

PPACA/HIPAA Wellness Programs and Rewards Final Regulations Issued

by: **Tim Carney**

The Treasury Department, Department of Labor and Department of Health and Human Services issued final regulations on wellness programs and rewards for group health plans on May 29, 2013. The regulations implement provisions of the Patient Protection and Affordable Care Act of 1996 (PPACA) and amend guidance previously issued under the Health Insurance Portability and Accountability Act (HIPAA).

Background

HIPAA generally prohibits group health plans (insured or self-insured) from discriminating against participants and beneficiaries with respect to eligibility, benefits, premiums or contributions based on eight specified "health factors" (i.e., health status, medical condition, claim experience, receipt of health care, medical history, genetic information, evidence of insurability and disability). However, HIPAA makes an exception to this general prohibition for plan provisions that vary benefits (including copayments, deductibles or coinsurance) or the premium or contributions for similarly situated individuals in connection with programs of health promotion or disease prevention ("wellness programs"). The PPACA includes a provision that extends the HIPAA nondiscrimination protections to the individual market and also increases the permissible wellness-related financial rewards from the amount previously established under HIPAA rules.

When the Regulations go into Effect

The regulations apply to insured and self-insured group plans, both grandfathered and non-grandfathered, for plan years beginning on or after January 1, 2014.

Summary

The regulations are over 120 pages in length. This is intended to summarize certain key features of the regulations, not to serve as a comprehensive outline of all of the regulations.

Types of Wellness Programs

1. Participatory Wellness Programs

Participatory Wellness program rewards are based only on participation, not on meeting specific health standards. Examples include:

- A program that reimburses all or part of the cost of membership at a fitness center.
- A diagnostic testing program that provides a reward for participation in the program and does not base any part of the reward on outcomes. For example, a wellness program that provides a reward for taking a series of biometric tests (regardless of the results).
- 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 (although the PPACA's preventive services mandate requires non-grandfathered plans to provide certain preventive health services without participant cost sharing).

- A program that reimburses employees for the costs of, or otherwise provides a reward for participating in, a smoking-cessation program regardless of 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 (educational or otherwise) required by the employee with respect to the health issues identified in the assessment.

There are no limits on the rewards that may be offered for Participatory Wellness programs. Therefore, any rewards provided in connection with a participatory wellness program do not count toward the maximum permissible reward thresholds (discussed below). Also, participatory wellness programs are not required to meet the five special requirements applicable to health-contingent wellness programs (discussed below). Also, reasonable alternative standards (discussed below) need not be made available under participatory wellness programs.

2. Health-Contingent Wellness Programs

Health-Contingent Wellness programs are those that require individuals to meet a “health standard” or to participate in a health program to receive a reward. Every individual eligible for the program must be given an opportunity to qualify for the reward once a year. The reward cannot exceed the maximum limits discussed further below.

The standard may require a participant to perform or complete an activity relating to a health factor, or to attain or maintain a specific health outcome. According to regulators, this may constitute discrimination among plan participants and beneficiaries based on their health status, which is generally prohibited under current HIPAA rules and the PPACA. However, if a plan complies with five special requirements for health-contingent wellness programs (as described below), the final regulations continue to permit such rewards.

Health-Contingent programs are of two types.

(a) Activity-Only Wellness Programs

In these programs, participants are rewarded based on participation, not outcomes. Examples include:

- A walking program.
- An exercise program.
- A diet program.

An activity-only program may require completion of the program in order to qualify for the reward, but it cannot require participants to achieve a certain outcome, such as losing weight.

Some individuals may be unable to participate in an activity-only wellness program due to a health factor. The final regulations require that individuals be given a reasonable opportunity through a “reasonable alternative standard” to qualify for the reward. That standard is discussed below.

(b) Outcome-Based Wellness Programs

Under an outcome-based wellness program, an individual must attain or maintain a specific health outcome in order to obtain a reward. Individuals who do not meet the required standard must take additional steps such as working with a health coach or completing a health improvement plan, to receive the reward.

Examples of outcome-based wellness programs include biometric screening that tests individuals for specified medical conditions or risk factors, such as high cholesterol, high blood pressure, abnormal BMI (body mass index) or high glucose level, and provides a reward to employees identified as within a normal or healthy range (or at low risk for certain medical conditions). Employees who are identified as outside the normal or healthy range (or at high risk) are required to take additional steps, 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 plan of care, to obtain the same reward.

Reasonable Alternative Standards

If an individual does not qualify for a Health-Contingent reward, a reasonable alternative standard or waiver must be available.

- For Activity-Only programs, a reasonable alternative for obtaining the reward must be provided if it is unreasonably difficult due to a medical condition, or it is medically inadvisable for an individual to attempt, to complete the activity.
- For Outcome-Based programs, a reasonable alternative must be provided to all individuals who do not meet the initial standard.

