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The Departments of Treasury, Labor and Health and Human Services issued final regulations regarding nondiscriminatory wellness programs in group health coverage under the Affordable Care Act. The final regulations generally apply to group health plans and carriers for plan years beginning on or after January 1, 2014.

Background

HIPAA generally prohibits group health plans and carriers from discriminating against individual participants and beneficiaries in eligibility, benefits, or premiums based on a health factor. An exception to the general rule allows wellness programs that reward employees based on a health factor complying with the 5 HIPAA requirements, including capping the reward at 20% of the cost of coverage and offering a reasonable alternative standard to obtain the reward to any individual for whom it is unreasonably difficult due to a medical condition (includes nicotine addiction) or for whom it is medically inadvisable to satisfy the otherwise applicable standard.

Final regulations were issued in May 2013 which make some changes to these rules as follows:

- The maximum permissible reward under a health contingent wellness program is increased from 20% to 30% of the total cost of coverage and allows for a maximum permissible reward up to 50% for wellness programs designed to prevent or reduce tobacco use;
- There are now two types of health contingent wellness programs: outcome-based and activity-based;
- The rules clarify that they apply whether the premium differential is a reward or penalty;
- In an outcome-based wellness program, the reasonable alternative to qualify for the reward is available to any individual who cannot satisfy the initial measurement, test, or screening associated with the program; and
- The rules provide sample language to satisfy notification requirements with respect to wellness programs.

The rules regarding participation-only plans remain unchanged. Below you will find a brief summary of the HIPAA wellness rule, as amended by the regulations.

Types of Wellness Programs

Participatory Wellness Programs

A wellness program is a participatory wellness program if none of the conditions for obtaining a reward is based on an individual satisfying a standard that is related to a health factor or if the program does not provide a reward. A participatory wellness program does not violate HIPAA as long as participation in the program is made available to all similarly situated individuals, regardless of health status. Examples of participatory wellness programs include:

- A program that reimburses employees for all or part of the cost for membership in a fitness center.
- A diagnostic testing program that provides a reward for participation in that program and does not base any part of the reward on outcomes.
- A program that encourages preventive care through the waiver of the copayment or deductible requirement under a group health plan for the costs of, for example, prenatal care or well-baby visits.
- A program that reimburses employees for the costs of participating, or that otherwise provides a reward for participating, in a smoking cessation program without regard to whether the employee quits smoking.
- A program that provides a reward to employees for attending a monthly, no-cost health education seminar.
- A program that provides a reward to employees who complete a health risk assessment regarding current health status, without any further action required by the employee with regard to the health issues identified as part of the assessment.

Health Contingent Wellness Programs

A health contingent wellness program is a program that requires an individual to satisfy a standard related to a health factor to obtain a reward. There are two types of health contingent wellness programs: activity-only and outcome-based.



Activity-Only Wellness Programs

An activity-only wellness program 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 income. Examples of these programs include: walking, diet or exercise programs, which some individuals may be unable to participate in or complete (or have difficulty participating in or completing) due to a health factor such as severe asthma, pregnancy, or a recent surgery.

Outcome-Based Wellness Programs

An outcome-based wellness program 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. This type of program will typically have an alternative pathway for individuals who do not attain or maintain the specific health outcome such as compliance with an educational program or an activity to obtain the same reward. The alternative will not cause the program to not be considered an outcome-based program if a measurement, test or screening is used as part of an initial standard and individuals who meet the standard are granted the reward. For example, if a wellness program tests individuals for high blood pressure and provides a reward to individuals identified as within a normal or health range, while requiring individuals who are outside that normal or healthy range (or at risk) to take additional steps (such as meeting with a health coach, taking a walking or exercise program or complying with a health care provider's plan of care) to obtain the same reward, the program is an outcome-based wellness program.

Rewards

A reward includes both obtaining a reward and avoiding a penalty. Examples of a reward include:

- Discount
- Rebate of a premium or contribution
- Waiver of all or part of a cost-sharing mechanism
- Additional benefit
- Any financial or other incentive

Examples of a penalty include:

- Absence of a premium surcharge
- Other financial or nonfinancial disincentive

HIPAA's Rules for Health Contingent Wellness Programs, As Amended

Health contingent wellness programs must comply with 5 HIPAA requirements as set forth below.

Frequency of opportunity to qualify

The program must give individuals eligible for the program the opportunity to qualify for the reward under the program at least once per year.

