PPACA, HIPAA and Federal Health Benefit Mandates: Practical Q&A

The Patent Protection and Affordable Care Act (PPACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on PPACA, HIPAA and other federal benefit mandates.

Final Regulations Create New Requirements for Employer Wellness Programs

The Departments of Labor, Treasury, and Health and Human Services (the "Departments") published final wellness regulations this summer (the "Final Wellness Rules")[1] modifying the 2006 HIPAA wellness program regulations (the "2006 Regulations")[2] in light of the changes made to the statutory provisions by the Affordable Care Act (the "ACA"). These Final Wellness Rules supersede the proposed regulations published on November 26, 2012 (the "Proposed Wellness Rules").[3]

Although there are some welcome changes in the Final Wellness Rules, other changes, particularly those that apply to health-contingent wellness programs (including activity-based programs as described below), will make certain types of wellness programs more difficult to administer. On the plus side, consistent with the statutory provisions, the maximum reward that may be offered under a health-contingent program is increased generally from 20% of the cost of coverage (as under the 2006 Regulations) to 30%, and up to 50% of the cost of coverage for tobacco cessation programs. However, for wellness plans that condition a reward on the satisfaction of a health-contingent standard — e.g., no smoking or attainment of a certain body mass index (BMI) — the Final Wellness Rules change the way such health-contingent wellness incentive programs must be administered

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by adding new, stricter requirements. The Final Wellness Rules apply to both grandfathered and non-grandfathered plans for plan years beginning on or after January 1, 2014. This article discusses key aspects of the Final Wellness Rules as applied to group health plans.

Types of Wellness Programs

Like the 2006 Regulations, the Final Wellness Rules make a distinction between participatory wellness programs and health-contingent wellness programs.

Participatory Wellness Programs

Practice Pointer: The Final Wellness Rules contain different rules for participatory wellness programs and health-contingent wellness programs. Health-contingent wellness programs are subject to stricter requirements, making it critical to correctly categorize the type of wellness program offered.

Participatory wellness programs are programs that either 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. Examples cited in the Final Wellness Rules include a fitness center reimbursement program, a diagnostic testing program that does not base rewards on test outcomes, a program that waives cost-sharing for preventive care, such as prenatal or well-baby visits (generally relevant for grandfathered plans only),[4] a program that reimburses employees for the costs of participating in a smoking cessation program regardless of whether the employee quits smoking, and a program offering rewards for attending a free health education seminar.

Participatory programs comply with the HIPAA and ACA non-discrimination requirements as long as participation in the program is available to all similarly situated individuals, regardless of health status.

There is no limit on financial incentives for participatory wellness programs, and they do not have to meet the requirements for health-contingent wellness programs.

Practice Pointer: "Reward" refers to a discount or rebate of premiums or contributions, a waiver of all or part of other cost-sharing, and other financial incentives. It also includes avoiding penalties (such as surcharges).

Health-Contingent Wellness Programs

A "health-contingent wellness program" is a program that bases any portion of a reward on an individual satisfying a standard that is related to a health factor, or requires an individual to "do more" than a similarly situated individual in order to obtain the same reward. This includes performing or completing an activity relating to a health factor, or attaining a specific health outcome (such as attaining certain results on biometric screenings). In a departure from the Proposed Wellness Rules, the Final Wellness Rules divide health-contingent wellness programs into two categories: activity-only and outcome-based programs.

Activity-only wellness programs require individuals to perform or complete activities related to a health factor in order to obtain a reward. However, they do not require an individual to attain or maintain a specific health outcome. Examples of such programs include walking, diet, and exercise programs.

Outcome-based programs, in contrast, require individuals to attain or maintain a specific health outcome (such as a certain BMI) in order to obtain a reward. In order for outcome-based programs to satisfy the Final Wellness Rules, the program will generally need to have two tiers. The first is the outcome – e.g., a measure, test, or screening that sets the initial standard for obtaining the reward, such as no smoking, or a BMI within a certain range. The second tier is a reasonable alternative that must be offered to all individuals who do not meet the specified health outcome (regardless of their medical condition). This second tier could be activity-based (e.g., exercise program) or outcome-based (e.g., an alternative BMI standard and a reasonable time period to meet the standard). Even if the reasonable alternative is activity-only, the program as a whole is considered outcome-based and must satisfy the requirements for outcome-based programs.