As an example, a reasonable alternative for an individual who failed to meet a BMI standard might be participation in a weight loss program or to require the participant to reduce BMI by a small amount or percentage over a year's time.

Any information provided to employees that describes wellness programs must address the availability of reasonable alternatives and provide contact information to request an alternative. Reasonable alternatives do not need to be defined in advance and can be determined on an individual basis.

Five Requirements for Health-Contingent Wellness Programs

As under current HIPAA rules, health-contingent wellness programs will be permitted in a group health plan only if they satisfy all five requirements, as revised in the final regulations. The five special requirements are:

1. Frequency of opportunity to qualify
2. Size of reward
3. Reasonable design
4. Uniform availability and reasonable alternative standards
5. Notice of availability of reasonable alternative standards

1. Frequency of Opportunity to Qualify

Individuals eligible for the health-contingent wellness program must be given the opportunity to qualify for the reward at least once per year. The once-per-year requirement is a bright-line standard for determining the minimum frequency consistent with a reasonable design for promoting good health or preventing disease.

2. Size of Reward

The maximum wellness reward amounts allowed:

- The maximum wellness program reward is 30 percent of the total cost of medical coverage, including both employer and employee contributions.
- The maximum wellness program total reward may be increased to 50 percent for programs related to tobacco use.
- Rewards can take many forms, such as premium discounts or surcharges, reduced cost sharing, enhanced benefits, gift cards or deposits to Health Savings Accounts or Health Reimbursement Accounts.
- The reward must be available at least once per year for all similarly situated individuals.
- If family members participate in wellness programs, the reward can be based on the total cost of coverage for all covered family members. If some family members are eligible for the reward and others are not, employers have flexibility in determining the portion of the reward attributable to each family member.

For this purpose, the total cost of coverage is determined based on the total amount of employer and employee contributions toward the cost of coverage for the benefit package under which the employee is (or the employee and any dependents are) receiving coverage. Any rewards offered in connection with participatory wellness programs do not count toward the maximum permissible reward and may be provided over and above those maximum permissible rewards.

The final regulations include the following examples to illustrate maximum permissible rewards:

Example 1

- *Facts.* An employer sponsors a group health plan. The annual premium for employee-only coverage is \$6,000 (of which the employer pays \$4,500 per year and the employee pays \$1,500 per year). The plan offers employees a health-contingent wellness program with several components, focused on exercise, blood sugar, weight, cholesterol and blood pressure. The reward for compliance is an annual premium rebate of \$600.
- *Conclusion.* In this example, the reward for the wellness program, \$600, does not exceed the applicable percentage of 30% of the total annual cost of employee-only coverage, \$1,800 ($\$6,000 \times 30\% = \$1,800$).

Example 2

- *Facts.* Same facts as Example 1, except the wellness program is exclusively a tobacco prevention program. Employees who have used tobacco in the previous 12 months and who are not enrolled in the plan's tobacco-cessation program are charged a \$1,000 premium surcharge (in addition to the employee contribution toward the coverage). Those who participate in the plan's tobacco-cessation program are not assessed the \$1,000 surcharge.
- *Conclusion.* In this example, the reward for the wellness program (absence of a \$1,000 surcharge), does not exceed the applicable percentage of 50% of the total annual cost of employee-only coverage, \$3,000 ($\$6,000 \times 50\% = \$3,000$).

Example 3

- *Facts.* Same facts as Example 1, except that, in addition to the \$600 reward for compliance with the health-contingent wellness program, the plan also imposes an additional \$2,000 tobacco premium surcharge on employees who have used tobacco in the previous 12 months and who are not enrolled in the plan's tobacco-cessation program. Those who participate in the plan's tobacco-cessation program are not assessed the \$2,000 surcharge.
- *Conclusion.* In this example, the total of all rewards (including absence of a surcharge for participating in the tobacco program) is \$2,600 ($\$600 + \$2,000 = \$2,600$), which does not exceed the applicable percentage of 50% of the total annual cost of employee-only coverage (\$3,000) and, tested separately, the \$600 reward for the wellness program unrelated to tobacco use does not exceed the applicable percentage of 30% of the total annual cost of employee-only coverage (\$1,800).

