

# REFORM *Update*

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Recently the Departments of Health and Human Services, Labor and Treasury jointly released proposed rules related to wellness plans and health reform.

Many employers currently offer programs to encourage employee health and prevent disease. These diverse programs typically offer employees incentives to participate in wellness plans. Some employers even offer incentives for employees to achieve specific health goals as part of the wellness program.

Employers need to ensure they are complying with several federal laws governing wellness plans. The HIPAA nondiscrimination rules most directly pertain to wellness plans and permitted incentives.

Health care reform allows employers to increase incentives for health-contingent wellness programs. The latest guidance proposes rules on this increase and offers additional detail on the HIPAA nondiscrimination rules. This allowable incentive increase becomes effective on the first day of the first plan year occurring on or after January 1, 2014.

## **Background**

The HIPAA nondiscrimination rules divide wellness plans into two categories. The first, “participatory wellness programs,” refers to programs that offer an incentive to participate in a wellness activity. The guidance provides the following examples of participatory wellness programs:

- Programs that reimburses for all or part of the cost for a fitness club membership
- Programs that provides a reward for employees attending a monthly no-cost health education seminar
- Diagnostic test programs that do not base a reward on test outcomes
- Programs that reimburse employees for the cost of a smoking cessation program, regardless of whether the employee actually quits smoking
- Programs that reward employees who complete a health assessment but do not require them to act on any current health issues the assessment identifies

The non-discrimination rules do not limit the level of incentives an employer can provide for participatory wellness programs. The only requirement is that the program be offered to all similarly situated individuals. However, a very strong incentive for a participatory wellness program may run afoul of the American with Disabilities Act.

The second wellness plan category is “health-contingent wellness programs.” These wellness programs require employees to reach or maintain a certain health goal before they can receive a reward or incentive. Examples of health-contingent wellness programs include:

- Programs that imposes a premium surcharge for smokers
- Programs that use biometric screenings or health assessments to identify employees with specific medical conditions or risk factors. The plan rewards employees who score within a normal or healthy range for biometrics. Employees outside the range must take other steps to earn the rewards, such as meeting with a health coach, taking a health or fitness course, adhering to a health improvement action plan or complying with a health care provider's treatment plan.

Health contingent wellness programs may vary benefits, premiums or contributions based on whether a member meets specific health targets. However, for this "discrimination" to be allowed, these wellness plans **must meet HIPAA non-discrimination requirements**.

Specifically, health contingent wellness programs must meet the following consumer protection conditions:

1. The total reward (or incentive) the plan sponsor offers for achieving a specific health goal cannot exceed 20 percent of the total cost of coverage under the plan.
2. The program must be reasonably designed to promote health or to prevent disease. The plan cannot be overly burdensome, nor be a subterfuge for discrimination based on a health factor.
3. The program must give eligible employees an opportunity to qualify for the reward or incentive at least once a year.
4. The reward or incentive must be available to all similarly situated employees. Thus the plan must provide a reasonable alternative (or waiver of the applicable standard) when, due to a medical condition, it is too difficult for a participant to achieve the target standard.
5. In all the materials describing the plan, employers must address the availability of a reasonable alternative.

The rules refer to a reward as an incentive to participate or achieve a health factor. Rewards can take many forms. They can include premium discounts or rebates, a waiver of all or part of employee cost-sharing, an additional benefit or even nonfinancial incentives, such as extra jean days. Other rewards are actually penalties, such as surcharges. Whether the incentive is presented as a positive or a negative, the wellness plan needs to satisfy HIPAA non-discrimination requirements.

The 2006 HIPAA law established basic non-discrimination rules. The recently issued proposed rules concern the enhanced incentive allowed under health care reform. The rules also clarify certain aspects of the HIPAA non-discrimination rules for wellness plans.

### **Proposed Changes/Clarifications**

The proposed rules clarify a number of issues. First, the increase in potential health-contingent wellness incentives is grandfathered. Thus grandfathered plans would not be subject to the increase until they lose their grandfathered status. However, expanding an incentive is a wellness plan's decision. The government will allow grandfathered plans to take advantage of the increase as of the first day of the first plan year occurring on or after January 1, 2014. This ruling provides

grandfathered health plans with the same flexibility to promote health and prevent disease as non-grandfathered plans.

