

Wellness Compliance and the Final HIPAA Wellness Regulations

July 25, 2013



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- Welcome! We will begin at 2 p.m. Eastern
- There will be no sound until we begin the webinar. You can listen to the audio portion through your computer speakers or by calling into the phone conference number provided in your invitation email.
- You will be able to submit questions during the webinar by using the “questions” box located on your webinar control panel.



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Wellness Compliance

Background

General HIPAA health status non-discrimination rule:

Group health plans are prohibited from discriminating against individuals on the basis of “health factors” for purposes of eligibility or benefits:

Eligibility

- Enrollment
- Effective Date of Coverage
- Waiting periods

Benefits

- Premiums
- Contributions
- Deductible
- Co-payments
- Coinsurance



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Background

“Health Factors” include:

- Health Status
- Claims Experience
- Evidence of Insurability (incl. dangerous activity)
- Genetic Information
- Medical Condition (physical or mental)
- Medical History
- Health Care Previously Received
- Disability



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Background

Application to wellness programs

- Plan-related incentives often used to encourage participation in wellness programs
- Premium differentials or other plan-related financial incentives based on health factors generally violate HIPAA's health status nondiscrimination rules
- Since the 2006 final HIPAA regulations, we've dealt with several exceptions allowing various types of wellness programs:
 - Benign discrimination
 - Participation-only programs
 - Standards-based programs



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Key Initial Question:

Does the program's incentive relate to a group health plan?

- *IF NOT, THE HIPAA NONDISCRIMINATION RULES DON'T APPLY*
- “Relating” to a group health plan means that the incentive affects the plan’s benefit design or cost for participants.

Example – UNRELATED: \$100 monthly coupon for all employees joining fitness center.

Example – RELATED: 10% reduction in employee medical premiums for any employee earning 300 points in healthy habits program.

- Potential issue: Is wellness program itself a group health plan? (Common issue for biometric screening programs.)



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Second Key Question:

Is the program (and incentive) only offered to individuals with an adverse health factor?

- IF THE PROGRAM ONLY FAVORS INDIVIDUALS WITH ADVERSE HEALTH FACTORS, IT IS PERMITTED AS “BENIGN DISCRIMINATION”

Example: Plan participants identified by completing specific medical screening test as having diabetes receive a \$200 gift card regardless of the test results; non-diabetics are not eligible for the \$200 gift card



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Third Key Question:

Does availability of the financial incentive depend on an individual's ability to satisfy a standard (or engage in activity) related to health status factor?

- This can mean: - Achieving a particular result, or
 - Modifying behavior

"YES" Examples	"NO" Examples
<i>Standards-Based</i>	<i>Participation-Based*</i>
Achieve specific blood pressure	Answer a healthy habits questionnaire
Stop smoking	Attend smoking cessation classes
Walk for 30 minutes	Undergo biometric screenings

* No specified result required



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- **Standards-Based & Participation-Based Wellness Exceptions**

- The HIPAA wellness regulations finalized in 2006 established specific criteria that standards- /participation-based wellness programs had to meet to be considered non-discriminatory

- **WHAT'S NEW**

The final wellness regulations issued in June 2013 under the ACA

- Retain most of the 2006 HIPAA non-discrimination rules for wellness programs
- Increase the value of incentives permitted
- Increase situations in which alternative methods for earning incentives will be needed
- Extend HIPAA's health status non-discrimination prohibition (but not wellness exception) to the individual market



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- **Effective Date of New Rules**

- Plan years starting on or after 1/1/2014
 - Note: Health contingent programs basing 2014 rewards on 2013 measurements or activity will need to apply the new rules in 2013

- **New Definitions**

- Participatory Wellness Program
 - Reward not based on a specific health-related factor (or no reward is provided)
- “Health Contingent” Wellness Program
 - “Outcome-based” - require an individual to satisfy a standard related to a health factor to obtain a reward
 - “Activity-only” - require an individual to engage in a specific activity to obtain a reward where the activity relates to the individual’s health status



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- **Types of Wellness Programs**

- Participatory Wellness Programs

- Rewards not based on an individual satisfying a standard , or engaging in an activity, related to a health factor
 - As in the past, rules do not impose a limit on incentives or rewards for participatory programs
 - Rewards must be available to all similarly situated individuals
 - Examples described in the guidance include:
 - a program that reimburses employees for all or part of the cost of membership in a fitness center
 - a diagnostic testing program that provides a reward for participation and does not base any part of the reward on outcomes
 - a program that provides a reward to employees for attending a monthly, no-cost health education seminar



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- **Types of Wellness Programs**
 - Participatory Wellness Programs
 - Design warning: Basing eligibility for a plan on a participatory program will affect health reform requirements for applicable large employers
 - Example:
 - If employees cannot participate in the employer's only health plan unless they complete a health risk assessment, that would mean some employees may not be eligible for coverage triggering possible employer penalties under the ACA
 - An alternative : Condition eligibility for a buy up plan on health risk assessment participation, but allow all employees the choice to enroll in the lower option plan



