

December 4, 2012

Revisions Proposed to Standards for Health-Contingent Wellness Programs Under the ACA

The Departments of HHS, DOL and Treasury jointly released proposed rules on November 20, 2012 regarding nondiscriminatory wellness programs. This guidance reflects changes made by the ACA and encourages appropriately designed, consumer protective wellness programs in GHP coverage.

These proposed regulations are effective for **plan years starting on or after January 1, 2014** and propose revisions and clarifications to existing wellness provisions created by the 2006 final HIPAA regulations for **health-contingent wellness programs** offered in connection with a GHP. Specifically, these newly proposed regulations under the ACA:

- **Increase the maximum permissible reward under a health-contingent wellness program from 20% to 30% of the cost of coverage**
- **Further increase the maximum permissible reward to 50% of the cost of coverage for wellness programs designed to prevent or reduce tobacco use**
- **Clarify what is considered a reasonably designed health-contingent wellness program**
- **Clarify what reasonable alternatives must be offered by a health-contingent wellness program in order to avoid prohibited discrimination**
- **Provide new sample language notifying individuals of the opportunity to qualify for the wellness reward through other reasonable means if they fail to meet a required health-contingent standard**

REVISED STANDARDS FOR HEALTH-CONTINGENT WELLNESS PROGRAMS

Employers with health-contingent wellness programs (HCWPs) will continue to maintain those plans in accordance with the five nondiscrimination requirements applicable to health-contingent wellness programs. However, these five nondiscrimination requirements have been modified and clarified by the proposed regulations to be effective for plan years starting on or after January 1, 2014 (January 1, 2014 for calendar year plans).

HCWPs generally provide a reward and require individuals to meet a specific standard related to their health to obtain a reward. Examples of a health-contingent wellness program include a program that imposes a premium surcharge based on tobacco use; and **prior to 2014** a program that uses a biometric screening or a health risk assessment to identify individuals with specified medical conditions or risk factors (such as high cholesterol, high blood pressure, abnormal body mass index, or high glucose level) and provides a reward to individuals identified as within a normal or healthy range (or at low risk for certain medical conditions).

Beginning in 2014, however, a program that uses a biometric screening or a health risk assessment to identify individuals with specified medical conditions or risk factors must also permit those individuals who are identified as outside the normal or healthy range (or at risk) to take additional steps (such as meeting with a health coach, taking a health or fitness course, adhering to a health improvement action plan, or complying with a health care provider's plan of care) to obtain the same reward as those individuals identified as within a normal or healthy range.

In other words, if an individual does not meet the standard based on the measurement, test, or screening, then the HCWP must make available a different, reasonable means of qualifying for the reward. See requirement #4 below regarding reasonable design.

Here are the Five Revised Nondiscrimination Requirements for HCWPs

- (1) Frequency to Qualify. HCWPs must give individuals eligible for the program the opportunity to qualify for the reward at least once per year.
- (2) Size of Reward. The maximum reward under the HCWP is 30% of the cost of coverage, and increased to 50% of the cost of coverage for wellness programs designed to prevent or reduce tobacco use.
- (3) Uniform Availability and Reasonable Alternative Standards. Rewards under a HCWP must be available to all similarly situated individuals.
 - A reasonable alternative standard (or a waiver of the standard) for obtaining the reward must be provided to an individual when it is either unreasonably difficult due to a medical condition to meet the otherwise applicable standard, or medically inadvisable to attempt to satisfy the otherwise applicable standard.

- GHPs and carriers are not required to establish a particular alternative standard in advance of an individual's specific request for one.
- GHPs and carriers cannot cease to provide a reasonable alternative merely because it was not successful before. The same or a new alternative must be offered.
- Facts and circumstances considered in determining if a reasonable alternative has been provided include:
 - If the reasonable alternative standard is completion of an educational program, the plan or issuer must make the educational program available instead of requiring an individual to find such a program unassisted, and may not require an individual to pay for the cost of the program.
 - 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 the reasonable alternative standard is compliance with the recommendations of a medical professional who is an employee or agent of the plan or issuer, and an individual's personal physician states that the medical professional's recommendations are not medically appropriate for that individual, the plan or issuer must provide a reasonable alternative standard that accommodates the recommendations of the individual's physician with regard to medical appropriateness.

(4) Reasonable Design. The determination of whether a HCWP is reasonably designed is based on all the relevant facts and circumstances. To ensure that programs are not a subterfuge for discrimination or underwriting based on health factors such as weight, blood pressure, glucose levels, cholesterol levels, or tobacco use with no or insufficient support to improve individuals' health, the proposed regulation proposes that:

- To the extent a GHP'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.**

(5) Notice of Other Means of Qualifying for the Reward. All GHPs and carriers are required to disclose the availability of other means of qualifying for the reward or the possibility of waiver of the otherwise applicable standard in all plan materials describing the terms of a HCWP.

- Merely mentioning the availability of the wellness program (including in the newly required Summary of Benefits and Coverage (SBC)) without describing its terms does not trigger the disclosure in the applicable materials.
- New simpler sample notice language is provided in the proposed regulation and in the respective examples, which is intended to be easier to understand and increase the likelihood that those who qualify for a different way of obtaining a reward will contact the GHP or carrier to request it.
- Here is one example of the notice of other means from the text of the proposed regulations:

“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.”

NO CHANGES TO PARTICIPATORY WELLNESS PROGRAMS

Participatory welfare programs are not required to meet the five standards applicable to health-contingent wellness programs discussed above.

For employers with participatory wellness programs, the proposed rules continue to support these programs and there are no revisions or clarifications to the existing wellness provisions. Therefore, participatory wellness programs in 2014 will operate in the same manner and in accordance with the same rules as they do today.

Participatory wellness programs are generally programs that are made available to all similarly situated individuals and that either do not provide a reward or do not include any conditions for obtaining a reward that are based on a standard related to their

health. Examples of a participatory wellness program include a program that reimburses for all or part of the cost of membership in a fitness center; and a program that provides a reward to employees for attending a monthly, no-cost health education seminar.

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Please contact me if you have any questions.

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