Well, Well, Well…Wellness Program Rules Updated

By: Joanne Jacobson, Sally Church and Joni Landy

Increased Rewards

The Departments of Treasury, Labor and Health and Human Services jointly issued final regulations on June 3, 2013 addressing wellness programs under the Affordable Care Act (the "ACA") and the HIPAA non-discrimination rules. Generally, the HIPAA nondiscrimination provisions prohibit group health plans from charging similarly situated individuals different premiums or imposing different deductible, copayment or other cost sharing requirements based upon a health factor. However, there is an exception that allows plans to offer wellness programs. Effective January 1, 2014, the regulations permit employers to reward their employees with as much as 30% of the total cost of medical coverage (up from 20%) if they meet certain health-contingent goals, and up to 50% for health contingent wellness programs designed to prevent or reduce tobacco use. Rewards can take many forms, such as premium discounts or surcharges, reduced cost sharing, enhanced benefits, gift cards or deposits to Health Savings or Health Reimbursement Accounts.

Increased Requirements

There are essentially two types of wellness programs: (1) participatory wellness programs that provide a benefit for merely participating (e.g., rebates for gym membership and health education seminars), and (2) health-contingent (activity-based and outcome-based) wellness programs that require an individual to complete an activity (e.g., walking program) or attain a certain outcome (e.g., weight loss, lower blood pressure) in order to receive awards.

The increased requirements under the final regulations only apply to "health contingent" wellness programs and do not apply to "participatory" wellness programs. If an individual does not have to satisfy a specific health standard in order to obtain a reward, then the wellness program is considered "participatory." Health-contingent based programs must be reasonably designed to promote health and prevent disease, available to all similarly situated individuals, and participants must have the opportunity to qualify for the benefit at least annually. Furthermore, employers must provide a "reasonable alternative" to employees who want the discount but are unable to meet the initial health-related standards.

As noted above, there are two classes of health-contingent programs: activity-based and outcome based. Activity-based programs can waive the standards for those unable to comply for medical reasons, or establish alternatives on a case by case basis; outcome-based programs must provide an alternative regardless of the individual's medical condition. This means that only activity-based programs permit the plan to obtain a doctor's certification that the participant cannot satisfy the program requirements or can allow the participant's doctor to participate in designing a reasonable alternative that the participant can satisfy. If any alternative program charges a fee, the plan must pay the fee, unless the alternative has been recommended and/or designed specifically for the individual participant by his or her personal physician. In that case, the participant would be required to pay for any cost required to participate in that individually-

designed program. If the alternative standard itself is activity-based; the employer may need to offer a medically reasonable alternative. (For example, if the activity-based program requires the employee to run three days/week and the employee cannot run for medical reasons, the alternative could be to walk three days/week. If the employee cannot walk for medical reasons, the employer would need to provide even another alternative.) If the alternative is outcome-based, the employer may need to provide an additional alternative. If the alternative is to meet a different level of the same standard, the employer must give the individual additional time to comply with that standard. (For example, if the standard is Body Mass Index (BMI), and the alternative is to meet a different BMI, the employer must give the employee additional time to reach that BMI.) Finally, the employee can consult with his/her physician to obtain a recommendation for an alternative – but only under an activity-based program. Any materials provided to employees that describe wellness programs must include information about the availability of reasonable alternatives and contact information to request an alternative. Reasonable alternatives do not need to be defined in advance and can be determined on an individual basis.

Penalties

Under the ACA, wellness programs that do not comply with the requirements could be subject to penalties of up to $100 per day.

Impact of Wellness Programs on the Affordability of Health Coverage for Pay or Play Purposes

Note that while the employer may give the employee a break on his/her health plan premiums for participation in a wellness program, any premium discount or surcharge will not count towards the determination of whether or not the health plan is "affordable" (with respect to the employer shared responsibility penalties) except the amount related to tobacco cessation programs. For tobacco cessation programs, affordability is determined based on the premiums charged to non-tobacco users. For 2014 affordability determinations, a transition rule applies and employers can assume that all employees satisfy wellness program requirements, tobacco related or not. However, this transition rule can only be used for wellness programs that were in effect on May 3, 2013 and only for those specific categories of employees who were eligible for the program as of May 3, 2013.