

July 30, 2015

New EEOC Rules for Wellness Plans

Presented by Benefit Comply

New EEOC Rules for Wellness Plans

- Welcome! We will begin at 3 p.m. Eastern
- There will be no sound until we begin the webinar. When we begin, you can listen to the audio portion through your computer speakers or by calling into the phone conference number provided in your confirmation email.
- You will be able to submit questions during the webinar by using the “questions” box located on your webinar control panel.
- Slides can be printed from the webinar control panel – expand the “Handouts” section and click the file to download.

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HIPAA Wellness Plan Regulations

HIPAA Wellness Plan Regulations

- HIPAA Wellness Plan Regulations Background
 - HIPAA non-discrimination rules prohibit discrimination in health plans based on health status
 - Wellness programs that base health plan eligibility, cost of coverage, or benefits levels (i.e., amount of co-pay, deductible, etc.) on health factors are “discriminatory”
 - HIPAA wellness regulations set guidelines for programs to be considered non-discriminatory
 - Important note: HIPAA wellness rules do not apply to wellness incentives that simply provide cash, gifts, etc., which do not impact the health plan

HIPAA Wellness Plan Regulations

- Effective date of final rules
 - Plan years starting on or after 1/1/2014
- Definitions
 - Participatory wellness program
 - Reward not based on a specific health outcome
 - “Health contingent” wellness program
 - Require an individual to satisfy a standard related to a health factor to obtain a reward
 - Require an individual with an identified health factor to take action to obtain a reward
 - Provide a reward to employees identified through a health assessment as having high cholesterol provided they take additional steps such as meeting with a health coach to qualify for a reward

HIPAA Wellness Plan Regulations

- Types of Wellness Programs
 - Participatory Wellness Programs
 - Do not provide a reward or do not include any conditions for obtaining a reward that are based on an individual satisfying a standard that is related to a health factor
 - As in the past, rules do not impose a limit on incentives or rewards for participatory programs
 - 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

HIPAA Wellness Plan Regulations

- Health-Contingent Wellness Programs
 - Require an individual to satisfy a standard related to a health factor to obtain a reward
 - Two types of health-contingent wellness programs
 - Activity-only
 - Outcome-based
 - 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 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)

HIPAA Wellness Plan Regulations

- Outcome-based health contingent wellness program
 - Individual must attain or maintain a specific health outcome (such as not smoking or attaining certain results on biometric screenings) in order to obtain a reward
 - As with the activity-only 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

HIPAA Wellness Plan Regulations

- 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 outcomes-based rewards and a reward related to tobacco may not exceed 50% of the cost of coverage
 - Reasonable Design
 - Reasonable chance of improving the health of, or preventing disease ...is not overly burdensome, is not a subterfuge for discrimination

HIPAA Wellness Plan Regulations

- 5 Criteria (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
 - Must provide a reasonable alternative standard to qualify for the reward for all individuals who do not meet the initial standard that is related to a health factor (more later)
 - 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
 - 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

HIPAA Wellness Plan Regulations

- Reasonable Alternatives
 - 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 the reasonable alternative standard is a diet program, the 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

HIPAA Wellness Plan Regulations

- Reasonable Alternatives (continued)
 - Requirements apply differently to activity-only or outcome-based wellness program
 - Activity-only wellness programs
 - Must allow a reasonable alternative for 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

HIPAA Wellness Plan Regulations

- Reasonable Alternatives (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 the individual's physician, that a health factor makes it unreasonably difficult to satisfy the outcome-based standard
 - If an employer provides an activity-only wellness program as an alternative to the outcome-based wellness program, then verification from physician may be requested with respect to the activity-only component of the program

EEOC Proposed Regulations

EEOC Proposed Wellness Regulations

- Background
 - The Americans with Disabilities Act (ADA) prohibits employment discrimination based on disability
 - ADA restricts when an employer may make disability-related inquiries or require medical examinations
 - Wellness programs often include elements of both
 - A health risk assessment (HRA) may include disability-related questions
 - Biometric screening programs are considered medical examinations
 - Importantly, the ADA includes exceptions for certain types of health plans and wellness programs
 - An employer may make disability-related inquiries or conduct medical examinations if the program is “voluntary”

EEOC Proposed Wellness Regulations

- For years EEOC has been “continuing to examine what level, if any, of financial inducement to participate in a wellness program would be permissible under the ADA.”
 - In 2012 Florida court ruled in favor of employer in an ADA lawsuit *Seff v. Broward County*
 - HRA and biometric screening used to identify employees with one of five disease states (diabetes, asthma, etc.). Participants identified were offered disease management coaching and co-pay waivers on medications. Each employee refusing to participate was assessed a \$20 surcharge on each biweekly paycheck.
 - Court held: No ADA violation. Program was within “safe harbor” exception as a bona fide benefit plan. However “voluntary” aspect not evaluated due to being within safe harbor
 - In 2014 EEOC filed three lawsuits against employers
- No guidance issued until recently

