EXPERT UPDATE

Affordable Care Act Proposed Regulations for Wellness Program Incentives

HENDERSON BROTHERS

Affordable Care Act Proposed Regulations for Wellness Program Incentives

On November 26, 2012, the IRS, DOL and HHS released guidance on several health reform issues. A portion of the guidance produced includes proposed regulations that provide clarification regarding nondiscriminatory wellness programs.

Objectives for New Proposed Regulations

The Departments believe that appropriately designed wellness programs play a significant role in the promotion of health and prevention of disease. It has become clear that even after the issuance of the 2006 regulations there has continued to be a degree of confusion regarding the scope of the rules governing wellness programs. The Departments are hoping that the proposed regulations will provide clarity and dispel confusion regarding health-contingent wellness programs and the five regulatory requirements relating to the frequency of opportunity to qualify for a wellness reward, the size of the reward, the uniform availability and reasonable alternative standards, reasonable design and notice of other means of qualifying for the reward.

There are two critical elements of the proposed regulations with respect to nondiscrimination requirements:

1. The standard of a reward under a health-contingent wellness program must be available to all similarly situated individuals, and

2. The standards required to be met as part of a health-contingent wellness program must be reasonably designed to promote health or prevent disease.

Background - Wellness Program Regulations

Prior to the advent of the Affordable Care Act, HIPAA added code to address nondiscrimination and wellness programs. The 2006 HIPAA provisions generally prohibit group health plans and health insurance issuers from discriminating against participants and beneficiaries in health plan eligibility, benefits, or premiums based on a health factor. A health factor is an individual's health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability and disability. There is an exception to HIPAA's nondiscrimination rules, however, that permits plan sponsors and issuers to offer premium discounts, rebates, or modification to cost sharing (i.e., plan design adjustments) in return for adherence to certain programs that promote health and disease prevention. The agencies permit this as long as the wellness program adheres to certain conditions.

HIPAA divides wellness plans into two different categories: participant-based and standard-based programs. Participation based programs **do not require** an individual to meet a certain standard related to a health factor in order to obtain a reward. Examples of a participatory wellness program include a fitness center reimbursement program, participation in biometric screenings, a program that reimburses employees for the costs of a smoking cessation program regardless of whether the employee quits smoking or not and a program that provides rewards for attendance in health education seminars. For these types of wellness programs, there is no limit on the financial incentives plan sponsors and issuers may offer in exchange for participation.

The second category of wellness programs requires individuals to satisfy a certain standard related to a health factor in order to obtain a reward. This type of wellness program, also referred to now as a "health-contingent wellness program", requires individuals to satisfy a standard related to a health factor in order to obtain a reward. A wellness program that requires an individual to attain or maintain a certain result on a biometric screening or meet a specific target for exercise are both good examples.

Another example is a non-tobacco program that requires employees to not smoke or quit smoking in return for lower premiums, reduced plan cost-sharing, etc.

The 2006 HIPAA regulations require that standard-based (health-contingent) wellness programs meet the following five conditions in order for them to be considered nondiscriminatory:

1. The total reward for such wellness programs offered by a plan sponsor does not exceed 20 percent of the total cost of coverage under the plan (increases to 30% in 2014).

2. The program is reasonably designed to promote health or prevent disease. For this purpose, it must have a reasonable chance of improving health or preventing disease, not be overly burdensome, not be a subterfuge for discriminating based on a health factor, and not be highly suspect in method.

3. The program gives eligible individuals an opportunity to qualify for the reward at least once per year.

4. The reward is available to all similarly situated individuals. For this purpose, a reasonable alternative standard (or waiver of the otherwise applicable standard) must be made available to any individual for whom it is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard during that period (or for whom it is medically inadvisable to attempt to satisfy the otherwise applicable standard).

5. In all plan materials describing the terms of the program, the availability of a reasonable alternative standard (or the possibility of waiver of the otherwise applicable standard) is disclosed.

Overview of the Proposed Regulations for Wellness Programs

The new proposed regulations summarized in the November 26, 2012 Notice are intended to apply to both grandfathered and non-grandfathered group health plans for plan years beginning on or after January 1, 2014. They do not alter the five conditions health-contingent wellness programs must meet in order to be considered nondiscriminatory and also consistent with the 2006 HIPAA regulations, they divide wellness programs into two different categories, labeled in the regulations as "participatory wellness programs" and "health-contingent wellness programs."

Examples of health contingent wellness programs are illustrated in the proposed regulations. These examples include (1) a program that imposes a premium surcharge based on tobacco use; and (2) a program that uses a biometric screening or a health risk assessment to identify employees with specific medical conditions or risk factors and then provides a reward to employees who have been identified as within the normal or healthy range, while requiring those who are identified outside the normal or health range to take additional steps to obtain the same reward. The rewards for this type of wellness program can come in the form of a discount or rebate of a premium contribution, a waiver of all or part of a cost-sharing mechanism, the absence of a surcharge, or other financial or nonfinancial incentives or disincentives.