Example 4

- *Facts.* An employer sponsors a group health plan. The total annual premium for employee-only coverage (including both employer and employee contributions toward the coverage) is \$5,000. The plan provides a \$250 reward to employees who complete a health risk assessment, without regard to the health issues identified as part of the assessment. The plan also offers a healthy-heart program, which is a health-contingent wellness program, with an opportunity to earn a \$1,500 reward.
- *Conclusion.* In this example, even though the total reward for all wellness programs under the plan is \$1,750 ($\$250 + \$1,500 = \$1,750$, which

exceeds the applicable percentage of 30% of the cost of the annual premium for employee-only coverage ($\$5,000 \times 30\% = \$1,500$), only the reward offered for compliance with the health-contingent wellness program ($\$1,500$) is taken into account in determining whether the rules regarding the size of the reward are met. (The $\$250$ reward is offered in connection with a participatory wellness program and therefore is not taken into account.) Accordingly, the health-contingent wellness program offers a reward that does not exceed the applicable percentage of 30% of the total annual cost of employee-only coverage.

3. Reasonable Design

The regulations require that health-contingent wellness programs (whether activity-only or outcome-based) be reasonably designed to promote health or prevent disease. This reasonable design requirement is intended prevent abuse and, according to the regulators, is “intended to be an easy standard to satisfy.” The final regulations state that a wellness program is reasonably designed if it has a reasonable chance of improving the health of, or preventing disease in, participating individuals, and is not overly burdensome, is not a subterfuge for discrimination based on a health factor and is not highly suspect in the method chosen to promote health or prevent disease. The determination of whether a health-contingent wellness program is reasonably designed is based on all the relevant facts and circumstances. The regulators note that wellness programs are not required to be accredited or based on particular evidence-based clinical standards, and continue to provide plans and issuers flexibility and encourage innovation.

Nothing in the final regulations prevent a plan from establishing more favorable rules for eligibility or premium rates (including rewards for adherence to certain wellness programs) for individuals with an adverse health factor than for individuals without the adverse health factor.

Finally, as described in further detail below, to ensure that an outcome-based wellness program is reasonably designed, a reasonable alternative standard to qualify for the reward must be provided to any individual who does not meet the initial standard based on a measurement, test or screening that is related to a health factor (such as not smoking or attaining certain results on biometric screenings). The final regulations include a new requirement that all individuals must be provided with a reasonable alternative standard to qualify for the reward. Before, this standard applied only to those for whom meeting the initial standard is unreasonably difficult due to a medical condition to satisfy or medically inadvisable to attempt to satisfy.

4. Uniform Availability and Reasonable Alternative Standards

(a) Activity-only wellness programs

Activity-only wellness programs, such as walking programs, diet programs and/or exercise programs, must make the full reward available to all similarly situated individuals. A reward under an activity-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 as to for any individual that, for that period, it is

either: (i) unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard or (ii) medically inadvisable to attempt to satisfy the otherwise applicable standard.

For example, if it is unreasonably difficult for an individual, due to a medical condition, to participate in a walking, diet or exercise program, or if it is medically inadvisable for the individual to attempt to participate in a walking, diet or exercise program, the plan must provide the individual a reasonable alternative standard that would allow the individual to receive the award, or alternatively, to simply waive the requirement to participate in the wellness program to obtain the reward.

The final regulations do not require plans to determine a particular reasonable alternative standard in advance of an individual's request for one; however, a reasonable alternative standard must be furnished by the plan upon the individual's request, or the condition for obtaining the reward must be waived.

All facts and circumstances are to be taken into account in determining whether a plan has furnished a reasonable alternative standard, including things such as the following:

- If the reasonable alternative standard is completion of an educational program, the plan must make the educational program available or assist the individual 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. Thus, the additional costs associated with providing educational programs must be borne by the plan.
- The time commitment required must be reasonable (for example, requiring attendance nightly at a one-hour class would be unreasonable).
- If the reasonable alternative standard is a diet program, the plan 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 that a plan standard (including, if applicable, the recommendations of the plan's medical professional) is not medically appropriate for that individual, the plan must provide a reasonable alternative standard that accommodates the recommendations of the individual's personal physician with regard to medical appropriateness. Plans may impose standard cost sharing under the plan or coverage for medical items and services furnished pursuant to the physician's recommendations.

It is permissible for a plan to seek verification, such as a statement from the 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, if reasonable under the circumstances. Thus, plans are permitted to seek verification under an activity-only program, but not under an outcome-based program.

(b) Outcome-based wellness programs

Outcome-based wellness programs allow plans to conduct screenings and employ measurement techniques in order to target wellness programs effectively. For example, plans are able to target only individuals with high cholesterol for participation in cholesterol-reduction programs, or individuals who use tobacco for participation in tobacco-cessation programs, rather than the entire population of participants and beneficiaries, with the reward based on health outcomes or participation in reasonable alternatives.

In order for outcome-based wellness programs to meet the requirement that the reward be available to all similarly situated individuals, the final regulations require that the program allow 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 a measurement, test or screening. Therefore, if an individual does not meet a plan's target biometrics (or other, similar outcome-based initial standards, such being a non-tobacco user), that individual must be provided with a reasonable alternative standard regardless of any medical condition or other health status factor, to ensure that outcome-based initial standards are not a subterfuge for discrimination or underwriting based on a health factor.

