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What Employers Need to Know Right Now About Health Care Reform

AGENCIES ISSUE FINAL RULES ON WELLNESS PROGRAMS

On May 29, 2013 the Department of Health and Human Services, the Internal Revenue Service and the Department of Labor jointly issued a final rule that addresses how wellness programs must operate under PPACA beginning in 2014. In many respects the final rules carry forward the rules that have been in effect for wellness programs since 2006, and most of the updates that were proposed last November have been adopted.

The wellness program rules provide an exception to the general rule that employers may not take a person's health status into account with respect to eligibility, benefits or premiums under a group health plan. Wellness programs therefore are allowed if they are designed to help employees improve their health; if they are primarily punitive they will not be allowed.

The agencies categorize wellness programs as either "participatory" programs or "health-contingent" programs. A participatory program is one that either has no reward or penalty (such as providing free flu shots) or simply rewards participation (such as a program that reimburses the cost of a membership to a fitness facility or the cost of a seminar on nutrition). As long as a participatory program is equally offered to all similar employees, no special requirements will apply to the program.

In contrast, programs that base incentives or requirements on an employee's health status ("health-contingent wellness programs") will be required to meet several conditions to be legal. The regulations further divide health-contingent programs into "outcomes-based" programs and "activity-only" programs. An outcomes-based program includes programs that reward or penalize based on achieving a certain health status, such as meeting targets for cholesterol level, BMI, blood pressure level, etc. An activity-only program provides rewards or penalties for participating, or not participating, in things like a walking program, nutrition counseling, smoking cessation program,

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31-May-2013

etc. A program that requires those with a particular health condition to complete a specific educational program is considered a health-contingent program.

A wellness program with health-contingent requirements must:

1. Be reasonably designed to promote health or prevent disease, and
2. Give employees a chance to qualify for the incentive at least once a year, and
3. Cap the reward or penalty at a prescribed percentage of the total cost of coverage, and
4. Provide an alternative way to qualify for the incentive for those who have medical conditions, and
5. Describe the availability of the alternative method of qualifying for the incentive in written program materials.

Of the five required wellness program components, the first two are pretty straightforward.

Beginning with the 2014 plan year, group health plans may have a reward or penalty of up to 30 percent of the cost of coverage if the incentive is not related tobacco usage. If there are multiple parts to the program (such as meeting certain BMI, blood pressure, cholesterol and exercise targets) the maximum total reward or penalty for all parts of the program is 30 percent.

Plans may have an incentive of up to 50 percent of the cost of coverage for non-use of tobacco. If the program includes non-tobacco rewards or penalties, too, the maximum total reward or penalty is 50% of the cost of coverage. (The higher incentive for non-use of tobacco is designed to mirror the amount of smoker surcharge that may be applied in the small group market.)

Note: Both the 30 percent and 50 percent incentives are based on the total cost of the coverage (the employer share plus the employee share). An incentive may either be a reward, such as a premium discount, or a penalty, such as a premium surcharge. If the program is just directed to the employee, the reward or incentive is based on the cost of single coverage. If other family members may participate, the reward or incentive may also consider the applicable dependent's results. The employer may use any reasonable method to allocate the incentive if some but not all dependents are eligible to participate or meet the goal.

Example: The annual premium for employee-only coverage under XYZ Company's group health plan is \$6,000 (XYZ pays \$4,500 per year and the employee pays \$1,500 per year). The plan offers employees a health-contingent wellness program focused on exercise, blood sugar, weight, cholesterol, and blood pressure. The reward for meeting all five targets is an annual premium rebate of \$600. The plan also has a \$2,000 tobacco premium surcharge on employees who have used tobacco in the last 12 months and who are not enrolled in the plan's tobacco cessation program. (Those who participate in the plan's tobacco cessation program are not assessed the \$2,000 surcharge.)

XYZ's program is permissible because the total of all rewards is \$2,600 ($\$600 + \$2,000 = \$2,600$), which does not exceed 50 percent of the total annual cost of employee-only coverage (\$3,000), and, tested separately, the \$600 reward for the wellness program unrelated to tobacco use does not exceed 30 percent of the total annual cost of employee-only coverage (\$1,800).

Plans that include health-contingent incentives must provide an alternative way to meet the health-contingent standard, and provide the same incentive for meeting the alternative as would have been provided if the person had met the actual standard. For activities-only requirements, the alternative only needs to be provided if it is medically inadvisable or unreasonably difficult for the person to participate because of a medical condition. For instance, an alternative would be needed to a walking program for an employee who had recently had hip replacement surgery. For outcomes-based requirements an alternative must always be available (as the goal of the program must be to improve health, not to punish those who are unhealthy). So, for example, if a program rewards employees with BMIs below a certain level, overweight employees who complete a nutrition program must also be given the reward that is provided for meeting the BMI standard.

Employers who choose to use educational programs as a reasonable alternative must locate or help the employee locate an acceptable program. The employer must pay the cost of the program, including membership fees. (However, the employer is not required to pay the cost of food under a weight loss program.) An employer may not limit the number of times an employee may use an alternative standard but it may require a different alternative standard if previous ones have failed (meaning, for example, that an employee would be eligible for the non-smoker discount if he continues to smoke despite participating in a smoking cessation program, but the employer could require use of a nicotine patch in the next program year.) The employer does not have to provide the same alternative to all employees.

Employers must provide notice that an alternative standard is available in all materials that describe the program. The notice does not need to include details of the alternative standard. The regulations suggest a notice such as: "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."

The final rule may be found here:

<http://www.dol.gov/ebsa/pdf/workplacewellnessstudyfinalrule.pdf>