Final Wellness Regulations Expand Employer Compliance Duties

June 10, 2013

On June 3, 2013, the departments of the Treasury, Health and Human Services, and Labor (the "Agencies" or "Departments") published final regulations defining how wellness programs may comply with the Affordable Care Act's prohibition against discrimination based on one or more "health factors," a term that includes an individual's health status, medical condition, disability, and claims experience. The final regulations make some significant changes to proposed wellness regulations published in November 2012, which were the subject of an earlier post on this blog. I outline the key changes, which take effect for plan or policy years[1] beginning on or after January 1, 2014, in the following Frequently Asked Questions list.

Q. 1. What is the most significant change the final regulations make to wellness program compliance duties?

A.1. The final regulations treat certain wellness programs that formerly were classed as "participatory-only" programs as "health contingent" programs that must meet five criteria designed to permit individuals with health limitations to still qualify for the wellness reward. Examples include walking programs or other programs that do not require that employees attain a specific result, but that do require their physical participation or other activity that may be ruled out by health issues.

Q. 2. How do the final regulations change the terminology of wellness programs?

A. 2. As referenced above, wellness programs generally were classed in two categories: "participatory" or "participation only" programs that merely required the employee to take part in wellness programs and activities in order to attain the related reward, and "results-based" programs that conditioned a reward on the employee meeting a standard or criteria that is related to a health factor, such as actually reducing Body Mass Index (BMI) or blood pressure readings. The proposed regulations introduced the term "health-contingent wellness programs" to replace "results-based" programs (which was never an official regulatory term to begin with), but did not change the definition of participatory plans. The final regulations retain the participatory category, but break the "health contingent" category down into two sub-categories: "activity-only" health-contingent wellness programs – many of which formerly met the "participatory-only" category, and "outcome-based" health-contingent wellness programs, as follows:

Q. 3. How do the final regulations define "activity-only" health-contingent wellness programs?

A. 3. An activity-only health contingent wellness program requires an individual to perform or complete an activity related to a health factor in order to obtain a reward, but does not require the individual to attain or maintain a specific health outcome. Examples include walking, diet or exercise programs, which some individuals may be unable to participate in or complete, or have difficulty in doing so, due to health factors such as asthma, pregnancy, or recent surgery.

Q. 4. How do the final regulations define "outcome based" health-contingent wellness programs?

A. 4. An outcome-based health-contingent wellness program requires an individual to attain or maintain a specific health outcome, such as smoking cessation, or reducing BMI or blood pressure below a set threshold, in order to obtain a reward. As the regulations explain, however, such programs usually contain an "activity-only" subcomponent for individuals who do not attain the desired health outcome. For instance, if the program provides a reward to employees who reduce their BMI or blood pressure by a set amount, employees who, for health reasons, cannot or should not attempt to attain those results may receive the same reward by participating in a walking program or by attending healthy cooking classes. As a consequence, the special rules for activity-only health-contingent wellness programs generally will apply to that subcomponent of outcome-based health-contingent wellness programs.

Q. 5. When is a participation-only or "participatory" wellness program nondiscriminatory under the final regulations?

A. 5. A participatory wellness program – such as a program that provides a 10% reduction in premiums to employees who take part in biometric testing, without any required result – is nondiscriminatory provided that it is made available to all similarly situated individuals, regardless of health status. The "similarly situated" rule permits differences among "bona fide employment-based classifications" such as work location, union versus non-union, etc. There is no dollar or percentage limit on financial rewards for taking part in a participatory-only wellness program.

Q. 6. When is a "health-contingent" wellness program nondiscriminatory under the final regulations?

A. 6. All health-contingent wellness programs – whether activity-only or outcome-based, must meet five separate requirements designed to make wellness rewards attainable regardless of health factors such as disabilities or medical conditions. The five criteria are: (a) that employees be able to qualify for the reward at least annually; (b) that the financial reward not exceed certain thresholds, as applied to the total premium cost for individual coverage; (c) that the wellness program be reasonably designed to promote health or prevent disease; (d) that the wellness program be made available to all similarly situated individuals, including through waiver of the health goal or offer of a reasonable alternative means of attaining the reward when health factors present an obstacle; and (e) that all written plan materials disclose the availability of other means of qualifying for the reward. These criteria are found in final nondiscrimination regulations under HIPAA from 2006 as well as in Section 2705(j) of the Public Health Service Act, which was incorporated into the Affordable Care Act (ACA § 1201(4)). Most of the changes in the final regulations involve criteria (d), which is referred to below as the "universal availability/reasonable alternative standard" requirement.