Size of reward

Effective for plan years that begin on or after January 1, 2014, the reward, together with the reward for other health contingent wellness programs with respect to the plan, must not exceed 30% of the total cost of employee-only coverage under the plan. For programs designed to reduce or prevent tobacco use, the reward may be increased up to 50% of the total cost of employee-only coverage. If the health contingent program provides rewards for tobacco related activities as well as non-tobacco related activities, the combined total reward cannot exceed 50% of the total cost of coverage and, when tested separately, the reward unrelated to tobacco use cannot exceed the 30% threshold.

If, in addition to employees, any class of dependents (such as spouses, or spouses and dependent children) may participate in the wellness program, the reward must not exceed the applicable 30%/50% based on the total cost of the coverage in which an employee and any dependents are enrolled. The cost of coverage is determined based on the total amount of employer and employee contributions towards the cost of coverage for the benefit package under which the employee is (or the employee and any dependents are) receiving coverage. Rewards offered in connection with a participatory wellness program are not taken into account for purposes of the 30%/50% thresholds.

Reasonable design

The program must be reasonably designed to promote health or prevent disease. A program does so if it has a reasonable chance of improving the health of, or preventing disease in, participating individuals and it is not overly burdensome, is not a subterfuge for discriminating based on a health factor, and is not highly suspect in the method chosen to promote health or prevent disease. This determination is based on all the relevant facts and circumstances. The new rules clarify that, in order to satisfy this requirement, an outcome-based wellness program must make a reasonable alternative standard available to qualify for the reward to any individual who does not meet the initial standard based on a measurement, test, or screening that is related to a health factor. Individuals cannot be required to have a medical condition or medical necessity in order to receive the alternative.

Uniform availability and reasonable alternative standards.
The full reward under the health contingent wellness program must be available to all similarly situated individuals. A reward under an activity-only wellness program is not available to all similarly situated individuals for a period unless the program allows a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual for whom, for that period (a) is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard, and (b) it is medically inadvisable to attempt to satisfy the otherwise applicable standard. A reward under an outcome-based wellness program is not available to all similarly situated individuals for a period unless the program allows a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual who does not meet the initial standard based on the measurement, test or screening. This is a broader requirement than what is required for activity-based programs.

For both types of wellness programs, while plans and issuers are not required to determine a particular reasonable alternative standard in advance of an individual's request for one, if either (a) or (b) above applies, a reasonable alternative standard must be furnished by the plan or issuer upon the individual's request or the condition for obtaining the reward must be waived. All the facts and circumstances are



taken into account in determining whether a plan or issuer has furnished a reasonable alternative standard, including but not limited to the following:

- If the reasonable alternative standard is completion of an educational program, the plan or issuer must make the educational program available or assist the employee in finding such a program (instead of requiring an individual to find such a program unassisted), and may not require an individual to pay for the cost of the program.
- The time commitment required must be reasonable (e.g., requiring attendance nightly at a one-hour class would be unreasonable).
- If the reasonable alternative standard is a diet program, the plan or issuer is not required to pay for the cost of food but must pay any membership or participation fee.
- If an individual's personal physician states a plan standard (including, if applicable, the recommendations of the plan's medical professional) is not medically appropriate for that individual, the plan or issuer must provide a reasonable alternative standard that accommodates the recommendations of the individual's personal 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 pursuant to the physician's recommendations.

For an activity only wellness program, if reasonable under the circumstances, a plan or issuer may seek verification, such as a statement from an individual's personal physician, that a health factor makes it unreasonably difficult for the individual to satisfy, or medically inadvisable for the individual to attempt to satisfy, the otherwise applicable standard of an activity-only wellness program. For an outcome-based wellness program it is not reasonable to seek such verification, however, if a plan or issuer provides an alternative standard to the otherwise applicable measurement, test or screening that involves an activity that is related to a health factor, then the rules for activity-only wellness programs apply to that component of the wellness program and the plan or issuer may, if reasonable under the circumstances, seek verification that it is unreasonably difficult due to a medical condition for an individual to perform or complete the activity (or it is medically inadvisable to attempt to perform or complete the activity).

Notice of availability of reasonable alternative standard

The plan or issuer must disclose in all plan materials describing the terms of a health contingent wellness program, and in any disclosure that an individual did not satisfy an initial outcome-based standard, the availability of a reasonable alternative standard to qualify for the reward (and, if applicable, the possibility of waiver of the otherwise applicable standard), including contact information for obtaining a reasonable alternative standard and a statement that recommendations of an individual's personal physician will be accommodated. If plan materials merely mention that such a program is available, without describing its terms, this disclosure is not required.

Sample language for the notice is as follows:

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.