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REFORM Update

Issue Sixty-Eight July 2013

July 12, 2013

The Departments of Treasury, Labor, and Health and Human Services recently released their final regulations on non-discriminatory wellness programs. The Health Insurance Portability and Accountability Act (HIPAA) prohibits health plans from discriminating in eligibility, premiums or benefits because of a health factor. The only exception to these non-discrimination requirements is qualifying wellness plans.

HIPAA requires qualifying wellness plans to meet certain requirements. The final regulations revise these requirements. The regulations also increase the incentive amounts permitted for health-contingent wellness plans. These increases were included as part of health care reform.

Proposed guidance on this issue was released in late 2012. This guidance was explained in our *Reform Update* at http://www.mcgrawwentworth.com/Reform_Update/2013/Reform_Update_54.pdf. The proposed guidance modified some of the critical elements of health-contingent wellness programs. These proposed changes would have forced major adjustments to how some employers administer their wellness programs. Because of significant stakeholder feedback, the final regulations have restructured some of these requirements. The regulations now clarify the programs that may be considered health-contingent wellness programs.

Wellness plans typically offer incentives for employees to participate in the program or achieve certain health goals. Incentives are referred to as rewards in the final regulations. These rewards can include a premium discount, a cost-sharing waiver, or an additional benefit. The chance to avoid a penalty (for example, avoiding a tobacco use surcharge) can also be considered a reward.

The final regulations distinguish between participatory and health-contingent wellness programs. Following is an explanation of these two types of wellness programs.

Participatory Wellness Programs

A participatory wellness program is one that either does not provide a reward, or does not require employees to achieve a health standard in order to receive a reward. Examples of participatory wellness programs include:

- A program that reimburses employees for all or part of a fitness center membership.
- A diagnostic testing program that rewards employees for participating and does not base any of the reward on outcomes.
- A program that rewards employees for attending a monthly, no-cost health education seminar.

HIPAA requires employers to make participatory wellness programs available to all similarly situated employees regardless of their health. Although HIPAA does not limit the reward amount for participatory wellness programs, significant rewards may cause a problem under the Americans with Disabilities Act (ADA). The final regulations make it clear that these programs do not have to meet health-contingent wellness program requirements.

Health-Contingent Wellness Programs

Health-contingent wellness programs require an employee to meet a health-related standard in order to receive a reward. A health-contingent wellness program could also require an employee to undertake more commitments than a similarly situated employee in order to obtain the reward. The health standard could involve performing a specific activity, or achieving and maintaining a specific health outcome.

Health-contingent wellness plans have to meet the five consumer protections outlined in the HIPAA rules. The proposed guidance from November 2012 included significant changes to these consumer protections. Stakeholder feedback prompted changes to how health contingent programs must be handled. The final regulations divide health-contingent wellness programs into two types:

1. ***Activity-only wellness programs:*** An employee must perform or complete a health related activity to obtain a reward.
2. ***Outcomes-based wellness programs:*** An employee must meet or maintain a specific health outcome (such as meeting certain biometric targets or not smoking) in order to obtain a reward. These programs have two tiers. The first tier is a measurement, test, or screening to determine whether the employee meets the initial standard. Plans need a baseline to determine an employee's current status as it pertains to the desired outcome. The second tier targets those who do not meet the initial standard. The program will help employees achieve that standard. A program is considered outcomes-based if a measurement, test or screening is used as part of the initial standard and those who meet the initial standard receive the reward.

The final regulations now indicate that activity-only and outcomes-based plans must satisfy the five consumer protections. The consumer protections are similar. Key differences apply to the alternative standards under each type of health-contingent wellness programs.

Activity-Only Wellness Plans

The following five consumer protections apply to activity-only wellness plans:

1. Anyone eligible for the program must be given the opportunity to qualify for the reward at least once a year.
2. The total reward for all health-contingent wellness activities cannot exceed 30 percent of the gross cost. This percentage is calculated against the coverage tier that applies. For example:
    - ✓ If only employees are eligible, the percentage would be calculated using the employee-only gross cost.

- ✓ If employees and spouses are eligible, the percentage would be calculated using the employee plus one gross cost. If the employer has a two-tier rate structure, family rates can be used since no two-person rate is available.

3. The program must be reasonably designed to promote health or prevent disease. A wellness program is reasonably designed if it:
   - ✓ Has a reasonable chance to improve health
   - ✓ Has a reasonable chance to prevent disease
   - ✓ Is not overly burdensome
   - ✓ Is not a subterfuge for discrimination based on a health factor
   - ✓ Is not highly suspect in the method chosen to promote health or prevent disease

   Several stakeholders requested a more formal way to determine a reasonable design. Under the final regulations, whether or not a design is reasonable continues to depend on facts and circumstances.
4. The reward must be available to all similarly situated employees. In some cases, the plan will have to offer an alternative standard for certain members to achieve the reward. (Alternative standards are discussed in more detail in the next section.) For activity-based wellness programs, an alternative standard need only be provided if it is unreasonably difficult because of a medical condition, or medically inadvisable, to achieve the standard. Plans can require employees to have a physician verify that their health condition makes it medically inadvisable to achieve the standard.
5. The program must notify employees that a reasonable alternative standard is available.