Practice Pointer: With an "activity only" wellness program, such as an exercise or diet program, a reasonable alternative means of obtaining the reward must be offered only to individuals for whom it is unreasonably difficult due to a medical condition to meet the applicable standard, or for whom it is medically inadvisable to attempt to satisfy the standard. In contrast, with an "outcomes-based" wellness program (e.g., no smoking), each individual who does not meet the standard must be offered a reasonable alternative to obtain the reward and an opportunity to involve the individual's personal physician to develop an alternative.

Five Requirements for Health-contingent Wellness Programs

The 2006 Regulations and the Proposed Wellness Rules contained five requirements for health-contingent

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wellness programs. Although the Final Wellness Rules maintain these five categories of requirements, there are some significant changes.

1. Frequency of Opportunity to Qualify

As under the 2006 Regulations and Proposed Wellness Rules, individuals must have the opportunity to qualify for a reward at least once per year in health-contingent programs (both activity-only and outcome-based). Thus, an opportunity to re-qualify each year must be extended even if a participant has repeatedly failed to meet a goal or complete established requirements.

2. Size of Reward

In general. The total reward for a health-contingent wellness plan – either activity-only or outcome-based – cannot exceed a specified percentage of the total cost of employee-only coverage, taking into account both employer and employee contributions. This is typically referred to as the "COBRA cost" of coverage, less the applicable 2% administrative charge. If dependents can participate in the program, the reward cannot exceed the applicable percentage of the total cost of coverage in which the employee and dependents are enrolled. In the Proposed Wellness Rules, the Departments requested comments as to whether (and if so, how) a reward should be apportioned among family members if the program is offered to family members and only some qualify for the reward. The Final Wellness Rules do not provide a specific method for apportionment of a reward; thus, there is some flexibility, as long as the solution is reasonable.

The 2006 Regulations capped the permissible reward at 20% of the total cost. In accordance with the ACA, the Final Wellness Rules increase the maximum reward to 30% for programs other than those related to tobacco use.

Tobacco use. The Departments exercised their regulatory authority by permitting a reward of up to 50% for programs designed to prevent or reduce tobacco use. Tobacco use can only affect rewards/penalties from 30% to 50%, while other wellness-related factors can impact the initial 30% of the reward/penalty. The 50% differential for tobacco use provides consistency with the modified community rating rules which go into effect in 2014 and which permit health insurance issuers in the small and individual market to vary premiums for tobacco use by a similar factor (the modified community rating rules do not apply at this time to the large group market). Insurers that impose such a differential in the small group market must offer a wellness program that meets the requirements of the Final Wellness Rules.

The final regulations under the modified community rating rules

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define "tobacco use" as use of tobacco products on average four or more times a week in the past six months. This definition has not been carried over into the Final Wellness Rules. Thus, outside the fully-insured small group market, employers appear to have some flexibility in defining tobacco use. The Final Wellness Rules contain an example of a permissible wellness program that defines tobacco use as use of tobacco in the past 12 months.

Example. This example, taken from the Final Wellness Rules, demonstrates how the maximum permitted reward is coordinated in a wellness program that provides rewards based on tobacco use and other health factors.

Facts: An employer sponsors a group health plan. The annual premium for employee-only coverage is $6,000 (of which the employer pays $4,500 per year and the employee pays $1,500 per year). The plan offers employees a health-contingent wellness program with several components, focused on exercise, blood sugar, weight, cholesterol, and blood pressure. The reward for compliance is an annual premium rebate of $600. In addition, the plan also imposes and additional $2,000 tobacco premium surcharge on employees who have used tobacco in the last 12 months are who are not enrolled in the plans' tobacco cessation program. (Those who participate in the plans' tobacco cessation program are not assessed the $2,000 surcharge.)

Conclusion: The amount of the reward under this program is permissible. The total of all rewards is $2,600 ($600 + $2,000 = $2,600), which does not exceed the applicable percentage of 50 percent of the total annual cost of employee-only coverage ($3,000); and, tested separately, the $600 reward for the wellness program unrelated to tobacco use does not exceed the applicable percentage of 30 percent of the total annual cost of employee-only coverage ($1,800).

3. Reasonable Design

The Final Wellness Rules emphasize that health-contingent wellness programs (both activity-based and outcome-based) must be reasonably designed to promote health or prevent disease. A wellness program is reasonably designed if it has a reasonable chance of improving the health of, or preventing disease in, participating individuals. It must not be overly burdensome, cannot be a subterfuge for discrimination based on a health factor, and cannot be highly suspect in the method chosen to promote health or prevent disease. However, it may have more favorable rates for eligibility or premium rates for individuals with an adverse health factor. The determination of whether a wellness program is reasonably designed is based on the relevant facts and circumstances. The Final Wellness Rules provide that in order to satisfy the requirement of reasonable design, outcome-based wellness programs must provide a reasonable alternative standard to qualify for the reward for all individuals who do not meet the initial standard.

