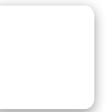




WORKPLACE WELLNESS PROGRAMS— HIPAA NONDISCRIMINATION RULES

NOVEMBER 7, 2018 | IN BLOG, COMPLIANCE, COMPLIANCE ALERT, COMPLIANCE NEWS, HELPFUL TIPS, RESOURCES, UNCATEGORIZED, WELLNESS, WELLNESS PROGRAMS | BY 6DRACHAEL



discourage behaviors that are detrimental to employees' good health. A wellness program that relates to a group health plan must comply with nondiscrimination rules under the Health Insurance Portability and Accountability Act (HIPAA). These rules allow employers to provide rewards as part of a wellness program, provided the program follows certain guidelines.

For plan years beginning on or after Jan. 1, 2014, the Affordable Care Act (ACA) adopted the existing HIPAA nondiscrimination requirements for wellness programs with some modifications. This Compliance Overview describes HIPAA's nondiscrimination rules for workplace wellness programs.

Links and Resources

- On May 29, 2013, the Departments of Labor (DOL), Health and Human Services (HHS) and the Treasury (Departments) released final rules implementing HIPAA's nondiscrimination requirements for wellness programs, as amended by the ACA. The [final rules](#) apply to both grandfathered and non-grandfathered group health plans for plan years beginning on or after Jan. 1, 2014.
- The DOL also offers a [Compliance Assistance Guide](#) for wellness program requirements.

Categories of Wellness Programs

Under HIPAA, workplace wellness programs are 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 same non-discrimination standards that apply to health-contingent wellness programs.

Highlights

Types of Wellness Plans

- HIPAA divides wellness programs into two categories.
- Participatory wellness programs do not require individuals to meet a health-related standard to obtain a reward (or do not provide a reward at all).
- Health-contingent wellness programs require individuals to satisfy a health-related standard to qualify for a reward.

Limits on Rewards

- There is no limit on financial rewards for participatory wellness programs.
- For health-contingent wellness programs, the maximum permissible reward is 30 percent of the total cost of health coverage (50 percent for



Health-contingent Wellness Programs

Participatory Wellness Programs

Participatory wellness programs either do not require an individual to meet a health-related standard 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 (reward not based on outcomes), a program that reimburses employees for the cost of smoking cessation programs (not based on whether the employee quits smoking), or 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, regardless of health status*. 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. There are two types of health-contingent wellness programs:

<p>Activity-only Wellness Programs</p>	<p>This type of wellness program requires an individual to perform or complete an activity related to a health factor in order to obtain a reward (for example, walking, diet or exercise programs). Activity-only wellness programs do not require an individual to attain or maintain a specific health outcome.</p>
<p>Outcome-based wellness programs</p>	<p>This type of wellness program requires 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). Generally, these programs have two tiers: (1) a measurement, test or screening as part of an</p>



Outcome-based programs allow plans and issuers to target specific individuals (for example, those with high cholesterol for participation in cholesterol reduction programs, or those who use tobacco for participation in tobacco cessation programs), rather than the entire population of participants and beneficiaries, with the reward based on health outcomes or participation in reasonable alternatives.

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.

Nondiscrimination Standards For Health-Contingent Wellness Programs

Under HIPAA, group health plans and group health insurance issuers are prohibited 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. The final rules establish **five nondiscrimination standards** for health-contingent wellness programs.

1. Frequency of opportunity to qualify
2. Size of reward
3. Reasonable design
4. Uniform availability and reasonable alternative
5. Notice of availability of reasonable alternative

Frequency of Opportunity to Qualify



activity-only and outcome-based programs.

Size of Reward

The final rules limit the total amount of the reward for health-contingent wellness programs (both activity-only and outcome-based) with respect to a plan, whether offered alone or coupled with the reward for other health-contingent wellness programs. The total reward offered to an individual under an employer's health-contingent wellness programs cannot exceed a specified percentage of the total cost of employee-only coverage under the plan.