Q. 7. What is the maximum financial reward that a health-contingent wellness program may provide?

A. 7. Under *current law* the maximum financial reward is an amount equal to 20% of the total premium cost (employer and employee portions) for individual coverage under a group health insurance policy or self-funded plan. (The percentage may be based on family or self plus one coverage costs only to the extent that the added spouse/dependents may participate in the results-based wellness program.[2]) For plan or policy years beginning on or after January 1, 2014, the final regulations increase the maximum to 30% of the total premium cost. An additional 20% incentive is allowed (for a total incentive of 50%) but only if it is offered in connection with a program that reduces or stops tobacco use. Employers must be sure that their results-based wellness program incentives do not exceed the 30% and 50% thresholds either separately or when added together. Examples are described in my earlier post on the proposed regulations.

Q. 8. What special requirements apply to activity-only, health-contingent wellness programs?

A. 8. The five criteria listed above all apply, but special rules apply under the universal availability/reasonable alternative means requirement, as follows: The program must either waive the activity requirement, or offer a reasonable alternative standard for obtaining the reward, for any individual for whom it is either (a) unreasonably difficult due to a medical condition to participate in the activity or (b) medically inadvisable to attempt to do so. For example, for individuals recovering from hip replacement surgery, a requirement to participate in a walking program would need to either be waived, or a substitute offered. The following additional rules apply:

- Employers do not need to "pre-design" reasonable alternative standards but instead may design them once an employee requests alternative standards.
- If the reasonable alternative standard is completion of an educational program, the employer must make the educational program available or assist the employee in finding such a program, and may not require the individual to pay for the program.
- The time commitment must be reasonable. The regulations state that requiring attendance at a nightly one-hour class would not be reasonable.
- If the reasonable alternative standard is a diet program, the employer does not need to pay for the cost of food but must pay any membership or participation fee.
- If the reasonable alternative standard that is offered meets the definition of an activity-only wellness program, it must independently comply with the five requirements, including the universal availability/reasonable alternative standard criteria, as if it were a self-standing program.
- If the reasonable alternative standard that is offered meets the definition of an outcome-based wellness program, it must independently satisfy the five requirements, including the universal availability/reasonable alternative standard criteria, as if it were a self-standing program.

Q. 9. What special requirements apply to outcome-based, health-contingent wellness programs?

A. 9. The five criteria listed in response to Q. 5 all apply, but special rules apply under the universal availability/reasonable alternative means requirement, as follows: The program must either waive the required health outcome, or offer a reasonable alternative standard for obtaining the reward, for any individual for whom it is either (a) unreasonably difficult due to a medical condition to attain the health outcome or (b) medically inadvisable to attempt to do so. For example, a requirement to lower blood pressure below a certain threshold would need to either be waived, or a substitute offered, to individuals with chronic hypertension. The following additional rules apply:

- Employers do not need to "pre-design" reasonable alternative standards but instead may design them once an employee requests alternative standards.
- If the reasonable alternative standard is completion of an educational program, the employer must make the educational program available or assist the employee in finding such a program, and may not require the individual to pay for the program.
- The time commitment must be reasonable. The regulations state that requiring attendance at a nightly one-hour class would not be reasonable.
- If the reasonable alternative standard is a diet program, the employer does not need to pay for the cost of food but must pay any membership or participation fee.
- 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. The final regulations use an example of an initial standard of reducing BMI below 30, and state that a reasonable alternative standard cannot be to achieve a BMI less than 31 on the same date that the original standard was required. Instead, reducing BMI by a small amount or percentage over a realistic period of time, such as a year, is a permitted alternative goal.
- 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, but only if the physician joins in the request. The individual can make a request to involve a personal physician's recommendations at any time and the personal physician can adjust his or her recommendations at any time, consistent with medical appropriateness.

