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Proposed wellness regulations permit increased rewards

The Departments of Treasury, Labor and Health and Human Services (the Departments) recently issued proposed regulations implementing rules for wellness programs under the Affordable Care Act (ACA). The proposed regulations increase the maximum permissible reward offered to plan participants for "health-contingent wellness programs" from 20 percent to 30 percent of the total annual cost of coverage and permit a maximum reward of up to 50 percent for tobacco-cessation programs. The guidance sets out additional rules relating to the provision of reasonable alternative standards for qualifying for a reward, including requiring that employers pay the cost of designated educational programs and memberships in weight-loss programs. It also provides new sample disclosure language. The proposed regulations are generally effective for plan years beginning on and after January 1, 2014 and will impact all employer group health plans that offer wellness programs, including grandfathered plans.

Background

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) amended the Internal Revenue Code (Code), ERISA and the Public Health Service Act (PHSA) to add rules that generally prohibit group health plans and insurers providing such plans from discriminating against individual participants and beneficiaries with respect to eligibility, benefits or premiums based on a health factor. Final regulations issued in 2006 ("2006 regulations") created an exception to this general rule and permitted group health plans to provide premium discounts or rebates or to modify otherwise applicable cost-sharing (e.g., copayments, deductibles or coinsurance) for participants who satisfy (or fail to satisfy) a health standard, as long as the program satisfies certain conditions specified in those regulations. Among those conditions is that the maximum reward or penalty under the wellness program may not exceed 20 percent of the total cost of coverage under the plan.

Section 1201 of the Affordable Care Act (ACA) amended the nondiscrimination and wellness program provisions of the PHSA (but not those in the Code or ERISA) to essentially codify the provisions in the 2006 regulations, except that it increased the maximum reward available to participants in wellness programs to 30 percent of the total cost of coverage. In addition, the law authorized the Departments to increase the reward to up to 50 percent of the cost of coverage if they deemed it appropriate. The increased maximums permitted by the statute, which become effective for plan years beginning on and

after January 1, 2014, would have only applied to non-grandfathered plans, but the proposed regulations, discussed below, expand coverage to grandfathered plans as well.

Proposed wellness regulations

On November 20, the Departments issued proposed regulations implementing the wellness program standards under the ACA. These proposed regulations amend the 2006 regulations under the PHSA, the Code and ERISA; as a result, new rules apply to both grandfathered and non-grandfathered group health plans. The proposed regulations, which address both participatory and health standard based programs, retain the general concepts of the 2006 regulations but increase the maximum allowable reward/penalty and provide some useful clarifications.

Participatory wellness programs. The proposed regulations define "participatory wellness programs" as programs that are available to all similarly situated individuals and do not base a reward on a specific health outcome. Programs that reward employees for attending a no-cost health education seminar are considered participatory programs, as are those that reward individuals for filling out a health risk assessment or taking a biometric screening, without requiring specific health results or requiring the completion of any additional education programs as a result of the assessment or screening. Participatory programs are not required to meet the same standards as health-contingent programs.

Health-contingent wellness programs. As under the 2006 regulations, programs that provide a reward based upon satisfaction of a health standard (called “health-contingent wellness programs” in the proposed regulations) must satisfy specific requirements in order to be deemed nondiscriminatory. The proposed regulations clarify that health-contingent wellness programs include not only programs that require an individual to satisfy a standard related to a health factor to obtain a reward, but also programs that require an individual with an identified health factor to take additional action in order to obtain the same reward. Examples of health-contingent wellness programs include: (1) programs that impose a premium surcharge based on tobacco use, and (2) programs that provide a reward to employees identified through a biometric screening or health risk assessment as having cholesterol, blood pressure, or body mass index within a normal or healthy range, while requiring employees identified as having specified conditions or risk factors outside the normal or healthy range (or at risk) to take additional steps (such as meeting with a health coach, taking a health or fitness course, adhering to a health improvement action plan or complying with a health care provider’s plan of care) to qualify for the same reward.

Meaning of "reward." The proposed regulations clarify that for purposes of the wellness rules, a reward includes not only financial incentives—such as lower contributions, reductions in cost-sharing and the like, but also includes the avoidance of a penalty—such as the absence of a premium surcharge or other financial or nonfinancial disincentives.

Requirements for health-contingent wellness programs. The proposed regulations generally adopt the 2006 regulation requirements, with the following modifications and clarifications:

- *Annual opportunity to qualify.* The wellness program must allow eligible individuals the opportunity to qualify for the reward at least once per year.
- *Limitation on amount of reward.* The maximum reward under a wellness program is increased to 30 percent. Thus, if only the employee is eligible to participate, the maximum reward cannot exceed 30 percent of the total cost (i.e., the sum of employer and employee contributions) of employee-only coverage for the benefit option in which the employee is enrolled. If any of the employee's dependents are also eligible to participate in the wellness program, the reward limit cannot exceed 30 percent of the cost of the coverage category (e.g., employee plus one, family) in which the employee and any dependents are enrolled.

  Plans may offer a reward of up to 50% for programs designed to prevent or reduce tobacco use. The proposed regulations provide several examples to demonstrate how to apply this increased limit, including the following:

  - For a wellness program that is exclusively a tobacco prevention program. The total annual cost of employee-only coverage is $6,000. Employees who have used tobacco in the last 12 months and who are not enrolled in the plan's tobacco cessation program are charged a $1,000 premium surcharge in addition to their employee contribution towards the coverage. Employees who participate in the plan's tobacco cessation program are not assessed the $1,000 surcharge.

    The program satisfies the maximum reward limitation because the reward for the wellness program (absence of a $1,000 surcharge) does not exceed 50 percent of the total annual cost of employee-only coverage, $3,000. ($6,000 x 50% = $3,000.)