Also, as noted above, with respect to outcome-based programs a plan is not permitted to seek verification such as a statement from the 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. Instead, an individual is allowed to request a reasonable alternative standard even if the individual does not meet these health factor requirements. For example, a plan must offer a tobacco user a reasonable alternative standard (for example, participation in a tobacco-cessation program), and is not allowed to first require that such individual get a statement from his or her physician that a health factor (e.g., addiction to nicotine) makes it unreasonably difficult for the individual to satisfy the nonsmoker standard. This is significantly different from the earlier HIPAA rules.

If a plan provides a reasonable alternative standard to the otherwise applicable measurement, test or screening that involves an activity (as opposed to an outcome) 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 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). For example, if an outcome-based wellness program requires participants to maintain a certain healthy weight and provides, as a reasonable alternative standard, a diet and exercise program for individuals who do not meet the targeted weight, a plan or issuer may seek verification, if reasonable under the circumstances, that a second reasonable alternative standard is needed for certain individuals because, for those individuals, it would be unreasonably difficult due to a medical condition to comply, or medically inadvisable to attempt to comply, with the diet and exercise program (i.e., the first reasonable alternative standard) due to a medical condition.

As with activity-only wellness programs, the regulations do not require plans to determine a particular reasonable alternative standard in advance of an individual's request for one. In

addition, as with activity-only wellness programs, all the facts and circumstances are taken into account in determining whether a plan or issuer has furnished a reasonable alternative standard.

To the extent a reasonable alternative standard under an outcome-based wellness program is, itself, an activity-only wellness program, the activity-only reasonable alternative standard must comply with the requirements for activity-only programs as if it were an initial program standard. Therefore, for example, if a plan provides a walking program as an alternative to a running program, the plan must provide reasonable alternatives to individuals who cannot complete the walking program because of a medical condition. Moreover, to the extent that a reasonable alternative standard under an outcome-based wellness program is, itself, another outcome-based wellness program, the outcome-based reasonable alternative standard must generally comply with the requirements for outcome-based wellness programs, subject to the following special rules:

- 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 to meeting the reasonable alternative standard defined by the plan, but only if the physician joins in the request. 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, consistent with medical appropriateness.

The regulations require plans to disclose the availability of a reasonable alternative standard to qualify for the reward (and, if applicable, the possibility of a waiver of the otherwise applicable standard) in all plan materials describing the terms of a health-contingent wellness program (for both activity-only and outcome-based wellness programs). A disclosure of the availability of a reasonable alternative standard must include contact information for obtaining the alternative and a statement that recommendations of an individual's personal physician will be accommodated. For outcome-based wellness programs, this notice must also be included in any disclosure that an individual did not satisfy an initial outcome-based standard.

For all health-contingent wellness programs (both activity-only and outcome-based), if plan materials merely mention that such a program is available, without describing its terms, this disclosure is not required. For example, a Summary of Benefits and Coverage that notes that cost sharing may vary based on participation in a diabetes wellness program, without describing the standards of the program, would not trigger this disclosure. In contrast, a plan disclosure that references a premium differential based on tobacco use, or based on the results of a biometric exam, is a disclosure describing the terms of a health-contingent wellness program and, therefore, must include this disclosure.

The regulations provide the following sample language:

"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."

The regulations also provide sample language addressing specific types of potential programs:

"Your health plan wants to help you take charge of your health. Rewards are available to all employees who participate in our Cholesterol Awareness Wellness Program. If your total cholesterol count is under 200, you will receive the reward. If not, you will still have an opportunity to qualify for the reward. We will work with you and your doctor to find a Health Smart program that is right for you."

* * *

"Fitness Is Easy! Start Walking! Your health plan cares about your health. If you are considered overweight because you have a BMI of over 26, our Start Walking program will help you lose weight and feel better. We will help you enroll. (If your doctor says that walking isn't right for you, that's okay, too. We will work with you [and, if you wish, your own doctor] to develop a wellness program that is.)"

EEOC Guidance

Although the regulations govern whether a program is HIPAA/PPACA-compliant, the EEOC has cautioned that compliance with the regulations does not automatically ensure compliance with other federal laws such as the Americans with Disabilities Act (ADA) or the Genetic Information Nondiscrimination Act (GINA).

Accordingly, employers and issuers need to keep this in mind when drafting and implementing, or revising, wellness programs. Although the regulations do not go into effect until January 1, 2014, employers should begin reviewing their plans now.

Tags: wellness programs, HIPAA, reasonable alternative standards, final regulations, PPACA, activity-based, outcome-based, rewards