- If the reasonable alternative standard that is offered meets the definition of an activity-only wellness program, it must independently comply with the five requirements, including the universal availability/reasonable alternative standard criteria, as if it were a self-standing program.
- If the reasonable alternative standard that is offered meets the definition of an outcome-based wellness program, it must independently satisfy the five requirements, including the universal availability/reasonable alternative standard criteria, as if it were a self-standing program.

Q. 10. When may an employer request verification, from an employee's medical provider, that health factors prevent the employee from earning a reward under a health-contingent wellness program?

A. 10. Employers may request such verification only in connection with activity-only wellness programs (or in connection with activity-only subcomponents of outcome-based wellness programs). The proposed regulations would have permitted employers to make such requests whenever it was "reasonable under the circumstances" to do so, but the final regulations conclude that it is never reasonable to require verification that an employee's inability to attain, or attempt to attain, a specific health outcome is based on one of the enumerated health factors such as a medical condition or disability. As mentioned, however, if an employee who cannot attempt to lower his or her blood pressure under an outcome-based program is offered the alternative of a walking program or other activity-only program, an employer may request verification that a health factor prevents the employee from taking part in the walking program, as it is an activity-only subcomponent of the outcome-based wellness program. Under the final regulations, verification requests still must be "reasonable under the circumstances," and further must be sought only when it is "reasonable to determine that medical judgment is required to evaluate the validity of the request" for a reasonable alternative standard.

Q. 11. How do the final wellness regulations increase the role and authority of employees' personal physicians?

A. 11. The proposed regulations limited the role of an employee's personal physician to that of rebutting the alternative compliance methods recommended, under a health-contingent wellness program, by a medical professional hired or employed by the employer. The final regulations permit an employee's personal physician to prescribe reasonable alternative standards for earning a wellness reward in any instance where original health-contingent program standards are deemed to be medically inappropriate for an employee, including, but not limited to, instances in which the plan or employer's medical professional has recommended an alternative method. As described above, outcome-based wellness programs also must include, as a second reasonable alternative standard (in place of the reasonable alternative standard proposed by the plan), the opportunity to comply with recommendations of the employee's personal physician. Employees in outcome-based programs also may request to involve a personal physician's recommendation at any time, and if the physician agrees to participate he or she may adjust recommendations at any time consistent with medical appropriateness.
Regular insurance co-pays or costs will apply to medical items and services furnished in accordance with the physician's recommendations.[3]

Q. 12. Must health-contingent wellness programs provide a never-ending series of reasonable alternative standards?

A. 12. No. This was a possible interpretation of the preamble to the proposed regulations, which stated that employers must continue to offer alternative standards despite a low success rate, particularly where addictive behavior is involved, and which gave the example of offering different weight loss programs or different nicotine replacement therapies when predecessors failed to have an effect. The final regulations make clear that employers need not get caught in an endless cycle of suggesting alternative standards, and introduce two new requirements for outcome-based programs designed to shortcut the reasonable alternative standard process. These requirements are described more fully in Q&A 9, above; the first requirement is that a 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, and the second is that the individual be given the opportunity to comply with the recommendations of the individual's personal physician in lieu of meeting an alternative standard set by the program or a program physician.

Q. 13. How do the final regulations change the notice requirements for wellness programs?

A. 13. The proposed regulations contain several alternative model notices that reasonable alternative standard will be offered to individuals who cannot attain health-contingent program goals, and required that the notice be set forth in all written materials that describe a wellness program, but not to materials that simply make reference to the existence of the program. For instance, it need not be set forth in the Summary of Benefits and Coverage document (which is provided by carriers to employers with insured plans). The final regulations maintain the notice requirement but add to the model notice language reference to the role that personal physicians may play in designing reasonable alternative standards, as follows:

"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."

