Update on Wellness:
Final HIPAA Wellness Rules
& Other Compliance Issues

American Benefits Council
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June 4, 2013
Update on Wellness

- Final HIPAA Wellness Rules – Issued 6/3/13
- Proposed IRS Minimum Value / Affordability Rules – Issued 5/3/13
- Other Compliance Issues – ERISA, ADA, GINA, Tax, Privacy
Final HIPAA Wellness Rules

Background

- 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
- ACA codified most of wellness program rules and increased allowed incentive limit from 20% to 30% of cost of coverage (and gave Secretary discretion to increase to 50%)
- Proposed wellness rules issued 11/26/12
### Participatory v. Health-Contingent Wellness Program

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<tr>
<th>Participatory</th>
<th>Health-Contingent</th>
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<tr>
<td>● Reward Not Based on Health Factor</td>
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<tr>
<td>● HIPAA Wellness Rules N/A</td>
<td>● HIPAA Wellness Rules Apply</td>
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<td>● But Other Laws May Apply – ERISA, ADA, GINA, ADA, Tax, Privacy</td>
<td>● <strong>NEW!</strong> Broken Down into Two New Subcategories:</td>
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<td>- Activity-Only Wellness Programs</td>
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<td>- Outcome-Based Wellness Programs</td>
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Participatory Wellness Program (HIPAA Wellness Rules N/A)

None of the conditions for obtaining reward based on individual satisfying standard related to health factor.

Examples:

- Reimburse fitness center membership cost
- Reward to participate in diagnostic testing, not based on outcome
- Deductible or copayment waiver to encourage preventive care, such as prenatal care or well-baby visit
- Reward or reimbursement for smoking cessation program, regardless of whether employee quits
- Reward to attend monthly, no-cost health education seminar
- Reward to complete health risk assessment without further action required with respect to health issues identified
Health-Contingent Wellness Program (HIPAA Wellness Rules Apply)

**Activity-Based**

- Individual required to complete activity related to health factor to obtain reward, but not required to attain specific health outcome

- **Examples:** Walking, diet, or exercise program where some individuals may be unable to or have difficulty participating or completing due to health factor (for example, such as asthma, pregnancy, or recent surgery)

**Outcome-Based**

- Individual required to attain or maintain specific health outcome in order to obtain reward

- **Example:** Reward for not smoking

- **Example:** Reward for certain result on biometric screening

- **Example:** Reward for favorable BMI, while requiring those outside of healthy range to meet with health coach to earn reward
Real Life Example: Health-Contingent Program (Activity-Based)

- Program: Exercise twice a week and earn premium credit
  - If plan designates exercise, appears to be Health-Contingent Wellness Program (Activity-Based). **Example:** Must walk twice a week.
  
  - Due to health factor, some individuals may have difficulty meeting.
  
  - If plan allows **any** exercise, may be able to argue Participatory Wellness Program because individuals should not have difficulty meeting for health reasons, since can choose any.
Real Life Example: Health-Contingent Program (Outcome-Based)

- Program: Take health risk assessment. If identified as “at risk” based on responses, subject to premium surcharge unless participate in 3 coaching calls.
  - Some had argued that this was “Participatory” because all activities were participation-only (taking HRA, participating in coaching calls)
  - Final rules clarify that this is Health-Contingent Wellness Program (Outcome-Based)
  - Rationale: Unhealthy group must do more than healthy group to earn same reward
American Benefits Council

*Preparing for PPACA*

Session #22: Final Wellness Regulations

June 4, 2013

Seth T. Perretta
Overview

- Standards that apply to the three types of programs:
  - Participation-only
  - Activity-only
  - Outcome-based Health-Contingent
Participation-Only Standards

• Only requirement is that the participation-only program be available to all similarly situated individuals regardless of health status
Health-Contingent Standards

• Same over-arching standards apply to both activity-only and outcome-based programs

• HOWEVER, the final rules impose material differences in how these standards must be administered for activity-only versus outcome-based programs (e.g., how to provide a reasonable alternative standard)

• Thus, there are some VERY important differences in how activity-only and outcome-based programs must be implemented
Health-Contingent Standards