  - For a wellness program that has other health-contingent components in addition to a tobacco prevention program. The facts are the same as above, except that in addition to a $2,000 premium surcharge imposed on employees who do not participate in the plan's smoking cessation program, the plan provides a $600 premium reduction to employees who comply with a wellness program focused on exercise, blood sugar, weight, cholesterol and blood pressure.

    The program satisfies the maximum reward limitation because (1) the total of all rewards (including absence of a surcharge for participating in the tobacco program) is $2,600 ($600 + $2,000 = $2,600), which does not exceed 50 percent of the total annual cost of employee-only coverage ($3,000); and (2) tested separately, the $600 reward for the wellness program unrelated to tobacco use does not exceed 30 percent of the total annual cost of employee-only coverage, $1,800 ($6,000 x 30% = $1,800).

INSIGHT

Even when both the reward for non-tobacco use and other health-contingent components of a wellness plan are less than their applicable percentage of total cost, a plan will fail to satisfy the maximum reward limitation if the sum of these rewards exceeds 50 percent of the total annual cost of coverage. For example, in the above situation, the plan will exceed the maximum limitation if the reward for satisfying the non-tobacco use portion of the wellness program had been $1,200, even though that reward is only 25 percent of the total annual cost of employee-only coverage. This is because the sum of the rewards, $3,200 ($2,000 for not using tobacco and $1,200 for other health-contingent compliance) exceeds 50 percent of the total cost, $3,000 ($6,000 x 50%=$3,000).

The proposed regulations do not address how the reward limits apply when an employee's family members are also eligible to participate in a health-contingent wellness program. However, the Departments are soliciting comments on how rewards in health-contingent wellness programs should be apportioned if only one family member fails to qualify for it.

- *Reasonable design requirement*. The determination of whether a health-contingent wellness program is reasonably designed is based on all the relevant facts and circumstances. The proposed regulations provide that to the extent a plan's initial standard for obtaining a reward (or a portion of a reward) is based on results of a biometric test, the plan will not be considered reasonably designed unless it makes a different, reasonable means of qualifying for the reward available to all individuals who do not meet the initial standard. For example, a plan that offers a reward to individuals who have a BMI of 26 or lower may satisfy this requirement if it also makes the reward available to individuals with higher BMIs who comply with a reasonable exercise program. (The plan must also make a reasonable alternative standard available to individuals who cannot participate in the exercise program due to a medical condition. See *Reasonable alternative standard* below.)

INSIGHT

A reasonably designed health-contingent wellness program thus actually consists of two elements: (1) the initial health standard that must be satisfied to qualify for the reward, and (2) a different reasonable course of action that individuals who cannot meet the standards may complete in order to qualify for the reward.

- *Reasonable alternative standard*. A wellness program must make a reasonable alternative standard available upon request to an individual who cannot otherwise satisfy the requirements of the wellness program because of a medical condition or because it is medically inadvisable to do so. Alternatively, the plan may waive the initial health standard for that individual and provide him

or her with the reward. The guidance explicitly states that a plan cannot cease to provide a reasonable alternative standard merely because the standard did not produce the desired result in the past (for example, the individual previously attended a smoking cessation program but did not stop smoking). The plan must continue to offer the same alternative standard or a new reasonable alternative, such as a new smoking cessation program or weight-loss class.

The proposed regulations provide that in order to be considered reasonable, the alternative standard must satisfy the following conditions:

- If the individual must complete an educational program, the plan must make the educational program available to the employee without charge. The plan cannot require the individual to find the program.
- If the individual must participate in a weight-loss program, the plan must pay any membership or participation fees but is not required to pay for the cost of food.
- If the individual must comply with the recommendations of a medical professional acting on behalf of the plan, and the individual's personal physician states that these recommendations are not appropriate for that individual, the plan must provide a reasonable alternative standard accommodating the personal physician's recommendations. Plans may impose standard cost-sharing under the plan or coverage for medical items and services furnished in accordance with the physician's recommendations.

The proposed regulations clarify that a plan may seek verification that an individual requesting a reasonable alternative has a medical condition that makes it difficult or inadvisable to meet the applicable standard only "if reasonable under the circumstances." They note that it would not be reasonable for a plan to require verification when the nature of the individual's medical condition is known to the plan and the claim is obviously valid. It would be reasonable for a plan to seek verification of claims that require the use of medical judgment to evaluate their validity.

- *Notice of availability of other means of qualifying for the reward.* All plan materials describing the terms of a wellness program must disclose the availability of other means of qualifying for the reward (or the possibility of waiving an applicable standard). This requirement does not apply to plan materials that merely mention the availability of the wellness program without describing its terms (e.g., the summary of benefits and coverage (SBC)). The proposed regulations replace the model notice set out in the 2006 regulations with new, simpler model language.

Request for comments. The Departments have requested comments on a number of issues, including:

- How to apportion the reward among participating family members
- How to design a reasonable plan that promotes wellness and is not subterfuge for discrimination, including whether best practices with regard to evidence and practice-based strategies are needed
- Using different reasonable means of qualifying for a reward

The Departments also seek feedback on the new sample language regarding the disclosure of an available alternative standard.

Comments on the proposed regulations are due on or before January 25, 2013.

Conclusion

Wellness programs continue to become more popular as health costs increase. Wellness programs try to address the body, mind and pocketbook – helping employers reduce benefit costs and lost work time, while increasing employees' health, productivity and quality of life. Over a half dozen different sets of laws, including ERISA, Genetic Information Nondiscrimination Act (GINA), Americans with Disabilities Act (ADA), COBRA, tax and employment laws can impact wellness programs. It is important for employers to consider these new proposed regulations, effective for plan years beginning on or after January 1, 2014, and other laws when designing and implementing wellness programs.