

## Final Nondiscrimination Regulations: How Do They Affect Wellness Programs?

December brought us several employee benefits developments, including new regulations interpreting HIPAA's nondiscrimination provisions. You may recall that HIPAA, among many other things, prohibits certain types of discrimination based on health factors by group health plans and insurers providing group health plan coverage. These new regulations finalize and replace previous interim and proposed rules.

HIPAA's nondiscrimination provisions have been around since 1996, and previous guidance made it clear that health plans can run afoul of the nondiscrimination standards if they give premium discounts or enhanced benefits to individuals who meet certain wellness goals (e.g., cholesterol below 200 or body mass index below 25). Nonetheless, proposed regulations issued in 2001 allowed an exception for limited plan rewards under wellness programs if these programs met several conditions. For the most part, the final regulations adopt the proposed regulations' exception intact, but the final rules also include some important clarifications and additional provisions.

This *Alert* reviews the new regulations' provisions regarding wellness programs and their likely impact on employers' existing wellness initiatives. The remaining provisions of the final regulations, which explain how the nondiscrimination rules apply to health plans generally, will be covered in a future *Alert*. The final nondiscrimination regulations become applicable to group health plans starting on the first day of the first plan year that begins after June 30, 2007 (January 1, 2008 for calendar year plans).

### *Wellness Programs Defined*

Speaking very generally, the nondiscrimination rules disallow premium and benefit variations within groups of similarly situated individuals, subject to several exceptions.

#### *Which Individuals Are Similarly Situated?*

The rules specify that employees are similarly situated to one another unless they are in different employment-based classifications that are consistent with the employer's usual business practices. Classifications usually meet this test if the employer uses them for purposes other than health plan eligibility (e.g.,

eligibility for other employee benefits or determination of other terms of employment). Examples of classifications that may satisfy the test include full-time versus part-time, different geographic locations, membership in a collective bargaining unit, and current versus former employee status. Employees that are in a single employment classification will be treated as similarly situated unless they have a choice of two or more benefit packages. In that case, employees that choose different packages generally are not similarly situated. The final regulations also provide rules for determining whether dependents are similarly situated.

Wellness programs are one of the exceptions to the general nondiscrimination rule noted above. That is, group health plans can vary similarly situated individuals' premiums and benefits pursuant to wellness programs that meet the requirements of the regulations. The regulations broadly define wellness programs as including any program that is designed to promote health or prevent disease.

NOTE: In thinking about wellness programs, it is important to keep in mind that the nondiscrimination rules do not affect any wellness program unless the reward provided is a variation in premiums or benefits under a group health plan. These health plan rewards include things like avoiding a premium surcharge that applies to smokers, avoiding a deductible that normally applies to hospitalization, and receiving a premium discount for meeting specified wellness goals. If a wellness program provided a gift certificate as the reward for meeting certain exercise goals, the nondiscrimination rules would not affect that program because it does not deliver a health plan reward (i.e., it does not vary premiums or benefits under a group health plan).

#### *Final Regulations Set Rules for Two Types of Wellness Programs*

The final rules specify that, for nondiscrimination purposes, there are two types of wellness programs:

- Those under which *none* of the conditions for obtaining a health plan reward “is based on an individual satisfying a standard that is related to a health factor;” and
- Those under which *any* of the conditions for obtaining a health plan reward “is based on an individual satisfying a standard that is related to a health factor.”

A program that provides a premium discount to employees who attend a monthly health education seminar is the first type of wellness program (a non-health-factor-related wellness program). This same program will be the second type of wellness program (a health-factor-related wellness program), however, if it also provides the discount to employees who do not attend the seminar but have cholesterol and blood pressure readings within normal ranges. The nondiscrimination rules require health-factor-related wellness programs to meet a variety of conditions, as described below, while non-health-factor-related wellness programs are subject to very limited requirements.

#### *Non-Health-Factor-Related Wellness Programs*

The biggest issue for non-health-factor-related wellness programs is distinguishing these programs from health-factor-related wellness programs. The regulations provide some assistance. In addition to the program (noted above) that rewards those attending health education seminars, the final regulations offer additional examples of non-health-factor-related wellness programs, including:

- A diagnostic testing program that provides a reward for participation and does not base any part of the reward on outcomes.
- A program that encourages preventive care through the waiver of the copayment or deductible requirement under a group health plan for the costs of, for example, prenatal care or well-baby visits.
- A program that reimburses employees for the costs of smoking cessation programs without regard to whether the employee quits smoking.

The key to identifying these programs is determining whether all similarly situated individuals obtain the health plan reward by satisfying a standard that is unrelated to their

health condition as measured by any of the following health factors:

- Health status
- Receipt of health care
- Genetic information
- Disability
- Claims experience
- Medical history
- Evidence of insurability
- Medical condition (including both physical and mental illnesses)

A wide variety of programs fall into non-health-factor-related category, including those conditioning a health plan reward on completing a health risk assessment form or having a medical examination, provided the reward is not contingent on the information obtained.

**CAUTION:** The final regulations specify that complying with HIPAA nondiscrimination requirements does not automatically ensure compliance with “any other State or Federal law, such as the Americans with Disabilities Act.” EEOC guidance states that a wellness program may violate the ADA if it requires employees to undergo medical examinations or respond to disability-related inquiries, unless participation in the program is voluntary. The EEOC’s guidance indicates that participation is not voluntary if it is required or if the program applies a penalty to employees who do not participate. EEOC representatives have stated informally that requiring completion of a health risk assessment as a condition of health plan coverage would not be protected as a voluntary wellness program. See *Willis Employee Benefits Alert # 80, Wellness Plans: HIPAA, the ADA and the EEOC*, for additional information about the ADA implications of wellness programs.