Beginning in 2014, the maximum permissible reward is **30 percent** of the total cost of health coverage (*50 percent* for wellness programs designed to prevent or reduce *tobacco use*).

Total cost includes **both employer and employee contributions towards the cost of coverage**. If, in addition to employees, any class of dependents (such as spouses and dependent children) may participate in the health-contingent wellness program, the reward cannot exceed the specified percentage of the total cost of the coverage in which the employee and any dependents are enrolled (such as family coverage or employee-plus-one coverage). For health-contingent wellness programs that allow a class of dependents to participate, there are no special rules regarding apportionment of the reward among family members. Plans and issuers have flexibility to determine whether, and how, the maximum allowed reward or incentive would be prorated based on the portion of the premium or contribution attributable to that family member, as long as the method is reasonable.

On Oct. 23, 2015, the Departments issued an FAQ addressing non-financial (or in-kind) incentives (for example, gift cards, thermoses and sports gear) under a wellness program. **According to this FAQ, these types of non-financial incentives are subject to HIPAA's wellness program rules.** If a group health plan provides a "reward" based on an individual satisfying a standard that is related to a health factor, the wellness program is subject to the Departments' final rules on wellness programs.

Reasonable Design



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, a subterfuge for discrimination based on a health factor or highly suspect in the method chosen to promote health or prevent disease.

While programs are not required to be accredited or based on particular evidence-based clinical standards (such as the CDC's Guide to Community Preventive Services), these practices may increase the likelihood of wellness program success and are encouraged as a best practice.

Plans and issuers have flexibility to consider innovative programs for encouraging wellness. However, to be considered reasonably designed to promote health or prevent disease, *outcome-based wellness programs* 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. This is intended to ensure that outcome-based programs are reasonably designed to improve health and do not act as a subterfuge for underwriting or reducing benefits based on a health factor. Plans and issuers may establish more favorable rules for eligibility or 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.

Uniform Availability and Reasonable Alternative Standards

The full reward under a health-contingent wellness program (whether activity-only or outcome-based) must be available to all similarly situated individuals. To meet this requirement, all health-contingent wellness programs must provide a reasonable alternative standard (or waiver of the otherwise applicable standard) in certain circumstances.

Although an individual may take some time to request, establish and satisfy a reasonable alternative standard, the same, full reward must be available to that individual as is provided to individuals who satisfy the initial standard. Also, plans and issuers cannot stop providing a reasonable alternative standard under any health-contingent wellness program (whether activity-only or outcome-based) merely because one

Plans and issuers have flexibility in designing reasonable alternative standards and determining whether to provide the same alternative standard for an entire class of individuals or on an individual-by-individual basis. In addition, plans and issuers are not required to establish an alternative



same standard or a new one (such as a new weight loss class or a new nicotine replacement therapy).

Plans and issuers also have flexibility to determine how to provide the portion of the reward for the period before an alternative was satisfied (for example, payment for the retroactive period or pro rata over the remainder of the year), as long as the method is reasonable and the individual receives the full amount of the reward. If an individual does not satisfy the alternative standard until the end of the year, the plan or issuer may provide a retroactive payment within a reasonable time after the end of the year, but may not provide pro-rata payments over the following year.

requests one, as long as a reasonable alternative standard is provided (or the condition for obtaining the reward is waived) upon request.

All facts and circumstances are taken into account in determining whether a plan or issuer has provided a reasonable alternative standard, including, but not limited to:

- 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 a program (instead of requiring an individual to find a program unassisted) and cannot 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 plan standard (including 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.



A reward under an **activity-only wellness program** is not available to all similarly situated individuals unless the program allows a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual for whom, for that period, it is:

- Unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard; or
- Medically inadvisable to attempt to satisfy the otherwise applicable standard.