4. Uniform Availability and Reasonable Alternative Standards

Availability of Reasonable Alternative Standard

Activity-only programs (e.g., diet or exercise programs) must make available an alternative means of obtaining the reward only to individuals for whom it is unreasonably difficult due to a medical condition to meet the applicable standard, or for whom it is medically inadvisable to attempt to satisfy the standard.

If reasonable under the circumstances, the plan can seek verification, such as from a participant's personal physician, that a health factor creates the need for an alternative standard.

Outcome-based programs must offer each individual who does not meet the initial standard a reasonable alternative to obtain the reward. The plan may not, in general, seek verification under an outcome-based program that an alternative is necessary due to a health factor.

- If the plan offers an alternative to the initial standard that is an activity-only program, then the plan must comply with the requirements applicable to such programs with respect to the alternative. For example, if the plan offers an exercise program as an alternative to having a BMI below a certain level, then the plan must offer an alternative to the exercise program to anyone for whom compliance with the exercise program is unreasonably difficult or medically inadvisable. The plan may, if reasonable under the circumstances, seek verification that a health factor requires an alternative to the exercise program.
- If the plan offers an alternative that is itself an outcome-based program, e.g., satisfaction of a different level of the same standard, then additional requirements apply. The reasonable alternative cannot be a different level of the same standard unless the plan also allows additional time to meet the standard. An example given in the Final Wellness Rules is that if the initial standard is a BMI of less than 30, a reasonable alternative would be to reduce the individual's BMI by a small percentage over a realistic period of time, such as a year. An individual must be given the opportunity to comply with the recommendations of his or her personal physician as a second, reasonable alternative standard

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to that offered by the plan. An individual may make a request at any time to involve his or her personal physician at any time (if the physician joins in the request) and the physician can change the recommendations at any time consistent with medical appropriateness.

Practice Pointer: Keep in mind that instead of implementing an alternative, a plan can also waive the standard and provide the reward. Waiving the standard will be a more administrable approach, but could lessen the intended effects of the program.

The Final Wellness Rules contain a number of examples that help illustrate how the requirements apply in particular situations.

Other Requirements

In general Except as otherwise indicated, the following requirements for a reasonable standard apply to both activity-only and outcome-based programs.

Plans do not have to establish an alternative standard in advance of a request, but an alternative must be provided (or the original standard waived) upon request. Plans have flexibility to determine whether to provide the same reasonable alternative standard to an entire class of individuals (provided it is reasonable), or provide it on a case-by-case basis. Persons who meet the alternative standard must be eligible for the entire reward. If the alternative standard is not met until the end of the plan year, the plan can provide a retroactive payment for the amount of the reward. If a person fails to meet the reasonable alternative for a year, that does not excuse the plan from providing a reasonable alternative for the next plan year.

In the case of an outcome-based program, a person who fails to meet the initial requirement after completing a reasonable alternative may be required to complete the alternative in subsequent years in order to obtain the reward.

Example. For example, suppose a lower premium is offered to individuals who do not use tobacco. As a reasonable alternative, the plan provides the same lower premium who complete a smoking cessation education program. At the start of the 2014 plan year, individual A does not qualify for the reward initially (because she smokes), but does complete the smoking education program. A is entitled to the reward for 2014 (which may be paid by the plan after she completes the program). For the 2015 plan year, if A still does not meet the initial standard, the plan may again require A to complete the smoking education program to qualify for the reward for 2015.

If the reasonable alternative standard is the completion of an educational program, the plan must

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make the program available or assist the employee in finding it, instead of requiring the individual to find one, and it cannot require an individual to pay for it. The time commitment required must be reasonable (e.g., one night a week is not reasonable).

If the reasonable alternative standard is a diet plan, the plan must pay for a membership or participation fee, but does not have to pay for the cost of food.

If a medical professional who is the employee or agent of the plan makes a recommendation and a participant's personal physician states that such a recommendation is not medically appropriate, the plan must provide a reasonable alternative standard that accommodates the recommendations of the personal physician. The plan may, however, impose standard cost sharing for coverage of medical items and services under the physician's recommendations.

