

Update on Wellness: New Proposed Regulations

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Current State of Affairs

- HIPAA nondiscrimination rules prohibit discrimination against individuals based on health status.
- Exception for benign discrimination in favor of individual with adverse health status.
- Exception if meet HIPAA wellness rules.
- Good Resource: DOL Checklist (Field Assistance Bulletin 2008-02). www.dol.gov/ebsa.

Current State of Affairs

- HIPAA wellness rules apply to health-based wellness programs.
- Five requirements
 - Annual Qualification
 - 20% Limit on Incentive Amounts
 - Reasonable Alternative
 - Reasonable Design
 - Notice of Reasonable Alternative



Affordable Care Act (ACA)

- Codified most of the wellness program rules (PHSA 2705).
- Increased 20% limit to 30% and gave Secretary discretion to increase to 50%.
- Separately, imposed rating rules on individual and small group insurance market that limit group underwriting based on age, family, geographic area, and tobacco use.

Proposed Wellness Rules

- Issued by HHS, DOL & Treasury
- Published November 26, 2012 (77 Fed. Reg. 70620)
- Comments due January 25, 2013
- Applicability date: Plan years on or after January 1, 2014
- Applies to group health plans and health insurance issuers offering coverage to group health plans, including grandfathered plans
- Does not apply to individual coverage

Participatory v. Health-Contingent

Participatory

- Reward not based on health factor
- New! Similarly situated individuals
- Wellness requirements N/A

Examples:

- Fitness center
- Complete HRA or screening, regardless of results
- Smoking cessation, regardless of whether quit smoking

Health-Contingent

- Reward based on health factor
- Wellness rules apply

Examples:

- Premium surcharge based on tobacco use
- Requirement that only applies to “at risk” individuals, such as coaching

If Health-Contingent Wellness Program -

- Five Factors



- Annual Qualification
- Amount of Reward/Penalty
- Reasonable Alternative
- Reasonable Design / Different Alternative
- Notice of Different Alternative

HIPAA Wellness Rules

Factor #1 – Annual Qualification

- Must give plan participant opportunity to qualify at least once per year.
- Same as current rule.



HIPAA Proposed Wellness Rules

Factor #2 – Amount of Reward

NEW!

- Reward for all health-based wellness programs cannot exceed 30% of cost of employee coverage (up from 20%).
- For tobacco-use programs, reward cannot exceed 50%.
- Must separately test:
 - If only offering tobacco-use program, may use entire 50%;
 - If using other health standards, other standards limited to 30%, but tobacco use rewards may go up to 50%.

HIPAA Proposed Wellness Rules

Factor #2 – Amount of Reward

- Mechanics of calculation generally same as existing rule.
- Cost of coverage includes employer + employee contributions.
 - For example, if employer contribution is \$60, employee contribution is \$40, total cost is \$100. Reward limit = \$30 for health-based, up to \$50 for tobacco use.
- Use single rate if only employee is eligible for wellness program (may use family rate if dependents also eligible).

Issues to Consider

- Grandfathered plans also may use increased limits.
- Agencies ask if “tobacco use” should be defined. Plans have different definitions (e.g., not smoked in 30 days, not used tobacco products within last year). Under final rule, will plans have to change standard?
- Agencies ask if reward should be prorated by family member, including whether employee portion should be capped based on single rate.

HIPAA Wellness Rules

Factor #3 – Reasonable Alternative

- Must allow “reasonable alternative” to those who can show it is unreasonably difficult due to medical condition, or medically inadvisable, to satisfy standard.
- Examples from existing rules:
 - Reasonable alternative to stop smoking requirement – attend smoking cessation class.
 - Reasonable alternative to lower cholesterol requirement – require participant to follow doctor’s advice.
 - Reasonable alternative to low BMI requirement – exercise 20 minutes per day.

HIPAA Wellness Rules

Factor #3 – Reasonable Alternative

- **New!** Whether program is reasonable will depend on facts and circumstances.
- **New!** Updated Examples:
 - If reasonable alternative is educational program, plan must make available. May not require individual to find own program unassisted or pay for program.
 - If reasonable alternative is diet program, must pay for membership or fees; not required to pay for food.
 - If reasonable alternative is to follow recommendations of doctor engaged by plan, may need to accommodate personal physician recommendations, if different.