Under an **activity-only wellness program**, a plan or issuer may seek verification (such as a statement from an individual's personal physician) that a health factor makes it unreasonably difficult to satisfy, or medically inadvisable to attempt to satisfy, the otherwise applicable standard, as long as it is reasonable under the circumstances. Plans and issuers may seek verification with respect

A reward under an **outcome-based wellness program** is not available to all similarly situated individuals unless the program allows a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for **any individual who does not meet the initial standard** based on the measurement, test or screening.

Under an **outcome-based wellness program**, it is not reasonable to seek verification (such as a statement from an individual's personal physician) that a health factor makes it unreasonably difficult to satisfy, or medically inadvisable to attempt to satisfy, the otherwise applicable standard **as a condition of providing a reasonable alternative to the initial standard.**



reasonable to determine that medical judgment is required to evaluate the validity of the request.

only wellness program, then the nondiscrimination rules for activity-only wellness programs apply to that component of the wellness program. In that case, the plan or issuer may seek verification (only with respect to the activity-only component of the program) that it is unreasonably difficult due to a medical condition to perform or complete the activity (or it is medically inadvisable to attempt to perform or complete the activity), as long as it is reasonable under the circumstances.

If a reasonable alternative standard (under any health-contingent wellness program) is, itself, an activity-only wellness program, it must comply with the nondiscrimination requirements for activity-only wellness programs in the same manner as if it were an initial program standard. Likewise, if a reasonable alternative standard (under any health-contingent wellness program) is, itself, an outcome-based wellness program, it must comply with the nondiscrimination requirements for outcome-based wellness programs.

However, if the reasonable alternative standard **under an outcome-based wellness program** is, itself, another outcome-based wellness program, it must also comply with the following additional special requirements:

- The reasonable alternative standard 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. For example, if the initial standard is to achieve a BMI less than 30, the reasonable alternative standard cannot be to achieve a BMI less than 31 on that same date. However, if the initial standard is to achieve a BMI less than 30, a reasonable alternative standard for the individual could be to reduce the individual's BMI by a small amount or small percentage over a realistic period of time, such as within a year.
- 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 or issuer, but only if the physician joins in the request. The individual can make a

consistent with medical appropriateness.

The following table summarizes the standards that apply to each type of health-contingent wellness program.

	ACTIVITY-ONLY	OUTCOME-BASED
Definition	Require an individual to perform or complete an activity related to a health factor in order to obtain a reward	Require an individual to attain or maintain a certain health outcome in order to obtain a reward
A reasonable alternative standard (or waiver of the otherwise applicable standard) must be provided for:	Any individual for whom it is unreasonably difficult due to a medical condition to satisfy, or medically inadvisable to attempt to satisfy, the otherwise applicable standard	All individuals who do not meet the initial standard based on a measurement, test or screening, regardless of any medical condition or other health status
Can a plan or issuer require verification as a condition of providing a reasonable alternative standard?	If reasonable under the circumstances, a plan or issuer may seek verification (such as a statement from the individual's personal 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.	A plan or issuer cannot require verification 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. However, if a plan or issuer provides an activity-only wellness program as an alternative to the outcome-based program, the plan or issuer may seek verification with respect to the activity-only



		<p>reasonable under the circumstances.</p>
<p>Special rules</p>		<p>The reasonable alternative standard 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.</p> <p>An individual must be given the opportunity to comply with his or her personal physician's recommendations as a second reasonable alternative standard to meeting the alternative standard defined by the plan or issuer, but only if the physician joins in the request.</p>

Notice of Other Means of Qualifying for the Reward

Plans and issuers are required to 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). The disclosure must include contact information for obtaining the alternative standard and 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.



If plan materials merely mention that a wellness program is available, without describing its terms, this disclosure is not required. For example, an SBC 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. The following language, or substantially similar language, can be used:

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.

Plans and issuers may modify the sample language to reflect the details of their wellness programs, provided that the notice includes all of the required content described in the final regulations. Additional sample language is available in the final rules in examples illustrating the requirements for outcome-based wellness programs.

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