Proskauer

New Guidance on Wellness Programs Issued

November 27, 2012

Overview

On November 20, 2012, the Departments of Health and Human Services, Labor and Treasury (hereinafter, the "Departments") issued long-awaited guidance on several key provisions of the Affordable Care Act [1] ("ACA"), including requirements on essential health benefits, preventing pre-existing condition discrimination, and employment-based wellness programs. This client alert summarizes the proposed rules (the "Proposed Rules") implementing and expanding employment-based wellness programs. The Proposed Rules track the final wellness program regulations under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") published in 2006 by the Departments (hereinafter, the "2006 Regulations") and provide additional clarification and modifications with respect to the standards for health-contingent wellness programs. Read our client alert of December 7, 2012 on information regarding the newly-issued guidance on essential health benefits and pre-existing condition nondiscrimination.

Background: The Affordable Care Act and Wellness Programs

Wellness programs take many forms; however, the common feature of all wellness programs is that they are designed to encourage healthier lifestyles, often by rewarding participants for attaining or improving certain health factors. Most wellness programs are subject to HIPAA's nondiscrimination rules, which generally prohibit group health plans and group health insurers from denying similarly situated individuals eligibility for benefits, varying benefits available to similarly situated individuals, or charging similarly situated individuals a higher premium based on an individual's health factor (e.g., health status, medical history, genetic information, etc.). However, the HIPAA nondiscrimination rules contain an exception whereby group health plans or issuers may offer employee premium/contribution discounts or rebates, or modify copayments, coinsurances, or deductibles based on participation in certain programs that promote health or disease prevention (wellness programs).

The 2006 Regulations set forth the standards for permissible wellness programs and formed the basis for the ACA's statutory exception of wellness programs from the HIPAA nondiscrimination rules. The ACA amended the Public Health Service Act by adding new sections incorporating the 2006 Regulations, with some clarifications, and increasing the maximum reward that can be provided under the health-contingent wellness programs from 20 percent to 30 percent. The ACA also authorized the various Departments to promulgate rules as necessary to carry out the new provisions.

The Proposed Rules: What Hasn't Changed

The Proposed Rules retain the basic structure of the 2006 Regulations (and the five requirements for certain wellness programs, as explained below). They also retain the rule that there are two categories of wellness programs that may be permissible, provided certain requirements are met – namely, participatory wellness programs and health-contingent wellness programs.

Participatory Wellness Program – A participatory wellness program is a program that either does not offer a reward or does not condition receipt of a reward on an individual satisfying a health status requirement. A participatory wellness program is exempt from the nondiscrimination requirements provided it is available to all similarly situated individuals. Examples of participatory wellness programs include employer-paid gym memberships or smoking cessation programs with no requirement of program success.

Health-Contingent Wellness Program – A health-contingent wellness program is a wellness program that conditions the receipt of a reward on an "individual satisfying a standard that is related to a health factor." It is often referred to as a standard-based wellness program and must satisfy the five wellness program requirements described below to be legally permissible. Examples of health-contingent wellness programs include attaining certain results on biometric screenings or meeting targets for exercise.

The Proposed Rules: Significant Changes and Clarifications

(1) The Proposed Rules Apply to Both Grandfathered and Non-Grandfathered Group Health Plans

The Proposed Rules apply beginning January 1, 2014 and they would apply to grandfathered as well as non-grandfathered group health plans. A "grandfathered health plan" is any group health plan or individual coverage that was in effect on March 23, 2010 and that is not changed in ways specified in the implementing regulations. Many of the ACA rules do not apply to grandfathered plans. However, the Proposed Rules would apply the same set of wellness program standards to both grandfathered and non-grandfathered health plans to "avoid inconsistency across group health coverage and to provide grandfathered plans the same flexibility to promote health and prevent disease as non-grandfathered plans."

(2) Clarifications of the Five Requirements for Health-Contingent Wellness Programs

The 2006 Regulations require a health-contingent wellness program to meet five requirements in order to comply with HIPAA's nondiscrimination rules. The Proposed Rules maintain the five requirements but provide important modifications and clarifications.

a. *Amount of the Reward Requirement*

Under the 2006 Regulations, the total reward for a health-contingent wellness program is limited to no more than 20 percent of the total cost of employee-only coverage under the plan. If dependents (such as spouses and/or dependent children) may participate in the wellness program, the total reward must not exceed 20 percent of the cost of the coverage in which an employee and any dependents are enrolled (e.g., family coverage or employee-plus-one coverage).