HIPAA Wellness Rules

Factor #3 – Reasonable Alternative

- May require doctor's certification.
- **New!** Only may require doctor's certification "if reasonable under the circumstances."
- Not reasonable if participant's medical issue "obviously valid based on information known to the plan."

Issues to Consider

- Facts and circumstances test means more judgment calls and less bright line rule.
- How customized must alternative be to be reasonable?
- Very common to request doctor's note at outset, but this may not be allowed if participant's condition already is known to plan. Does this mean plan must search claims records? Does this mean plan must start making own medical judgment calls?
- Medical judgment decisions, including related to reasonable alternative, subject to external review.

HIPAA Wellness Rules

Factor #4 – Reasonable Standard

- Same general standard as existing rules.
- Must be reasonably designed to promote good health.
- Will be “reasonable” if –
 - Reasonable chance to improve health or prevent disease;
 - Not overly burdensome;
 - Not a subterfuge for discrimination based on health; and
 - Not “highly suspect.”

HIPAA Wellness Rules

Factor #4 – Reasonable Standard

- **New!** Whether reasonable to be based on facts and circumstances.
- **New!** If standard is based on measurement, screening, or test relating to a health factor, such as HRA or biometric screening, must make available a “different” means of qualifying for reward.
- For example: Plan pays \$50 reward if meet target BMI. Alice has a favorable BMI and gets the reward. Bonnie has a medical condition that makes her medically incapable of meeting the target BMI. Christy has no medical condition – she just does not meet the target BMI. Under existing rule, only Bonnie is required to be given alternative. Under the proposed rule, Christy also must be given an alternative.

Issues to Consider

- New alternative rule significantly expands the reasonable alternative standard beyond just those who are medically incapable of meeting standard and would apply essentially to all participants.
- Facts and circumstances test means more judgment calls and less bright line rule.
- Agencies seek comment as to whether evidence- or practice-based standards are needed to ensure programs are reasonably designed to promote health or prevent disease.

HIPAA Wellness Rules

Factor #5 – Disclosure

- Plan must disclose availability of alternative standard in plan material describing wellness program (same as current rules).
- Not required where materials merely mention program, without describing terms. Preamble clarifies not required to include in SBC.
- **New!** Proposed regulations provide updated safe harbor language that takes into account expansion of reasonable alternative rule.

HIPAA Wellness Rules

Factor #5 – Disclosure

New Sample Language:

- Your health plan is committed to helping you achieve your best health status. 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 number] and we will work with you to find a wellness program with the same reward that is right for you in light of your health status.

Issues to Consider

- Plans will need to update communications materials.
- Language suggests that each person may be able to request own customized alternative. May lead to more questions or requests.
- Insurers who have included in filings may need to re-file. Is this possible before applicability date?

Interaction with PHSA 2701 (Rating Rules)

- ACA imposed rating rules on individual and small group insurance markets that limit group underwriting based on age, family tier, geographic area, and tobacco use.
- Permitted to vary rate by 50% based on tobacco use (agencies pointed to this as basis for increasing tobacco-use incentive in wellness rules).
- Proposed rating rule published same day as wellness rule cross-references wellness. Preamble indicates insurer in small group market using tobacco-based group rate must offer wellness program that gives opportunity to avoid full surcharge if participate in wellness program. 77 Fed. Reg. 70584, 70595.

Issues to Consider

- Rating rule regulation language only cross-references wellness rule; does not expressly require compliance.
- Preamble suggests that in order to use group tobacco rate, insurer must allow reasonable alternative under wellness program to avoid increase. Uncertain how that will play out since section 2701 relates to group rate, while section 2705 relates to individual reward.
- How would timing work? If group rate set prior to policy year, how will plan know if individual meets reasonable alternative?
- Comments on proposed premium rating/market rules due December 26, 2012.

Don't forget other laws impacting wellness . . .

- ERISA
- ADA
- GINA
- Tax
- Privacy

Q&A

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