
New wellness regulations may cause headaches

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In brief

Starting in 2014, group health plans and insurers will be able to offer higher financial rewards to participants achieving healthy behaviors such as quitting smoking or reducing cholesterol. But these wellness programs will have to avoid discriminating against people based on health factors. Employers offering group health plan-based wellness programs must follow several sets of legal requirements, including HIPAA (health factor discrimination), GINA (genetic information discrimination), and ADA (disability discrimination). The Affordable Care Act (ACA) builds on existing HIPAA wellness program rules for group health plans and extends those nondiscrimination protections to nongrandfathered individual health insurance policies.

New [final regulations](#) clarify how wellness programs must be structured to comply with the ACA requirements. While the basic provisions of the regulations proposed late last year are retained, the final regulations include changes aimed primarily at programs that link rewards to activities or outcomes that could be affected by health status. Also released was a [RAND Corporation research study](#) commissioned by the Departments of Labor (DOL) and Health and Human Services (HHS) to review workplace wellness programs, upon which the final regulations were partially based. The RAND report contains numerous statistics on wellness plan designs and utilization. The regulations are applicable to both grandfathered and nongrandfathered group health plans and group health insurance coverage for plan years beginning on or after January 1, 2014. The rules also apply to nongrandfathered individual health insurance for policy years starting on or after January 1, 2014.

In detail

The underlying theme of the final regulations is that for any type of plan-based wellness incentive program, every individual participating should be able to receive the full reward or incentive amount, regardless of health status. To achieve this goal, the final regulations include standards that programs must meet, with some of the standards varying depending on the type of program and,

ultimately, how an individual's health status might affect their ability to earn a reward. Thus, programs that condition rewards on participants achieving particular health-related outcomes, like biometric targets, are subject to more stringent requirements and offers of alternative ways to earn the reward, than are programs which most individuals will be able to complete, but may be unavailable to individuals with

particular medical conditions, like a walking or exercise program.

Observation

These rules do not apply to wellness programs that don't offer a reward, or that aren't linked to a health plan or insurance policy. For example, if an employer offers any employee a gift card for

quitting smoking, and no health plan premiums, cost-sharing or other plan-related features are involved, the new proposed rules won't govern that program, although other laws such as GINA and ADA should be considered.

Wellness program rules

The final regulations reorganize the rules as proposed in November 2012, and clarify several aspects of plan-related wellness programs, particularly those that are health-contingent. In addition, they confirm that rewards can include financial incentives such as a premium discount or rebate, as well as avoiding a penalty, such as the absence of a surcharge.

Wellness programs are assessed depending on whether they are participatory or health-contingent. A participatory wellness program does not require an individual to satisfy a standard related to a health factor in order to obtain a reward. A health-contingent wellness program is one that conditions the reward on an individual satisfying a standard related to a health factor (such as not smoking, attaining certain results on biometric screenings, or meeting targets for exercise). In a change from earlier proposed rules, health-contingent wellness programs are further divided into those which are 'activity-only' and those which are 'outcome-based.' Each type of wellness program is subject to different rules, as explained below.

Participatory wellness programs

Participatory wellness programs offering financial rewards must be available to all similarly situated individuals regardless of health status. These programs need not comply with more onerous rules for 'health-contingent' programs.

Participatory programs include those reimbursing fitness center membership fees, attending monthly no-cost health seminars, and providing rewards for completing a health risk assessment, a smoking cessation program or diagnostic screenings (with no further action or outcome required to earn the reward).

Plans continue to have flexibility in defining similarly situated individuals. Programs or rewards can differ for enrollees in different benefit packages (e.g. PPO versus indemnity programs), different dependents (e.g. spouses versus other family members), and different bona fide employment classifications (e.g. business units, union membership, or geographic locale).

Health-contingent wellness programs

Health-contingent wellness programs are those that require an individual to satisfy a standard related to a health factor to receive a reward (called outcome-based programs), as well as programs requiring an individual to complete an activity in order to obtain a reward, regardless of the standard achieved (called activity-only programs). These programs may require individuals with a health factor to potentially undertake more than a similarly situated individual in order to obtain the same reward. Both types of health-contingent wellness programs must comply with a five-factor scheme that largely echoes existing HIPAA wellness program rules, although the requirement for a reasonable design (item 3 below) and the requirement to provide and disclose a reasonable alternative standard for earning the reward or avoiding a penalty (item 5 below) vary for activity-only and outcome-based programs. The basic five-factor test is as follows:

1. The program must give individuals eligible for the program the opportunity to qualify for the reward under the program at least once per year.
2. The reward must not exceed 30% (50% if the program is designed to prevent or reduce tobacco use) of the total cost of coverage under the plan.
3. The program must be reasonably designed to promote health or prevent disease. A program satisfies this standard 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".
4. The full reward under a health-contingent wellness program, whether activity-only or outcome-based, must be available to all similarly situated individuals. This requirement has been significantly expanded in the final rules, as described below.
5. Plans and issuers must disclose the availability of a reasonable alternative standard to qualify for the reward (and, if applicable, the possibility of waiver of the otherwise applicable standard) in all plan materials describing the terms of a health-contingent wellness program (both activity-only and outcome-based wellness programs). Sample language is provided; the final rule adds a note to the sample stating that

the recommendations of a personal physician will be accommodated.

