



# Health Care Reform

## LEGISLATIVE BRIEF



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## Proposed Rules on Workplace Wellness Programs

The Affordable Care Act (ACA) includes provisions to encourage appropriately designed, consumer-protective wellness programs in group health coverage. Effective for plan years beginning on or after **Jan. 1, 2014**, ACA essentially codifies the existing HIPAA nondiscrimination requirements for health-contingent wellness programs, while also increasing the maximum reward that can be offered under these programs.

On Nov. 26, 2012, the Departments of Health and Human Services, Labor and the Treasury (Departments) released [proposed regulations](#) regarding ACA's nondiscrimination requirements for wellness programs. The proposed regulations would increase the maximum reward under a health-contingent wellness program from 20 percent to **30 percent** of the cost of coverage and would further increase the maximum reward to **50 percent** for wellness programs designed to prevent or reduce **tobacco use**.

The regulations would apply to both grandfathered and non-grandfathered group health plans and group health insurance coverage for plan years beginning on or after Jan. 1, 2014.

Because the regulations are not in final form, they do not provide definitive guidance. However, they are an indicator of how the Departments will apply ACA's nondiscrimination requirements for wellness programs. Comments on the proposed regulations are due by Jan. 25, 2013.

### CATEGORIES OF WELLNESS PROGRAMS

Employment-based wellness programs can be divided into two general categories – participatory wellness programs and health-contingent wellness programs. This distinction is important because participatory wellness programs are not required to meet the nondiscrimination standards applicable to health-contingent wellness programs.

#### ***Participatory Wellness Programs***

Participatory wellness programs do not require an individual to meet a standard related to a health factor in order to obtain a reward or do not offer a reward at all. Examples of these programs include a fitness center reimbursement program, a diagnostic testing program that does not base any reward on outcomes, a program that reimburses employees for the costs of smoking cessation programs, regardless of whether the employee quits smoking, and a program that provides rewards for attending a free health education seminar.

Participatory wellness programs comply with the nondiscrimination requirements without having to satisfy any additional standards, *as long as participation in the program is made available to all similarly situated individuals*. There is no limit on financial incentives for participatory wellness programs.

#### ***Health-contingent Wellness Programs***

Health-contingent wellness programs require individuals to satisfy a standard related to a health factor in order to obtain a reward. This category includes wellness programs that require an individual to attain or maintain a certain health outcome in order to obtain a reward (for example, not smoking, attaining certain results on biometric screenings or meeting exercise targets).

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To protect consumers from unfair practices, health-contingent wellness programs are required to follow certain standards related to nondiscrimination, including a standard that limits the maximum reward that can be offered.

## **STANDARDS FOR HEALTH-CONTINGENT WELLNESS PROGRAMS**

HIPAA currently prohibits group health plans and group health insurance issuers from discriminating against individual participants and beneficiaries in eligibility, premiums or benefits based on a health factor. An exception to this rule allows benefits (including cost sharing), premiums or contributions to vary based on participation in a wellness program, if the program complies with certain nondiscrimination standards.

In 2006, the Departments released final regulations regarding HIPAA's nondiscrimination and wellness provisions. The regulations prescribed five nondiscrimination standards for health-contingent wellness programs. ACA codified the existing HIPAA regulations for wellness programs, while also increasing the maximum permissible reward that can be offered under health-contingent wellness programs.

The proposed regulations include clarifications regarding the reasonable design of health-contingent wellness programs and provide guidance on the increased maximum reward size.

### ***Standard #1 – Frequency of Opportunity to Qualify***

Consistent with the HIPAA regulations, the proposed regulations would require health-contingent wellness programs to provide eligible individuals with an opportunity to qualify for the reward **at least once per year**.

### ***Standard #2 – Size of Reward***

Similar to the HIPAA regulations, the proposed regulations would limit the total amount of the reward for health-contingent wellness programs with respect to a plan, whether offered alone or coupled with the reward for other health-contingent wellness programs.

In addition, the proposed regulations would implement ACA's changes by increasing the maximum permissible reward from 20 percent to **30 percent** of the cost of health coverage. In addition, the regulations propose to increase the maximum permissible reward to **50 percent** of the cost of health coverage for programs designed to prevent or reduce **tobacco use**.

### ***Standard #3 – Uniform Availability and Reasonable Alternative***

Consistent with the HIPAA regulations, the proposed regulations would require the reward under a health-contingent wellness program to be available to all similarly situated individuals. To meet this requirement, a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward must be provided to any individual for whom it is 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.

The proposed regulations would clarify that plans and issuers are not required to establish an alternative standard in advance of an individual's specific request for one. However, a reasonable alternative standard would have to be provided upon an individual's request. Also, plans and issuers cannot cease to provide a reasonable alternative standard merely because one was not successful before. They must continue to offer a reasonable alternative standard, whether it is the same standard or a new one (such as a new weight loss class or a new nicotine replacement therapy).

In addition, the proposed regulations would include factors for determining whether a plan or issuer has provided a reasonable alternative standard. For example, if the reasonable alternative standard is completion of an educational program, the proposed regulations would provide that the plan or issuer must make the program available instead of requiring an individual to find this type of program unassisted and may not require an individual to pay for the program's cost.

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The proposed regulations also would clarify that, if reasonable under the circumstances, a plan or issuer may seek verification (such as a statement from an individual's 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. It would not be reasonable for a plan or issuer to seek verification of a claim that is obviously valid based on the nature of the individual's medical condition that is known to the plan or issuer. However, the proposed regulations would permit plans and issuers to seek verification of claims that require the use of medical judgment to evaluate.

## **Standard #4 – Reasonable Design**

The proposed regulations, like the HIPAA regulations, would require that health-contingent wellness programs be reasonably designed to promote health or prevent disease and not be overly burdensome for individuals or a subterfuge for discrimination based on a health factor. The proposed regulations would continue to give plans and issuers flexibility to consider innovative programs for encouraging wellness. However, to be considered reasonably designed to promote health or prevent disease, the proposed regulations would require the wellness program to offer a different, reasonable means of qualifying for the reward to any individual who does not meet the standard based on a measurement, test or screening related to a health factor (such as a biometric examination or health risk assessment).

## **Standard #5 – Notice of Other Means of Qualifying for the Reward**

Consistent with the HIPAA regulations, the proposed regulations would require plans and issuers to disclose the availability of other ways to qualify for the reward in all plan materials describing the terms of the wellness program. If plan materials merely mention that a wellness 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 the disclosure.

In addition, the proposed regulations include the following sample language intended to be simpler for individuals to understand and increase the likelihood that those who qualify for an alternative means of obtaining the reward will contact their plan or issuer:

*Your health plan is committed to helping you achieve your best health status. 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 to find a wellness program with the same reward that is right for you in light of your health status.*

## **APPLICATION TO GRANDFATHERED PLANS**

ACA's nondiscrimination provisions for health-contingent wellness programs do not apply to grandfathered plans. However, these plans are required to comply with the 2006 HIPAA regulations, which essentially include the same requirements for wellness programs, but have a lower maximum reward.

However, because the Departments believe that the provisions of the proposed regulations would be authorized under either HIPAA or ACA, they propose to apply the same set of standards to both grandfathered and non-grandfathered plans. According to the Departments, this approach is intended to avoid inconsistency across group health coverage and to provide grandfathered plans the same flexibility to promote health and prevent disease as non-grandfathered plans.

*Source: Departments of Health and Human Services, Labor and the Treasury*

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