Accordingly, some of the non-health-factor-related wellness programs described above may raise issues under the ADA that employers should investigate before implementing similar measures.

A health plan can vary individuals’ premiums and benefits under the plan based on satisfying the criteria of a non-health-factor-related wellness program, and can do so without meeting the conditions described below for health-factor-related wellness programs. The nondiscrimination rules impose only one condition on non-health-factor-related wellness programs: Such programs must be made equally available to all similarly situated individuals (as described above). For example, an employer can offer two plans to a group of similarly situated individuals — a high option and a low option — and make the high option available only to those who agree to complete a series of health and nutrition classes during the year. This program meets the requirements of the final regulations so long as it is equally available to all similarly situated individuals.

#### *Health-Factor-Related Wellness Programs*

The programs that fall into this category are the most familiar types of wellness programs, providing premium discounts or richer benefits for those who have positive health factors such as not smoking, cholesterol below 200, blood pressure within normal range, body mass index below 25, etc. As noted above, a wellness program falls into this category if *any* of the conditions for obtaining a health plan reward is based on an individual satisfying a standard related to a health factor — even if an alternative standard that is not related to a health factor is available. Five requirements must be met in order for a health plan providing a reward pursuant to a health-factor-related wellness program to comply with the nondiscrimination requirements.

- *Limit on Amount of Reward.* The health plan reward available as a result of meeting goals under all health-factor-related wellness programs must not exceed 20% of the total cost of coverage under the plan for an individual employee. The cost of employee-only coverage is determined based on the total amount of employer and employee contributions for the benefit package under which the employee is receiving coverage. If, in addition to employees, any dependents (such as spouses or dependent children) may participate in the health-factor-related wellness program, the limit on the reward is based on the cost of the coverage category in which the employee and any dependents are enrolled.
- *Chance to Qualify For the Reward at Least Once Each Year.* As a means of promoting good health or preventing disease, the health-factor-related wellness program must give each eligible individual an opportunity to obtain the health plan reward at least one time each year.
- *Reasonably Designed to Promote Good Health or Prevent Disease.* The preamble to the final regulations notes that the “reasonably designed” requirement is intended to be an easy standard to meet and that no scientific support for the design chosen is required. If a program has a reasonable chance of improving the health of participants, it probably will satisfy the “reasonably designed” standard. A program might not meet this standard if it imposed a burdensome time commitment, or a requirement to engage in bizarre, extreme, or illegal behavior.
- *Reasonable Alternative Standard.* A health-factor-related wellness program must provide certain individuals with a reasonable alternative standard for

obtaining the health plan reward. The example of a wellness program that provides a premium discount to those with cholesterol below 200 is used below to explain this requirement. The same analysis would apply with respect to other standards (e.g., smoking, blood pressures; or body mass index).

- *Individuals Entitled to the Alternative Standard.* An alternative standard must be available for individuals for whom it is unreasonably difficult, due to a medical condition, to meet the general standard (i.e., cholesterol below 200) or for whom it is medically inadvisable to attempt to lower their cholesterol below 200. Such individuals cannot be required to meet the general standard as a condition of obtaining the health plan award. They must be offered an alternative standard, as described below. In fact, the final regulations make clear that an alternative standard must be offered year after year to individuals for whom it remains unreasonably difficult, due to addiction or another medical condition, or medically inadvisable to lower their cholesterol. The final rules do, however, allow plans to require verification, such as a physician’s statement, that a health factor makes it unreasonably difficult or medically inadvisable for an individual to lower his or her cholesterol so that an alternative is needed.
- *Acceptable Alternative Standards.* A plan can meet the alternative standard requirements by lowering the threshold of the existing health-factor-related standard (e.g., cholesterol below 220), substituting a different standard (attending a

nutrition class), or waiving the standard altogether. If an alternative standard is offered that is, itself, a health-factor-related standard (e.g., cholesterol below 220), an additional alternative must be offered that an individual can satisfy without regard to any health factor (e.g., nutrition classes). A health-factor-related wellness program need not include a specific reasonable alternative standard from the start — the plan can wait to identify a reasonable alternative standard until a participant requests one under the program. If a plan prefers, it can simply waive the general standard for all individuals to whom a reasonable alternative standard must be offered.

- *Disclosure.* All of the health plan materials that describe the terms of the health-factor-related wellness program must disclose the availability of a reasonable alternative standard. The materials need not specify what that

reasonable alternative standard will be — only that some reasonable alternative standard will be made available. There is an exception to this requirement for plan materials that mention the wellness program, but do not describe its terms or the standards required in order to obtain the reward. Those materials need not mention the availability of an alternative standard.

### *Conclusion*

While the final nondiscrimination regulations do not give employers much additional latitude to implement wellness programs, they should be helpful because they provide some much-needed clarity. The efforts to define which wellness programs must meet the five-part test and which need not do so are particularly welcome. Of course, wellness initiatives encompass much more than programs that provide rewards by varying health plan premiums and benefits. Therefore, many questions about the compliance issues raised by wellness programs remain unanswered.

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