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LEGAL ADVICE FOR HEALTH PLANS

HEALTH LAW ALERT
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Final Wellness Rules Published

Higher Rewards Allowed, but Rewards are Easier to Earn

Today, the Departments of Health and Human Services, Labor, and the Treasury (the Agencies) formally published final rules adopting standards for wellness programs under the HIPAA Nondiscrimination Rules.[1] Health plans must comply with the standards for plan years beginning on or after January 1, 2014. While the standards allow health plans to offer higher rewards for participation in wellness programs, they also require that plan beneficiaries be allowed to qualify for the rewards more easily than under the rules currently in effect.

The rules implement Affordable Care Act provisions that allow rewards for participation in "health contingent" wellness programs to increase to 30% of the total cost of coverage—50% in the case of a wellness program designed to "prevent or reduce tobacco use." Under the final rules, however, health plans' ability to deny rewards to enrollees will be more limited than under the current rules. As the Agencies explain, the intent of the final rules "is that, regardless of the type of wellness program, every individual participating in the program should be able to receive the full amount of any reward or incentive, regardless of health factor."

The final rules are published at 78 *Federal Register* 33157 (click here). Click here for my compilation of Selected Federal Health Insurance Provisions incorporating the standards (*see* first line under "Compiled Rules") (or see the "Resources" page at tbixbylaw.com).

Types of Wellness Programs

The current Wellness Program Rules distinguish between two types of Wellness programs. First, wellness programs may be "participatory." These programs do not require an enrollee to satisfy a standard related to a health factor to qualify for a reward (or do not offer a reward). Examples of "participatory" programs include programs that pay enrollees for all (or part) of a health club membership or that reward enrollees for participating in diagnostic testing when the outcome of the tests is not tied to the reward. "Health

[1] The HIPAA Nondiscrimination Rules are codified at 26 C.F.R. § 54.9802-1 (Department of the Treasury), 29 C.F.R. § 2590.702 (Department of Labor) and 45 C.F.R. § 146.121 (Department of Health and Human Services).

contingent" wellness programs, on the other hand, require an enrollee to satisfy a standard related to a heath factor to obtain a reward. Examples include exercise programs (where the standard related to a health factor is the ability to participate in the program) and smoking programs (where the standard related to a health factor is status as a smoker—addiction to tobacco).

The requirements for "participatory" wellness programs remain essentially unchanged under the new rules: a participatory wellness program must be available to all similarly-situated enrollees, regardless of health status. Thus, a health plan may offer all enrollees part of the cost of their health club membership or a reward for engaging in biometric screening, as long as the reward is not contingent on any health-related factor.

The new rules distinguish between two types of "health contingent" wellness programs. First, "activity-only" wellness programs offer a reward for participation in an activity that is related to a health factor, such as an exercise or diet program. Second, "outcome-based" wellness programs offer a reward for attaining or maintaining a specific health outcome, such as cholesterol level, BMI, or status as a non-smoker. Although the new requirements for offering these types of programs are similar to the current requirements, several "clarifications" and a general "restructuring" will make wellness program rewards easier for enrollees to earn.

Types of Wellness Programs

Participatory Wellness Programs are programs that do not require an enrollee to satisfy a standard related to a health factor to qualify for a reward (or that do not offer a reward).

Health Contingent Programs are programs that **do** require an enrollee to satisfy a standard related to a health factor to qualify for a reward. Health contingent wellness programs are further divided into:

- **Activity-Only Programs**, which require enrollees to perform (or complete) an activity related to a health factor in order to obtain a reward (*i.e.*, exercise or diet programs); and
- **Outcome-Based Programs**, which require enrollees to attain or maintain a specific health-related outcome (*i.e.*, cholesterol level, body mass index, blood-sugar level).

Requirements for Activity-Only Programs

Under the new rules, activity-only wellness programs must meet five requirements, which are generally similar to the requirements under the current rules. First, enrollees must be given the opportunity to qualify for a reward at least once each year. Second, the reward must not exceed 30% of the total cost of coverage (up from 20% in the current rules), or 50% in the case of a tobacco-related wellness program. Although the Agencies declined to specify how a reward should be provided (or denied) in the case of family (or dependent) coverage when some but not all members of the family meet the wellness standard, they did stress that any method of "apportionment of the reward among family members [must be]

reasonable." Third, the wellness program "must be reasonably designed to promote health or prevent disease."

The fourth requirement is that the full reward must be available to all "similarly-situated individuals" either through participation in the activity (*i.e.*, exercise or diet program) or through a "reasonable alternative standard." The wellness program may limit the availability of the reasonable alternative standard to enrollees for whom it is unreasonably difficult due to a medical condition (or medically inadvisable) to participate in the activity. Moreover, the wellness program may require verification that an enrollee has a medical condition that makes participation unreasonably difficult (or that it is medically inadvisable for the enrollee to participate), provided that the verification is reasonable under the circumstances. Such verification might be, for example, confirmation from the enrollee's personal physician. The new rules clarify that an alternative is not "reasonable" unless:

- With respect to educational programs, (1) the health plan provides or finds (or assists the enrollee in finding) the program and (2) does not require the enrollee to pay for the program.

- The enrollee's required time commitment is reasonable, where "requiring attendance nightly at a one-hour class would be unreasonable."

- With respect to a diet program, the wellness program must pay for any membership or participation fee, but is not required to pay for food.

- The reasonable alternative "accommodates the recommendations of the [enrollee's] personal physician with regard to medical appropriateness" when the "physician states that a plan standard . . . is not medically appropriate for that [enrollee]."

Targeting Individuals with Adverse Health Conditions

The Agencies emphasize that wellness programs may be designed to target individuals with adverse health conditions by "establishing more favorable rules for eligibility of 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."

This suggests that a wellness program may be offered only to enrollees who have high blood pressure (for example). Such a program could offer a reward to enrollees with high blood pressure who participate in an exercise program (an activity-only wellness program), as long as those enrollees who cannot participate because of a medical condition (or for whom it would be medically inadvisable to participate) are offered a reasonable alternative standard (and other requirements for an activity-only wellness program are met).

Finally, wellness program sponsors must provide notice that a "reasonable alternative standard" is available for enrollees and provide contact information for obtaining information about an alternative standard.

Requirements for Outcome-Based Programs

Although the requirements for outcome-based wellness programs are generally similar to the requirements for activity-only programs, significant additional restrictions apply. First, health plans must offer a "reasonable alternative standard" to all enrollees who fail to meet an outcome-based standard, such as cholesterol level of under 200 or Body Mass Index under 26, rather than offering the alternative only to enrollees with a health-related reason for failing to meet the standard. Accordingly, no physician (or other) verification of an enrollee's eligibility for an alternative standard may be required.

Second, if the alternative standard is another outcome-based standard, additional restrictions apply, including giving the enrollee the opportunity to comply with the recommendations of his/her own "personal physician as a second reasonable alternative standard to meeting the reasonable alternative standard defined by the [health] plan." This applies only if the personal physician agrees to cooperate, but the plan must allow the personal physician to "adjust [his/her] recommendations at any time, consistent with medical appropriateness."

The required notice that an alternative reasonable standard is available must specify that "recommendations of an individual's personal physician will be accommodated."

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