Outcomes-Based Wellness Plans

Outcomes-based wellness plans need to satisfy the following similar five consumer protections but the requirement for the alternative standard is quite different.

1. Anyone eligible for the program must be given the opportunity to qualify for the reward at least once a year.
2. The total reward for all health-contingent wellness activities cannot exceed 30 percent of the gross cost. The percentage is calculated against the coverage tier that applies to participants eligible for the wellness program. The reward amount can be increased to 50 percent if the wellness program is designed to prevent or reduce smoking. Smoker surcharges are considered outcomes-based wellness programs. Employers that offer them must meet the five consumer protections.
3. The program must be reasonably designed to promote health or prevent disease.
4. The reward must be available to all similarly situated employees. The plan must offer **all employees** an alternative standard to receive the reward. For outcomes-based wellness plans, the alternative standard must be offered to all employees that do not meet the initial standard. The plan **cannot** require a physician to indicate the initial standard is medically inadvisable or too difficult because of a medical condition. Employers must offer an alternative means to achieve the reward.

5. The program must notify employees that a reasonable alternative standard is available.

The alternative standard may be a wellness program. For example, if an alternative standard requires an employee to attend a series of classes, that standard is considered an activity-based wellness plan. Similarly, an employer may offer a walking program to an employee who does not meet a Body Mass Index (BMI) standard. The walking program is considered an activity-based wellness program. If the reasonable alternative is considered a wellness program, the HIPAA requirements for that program may also be met.

Additional Wellness Issues to Consider

Originally, under the proposed regulations, a non-smoking reward had to be assessed at a member level. The employer could implement a surcharge only against family members who were smokers. The regulations requested feedback regarding whether other health-contingent incentives should also be assessed individually. Member-level administration of rewards would make wellness-based plan designs impossible to administer, as rewards are applied per-contract. Health plans cannot split contracts to allow rewards to be administered on a per-member basis.

The Departments received significant employer feedback indicating that non-smoking rewards **should not** be assessed at a member level. As a result, the final regulations allow plans and insurers to apportion rewards among family members, provided the method is reasonable. Under the final regulations non-smoking rewards **do not need** to be assessed individually. The Departments have indicated that sub regulatory guidance may be issued if questions persist.

The guidance also clarifies alternative standards that must be offered in health-contingent wellness programs. It may take some time for an employee to satisfy the alternative standard. If this is the case, the plan must provide the full reward, even if it takes several months to meet the alternative standard. For example, assume the reward is a premium discount if employees meet specific biometric targets. The alternative standard requires employees to complete several classes if they do not meet biometric targets. Let's say an employee will complete the classes in April. Everyone who met the initial standard received the discount on January 1. For employees that don't meet the alternative standard until April, the employer must retroactively apply the premium discounts for January, February, March and part of April. Employers can determine the process for awarding the discount retroactively in this situation. A plan could retroactively refund the discounted amount. Employers could also take the annual value of the discount and pro-rate that amount over the months remaining in the plan year. If an employee meets an alternative standard at the end of the year, the employer must pay the reward retroactively for the year within a reasonable period of time. The employer cannot pro-rate payments over the following year. The Departments may issue sub regulatory guidance if questions persist about this issue.

The plan can also waive the alternative standard and simply provide the reward. Plans are not required to have a specific alternative standard in place before an employee requests one. Plans and issuers can choose to provide the same reasonable alternative standard to a whole class of employees, or provide different alternatives for different individuals.

The alternative standard offered for receiving a reward under an outcomes-based wellness plan must be reasonable. All the facts and circumstances are taken into account to determine whether the alternative is reasonable. Employers should consider the following factors:

- If the standard is completing an education program, the plan must make the program available or help the employee locate a program. The employer cannot require employees to pay for the program.
- The time commitment required must be reasonable.
- If the reasonable alternative is a diet program, the plan must pay the membership or participation fee. The plan is not required to pay for food.
- If the employee's personal physician states that the plan's alternative standard is not medically appropriate for the employee, the plan must provide a reasonable alternative that the physician does regard as medically appropriate. Employees may have to share the cost for these services under the plan's cost-sharing requirements.

Behavioral change or overcoming addiction sometimes requires a cycle of failure and renewed effort. Therefore, health-contingent wellness plans cannot stop providing a reasonable alternative standard just because an employee previously failed to achieve the initial standard. They must continue to offer a reasonable alternative standard, whether it is the same or different.

