

Health Care Reform Management Alert Series



Wellness Programs Under the Affordable Care Act - New Agency Guidance

Issue 44

This is the forty-fourth issue in our series of alerts for employers on selected topics in health care reform. (Click [here](#) to access our general summary of health care reform and other issues in this series.) This series of Health Care Reform Management Alerts is designed to provide an in-depth analysis of certain aspects of health care reform and how it will impact your employer-sponsored plans.

The U.S. Departments of Treasury, Labor (DOL) and Health and Human Services (HHS) (collectively the “Departments”) released proposed regulations addressing the employer wellness program provisions of the Patient Protection and Affordable Care Act (PPACA) which were published in today’s Federal Register. These proposed wellness rules apply to both grandfathered and non-grandfathered plans in both the insured and self-insured markets. They would be effective for plan years starting on or after January 1, 2014.

Adoption of Existing HIPAA Wellness Guidance from 2006

The proposed rules closely follow existing guidance in effect for employer wellness programs since 2006. These rules establish two categories for wellness programs offered in connection with a health plan or health insurance coverage:

- **Participatory wellness programs.** These programs provide rewards based on participation in a program that is not related to an individual’s health status. Programs in this category must be available to all similarly situated employees and there is no limit on the amount of the financial incentive to encourage participation in a “participatory wellness program.”
- **Health-contingent wellness programs.** These programs generally require individuals to meet a specific standard related to their health to obtain a reward or avoid a surcharge. These programs generally must:
 1. provide an opportunity to qualify at least once a year;
 2. provide a reward no greater than 30 percent of the total cost of employee-only coverage (including both employee and employer contributions) or no greater than 50 percent in the case of a program designed to reduce or prevent tobacco use;
 3. be available to all similarly situated individuals and provide “reasonable alternatives” to obtain the same reward by other means;

- ✓ Applies to grandfathered plans
- ✓ Applies to health plans and plans that lose grandfathered status

4. be reasonably designed to promote health or prevent disease and not be used as “subterfuge for discrimination based on a health factor”; and
5. provide notice for other means for qualifying for the reward.

While this wellness program provision of the Affordable Care Act does not technically apply to grandfathered plans, the Departments stated that, for purposes of consistency, these proposed regulations would apply to grandfathered plans as well (issued under the Departments’ authority to issue regulations under HIPAA). The regulations also propose to apply these same nondiscrimination provisions to the individual insurance market.

Some Key Differences from Prior Wellness Guidance

1. Increase of the Size of the Reward

The proposed regulations increase the maximum permissible reward under a health-contingent wellness program offered in connection with a group health plan (and any related health insurance coverage) from **20** percent to **30** percent of the cost of coverage – and up to **50** percent for programs designed to prevent or reduce tobacco use. The examples in the proposed regulations would permit offering more than one reward/surcharge as long as the total amount of the reward/surcharge that is not related to smoking does not exceed 30 percent of the cost of coverage, and the total amount of *both* rewards/surcharges (including the one related to smoking) does not exceed 50 percent. This would mean, for example, if the other requirements are met, the surcharges listed in the box below could be imposed.

Annual premium for employee-only coverage	\$6,000
Employer pays \$4,500 per year	
Employee pays \$1,500 per year	
Health-contingent wellness program surcharge <i>(based on weight, cholesterol, and blood pressure)</i>	\$600 <i>(Does not exceed 30% of total annual cost of employee-only coverage (\$6,000 x 30% = \$1,800))</i>
Smoker surcharge	\$2,000
Total Surcharge	\$2,600 <i>(Does not exceed 50% of total annual cost of employee-only coverage (\$6,000 x 50% = \$3,000))</i>

2. New Considerations for Reasonable Alternative Standard

The proposed regulations, like the prior wellness guidance, require that a reward under a health-contingent wellness program be available to all similarly situated individuals. To meet this requirement, the program will need to offer a “reasonable alternative standard” (or waiver of otherwise applicable standard) for obtaining the reward to any individual for whom it is either unreasonably difficult due to a medical condition to meet the standard, or for whom it is medically inadvisable to attempt to satisfy the standard. Under these proposed regulations, a reasonable alternative will need to satisfy the following additional factors:

- If the reasonable alternative standard is completion of an educational program, the plan or issuer must make the educational program available to the individual, and may not require the individual to pay for the cost of the program.
- If the reasonable alternative standard is a diet program, the plan or issuer is not required to pay for the cost of food but would need to pay any membership or participation fee.

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- If the reasonable alternative standard is compliance with the recommendations of a medical professional who is an employee or agent of the plan or issuer, and an individual's personal physician states that the medical professional's recommendations are not medically appropriate for that individual, the plan or issuer must provide a reasonable alternative standard that accommodates the recommendations of the individual's physician with regard to medical appropriateness. Plans and issuers may impose standard cost sharing under the plan or coverage for medical items and services furnished in accordance with the physician's recommendations.

3. Change to Model Notice Language

The proposed regulations, consistent with the 2006 regulations, require plans or issuers to disclose the availability of other means of qualifying for the reward or the possibility of a waiver in all plan materials that describe the health-contingent wellness program and include new sample language. Click [here](#) for a complete copy of the proposed regulations which include this new sample language.

What This Means For Employers

- Consider whether you would like to submit comments to the Department regarding these proposed regulations (comments are due in 60 days, January 25, 2013).
- When designing plan options for 2014, consider factoring additional wellness rewards into your plan design, and increasing the size of the reward.
- Revisit administrative practices for reasonable alternatives and plan communications for existing wellness programs to determine whether changes would be needed in 2014.

Please note, on the same day the Departments issued these proposed regulations, they issued proposed regulations on essential health benefits as well. Our Management Alert on those proposed regulations will be issued shortly.

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