1. Must give individuals an opportunity to qualify for the FULL reward at least once per year
Health-Contingent Standards

2. The reward for all health-contingent programs with respect to a given individual may not exceed 30%
   - Based on total cost (including employer and employee premium share) of self-only coverage
     • If, however, spouses and dependents may participate in the wellness program, then based on total cost of coverage in which dependents and spouse are enrolled
   - BUT.... If smoking cessation program, can go as high as 50%

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3. The program must be reasonably designed to promote health or prevent disease
   – Must have “reasonable chance” of improving health or preventing disease
   – Must not be overly burdensome
   – Must not be a subterfuge for discriminating based on a health factor
   – Must not be highly suspect in the method chosen to promote health or prevent disease

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Health-Contingent Standards

4. The reward must be available to all similarly situated employees
   - This is accomplished by providing a reasonable alternative standard (RAS)

**Note: This is where most of the differences arise between the two types of health-contingent programs**
Health-Contingent Standards

5. **Must provide adequate notice of availability of reasonable alternative standard**
   - Must disclose availability of RAS in all plan materials describing wellness program terms
   - Must include contact information for obtaining a RAS
   - Must include statement that the recommendations of an individual’s physician will be accommodated
Reasonable Alternative Standards

**Old Rules**
- Wellness Program
  - Participation-Only
  - Outcome-Based

**New Rules**
- Wellness Program
  - Participation-Only
  - Health-Contingent
    - Activity-Only
    - Outcome-Based
Reasonable Alternative Standards

Old Rules

Wellness Program

- Participation-Only
- Outcome-Based

Must provide reasonable alternative standard where, based on health status:
1. Medically inadvisable, OR
2. Unreasonably difficult
Reasonable Alternative Standards

New Rules

Wellness Program

- Participation-Only
- Health-Contingent

Activity-Only

Outcome-Based

Must provide reasonable alternative standard where, based on health status:
1. Medically inadvisable, OR
2. Unreasonably difficult

Must provide reasonable alternative standard … period.
Reasonable Alternative Standards

- For Activity-Only:
  - The plan must provide a RAS if:
    1. It is medically inadvisable for the individual to attempt to satisfy the plan standard; **OR**
    2. It is unreasonably difficult due to a medical condition for the individual to obtain the reward
  - The plan is not required to determine a RAS in advance of request, **but** a RAS must be furnished upon request
  - “If reasonable under the circumstances,” the plan may require physician verification that RAS is needed
Reasonable Alternative Standards

- **For Activity-Only:**
  - Facts and Circumstances test on reasonableness of RAS, including:
    - Whether required time commitment is reasonable
    - If the RAS is an education program, must make such program available or assist individual in finding program – and may not require individual to bear the cost of the program
    - If the RAS is a diet program, must pay cost of membership or participation fee, but not food
    - If individual’s physician states that a plan standard is not medically appropriate, must provide RAS that “accommodates” the recommendations of the physician

**NEW**
Reasonable Alternative Standards

• For Activity-Only:
  – RAS may be participation-only, activity-only OR outcome-based program
    • If RAS$_1$ is participation-only, then participant either participates or does not. No requirement under HIPAA to do anything more
    • If RAS$_1$ is another activity-only program, then need to provide RAS$_2$ to RAS$_1$, **BUT only if the activity-only RAS$_1$ is medically inadvisable or unreasonably difficult**
    • If RAS$_1$ is an outcome-based program, need to comply with rules for outcome-based programs (by providing, in part, RAS$_2$)
Reasonable Alternative Standards

• **Example:**

  Plan requires individuals to walk one mile once a week
Reasonable Alternative Standards

• **Example:**

  Individual says they can’t meet the standard. What next? Depends...
Reasonable Alternative Standards

• Example:
Reasonable Alternative Standards

• **Example:**

Assume the plan chooses the activity-only RAS (i.e., moderate exercise once weekly of any type), but individual still says he or she can’t do it. What next? Depends...
Reasonable Alternative Standards

• **Example:**

Assume the plan chooses the activity-only RAS (i.e., moderate exercise once weekly of any type), but individual still says he or she can’t do it. What next? Depends...
Reasonable Alternative Standards