A reasonable alternative may be complying with the recommendations of a medical professional who is an agent or employee of the plan. If the employee's personal physician states that the recommendations are not medically advisable, the plan must provide a different alternative standard.

The final regulations include recommended wording for the alternative standard:

> 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 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.

Wellness plans must inform employees that the alternative standard is available.

Examples Included in Regulations

The regulations include a number of examples, summarized below, to help employers understand these final rules. These examples assume the reward amounts meet the HIPAA-permitted amounts.

Example 1: A group health plan rewards employees who participate in a reasonable, specified walking program. If the program is unreasonably difficult for an employee because of a medical condition, the plan will still provide the reward even though the employee cannot participate. All materials describing the terms of the walking program state that the waiver is available. This plan meets HIPAA's non-discrimination rules as modified by health care reform.

Example 2: A group health plan offers a reward to participants who achieve a count below 200 on a total cholesterol test. If a participant does not achieve this target, the plan allows the participant to develop an alternative cholesterol plan with a personal physician. The physician can modify the alternative plan as needed throughout the year. All plan materials must describe the option to work with a physician to achieve the reward for reaching the cholesterol target. This program is considered an outcomes-based wellness program, and also meets the requirements of the HIPAA non-discrimination rules.

Example 3: An employer has a cholesterol program similar to the one in Example 2. However, the wellness plan's physician and nurse practitioner determine the alternative cholesterol action plan to achieve the reward. The plan does not allow a personal physician to modify the plan if it is not medically appropriate for that participant. The plan describes the alternative standard within the other plan materials. This plan is considered an outcomes-based wellness program but does not meet the HIPAA non-discrimination requirements because it doesn't take into account the recommendations of the participant's personal physician. If the plan allowed the personal physician to modify the alternative cholesterol action plan, then it would meet the HIPAA requirements.

Example 4: A group health plan will reward employees who have a BMI of 26 or less. BMI measurement is done shortly before the beginning of the plan year. To receive the reward, participants who do not meet the target BMI may take part in a program requiring them to walk 150 minutes a week. If the walking program is medically inadvisable, the participant can still receive the reward by achieving an alternative standard. The availability of an alternative standard is stated in the plan materials. The health plan will work with the participant's personal physician to develop a reasonable alternative. This program is considered an outcomes-based wellness program that meets HIPAA non-discrimination requirements.

Example 5: This example uses the facts from the BMI program in Example 4. However, instead of a walking program, participants who do not meet the BMI target are expected to reduce their BMI by one point. At any time during the year, participants can obtain a second reasonable alternative standard from their personal physicians who can recommend weight, diet and exercise standards. The wellness plan's physician can design the program, but the participant's physician may adjust or change the plan. This program is considered an outcomes-based wellness program. It also meets HIPAA non-discrimination requirements by providing a second alternative standard because the first standard is another outcomes-based wellness plan.

Example 6: In conjunction with a plan's annual enrollment period, a health plan provides a premium differential based on tobacco use. Tobacco use is determined through responses to a health assessment. The plan discounts premiums for non-smokers. However, smokers can receive the discount if they participate in a smoking cessation program. The plan enrolls them in the program and pays for it. Participation in the program is not unreasonable, burdensome or impractical. The plan also allows smokers to include their physicians' recommendations as part of an alternative standard. The alternative standard option is stated in the plan materials. This is an outcomes-based wellness program that meets HIPAA non-discrimination requirements.

Example 7: The employer structures a plan similar to the one in Example 6. However, the plan requires employees to quit smoking after they complete the tobacco cessation program. Employees will not receive a non-smoker premium discount in subsequent years unless they stop smoking. This is an outcomes-based wellness program that does not meet HIPAA non-discrimination requirements. The plan cannot cease to provide an alternative standard merely because the employee did not stop smoking after participating in a tobacco cessation program. The plan needs to offer the same or a different alternative standard, but one must be offered.

The final regulations include several more examples on various wellness plan arrangements. The final regulations can be found at https://www.federalregister.gov/articles/2013/06/03/2013-12916/incentives-for-nondiscriminatory-wellness-programs-in-group-health-plans.

Concluding Thoughts

The final regulations provide the detail employers need to continue with wellness initiatives. The regulations also note that HIPAA is only one set of regulations affecting wellness plans. Employers need to stay mindful of state law, the Americans with Disability Act, and the Genetic Information Nondiscrimination Act.

The final regulations materially change the requirements for outcomes-based wellness programs. These changes will apply as of the first day of the first plan year beginning on or after January 1, 2014. If your organization offers an outcomes-based wellness plan, you will likely need to modify your approach to alternative standards.