The final regulations include new requirements for providing and disclosing reasonable alternatives – and these differ for activity-only and outcome-based programs.

Activity-only wellness programs

Activity-only programs require an individual to perform or complete an activity related to a health factor to obtain a reward but do not require the individual to attain or maintain a specific health outcome. Examples of this type of wellness program include walking, diet or exercise programs. Some individuals may not be able to participate in or complete activity-only programs due to a health factor, such as asthma, diabetes or pregnancy.

Activity-only programs must offer a reasonable alternative standard (or waiver of what would otherwise be required) for obtaining the reward for any individual for whom, for that period, it is either unreasonably difficult due to a medical condition to meet the otherwise applicable standard, or for whom it is medically inadvisable to attempt to satisfy the otherwise applicable standard. Plans are permitted to require an individual's personal physician to verify that a health factor makes it unreasonably difficult (or medically inadvisable) for the individual to meet the standard of an activity-only wellness program, if it is reasonable under the circumstances to do so.

Observations

Sometimes, it may be difficult to determine whether a particular program is activity-only or participatory and, therefore, whether reasonable alternatives must be offered. For example, for some populations, reading a printed health

promotion brochure may be participatory and not implicate any health conditions. For other populations, however, reading such a brochure might be considered health-contingent. The agencies acknowledge that the determination of what type of wellness program is involved will be very fact-specific.

The regulations offer certain guidelines and restrictions on how reasonable alternatives must be structured. For example, if an educational program is offered as a reasonable alternative, the group health plan or insurer must offer a particular program or choice of programs, and pay for any costs, and not require an individual to find a program on their own. In determining whether a program's alternatives are reasonable, employers and issuers should consult the various guidelines included in the regulations.

Outcome-based programs

Outcome-based programs require an individual to attain or maintain a specific health outcome in order to obtain a reward or avoid a surcharge or penalty under the group health plan or individual policy. Examples of outcome-based programs include achieving biometric targets such as cholesterol levels or body mass index (BMI), or not using tobacco.

To ensure that outcome-based standards, such as a BMI target or other measurement, test or screening, are not a subterfuge for discrimination based on health factors, the regulations require that a reasonable alternative standard be made available to any individual who cannot meet the plan's target, regardless of any medical condition or other health status.

Observation

The requirement to offer a reasonable alternative standard to any

individual who cannot meet the plan's target, regardless of health status or medical condition, reflects the concern that outcome-based standards are more likely to discriminate against individuals based on health status.

Plans may utilize participatory programs, such as educational programs, as a reasonable alternative standard, or they may provide reasonable alternative standards that are themselves health-contingent wellness programs, provided that the alternative standard also complies with the requirements to provide reasonable alternative standards.

In addition, outcome-based programs must allow individuals to follow the recommendations of a personal physician as a second reasonable alternative standard, even if the individual has no medical reason for not being able to comply with the program's standard. For example, if an individual's BMI does not meet the program's requirement for a reward, the plan must allow that individual's personal physician to set a recommendation that will result in earning the program's reward if complied with. In addition, a plan cannot require a doctor's note or physician verification as a prerequisite to providing a reasonable alternative to the initial standard required.

Observations

This deference to an individual's personal physician's recommendation, with no ability on the part of the plan or policy, or its own medical professionals, to determine whether the recommendation is reasonable or not, could present challenges in operation. Plans may want to consider how to implement this requirement and still retain meaningful and cost-effective outcome-based programs.

Many existing programs require a doctor's note before a reasonable alternative is offered to an individual to earn a reward. This practice will have to be altered to reflect the new rules – a doctor's note can be required for offering a reasonable alternative to an activity-only wellness program, but cannot be required for offering a reasonable alternative to an outcome-based wellness program.

Plans may not stop providing a reasonable alternative standard under any health-contingent wellness program merely because an individual was not previously successful in satisfying the initial standard. For example, with respect to incentives linked to smoking cessation programs or weight loss, for a plan with an initial outcome-based standard that an individual not use tobacco or lose a percentage of body weight, a reasonable alternative standard might

be to try an educational seminar. An individual who attends the seminar would be entitled to the reward, even if the individual does not quit smoking or lose weight. The following year, the plan may require completion of a different reasonable alternative standard, such as complying with a recommendation from the individual's physician. Completion of that standard will qualify the individual to receive the reward in that year, whether or not the individual satisfies the original standard regarding smoking or weight loss.

Effective date and other laws

The final regulations apply to group health plans and insurers for plan years beginning on or after January 1, 2014. In addition, wellness programs must continue to follow GINA, and the Americans with Disabilities Act – those two laws are enforced by the Equal Employment Opportunity

Commission (EEOC), which hasn't adopted the positions of the other agencies on wellness programs.

The takeaway

The final regulations will not disrupt many wellness programs that offer incentives for participating in completing a health risk assessment or attending health promotion activities – participation-only programs. However, the final regulations could cause disruption to many existing or planned programs that involve activities or outcomes. These programs should be evaluated as soon as possible so that any changes can be made before the effective date of the final regulations. This may be challenging, as many details of plan designs, rates, and communications for plan or policy years starting January 1, 2014 must be finalized soon.

Let's talk

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