. Plan participants' protected health information (PHI) and electronic protected health information (ePHI) are protected under HIPAA. The covered entity is responsible for ensuring appropriate protections are in place, including but not limited to:
 - » Designating a privacy official and a security official (one person may fill both roles, or they may be different people), to ensure the adoption and enforcement of the Privacy and Security Policy and procedures.

- » Conducting an assessment of physical and electronic locations where PHI is accessed and correcting any potential gaps in privacy and security that may result in impermissible disclosures of PHI or ePHI.
- » Adoption and implementation of Business Associate Agreements (BAAs) with any parties who will create, receive, maintain or transmit PHI as part of their services with respect to the covered entity (i.e., the health plan), breach notification procedures and development and distribution of the Notice of Privacy Practices to covered employees.
- » Training of employees who have access to PHI.
- **HIPAA nondiscrimination¹⁰:** Group health plans are prohibited from discriminating against an individual based on a health status or genetic factor in terms of eligibility, premiums, contributions or benefits.

In summary, an executive physical program can be a recruitment and retention tool for employers who provide it to their executives and other key employees. **However, various statutory requirements apply, and employers and plan sponsors should consult with their legal and tax advisor to ensure their plans are properly designed, documented and administered.**

⁷ While it is possible that an executive physical program may be provided through an on-site clinic, making it a HIPAA-excepted benefit (and therefore exempt from the ACA mandates), this arrangement may affect the exemption of the benefit from taxation. Per IRC §105-11(g)(1), for the plan to be nondiscriminatory and therefore nontaxable, "The diagnostic procedures must be performed at a facility which provides no services (directly or indirectly) other than medical, and ancillary, services." The plan sponsor should consult with their legal or tax advisor.

⁸ [29 CFR 2590.701-6 Special enrollment periods.](#)

⁹ HIPAA administrative simplification rules, including privacy and security regulations, generally apply to the executive physical program. However, a self-insured group health plan that has fewer than 50 participants and that is self-administered by the plan sponsor is exempt from those rules. See [45 CFR §160.103](#).

¹⁰ [Public Health Service Act §2705 \[42 USC §300gg-4\] Prohibiting discrimination against individual participants and beneficiaries based on health status.](#)



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