The ACA increased the 20 percent maximum reward to 30 percent and authorized regulations to increase the maximum reward to as much as 50 percent if the Departments deemed the increase appropriate. The Proposed Rules maintain the 30 percent maximum reward for participation in health-contingent wellness programs with one exception. If a wellness program is established for the purpose of tobacco use prevention or reduction, the Proposed Rules increase the maximum reward to 50 percent. The Proposed Rules provide examples that illustrate how to calculate the applicable percentage and invite comments (which are due January 26, 2013) on the general approach and whether additional rules and examples would be helpful for plans and issuers.

One question that is left unanswered by the Proposed Rules is whether and how, in the case of health-contingent wellness programs that allow dependents to participate, rewards should be apportioned. For example, should a reward be prorated if only one family member fails to qualify? The Departments specifically invited comments on these issues.

b. *Uniform Availability and Reasonable Alternative Standard Requirement*

As under the 2006 Regulations, the Proposed Rules provide that a reward under a health-contingent wellness program must be made available to all similarly situated individuals. Also, a reasonable alternative standard (or a waiver of the otherwise applicable standard) for obtaining the reward must be provided for those individuals for whom it is unreasonably difficult, due to a medical condition, to meet the otherwise applicable standard or for whom it is medically inadvisable to attempt to satisfy the otherwise applicable standard. The Proposed Rules also provide the following clarifications:

- *Individual or class-based waivers may be provided in lieu of a reasonable alternative standard*: In lieu of providing a reasonable alternative standard, a plan or issuer may waive the otherwise applicable standard and provide the reward. However, the preamble to the Proposed Rules clarifies that the plan or issuer may apply the waiver to an entire class of individuals or on an individual basis depending on the circumstances presented.

Advance establishment of particular reasonable alternative standards is not required: Plans and issuers are not required to establish a particular alternative standard in advance of an individual's specific request for one; however, a reasonable alternative must be provided by the plan or issuer upon request or the condition for obtaining the reward must be waived.

- *Prior unsuccessful attempts do not preclude the requirement to provide a reasonable alternative standard*:A plan or issuer cannot cease to provide a reasonable alternative standard merely because it was previously not successful; the plan or issuer must continue to offer the same, or a new reasonable alternative standard.

- *Factors to determine existence of a reasonable alternative standard*: All facts and circumstances must be considered in determining the existence of a reasonable alternative standard. The Proposed Rules provide the following non-exhaustive list of factors to aid in the determination:
    - Educational Programs: If the reasonable alternative standard requires completion of an educational program, the plan or issuer must make the program available instead of requiring the individual to find the program unassisted. The plan or issuer cannot require the individual to pay for the cost of the program.
    - Diet Programs: If the reasonable alternative standard is a diet program, the plan or issuer is not required to pay for the cost of food but must pay the membership or participation fees of the diet program.
    - Compliance with the Recommendation of Medical Professional: If an individual's personal physician states that the recommendations of the plan's or issuer's medical professionals are not medically appropriate for the individual, the plan must provide a reasonable alternative standard that accommodates the recommendations of the individual's physician with regard to medical appropriateness. The plan or issuer may impose standard cost sharing under the plan or coverage for medical items and services furnished in accordance with the physician's recommendations (but likely not the recommendations of the plan's or issuer's medical professionals).

The Departments have invited comments on this list of factors as well as what, if any, additional facts and circumstances should be addressed by the Proposed Rules.

- *Physician verification*: The 2006 Regulations permit a plan or issuer to seek verification, such as a statement from the individual's personal physician, that a health factor makes it unreasonably difficult for the individual to satisfy or medically inadvisable for the individual to attempt to satisfy the otherwise applicable standard provided it is reasonable under the circumstances. The Proposed Rules clarify that it would be unreasonable for a plan or issuer to seek verification of a claim that is obviously valid based on the nature of the individual's medical condition that is known to the plan or issuer; however, the plan or issuer may seek verification of claims that require the use of medical judgment to evaluate. Comments are invited as to whether additional clarifications would be helpful regarding the reasonableness of physician verification. One potential issue that plans and issuers might face when complying with this new rule is how also to ensure compliance with the HIPAA privacy rules.

c. *Reasonable Design Requirement*

Health-contingent wellness programs must be reasonably designed to promote health or prevent disease, not be overly burdensome, not be a subterfuge for discrimination based on a health factor, and not be highly suspect in the method chosen to promote health or prevent disease. The Proposed Rules provide further clarification as follows:

- The determination of whether a health-contingent wellness program is reasonably designed to promote health and prevent disease is a facts and circumstances inquiry. The facts and circumstances were not outlined in the Proposed Rules; however, comments are invited regarding whether standards are needed to ensure compliance with this requirement.
- Health-contingent wellness programs that condition receipt of a reward on the results of a measurement, test, or screening related to a health factor are not reasonably designed unless they provide other reasonable means of obtaining the reward to individuals who do not meet the standard.

d. *Notice of Availability of Other Means for Qualifying for the Reward Requirement*

The Proposed Rules require plans and issuers to disclose the availability of other means of qualifying for the reward or the possibility of a waiver in all plan materials that describe the terms of a health-contingent wellness program, consistent with the 2006 Regulations. Thus, if plan materials merely mention that a program is available, without describing the terms, the disclosure is not required. The Proposed Rules acknowledge the shortcomings of the prior sample disclosure language in the 2006 Regulations and provide new disclosure language that is easier for individuals to understand and increases likelihood that those who qualify for a different means of obtaining the reward will contact the plan or issuer. For more information and to see the various samples of disclosure language, please see the full text of the Proposed Rules.

e. *Frequency of Opportunity to Qualify for Reward Requirement*

The Proposed Rules confirm that the health-contingent wellness program must provide individuals an opportunity to qualify for the reward at least once every year.

What's Next?

It is clear from the Proposed Rules that the Departments are very supportive of the continued and expanded use of wellness programs by employers as a means of promoting health and preventing diseases. At the same time as the Proposed Rules add meaningful flexibility for employers to establish wellness programs consistent with those goals, however, the Departments recognized that neither the ACA nor the Proposed Rules enact any changes to other laws that impact the provision of wellness programs, such as the Americans with Disabilities Act ("ADA") or the Genetic Information Nondiscrimination Act of 2008 ("GINA").

Guidance issued by the Equal Employment Opportunity Commission (the "EEOC") has provided that, for a wellness program to be permissible under the ADA and Title II of GINA, it must be "voluntary." To be voluntary, an employer may not require participation nor penalize employees who do not participate. The EEOC has yet to provide specific guidance about what level of financial incentive can be provided as a condition of participation in a wellness program before the program is rendered involuntary, thus making it difficult for employers attempting to ensure that their wellness programs comply with all applicable laws. (In the final GINA Title II regulations, the EEOC suggested that offering a financial inducement of up to $150 for wellness program participation would be a permissible financial inducement. However, it is unclear whether financial inducements in excess of $150 would be permissible.)

Despite clear support for wellness programs expressed in the ACA and the Proposed Rules, it is not clear whether the EEOC will provide more definitive guidance on permissible financial incentives in the wellness program context. Indeed, in certain instances, the EEOC seems to be making it more difficult for employers to implement wellness programs. For example, earlier this year, the EEOC indicated informally that when an employer offers an incentive in return for a spouse's family medical history, such as through completion of a spousal health risk assessment, this may lead to a violation of Title II of GINA.

Similarly, the EEOC's characterization of the 11th Circuit's holding in the *Seff v. Broward County* appeal, affirming the lower court's ruling that the wellness program constituted a bona fide benefit plan and was therefore permissible under the ADA, leaves employers wondering. The EEOC explained that the 11th Circuit's decision was based on very narrow grounds, neither court addressed issue of whether the wellness program was "voluntary," and there is no official EEOC policy on the district court's interpretation of the safe harbor provision. Although the EEOC itself indicates that the agency has not taken a formal position on spousal HRAs or the applicability of the ADA safe harbor exception for bona fide benefit plans to wellness programs, employers must still consider this informal guidance when weighing the risks of their wellness program designs.

Going forward, in addition to reviewing their existing and proposed wellness programs to ensure compliance with the 2006 Regulations for years before 2014, and the Proposed Rules, for years on and after January 1, 2014, plan sponsors and health insurance carriers should also review these programs in light of the existing EEOC guidance under the ADA and Title II of GINA. In addition, plan sponsors and health insurance issuers should also bear in mind other federal laws that may apply to their wellness programs, such as ERISA, COBRA, the Internal Revenue Code, and HIPAA privacy rules, as well as any other applicable state laws.

Please feel free to contact your Proskauer lawyer or any member of our Health Care Reform Task Force should you have questions regarding the above.

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[1] The "Affordable Care Act" means the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010. For more information about the ACA, please visit our Health Care Reform Task Force Web site.