Q. 14. Do the final regulations expand on notice requirements for wellness programs?

A. 14. Arguably, yes. A footnote to the preamble provides that, if compliance with a wellness program affects premiums, cost sharing, or other benefits under the terms of a group health plan, then the wellness program terms (including the availability of any reasonable alternative standard) are generally required to be disclosed in governing plan documents as well as in the summary plan description (SPD). This is not a new rule as much as it is a valid interpretation of the required contents of an SPD, including a description of employee contributions (which are impacted by wellness program participation). However group health plan documents and SPDs – particularly for fully insured group plans – do not always integrate wellness program terms with the provisions for employee contributions and cost sharing. As a result, many employers will need to revisit their group health plan documentation and revise as necessary to describe the impact of wellness program participation.

Q. 15. Do the final regulations shed any light on when or whether a wellness program is "voluntary" as required under the Americans with Disabilities Act?

Q. 15. No. Clarification on this topic will have to come from the Equal Employment Opportunity Commission ("EEOC"), which regulates compliance with the Americans with Disabilities Act. EEOC has not yet clearly defined what makes a wellness program "voluntary" or not, but did recently hold a meeting at which business and advocacy groups spoke to the issue and urged the Commission to provide guidance on this point without future delay.

Q. 16. What can be done when smoking cessation/reduction rewards are provided to an employee who is later found to have lied about stopping or reducing smoking?

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A.16. The Affordable Care Act prohibits rescission of coverage under any group or individual plan other than instances of fraud or misrepresentation of a material fact. With regard to small group and individual policies subject to the tobacco rating surcharge, insurance market reform regulations prohibit rescission on the basis of misrepresentation of smoker status, but permit the plan to seek recovery of premium amounts that would have been paid to the plan if the employee had provided accurate information about tobacco use. It is possible that future guidance will address the rescission remedy in this context for large group and self-funded plans, but a footnote to the regulations states that the Departments view is that misrepresentation of this type would not be a "material" fact that would trigger rescission, because the lesser remedy of recouping premiums is available. Please note that the right to recoup the surcharge would need to expressly be permitted in the governing health plan documentation and would otherwise need to be carried out in compliance with ERISA. State wage and hour laws may prevent or limit the use of payroll deductions to recover the surcharge amounts. In a related note, final insurance market reform regulations published in February 2013 propose a definition of "smoking" as use of tobacco on average of four or more times per week within a period no longer than the prior six months.

Q. 17. Are all wellness programs subject to the final regulations?

A. 17. The final regulations apply to wellness programs that are teamed with small and large group health plans, whether grandfathered or non-grandfathered, insured or self-funded. They do not apply to wellness programs teamed with individual health insurance policies. The 50% maximum wellness incentive that includes a smoking cessation or reduction program teams with the tobacco use surcharge (up to 50% of the applicable premium) that applies in the small group market beginning in 2014, such that tobacco users who participate in the cessation or reduction programs can cancel out the effect of the surcharge. The surcharge would apply to large group plans only when such plans are offered on an exchange; in California this would pertain to plans with more than 50 participants and only in 2016 and subsequent (the California exchange is closed to groups of more than 50 in 2014 and 2015.)

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[1] As wellness programs generally do not comprise self-standing group health plans, the applicable plan or policy year is that of the group health plan to which the wellness program relates.

[2] The regulations do not provide direct guidance on how to apportion the reward among employee family members when they are allowed to participate in wellness programs, but the Agencies will likely issue future "soft" guidance – for instance in the form of an FAQ – on that topic in the future.

[3] The final regulations do not directly address the privacy concerns under GINA, HIPAA and comparable state laws, raised by the personal physician's increased role in wellness program design.

http://www.gpo.gov/fdsys/pkg/FR-2013-06-03/pdf/2013-12916.pdf

http://www.gpo.gov/fdsys/pkg/FR-2012-11-26/pdf/2012-28361.pdf

http://eforerisa.wordpress.com/2012/11/23/new-rules-defined-for-results-based-wellness-programs/

http://www.eeoc.gov/eeoc/newsroom/release/5-8-13.cfm

http://www.gpo.gov/fdsys/pkg/FR-2013-02-27/pdf/2013-04335.pdf