

HIPAA and the Affordable Care Act Wellness Program Requirements

The U.S. Departments of Labor, Health and Human Services and the Treasury issued final regulations on incentives for nondiscriminatory wellness programs in group health plans under the Affordable Care Act and the HIPAA nondiscrimination provisions. These rules apply to both grandfathered and nongrandfathered group health plans.

Are wellness programs provided in connection with a group health plan allowed under the Affordable Care Act and HIPAA?

The Affordable Care Act and HIPAA generally prohibit group health plans from charging similarly situated individuals different premiums or contributions or imposing different deductibles, copayment or other cost sharing requirements based on a health factor. However, there is an exception that allows plans to offer wellness programs.

There are two types of wellness programs provided in connection with a group health plan. Participatory wellness programs are generally available without regard to an individual's health status. Either no reward is offered, or none of the conditions for obtaining a reward are based on an individual satisfying a standard related to a health factor. These programs comply with the nondiscrimination requirements so long as the program is made available to all similarly situated individuals. For example:

- A program that reimburses employees for all or part of the cost for memberships 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.
- A program that reimburses employees for the costs of participating, or that otherwise provides a reward for participating, in a smoking cessation program without regard to whether the employee quits smoking.
- A program that provides a reward to employees for attending a monthly, no-cost health education seminar.

Health-contingent wellness programs require participants to satisfy a standard related to a health factor in order to obtain a reward. There are two types of health-contingent wellness programs: activity-only and outcome-based. Activity-only programs require an individual to perform or complete an activity related to a health factor in order to obtain a reward. Examples include a walking, diet or exercise program. Outcome-based programs require an individual to attain or maintain a specific health outcome (such as not smoking or attaining certain results on biometric screenings) in order to obtain a reward. To comply with the nondiscrimination rules, health-contingent wellness programs must meet five requirements described in the final rules.

What are the five requirements for health-contingent wellness programs under the final regulations?

- 1) The program must give individuals eligible to participate the opportunity to qualify for the reward at least once per year.
- 2) The total reward for all the plan's wellness programs that require satisfaction of a standard related to a health factor is limited – generally, it must not exceed 30 percent (or 50 percent for programs designed to prevent or reduce tobacco use) of the cost of employee-only coverage under the plan. If dependents (such as spouses and/or dependent children) may participate in the wellness program, the reward must not exceed 30 percent (or 50 percent) of the cost of the coverage in which an employee and any dependents are enrolled.
- 3) The program must be reasonably designed to promote health and prevent disease. (Note: different requirements apply for activity-only and outcome-based programs, as described later in this section.)
- 4) The full reward must be available to all similarly situated individuals. This means the program must allow a reasonable alternative standard (or waiver of the otherwise applicable standard). (Note: different requirements apply for activity-only and outcome-based programs, as described later in this section.)
- 5) The plan must disclose in all materials describing the terms of the program the availability of a reasonable alternative standard (or the possibility of a waiver of the otherwise applicable standard). (Note: different requirements apply for activity-only and outcome-based programs, as described later in this section.) Model language is available (see page 139).

What factors may be considered in determining whether a program is reasonably designed to promote health and prevent disease?

An activity-only or outcome-based program is considered reasonably designed to promote health or prevent disease, if the program has a reasonable chance of improving the health of, or preventing disease in, participating individuals; 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 is based on all the relevant facts and circumstances.

To ensure that an outcome-based wellness program is reasonably designed to improve health and does not act as a subterfuge for underwriting or reducing benefits based on a health factor, 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 test or screening that is related to a health factor.

Under what circumstances must a reasonable alternative standard be offered?

For activity-only programs, a reasonable alternative standard (or waiver of the otherwise applicable standard) must be offered to any individual for whom it is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard, or for whom it is medically inadvisable to attempt to satisfy the otherwise applicable standard. Plans can seek physician verification with respect to a request for a reasonable alternative standard, if the request is reasonable under the circumstances.

For outcome-based programs, the reasonable alternative standard (or waiver of the otherwise applicable standard) must be offered to any individual who does not meet the initial standard based on the measurement, test or screening. If the reasonable alternative standard is, itself, another outcome-based wellness standard, the reasonable alternative 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 and an individual must be given the opportunity to comply with the recommendations of their personal physician as a second reasonable alternative standard (if the physician joins in the request). It is not reasonable for plans to seek physician verification that a health factor makes it unreasonably difficult for the individual to satisfy, or medically inadvisable for the individual to attempt to satisfy a standard under an outcome-based wellness program.

For all health-contingent wellness programs (whether activity-only or outcome-based), all of the facts and circumstances are taken into account when determining whether a plan has provided a reasonable alternative standard, including but not limited to the following:

- If the reasonable alternative standard is completion of an educational program, the plan or issuer must make the educational program available or assist the employee 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.
- 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 or issuer 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 program standard (including, if applicable, the recommendations of the plan's medical professional) is not medically appropriate for that individual, the plan or issuer must provide a reasonable alternative standard that accommodates the recommendations of the individual's personal physician with regard to medical appropriateness. Plans and issuers may impose standard cost sharing under the plan or coverage for medical items and services furnished pursuant to the physician's recommendations.

What disclosure is required for the availability of a reasonable alternative standard?

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). This disclosure must include contact information for obtaining the alternative and a statement that recommendations of an individual's personal physician will be accommodated. If plan materials merely mention that such a program is available, without describing its terms, this disclosure is not required.

In addition, 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 example a notice that an individual did not meet the BMI target range to qualify for the reward.

How do the wellness program rules apply to a group health plan that offers a reward to individuals who participate in voluntary testing for early detection of health problems? The plan does not use the test results to determine whether an individual receives a reward or the amount of an individual's reward.

Such a program is considered a participatory wellness program since it does not base any reward on the outcome of the testing. Thus, it is allowed under the HIPAA nondiscrimination provisions as long as the program is made available to all similarly situated individuals, without being subject to the five requirements that apply to health-contingent wellness programs.

Can a plan provide a premium differential between smokers and nonsmokers?

The plan is offering a reward based on an individual's ability to stop smoking. This is considered an outcome-based wellness program. For the plan to implement this type of program, the plan's nonsmoking program would need to meet the five requirements for wellness programs that require satisfaction of a standard related to a health factor.

Accordingly, this wellness program is permitted if:

- The premium differential is not more than 50 percent of the total cost of employee-only coverage (or 50 percent of the cost of coverage if dependents can participate in the program);
- The program is reasonably designed to promote health and prevent disease;
- Individuals eligible for the program are given an opportunity to qualify for the discount at least once per year;
- The program provides a reasonable alternative standard, without physician verification that the individual met the standard, to all individuals who do not meet the otherwise applicable standard (those who use tobacco products). For example, the reasonable alternative standard could include discounts in return for attending educational classes or for trying a nicotine patch; and
- Plan materials describing the terms of the premium differential (and any disclosure that an individual did not satisfy the wellness program standard) describe the availability of a reasonable alternative standard to qualify for the lower premium.