Maximum Reward

Like the 2006 regulations, the size of the reward cannot exceed a specified percentage of the total cost of employee-only coverage under the plan, taking into account both employer and employee contributions towards the cost of coverage. If any class of dependents (such as spouses, or spouses and dependent children) may participate in the health-contingent wellness program, the reward cannot exceed the applicable 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). The proposed regulations being issued identify that any premium variation for tobacco use must be applied to the portion of premium attributable to each family member when family health coverage is provided. The Departments have invited comments on apportionment of rewards in health-contingent wellness programs which may involve tobacco use and/or other health factors. For example, should a plan sponsor be required to prorate the reward if only one family member fails to qualify for it?

As indicated previously, the 2006 regulations specify 20 percent as the maximum permissible reward for participation in a health-contingent wellness program. Effective for plan years beginning on or after January 1, 2014, the Act increases the maximum reward to 30 percent and authorizes the Departments to increase the maximum reward to as much as 50 percent if the Departments determine that such an increase is appropriate. In addition, the Departments have determined that an increase of an additional 20 percentage points (to 50 percent) for health-contingent wellness programs designed to prevent or reduce tobacco use is warranted to conform to the new PHS Act section 2701.

Premium Rating for Tobacco Use

Health Reform provides that issuers in the individual and small group markets cannot vary rates for tobacco use by more than a ratio of 1.5 to 1. HHS proposes that a health insurance issuer in the small group market would be able to implement the tobacco use only in connection with a wellness program. HHS is proposing the definition of "tobacco use" be consistent with the approach taken with respect to health-contingent wellness programs designed to prevent or reduce tobacco use.

Reasonable Alternative Standard

The proposed regulations indicate that the reward under a health-contingent wellness program must be available to all similarly situated individuals. Plan sponsors or issuers must offer a "reasonable alternative standard" to those who find it unreasonably difficult due to a medical condition to meet the applicable standard or they may waive the applicable standard entirely and provide the reward. The full reward must be available to individuals who qualify by satisfying a reasonable alternative standard and it must be the same exact full reward that is provided to individuals who qualify by satisfying the program's actual applicable standard. More details regarding the reasonable alternative standards can be found on pages 16-18 in the Notice.

The 2006 regulations provided that it is permissible for a plan or issuer to 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. The Affordable Care Act amendments codified this provision with one modification. The proposed regulations make it clear that physician verification may be required by a plan or issuer "if reasonable under the circumstances." These proposed regulations clarify that 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. Plans and issuers are permitted under the proposed regulations to seek verification of claims that require the use of medical judgment to evaluate.

Notice of Availability of Other Means of Qualifying for the Reward

The plan or issuer must disclose in all plan materials the terms of the program and the availability of other means of qualifying for the reward or the possibility of waiver of the otherwise applicable standard. If plan materials merely mention that a program is available, without describing its terms, this disclosure is not required.

Example of disclosure

"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."

Reasonable Design

Wellness programs must not be a subterfuge for reducing benefits based on health status and they must be designed to improve participants' health, promote wellness and prevent disease. The Departments have requested comments as to whether certain standards, including evidence- or practice-based standards, are needed to ensure that wellness programs are reasonably designed to promote health or prevent disease. Under the proposed regulations, the determination of whether a health-contingent wellness program is reasonably designed is based on all the relevant facts and circumstances. The Departments propose that, to the extent a plan's initial standard for obtaining a reward (or a portion of a reward) is based on results of a measurement, test, or screening that is related to a health factor (such as a biometric examination or a health risk assessment), the plan is not reasonably designed unless it makes available to all individuals who do not meet the standard based on the measurement, test, or screening a different, reasonable means of qualifying for the reward. Additionally, the general approach that was adopted in the 2006 regulations is preserved, which allows plans and issuers to conduct screenings and employ measurement techniques in order to target wellness programs effectively.

The Departments are also inviting comments on this approach, including on ways to ensure that employees will not be subjected to an unreasonable "one-size-fits-all" approach to designing the different means of qualifying for the reward that would fail to take an employee's circumstances into account to the extent that, as a practical matter, they would make it unreasonably difficult for the employee to access those different means of qualifying. Comments also are invited on whether any other consumer protections are needed to ensure that wellness programs are reasonably designed to promote health or prevent disease.

Please refer to the November 26, 2012 Notice in the link below for more details:

http://www.ofr.gov/OFRUpload/OFRData/2012-28361_PI.pdf

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