The basic distinction HIPAA makes between health-contingent and participatory wellness plans remains the same. Health-contingent wellness programs must meet the five consumer protection conditions noted above. Participatory wellness plans do not need to meet these conditions; however, they need to be offered to all similarly situated individuals.

The rules provide more details for health-contingent wellness programs. The most significant change is the size of the permitted reward or incentive. The amount of the reward cannot exceed the specified percentage of the gross cost of health coverage. The gross cost an employer should use depends on who can participate in the wellness activities. For example, if the health-contingent wellness program is offered only to employees, the employer calculates the reward maximum applying the specified percentage to the gross cost of single coverage. If the employer offers health-contingent wellness activities to any class of dependents, the reward can't exceed the specified percentage of the total cost related to that class of dependents. For instance, if you offer the health-contingent wellness to employees and their spouses, the total cost used would be the employee plus one or employee plus spouse rate. If your plan has only single and family rates, you can use the family rate to calculate the permitted reward.

Currently, the specified percentage for health-contingent wellness plans is 20 percent. As of the first day of the first plan year beginning on or after January 1, 2014, the specified percentage can be increased to 30 percent. The Departments will allow an additional 20 percent (up to 50 percent) for health-contingent wellness programs designed to prevent or reduce tobacco use. This percentage is allowed for tobacco-focused health-contingent plans in order to avoid inconsistencies between the group and individual markets.

The proposed regulations explain how to apply rewards or incentives for wellness programs designed to prevent or reduce smoking. For family coverage, a change in premium for smokers applies only to their part of the premium. For example, assume an employer's qualifying health-contingent wellness program includes a 50 percent premium surcharge for smokers. An employee who smokes has family coverage for himself, his spouse and two toddlers. The spouse and toddlers do not smoke. The employer can assess the 50 percent surcharge only on that employee's portion of the premium (the single premium).

Because the Departments realize this situation can also apply to other health-contingent wellness incentives, they have requested comments on apportioning the reward to wellness goals that are not tobacco-related.

The rules include more details on tobacco-focused health-contingent wellness plans. The following outlines the key points:

- The Departments have requested comments on possible definitions of "tobacco use" for these provisions.
- The Departments state that employers can offer a reward when employees reach a number of health targets. If the employer uses the 30 percent specified percentage on health targets that are not tobacco-related, then the employer can assess an additional 20 percent for the tobacco incentive.

- The Departments have requested specific comments on whether additional rules or examples would be helpful to illustrate the reward rules.

The proposed regulations include additional details on a health-contingent wellness plan's obligation to provide a reasonable alternative standard. This means the plan must offer an alternative when it is medically inadvisable for an employee to achieve the health target required for the reward. Plans can be flexible when they determine a reasonable alternative. New details on the alternative standard include:

- In lieu of offering a reasonable alternative, a plan may instead waive the health target requirement and simply provide the reward. The plan can offer a waiver for an entire class of employees or on a case-by-case basis. For example, assume a wellness plan has a target BMI of 30 or less to earn the reward. One employee, a dedicated weight lifter, exercises regularly and eats nutritiously. Because of his muscle mass, his BMI is 32. A plan may choose to waive the standard in this case because the employee is healthy. The usual BMI measurement does not reflect the employee's health status.
- Plans are not required to develop a reasonable alternative in advance. However, they must provide one upon request. Plans cannot withdraw a reasonable alternative standard merely because it was not successful in the past. Plans must offer a reasonable alternative every year. It can be the same one, such as completing a smoking cessation program, or a new option.
- All facts and circumstances will be taken into account when determining whether a plan offers a reasonable alternative. Factors that will be reviewed include:
  - ▶ If the reasonable alternative requires employees to complete an educational program, the plan must make the educational program available. It cannot require employees to locate a program on their own. In addition, the plan cannot require the employee to pay for the program.
  - ▶ If the reasonable alternative is a diet program, the plan does not need to pay the cost of food. However, the plan must pay any membership or participation fees.
  - ▶ If the reasonable alternative involves complying with the recommendations of the plan's medical professional, the employee's personal physician can override those recommendations. In this case, the plan can determine reasonable alternatives based on the personal physician's recommendations. Plans can impose cost-sharing for medical items and services based on the personal physician's recommendations.