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- **Health-Contingent Wellness Programs**
 - Require an individual to satisfy a standard , or engage in an activity, related to a health factor to obtain a reward
 - Health-contingent wellness programs are divided into activity-only & outcome-based wellness programs



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- **Health-Contingent Wellness Programs**
 - Activity-Only Health Contingent Wellness Program
 - Individual is required to perform or complete an activity related to a health factor in order to obtain a reward, but is not required to attain or maintain a specific “standard” or health outcome
 - Examples include walking, diet, or exercise programs.
 - Individuals participating in an activity-only wellness program may be unable to participate in the activity due to a health factor, so these individuals must be given a reasonable alternative opportunity to qualify for the reward (more later)



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- **Health-Contingent Wellness Programs**
 - Outcome-Based Health Contingent Wellness Program
 - Individual must attain or maintain a specific health outcome or standard (such as not smoking or attaining certain results on biometric screenings) in order to obtain a reward
 - As with the activity based programs, individuals who do not attain or maintain the specific health outcome must be offered an alternative to earn the reward
 - An activity based option may be offered as an alternative to the outcome based program to achieve the same reward



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- **5 Criteria for Health-Contingent Wellness Programs**

- Frequency of Opportunity to Qualify - must be given the opportunity to qualify for the reward at least once per year
- Size of Reward - maximum reward cannot exceed 30% of the total cost of employee-only coverage - 50% for programs designed to prevent or reduce tobacco use
 - The combined incentive for a program that includes both a reward related to tobacco and a non-tobacco related health-contingent reward may not exceed 50% of the cost of coverage (and the non-tobacco related portion must satisfy the 30% limit separately)
- Reasonable Design
 - Reasonable chance of improving the health of, or preventing disease
 - Not overly burdensome or a subterfuge for discrimination



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- **5 Criteria for Health-Contingent Wellness Programs**
(continued)
 - Uniform Availability and Reasonable Alternative Standards
 - The full reward must be available to all similarly situated individuals and individuals who qualify by satisfying a reasonable alternative (more on reasonable alternatives, upcoming)
 - Notice of Availability of Reasonable Alternative Standard
 - Must disclose the availability of a reasonable alternative standard in all plan materials describing the terms of a health-contingent wellness program and in any disclosure that an individual did not satisfy an initial outcome-based standard.
 - Updated, model notice language was provided in the guidance
 - If plan materials merely mention that a wellness program is available, without describing the wellness program terms, this disclosure is not required in that material



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- **Reasonable Alternative**

- Plans are not required to establish a reasonable alternative standard in advance of a request
 - Can provide the same reasonable alternative standard for a class of individuals, or on an individual basis
- Examples of reasonable alternative criteria in regulations:
 - If the reasonable alternative standard is completion of an educational program, the educational program must be made available at no cost to the individual
 - The time commitment required must be reasonable
 - If reasonable alternative standard is a diet program, participation fee must be paid by the plan (but not the cost of food)
 - If a physician states a standard is not medically appropriate, a reasonable alternative standard must accommodate the recommendations of the physician



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- **Reasonable Alternative** (continued)
 - Requirements apply differently to activity-only or outcome-based wellness programs
 - Activity-only wellness programs
 - Must allow a reasonable alternative to any individual for whom it is either unreasonably difficult due to a medical condition, or for whom it is medically inadvisable to attempt to satisfy the standard
 - The employer is permitted to seek verification, such as a statement from the individual's personal physician , if medical judgment is reasonably required



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- **Reasonable Alternative (continued)**
 - Outcome-based wellness programs
 - Must allow a reasonable alternative standard for obtaining the reward for any individual who does not meet the initial standard
 - If the alternative standard is to meet a different (easier) level of the same standard, reasonable time must be given
 - An individual must be given the opportunity to comply with the recommendations of the individual's personal physician as a second reasonable alternative standard
 - Employers are not allowed to require verification, such as a statement from a physician, that health factor makes it unreasonably difficult to satisfy the outcomes based standard
 - If an employer provides an activity-only program as an alternative to the outcome-based program, then verification may be requested with respect to the activity component



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- **Health Reform and Affordability and Minimum Value**

- “Affordability” and “Minimum Value” for purposes of employer penalties under the 4980(H) shared responsibility rules will be based on the cost for an employee to participate at non-wellness rates
 - Exception for smoking related wellness rates – in this case affordability is based on non-smoker rate
 - Design challenges when rate is based on both wellness and smoking criteria
 - Employer safe-harbor for 2014 plan year – affordability and MV will be based on “wellness rate” for plans in effect May 3, 2013
- Minimum Value based on non-wellness design
 - Example: Plan with \$6400 deductible that does not meet MV, but employees who complete wellness program are given a \$2000 HRA
 - Employer would not be considered offering MV plan



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- **Additional Key Laws to Navigate for Wellness Programs**
 - Americans with Disabilities Act (ADA)
 - ERISA
 - COBRA
 - HIPAA Privacy and Security
 - Genetic Information Nondiscrimination Act (GINA)
 - Federal & State income taxation
 - State insurance law
 - State employment discrimination laws



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