

Beware Laws Intersecting Benefit Concierge Services

By **Kendra Roberson and Christopher Lowther** (October 22, 2018, 11:54 AM EDT)

Employers commonly offer a wide array of employee benefit plans and programs. In addition to traditional staples, many employers today offer an employee assistance program, dependent care, accident insurance and even pet insurance. In an increasingly competitive labor market, offering a full spectrum of employee benefits is an important way to maintain a competitive advantage. While the type of programs offered have increased, employees may not always have sufficient knowledge to make use of them. In a 2017 survey[1], only 60 percent of employees thought their employers effectively educated them to select the benefits options that meet their needs. Underutilization means employers are not receiving the full benefit of their offerings.



Kendra Roberson

That is why some employers are starting to use a navigator, or concierge service, to help employers realize a greater return on their investment in these programs by raising employees' awareness of available benefits and promoting employees' access and utilization of them. Benefit concierge services raise several unique legal issues in the areas of data privacy, Health Insurance Portability and Accountability Act privacy, the Employee Retirement Income Security Act, and technology, to name a few. With appropriate legal counsel and planning, many of these issues can be addressed. This article highlights some of the legal issues that may arise when providing a concierge service.



Christopher
Lowther

Benefit concierge services use a variety of approaches to help connect employees to welfare benefits available from their employers to promote more efficient utilization of employer-sponsored welfare programs.

- **Central Point of Contact:** The concierge serves as the main point of contact for employees with questions about their health and welfare benefits, even replacing the contact information of third-party administrators on the back of medical insurance cards. The benefit concierge educates employees on benefits available to address a particular ailment or issue rather than leaving employees to find solutions on their own. By doing so, the benefit concierge increases participation in offerings that employees may not have been aware of or did not understand. For example, the concierge may educate a member who complains about weight loss challenges about an employer's nutritional and wellness weight loss programs.

- **Identifying Health Providers and Costs:** The benefit concierge may also provide information about nearby health care providers, including reviews of providers from third-party websites and estimated costs of services. This allows employees to take into account the cost of care when making health care decisions. For example, the benefit concierge would inform an employee that he or she may save \$100 in out-of-pocket expenses by undergoing an MRI at an outpatient facility that provides the same level of care as a more expensive inpatient facility.
- **Treatment and Claims Management:** In addition, benefit concierge services might assist employees with filing or appealing claims for benefits with the health plan and managing treatment plans and options.

In addition to increasing utilization of existing welfare benefits, concierge services also strive to produce better health outcomes for employees. They do this by using data analytics and algorithms that analyze claims data to provide proactive outreach to employees about their potential needs. For example, the concierge service provider may identify a pattern of diagnoses or treatments that typically lead to a complicated treatment regimen that could be avoided if employees receive timely outreach alerting them to seek medical attention. The health concierge may also use this data to help employees make more informed decisions when considering different treatment options. Employees with serious illnesses may be offered case management services to help coordinate care and develop health care options. Many of the services also provide a day-and-night nurse line for employees to call, which can save an employee from an unnecessary doctor or emergency room visit.

A benefit concierge service may assign employees a specific health assistant that the employees can reach by phone, email or through a mobile app. The aim of having a dedicated health assistant is to develop a level of trust so that employees will continue to engage with the benefit concierge service when they have medical needs. Increased engagement should result in increased utilization of the employer's benefits offerings and also improved employee health.

As with other innovative products, benefit concierge services raise legal issues that must be successfully navigated. Some of the legal issues for consideration in connection with concierge services include the following:

- Determining whether the concierge services will provide benefits in the nature of medical care. If so, consider whether the services will be offered under an existing ERISA group health plan or as a stand-alone plan;
- Determining whether the concierge service provider is a fiduciary to an ERISA plan;
- Reconciling a concierge provider's roles in facilitating plan administration and also assisting individual participants with filing or appealing claims for benefits;
- Providing reviews and estimated cost information about health care providers in a manner that avoids recommending or endorsing any particular provider;
- Structuring the arrangement with the concierge service provider to comply with HIPAA privacy and security requirements and ensuring that the service provider establishes and maintains appropriate data security measures;

- Ensuring that the concierge provider advises employees of available benefits options and coverage based on the terms of plan documents and establishing procedures to monitor the provider's statements about plan benefits;
- Establishing appropriate safeguards to protect data that is shared among the company, plan vendors and the concierge service provider, including through cloud-based systems, and restricting data's use to purposes that are permissible under HIPAA privacy requirements;
- Addressing any potential inappropriate discrimination among participants by the service provider's algorithms; and
- Managing any risks of intellectual property rights infringement by the concierge service.

Benefit concierge services offer a valuable service in helping welfare plan participants navigate available benefits and optimize their use of them. By helping to achieve better health outcomes for employees, health concierge services may reduce health care expenditures. Employers with a variety of welfare programs or multiple administrators for their programs (e.g., for medical or wellness benefits) who are considering concierge services are more likely to mitigate legal risks by (1) proactively collaborating with the concierge service provider to customize the services to address the unique issues the services present, and (2) negotiating the risk allocation in the concierge service agreement.

Kendra L. Roberson is of counsel and Christopher B. Lowther is an associate at Covington & Burling LLP.

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[1] ORC International. Working Redefined: A New Age of Benefits, MetLife, https://benefittrends.metlife.com/media/1422/2017-ebts-show-and-tell_exp0618.pdf (accessed Oct. 17, 2018).