These new details were issued to ensure that a health-contingent wellness program is reasonably designed to improve health and not merely a ruse for underwriting or reducing benefits. The Departments are seeking comments on whether employers need more rules or clarifications.

The new regulations will continue to allow wellness plans to require a physician to confirm when the health target for a reward is medically inadvisable.

According to the proposed regulations, determining whether a plan has been designed to promote health or prevent disease depends on the facts and circumstances of the plan. To the extent that a plan's initial standard for obtaining the reward is based on the results of a measurement, test or screening related to a health factor, the plan must offer a reasonable means for participants to earn the reward if they don't meet the initial health standard. The rule requests comments on other ways to determine whether a wellness plan has been reasonably designed to promote health and prevent disease.

One of the requirements when offering a reasonable alternative is that the plan must inform participants of other means available to qualify for the reward. Sample language is included in the proposed regulations:

"Your health plan is committed to helping you achieve your best health status. 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 to find a wellness program with the same reward that is right for you in light of your health status."

The proposed regulations contain several specific examples of these new proposed rules:

### Examples of Calculating Permitted Reward Amounts

- An employer sponsors a group health plan. The annual single premium is \$6,000, and the employee contribution is \$1,500. The employer offers a health-contingent wellness program focused on exercise, blood sugar, weight, cholesterol and blood pressure. The reward for meeting these health targets is \$600.

Assuming all the other requirements for a health-contingent program are met, is the reward amount acceptable? Yes, the \$600 reward does not come close to the maximum allowed in 2014 ( $\$6,000 \times .30 = \$1,800$ ).

- The same facts as above, but this plan, in addition to the \$600 incentive for health goals, includes a \$2,000 premium surcharge for employees who have used tobacco in the most recent 12 months.

Assuming all the other requirements for a health-contingent program are met, is the reward amount acceptable? Yes, the reward amounts meet the requirements when tested separately. The \$600 reward for achieving the health targets does not come close the 30 percent margin allowed. When the tobacco surcharge is added, the total possible incentive is \$2,600. This is permitted because it is less than 50 percent of the annual single premium ( $\$6,000 \times .50 = \$3,000$ ).

### Examples of Alternative Standards for Earning Rewards

- A group health program rewards employees who participate in a specified walking program. If it is unreasonably difficult or medically inadvisable for an employee to participate, then the plan will waive the requirement for that person and provide the reward. This program is

permitted because all other requirements for health-contingent wellness programs were satisfied.

- A group health plan rewards employees whose total cholesterol count is under 200. If a participant does not meet the cholesterol target, the plan provides a reasonable alternative to earn the reward. All plan materials describe the terms of the program and the alternative standard. For example, let's say the health plan will help find a Heart Smart education program for anyone unable to meet the target. As part of the Heart Smart program, the employee works with a nurse who recommends appropriate diet and exercise. The employee will receive the reward for participating in the Heart Smart program, even if he or she does not achieve the cholesterol target. This program is permitted because it provides a reasonable alternative standard. In addition, the group health plan had no additional charge for participating in the Heart Smart program.
- The same facts as above, but this example looks at the second year of the program. In this situation, the employee participated in the Heart Smart program, but was unable to achieve the total cholesterol target of 200. The reasonable alternative in the second year requires the employee to meet with his personal physician and to follow that doctor's recommendations. The physician recommends a prescription medication to help control cholesterol and a follow-up visit in six months. The individual can earn the reward by following the physician's recommendations. This program is still permitted because the alternative standard in the second year continues to be reasonable.

These are just a few of the examples discussed in the proposed regulations. The information they provide will help employers structure wellness plans that comply with HIPAA non-discrimination rules.

### **Concluding Thoughts**

Wellness programs have become more diverse as employers search for ways to motivate employees to improve their health. These proposed regulations explain the increases that will be allowed for incentives in health-contingent wellness programs in 2014. They also provide more discussion on the HIPAA non-discrimination rules for wellness plans in general.

Remember that laws other than HIPAA can affect wellness plans. Some of the other pertinent laws affecting wellness programs include the American with Disabilities Act, the Genetic Information Nondiscrimination Act and applicable state laws.

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