EEOC Proposed Wellness Regulations

- 2014 EEOC Wellness Lawsuits
 - EEOC v. Orion Energy Systems
 - Employees required to undergo a fitness evaluation, complete an HRA, and submit to biometric screening. Employees who refused were required to pay 100% of their health cost and a pay \$50/month penalty for failure to undergo the fitness evaluation
 - EEOC v. Flambeau, Inc.
 - Employer required employees to complete an HRA and biometric screening. New employees who refused to do so were not provided health coverage, and existing employees who refused to do so were required to pay 100% of their health coverage cost
 - EEOC v. Honeywell, Inc.
 - Required employees and spouses to complete biometric screening or lose \$250 HSA contribution and pay annual premium surcharge
 - Employee and spouse had to demonstrate that they were nicotine free, or participate in a tobacco cessation program, or incur a nicotine surcharge

EEOC Proposed Wellness Regulations

- Proposed Regulations Issued April 2015
 - Changes to Incentive Limits
 - If the wellness program includes disability-related inquiries and/or medical examinations, employers can offer incentives of up to 30% of the total cost of employee-only coverage
 - This limitation applies to all wellness programs - participatory, health-contingent, or a combination of the two
 - This is an area in which the EEOC rules differ significantly from existing HIPAA wellness rules - the current HIPAA restrictions on incentives do not apply to participatory programs
 - Prior to this EEOC rule, employers could have designed participatory programs with incentives exceeding 30% of the premium. Now, if that incentive involves a program that includes disability-related inquiries and/or medical examinations, the maximum incentive possible will be 30%, even if it is a participatory program

EEOC Proposed Wellness Regulations

- Proposed Regulations (continued)
 - Special rules for smoking cessation programs
 - A smoking cessation program that only asks employees whether they use tobacco would not be considered a disability-related inquiry or medical examination, and would not be subject to the EEOC rules
 - A wellness program requiring employees to submit to medical testing to determine tobacco use is a medical examination limiting even tobacco-related incentives to 30% instead of the 50% allowed by HIPAA and ACA wellness rules

EEOC Proposed Wellness Regulations

- Proposed Regulations (continued)
 - Other Changes
 - Wellness incentives can be offered to employees as long as participation is not required and non-participating employees are neither denied coverage under any employer group health plan nor subject to any adverse employment action
 - This condition directly addresses a strategy that some employers have begun to adopt in which participation in the employer's health plan is contingent on the employee's completing an HRA. Under these new rules, this strategy would violate the ADA
 - Notice Requirement
 - Employers must also provide employees with a notice that includes a description of the medical information collected, who will have access to it, and how it will be used and kept confidential

Wellness Plans and the ACA

Wellness Plans and the ACA

- Health Reform and Affordability and Minimum Value
 - “Affordability” for purposes of §4980H(b) employer shared responsibility rules will be based on the cost for an employee to participate in single coverage at non-wellness rates
 - Exception for smoking-related wellness rates – affordability is based on non-smoker employee plan participation cost
 - Example
 - Employer charges \$300/mo. to participate in single coverage if employee does not complete wellness plan requirements
 - Employer provides \$100/mo. premium reduction incentive for wellness plan completion (net \$200/mo. employee cost to participate in plan)
 - Plan affordability is based on \$300/mo. cost, even for employees who complete wellness program and pay lower rate
 - Exception: If premium reduction incentive is for completing a tobacco cessation related wellness program, the net \$200 per month cost is used for all employees

Wellness Plans and the ACA

- Health Reform and Affordability and Minimum Value (continued)
 - Minimum Value (MV) of a plan is based on non-wellness design
 - MV is a plan with at least a 60% actuarial value
 - Exception for smoking-related wellness cost-sharing incentives – MV is based on non-smoker employee cost-sharing levels
 - Example: Plan with 55% actuarial value that does not meet MV, but employees who complete wellness program are given a \$1500 HRA making the combined value of the health plan plus the HRA a 65% actuarial value
 - Employer would not be considered offering MV plan and employees covered by that plan may still qualify for subsidies when purchasing individual coverage through a public marketplace
 - Exception: If wellness incentive cost-sharing reductions are rewarded only for tobacco cessation related program (e.g., \$1500 HRA is provides cost-sharing reimbursements), MV would take value of those incentives into account

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Thank you.