

THE
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Final Regulations Addressing Changes to Wellness Programs Issued

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In early June, 2013, the Departments of Labor, Treasury, and Health and Human Services (the "Agencies") issued joint final regulations addressing the new standards for wellness programs that were part of the Patient Protection and Affordable Care Act of 2010 ("PPACA"). These regulations address changes that sponsors of wellness programs will need to address beginning in 2014.

Effective Date:

The final regulations become effective August 2, 2013, but first apply to a group health plan during the first plan year beginning on or after January 1, 2014. Thus, for a calendar year plan, an employer must implement changes required by the regulations beginning January 1, 2014.

Unlike some PPACA provisions, a plan's grandfathered status does not affect the application of the final wellness regulations.

Background:

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") generally prohibits group health plans and group health insurance issuers from discriminating against individual participants and beneficiaries in eligibility, benefits, or premiums based on a health factor. However, HIPAA created an exception to this rule where the discrimination occurred based upon a bona fide wellness program. In regulations released in 2006, the Agencies recognized two general categories of wellness programs:

- Participatory wellness programs; and
- Standard-based wellness programs.

Participatory wellness programs require only that the individual participate, but not attain any particular standard with regard to health, physical condition or activity, before some reward would be granted or a penalty imposed. These programs were permitted provided they were made available to all similarly-situated individuals, regardless of health status.

Standard-based wellness programs required the employee to achieve some status before a reward would be granted or a penalty imposed. These programs were subject to greater scrutiny and employers were prohibited from imposing a penalty (or reward) greater than 20% of the aggregate cost of health coverage.

In PPACA, Congress embraced the 2006 wellness regulations but increased the permitted penalty/reward to 30% of the cost of coverage, and permitted a differential of up to 50% based on regulations to be issued by the Agencies. The new final regulations expound upon PPACA's changes. Under both the old and new rules, the differential between those treated favorably and those not is considered important, not whether it takes the form of a reward that favors some or a penalty that is imposed on others. The described changes below refer to rewards but they are equally applicable if the differential is imposed in the form of a penalty.

Changes:



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Participatory Wellness Programs

Participatory wellness programs remain largely unchanged under the new regulations. Of note, the Agencies added an additional example of a participatory wellness program—such program includes 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 regard to the health issues identified as part of the assessment.

Health-Contingent Wellness Programs

On the other hand, standard-based wellness programs (now classified as “health-contingent wellness programs”) were significantly modified. Under the final regulations, health-contingent wellness programs still have five requirements that the program must meet to qualify for HIPAA’s exemption from health factor discrimination, but the regulations have subdivided health-contingent wellness programs into two types: activity-only and outcome-based wellness programs, and the requirements differ somewhat depending upon the type of health-contingent wellness program at issue.

During the remainder of this alert, we define the two types of health-contingent wellness programs, analyze the five main requirements for such programs, and highlight differences where they exist between the two types of health-contingent wellness programs.

Types of Health-Contingent Wellness Programs

An “activity-only wellness program” is one that requires an individual to perform or complete an activity related to a health factor in order to obtain a reward but does not require the individual to attain or maintain a specific health outcome. Examples include walking, diet or exercise programs.

An “outcome-based wellness program” is a program that requires 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.

Five Requirements of a Health-Contingent Wellness Program

(1) Frequency of Opportunity to Qualify

Both activity-only wellness programs and outcome-based wellness programs require that an eligible participant be permitted to qualify for a reward under the program at least once per year.

(2) Size of Reward

In general, both activity-only wellness programs and outcome-based wellness programs are restricted from providing a reward that exceeds 30% of the total cost of employee-only coverage (employer and employee contributions) under the plan. This amount may be increased if either of the following applies:

- If the wellness program allows a class of dependents (e.g., spouses and/or children) to participate in the program, the reward may not exceed 30% of the total cost of the coverage in which the employee and any dependents are enrolled.
- If a portion of the health-contingent wellness program is focused on preventing or reducing tobacco use, the applicable percentage listed above can be increased from 30% to 50% so long as the additional 20% is based solely on the tobacco use prevention or reduction.

(3) Reasonable Design

Both activity-only wellness programs and outcome-based wellness programs must be reasonably designed to promote health or prevent disease, which means that the program must have a reasonable chance of improving the health of, or preventing disease in, participating individuals, cannot be overly burdensome, cannot be a subterfuge for discriminating based on a health factor, and cannot be “highly suspect” in the method chosen to promote health or prevent disease.

To meet this standard, an outcome-based wellness program must provide a reasonable alternative standard to permit any individual who does not meet the initial standard to obtain the reward. Prior to the adoption of the final regulations, the alternative was required only for individuals for whom it was medically inadvisable to attempt to satisfy the standard or for whom it was unreasonably difficult to satisfy the standard due to a medical condition.

(4) Uniform Availability and Reasonable Alternative Standards

The regulations require that the full reward under both activity-based and outcome-based wellness programs be available to all similarly-situated individuals. The regulations state that a reward is generally not available unless there is an alternative basis upon which certain individuals can earn the reward if such individual fails to do so under the program's general standards. These rules are complex and vary by the type of program at issue. Stated succinctly,

- For activity-only programs, an alternative standard (or waiver) must be permitted if it would be either unreasonably difficult or medically inadvisable for the individual to attempt or attain the standard.
- For outcome-based wellness programs, an alternative standard (or waiver) must be permitted for all individuals who do not attain the standard.
- Permitted alternative standards have additional rules: the alternative standard need not be established in advance, and in arriving at an alternative standard, the recommendations of the individual's personal physician must be accommodated.

(5) Notice of Availability of Reasonable Alternative Standard

Plans which utilize both activity-only wellness programs and outcome-based wellness programs must disclose in all written materials that describe the programs' terms the fact that reasonable alternative standards to obtain the reward are available, including contact information to obtain the standard and provide a statement that the recommendations of an individual's personal physician will be accommodated. This description is also required in any disclosure to an individual regarding his/her failure to satisfy an individual outcome-based standard.

A copy of the wellness regulations may be found [here](#).

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