



June 7, 2013

Final Rules For Wellness Plans Released

Background

The Departments of Health and Human Services, Labor, and Treasury (The Departments) have issued final wellness program rules. The new final rules are based on the existing HIPAA wellness rules and the requirements contained in proposed rules issued in November 2012.

Wellness programs are divided into two categories: “participatory wellness programs” and “health-contingent wellness programs”. Participatory wellness programs are permissible under the HIPAA nondiscrimination rules, as amended by the Affordable Care Act (ACA), provided they are available to all similarly situated individuals regardless of health status. Health-contingent wellness programs are permissible under the rules, provided they meet the five specific criteria described below.

These final regulations regarding wellness plans generally apply for plan years beginning on or after January 1, 2014.

Types of Wellness Programs

Participatory Wellness Programs

Participatory wellness programs are defined as “programs that either do not provide a reward or do not include any conditions for obtaining a reward that are based on an individual satisfying a standard that is related to a health factor.” The rules do not impose a limit on incentives or rewards for participatory programs. Examples described in the guidance include:

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

Health-Contingent Wellness Programs

Health-contingent wellness programs require an individual to satisfy a standard related to a health factor to obtain a reward. This standard may be performing or completing an activity relating to a health factor, or it may be attaining or maintaining a specific health outcome. Under the final regulations, health-contingent wellness programs are further divided into activity-only wellness programs and outcome-based wellness programs.

In an important change from previous guidance, some programs that previously have been considered participatory programs, such as a walking program, are now classified as an activity health-contingent program.

- Activity-Only Health-Contingent Wellness Program
A program where an individual is required to perform or complete an activity related to a health factor in order to obtain a reward, but is not required to attain or maintain a specific health outcome. Examples include walking, diet, or exercise programs.

Some individuals participating in an activity-only wellness program may be unable to participate in or complete (or have difficulty participating in or completing) the program’s prescribed activity due to a health factor, so these individuals must be given a reasonable alternative opportunity to qualify for the reward.

- Outcome-Based Health-Contingent Wellness Program
A program where an individual must attain or maintain a specific health outcome (such as not smoking or attaining certain results on biometric screenings) in order to obtain a reward.

As with the activity-based programs, individuals who do not attain or maintain the specific health outcome must be offered an alternative to earn the reward. An activity-based option may be offered as an alternative to the outcome based program to achieve the same reward.

5 Criteria for Health-Contingent Wellness Programs

1. Frequency of Opportunity to Qualify.
Individuals eligible for the program must be given the opportunity to qualify for the reward at least once per year.

2. Size of Reward.
The maximum reward offered to an individual with respect to a group health plan cannot exceed 30% of the total cost of employee-only coverage under the plan. This percentage is increased to 50% for any programs designed to prevent or reduce tobacco use.

The combined incentive for a program that includes both outcomes-based rewards, and a reward related to tobacco, may not exceed 50% of the cost of coverage. For example, a combined program could provide an outcomes-based reward equal to 30% of the plans premium with a tobacco-based reward worth another 20% of premium for a total reward of 50%.

In addition, if dependents may participate in the wellness program, the reward cannot exceed 30% (or 50% for tobacco-related programs) of the total cost of the coverage in which the employee and any dependents are enrolled.

3. Reasonable Design.
“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.”

To be considered reasonably designed, an outcome-based wellness program must provide a reasonable alternative standard to qualify for the reward for all individuals who do not meet the initial standard that is related to a health factor. More detail on the reasonable standard requirement is included below.

4. Uniform Availability and Reasonable Alternative Standards.
The full reward must be available to all similarly situated individuals, and individuals who qualify by satisfying a reasonable alternative standard in place of the otherwise applicable standard. The reasonable standard requirements in the final regulations are significantly more detailed than prior HIPAA wellness rules guidance, and will require new procedures be adopted by many existing wellness programs. Additional detail on the reasonable alternative standard is included below.
5. Notice of Availability of Reasonable Alternative Standard.
Plans are required to disclose the availability of a reasonable alternative standard to qualify for the reward in all plan materials describing the terms of a health-contingent wellness program. The disclosure must include: (i) contact information for obtaining the alternative, and (ii) 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.

Model Notice Language Provided in the Guidance:


“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.”

If plan materials merely mention that a wellness program is available, without describing the wellness program terms, this disclosure is not required in that material.

Reasonable Alternatives

In what is arguably the most significant change to prior guidance, the final regulations impose considerable new requirements related to the offer of an alternative standard to allow individuals to receive an incentive.

Plans are not required to establish a reasonable alternative standard in advance of an individual’s request, and can provide the same reasonable alternative standard for an



entire class of individuals, or provide the reasonable alternative standard on an individual basis.

All facts and circumstances are taken into account in determining whether a plan has provided a reasonable alternative standard including, but not limited to, factors listed in the final regulations:

- If the reasonable alternative standard is completion of an educational program, the educational program must be made available at no cost to the individual.
- The time commitment required must be reasonable.
- If the reasonable alternative standard is a diet program, the membership or participation fee must be paid by the plan (but not the cost of food).
- If an individual's physician states that a plan standard is not medically appropriate, a reasonable alternative standard must be provided that accommodates the recommendations of the physician.

Some of the requirements apply differently, depending on whether the program is an activity-only, or an outcome-based wellness program:

Activity-Only Wellness Programs

The program must allow a reasonable alternative standard for any individual for whom it is either unreasonably difficult due to a medical condition, or for whom it is medically inadvisable to attempt to satisfy the standard.

The plan is permitted to seek verification, such as a statement from the individual's personal physician, that a health factor makes it unreasonably difficult or medically inadvisable for the individual to satisfy the standard.

Outcome-Based Wellness Programs

- The program must allow a reasonable alternative standard for obtaining the reward for any individual who does not meet the initial standard based on a measurement, test, or screening.
- In another notable expansion of earlier requirements, a program consisting solely of a measurement, test, or screening must provide

a reasonable alternative to earn the incentive for individuals who do not meet the initial standard.

- If the alternative standard is to meet a different (easier) level of the same standard, reasonable additional time must be given to meet the new alternative.
- 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.
- In a change to previous guidance, plans are not allowed to require verification, such as a statement from the individual's physician, that a health factor makes it unreasonably difficult or medically inadvisable for the individual to satisfy the outcomes-based standard. However, if a plan or issuer provides an activity-only wellness program as an alternative to the measurement, test, or screening of the outcome-based wellness program, then verification may be requested with respect to the activity-only component of the program.

Summary

While the amount of an incentive which employers can provide has been significantly increased, the final rules contain new requirements for employers to redesign many existing wellness programs that include "health-contingent" components. Employers must also remember that recent guidance has clarified the "affordability" of a plan, for the purposes of determining employer penalties under the ACA shared responsibility rules, will be based on the employee contribution level associated with non-participation in wellness programs.

If you have any questions about this subject, please contact your Parker, Smith & Feek Benefits Team.