

Health Care Reform Management Alert Series



Finally Final Wellness Regulations

Issue 65

This is the sixty-fifth 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 final rules addressing the employer wellness program provisions of the Affordable Care Act (ACA) which was published in the [Federal Register](#) on June 3, 2013. These final wellness rules apply to both insured and self-funded plans. They are applicable to plan years starting on or after January 1, 2014.

[✓] Applies to grandfathered plans

[✓] Applies to new health plans and plans that lose grandfathered status

Background

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) prohibits group health plans from discriminating against individuals in eligibility, benefits or premiums based on a health factor. An exception exists for programs of health promotion and disease prevention, commonly called “wellness programs”. The original rules, published in 2006, categorized wellness programs as either participatory or health-contingent, and health contingent wellness programs were required to meet five requirements in order to qualify for the exception. The ACA codified the wellness rules, and proposed regulations reflecting these changes and more were issued in November, 2012. (For more information on the proposed regulations, click [here](#) to see Issue 44)

New Types of Wellness Programs

Participatory Wellness Programs

A participatory wellness program does not violate HIPAA’s nondiscrimination rules if participation is made available to all similarly situated individuals, regardless of health status. Participatory wellness programs are programs that do not provide a reward, or do not include any conditions for obtaining a reward that are based on satisfying a standard that is related to a health factor. The final rules confirm that rewarding employees for completing a health risk assessment, without any further action required by the employee, is a participatory program. Other examples include:

- Reimbursing employees for membership in a fitness club;
- A diagnostic testing program that provides a reward for simply participating in the program; and
- Reimbursing or rewarding employees for simply participating in a smoking cessation program.

Health-Contingent Wellness Programs

The new rules subdivide health-contingent wellness plans into “**activity-only**” and “**outcome-based**” wellness programs and explain how the five requirements apply to each type.

New Categories Under Final Rules

“Activity-only wellness program” means a health-contingent wellness program that requires an individual to perform or complete an activity related to a health factor in order to obtain a reward but does not require the individual to attain or maintain a specific health outcome. Examples include walking, diet, or exercise programs.

“Outcome-based wellness program” means a health-contingent wellness program that requires an individual to attain or maintain a specific health outcome (such as not smoking or attaining certain results on biometric screenings) in order to obtain a reward. Outcome-based wellness programs allow plans to conduct screenings and employ measurement techniques in order to target wellness programs effectively (e.g. individuals who use tobacco may be targeted to participate in a tobacco cessation program). If a measurement, test or screening is used as part of an initial standard and individuals who meet the standard are granted a reward, the program is outcome-based.

Requirements for All Health-Contingent Wellness Programs

- 1. Frequency of Opportunity to Qualify** - The final rules retain the requirement that all health-contingent wellness programs must give an individual the opportunity to qualify for the reward at least once per year.
- 2. Size of Reward** - The final rules follow the proposed rules and increase the maximum permissible reward for all health-contingent wellness programs to 30% of the cost of coverage, but for programs designed to prevent or reduce tobacco use the maximum reward may be up to 50% of the cost of coverage.
- 3. Notice** - The final rules require health-contingent wellness plans to disclose, in all plan materials describing the terms of a health-contingent wellness program: the availability of a reasonable alternative standard (and, if applicable, the possibility of a waiver), contact information for obtaining the alternative, and a statement that recommendations of the employee’s personal physician will be accommodated. The following sample language is provided, which differs from the proposed rules in that it indicates that the plan will work with the individual’s doctor:

“Your health plan is committed to helping you achieve your best health. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at [insert contact information] and we will work with you (and, if you wish, with your doctor) to find a wellness program with the same reward that is right for you in light of your health status.”
- 4. Reasonable Design** - This requirement is similar for both activity-only and outcome-based programs in that the program must have a reasonable chance of improving health of participating individuals, and must not be a subterfuge for discrimination. In order to meet this requirement, however, the final regulations require that an outcome-based program provide a reasonable alternative to any individual who does not meet the initial standard based on a measurement, test or screening. (See chart below.)
- 5. Uniform Availability** - The same, full reward must be available to all similarly situated individuals under all health contingent wellness programs, but this requirement is applied differently depending on what type of health contingent program you offer. In order for the full reward to be available, plans offering a premium discount must provide the discount for the entire year. If an individual doesn’t satisfy a standard until mid-year, the plan may provide a retroactive payment of the reward when the standard is satisfied or may decrease payments pro rata over the remainder of the year. The plan may not provide pro rata payment over the following year (a year after the year to which the reward corresponds). Health-contingent wellness programs are not considered to be uniformly available to all similarly situated individuals unless reasonable alternative standards are made available as described in the following chart.

Reasonable Alternatives	
Activity-Only Program Requirements	Outcome-Based Program Requirements
<p>The program must allow a reasonable alternative method for obtaining the reward (or waive the applicable standard) for any individual for whom it is medically inadvisable to attempt to satisfy the otherwise applicable standard or unreasonably difficult due to a medical condition to satisfy the standard.</p> <p>Notably, the plan may seek verification and require a doctor's note.</p>	<p>The program must offer a reasonable alternative method for obtaining the reward to (or waive the applicable standard for) a much broader group. It must allow any individual who does not meet the initial standard based on the measurement, test, or screening to use an alternative standard. In other words, every individual who doesn't meet a targeted biometric (or similar standard) must be provided with an alternative method of obtaining the reward, regardless of any medical condition or other health status.</p>
<p>The reasonable alternative standard must be furnished (or the condition for obtaining the reward must be waived) upon the individual's request.</p>	<p>Same as Activity-Only</p>
<p>The rules enumerate certain facts and circumstances indicating that an alternative standard is reasonable, including: not requiring payment for the cost of an educational or dietary program, allowing a reasonable time for complying with the alternative, and accommodating the recommendations of an individual's physician who states that a plan standard is not medically appropriate.</p> <p>Notably, the preamble to the final rules states that adverse benefit determinations based on whether a participant is entitled to a reasonable alternative standard for a reward are considered to involve medical judgment and are therefore eligible for Federal external review.</p>	<p>Same as Activity-Only</p>

<p>To the extent a reasonable alternative is itself an activity-only program, it must comply with the requirements as if it were an initial program standard.</p>	<p>To the extent that a reasonable alternative standard under an outcome-based wellness program is itself another outcome-based wellness program, it must comply with the requirements applicable to outcome-based programs, subject to the following special rules:</p> <ul style="list-style-type: none">- The reasonable alternative standard cannot be a requirement to meet a different level of the same standard without additional time to comply that takes into account the individual's circumstances. For example, if the initial standard is to achieve a BMI less than 30, the reasonable alternative standard cannot be to achieve a BMI less than 31 on that same date. However, if the initial standard is to achieve a BMI less than 30, a reasonable alternative standard for the individual could be to reduce the individual's BMI by a small amount or small percentage, over a realistic period of time, such as within a year.- An individual must be given the opportunity to comply with the recommendations of the individual's personal physician as a second reasonable alternative standard. The individual can make a request to involve a personal physician's recommendations at any time and the personal physician can adjust the physician's recommendations at any time.
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Prior to January 1, 2014, employers should evaluate their wellness programs to determine whether their plan design is participatory or health-contingent, and if health-contingent, whether it is an activity-only or outcome-based program. In some cases, it may not be easy to distinguish among the different types of programs. Care should be taken in drawing that line. Employers are well-advised to monitor future developments and any litigation over wellness plans. These regulations and expected guidance from the EEOC on wellness programs may spawn litigation as employers continue to search for plan designs that reduce health care costs.

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