5. Notice of Other Means of Qualifying for the Reward

Finally, the Final Wellness Rules require plans to disclose the availability of other means of qualifying for a reward, including the possibility of a waiver of the otherwise applicable standard, in all plan materials describing the terms of a health-contingent wellness program. This disclosure must include contact information for obtaining the alternative and a statement that recommendations of an individual's personal physician will be accommodated. For outcome-based programs, this notice must also be included in any disclosure that an individual did not satisfy an initial standard. A mere mention that a program is available, without describing its terms, does not trigger this disclosure requirement for either activity-based or outcome-based programs.

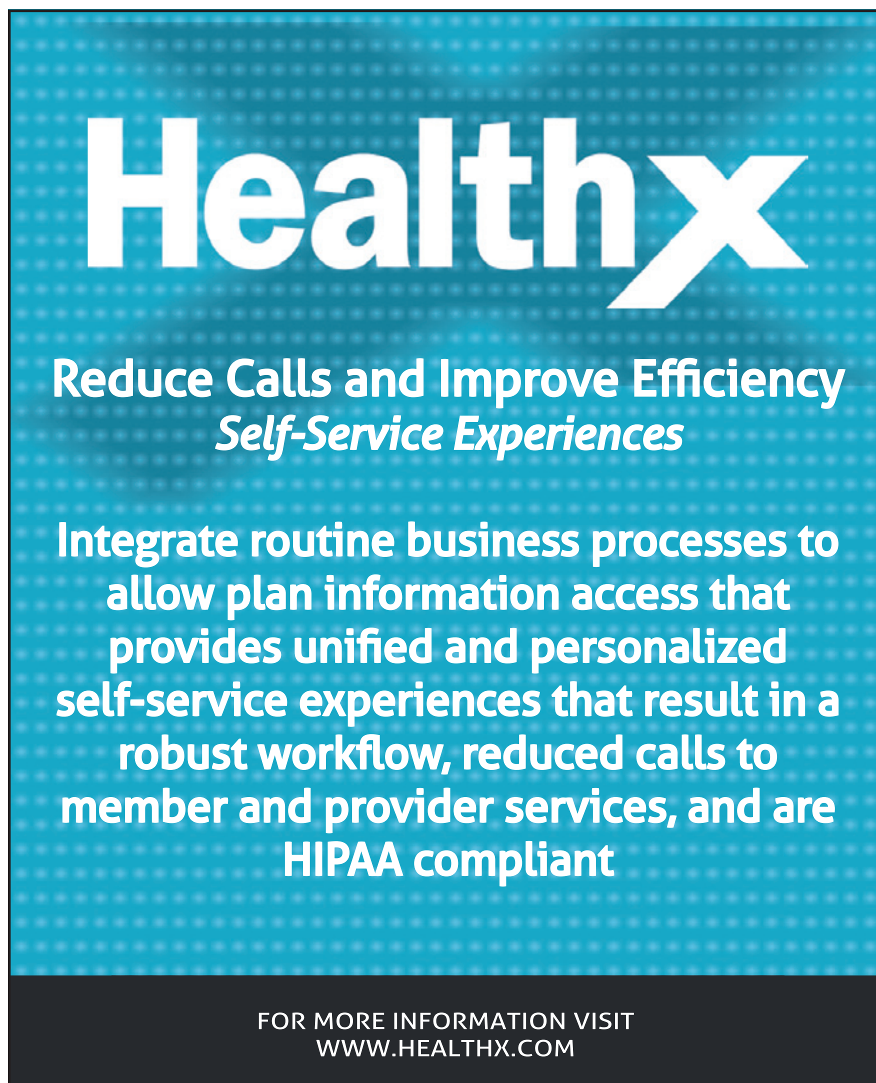
The Final Wellness Rules include the following updated sample text that plans may use to satisfy this requirement:

"Your health plan is committed to helping you achieve your best health. 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 contact information] and we will work with you (and, if you wish, with your doctor) to find a wellness program with the same reward that is right for you in light of your health status." ■

Attorneys John R. Hickman, Ashley Gillihan, Johann Lee, and Carolyn Smith provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte and Washington, D.C. law firm. Ashley Gillihan, Carolyn Smith and Johann Lee are members of the Health Benefits Practice. Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by email to Mr. Hickman at john.hickman@alston.com.

Resources

[1] *78 Fed. Reg. 33158 (June 3, 2013).*
[2] *71 Fed. Reg. 75014 (December 13, 2006).*
[3] *77 Fed. Reg. 70620 (November 26, 2012).*
[4] *Non-grandfathered plans are required to offer certain preventive care services without cost-sharing under the ACA.*



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