- **Example:**

  Of course, the plan can always waive an initial standard or RAS ...
Reasonable Alternative Standards

• **Example:** I have the perfect solution....
Reasonable Alternative Standards

• **Example:**

I have the perfect solution....
Reasonable Alternative Standards

• **For Outcome-Based:**
  
  – If eligibility for reward is based on initial screening or test (such as BMI, cholesterol, blood pressure), then:
    
    • **MUST** provide a RAS **REGARDLESS** of whether it is unreasonably difficult or medically inadvisable to achieve the outcome
    
  **NEW**

  • Thus, **CANNOT** require physician verification

  – The plan is not required to determine a RAS in advance of request, **but** a RAS must be furnished upon request
Reasonable Alternative Standards

• **For Outcome-Based:**

  - Facts and Circumstances test on reasonableness of RAS, including:
    
    • Whether required time commitment is reasonable
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Reasonable Alternative Standards

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Reasonable Alternative Standards

• **For Outcome-Based:**
  
  – RAS may be participation-only, activity-only **OR** outcome-based program

  • If RAS$_1$ is participation-only, then participant either participates or does not. No further action is required.

  • If RAS$_1$ is another activity-only program, then need to provide RAS$_2$ to RAS$_1$, **BUT only if the activity-only RAS$_1$ is medically inadvisable or unreasonably difficult**
Reasonable Alternative Standards

• **For Outcome-Based**: (Cont’d)
  
  – RAS may be participation-only, activity-only **OR** outcome-based program

• If RAS\(_{1}\) is an outcome-based program, then the outcome-based RAS\(_{1}\) must comply with final rules as if it were the initial standard, i.e., the plan must provide a RAS\(_{2}\) to the RAS\(_{1}\)

• Additionally, it must adhere to two “special rules”
  
  1. The RAS cannot be a requirement to meet a different level of the same standard without additional time to comply and that takes into account individual’s circumstances
     • *E.g.*, if initial standard is BMI < 30, then cannot be required to achieve BMI <31 on same date; however, could have standard be “small amount or small percentage” of BMI reduction over a realistic period of time, such as within a year
  
  2. An individual must be given the opportunity to comply with the recommendations of the individual’s physician as a second RAS
     • Physician must “join[] in the request” for this second RAS?
     • The individual can make a request to involve his personal physician at any time and the physician can adjust the physician’s recommendations at any time “consistent with medical appropriateness”
Reasonable Alternative Standards

- **Example:**

  Initial Standard is a BMI < 30

- Outcome-Based
  - Participation-Only

- Outcome-Based
  - Activity-Only
  - Participation-Only

- Outcome-Based
  - Participation-Only
Reasonable Alternative Standards

• **Example:**

   It’s not medically inadvisable or unreasonably difficult for Bob to reduce his BMI to 30 ...
Reasonable Alternative Standards

Example:

Doesn’t matter. The new final rules require the plan to make available a RAS ...
Reasonable Alternative Standards

• Example:

Plan could offer a RAS that is participation-only, activity-only or outcome-based
Reasonable Alternative Standards

Example:

If choose participation-only RAS...
Reasonable Alternative Standards

• **Example:**

If choose activity-only RAS ...
Reasonable Alternative Standards

Example:

If choose activity-only RAS ...

[Diagram showing a flowchart with nodes labeled Participation-Only, Activity-Only, and Outcome-Based, with arrows indicating the flow between them.]
Reasonable Alternative Standards

• **Example:**

If choose outcome-based RAS ...
Reasonable Alternative Standards

**Example:**

If choose outcome-based RAS ...
Reasonable Alternative Standards

• Example:

If choose outcome-based RAS ...
Reasonable Alternative Standards

• So when/how does the plan “turn off the spigot to RAS”?
  – If offer participation-only program
  – If activity-only initial standard or activity-only RAS and either (i) standard/RAS is not medically inadvisable or unreasonably difficult, or (ii) individual fails to get doctor verification
  – If waive initial standard or waive RAS
  – If individual joins with personal physician to recommend an alternative and the plan accommodates such recommendations

• BUT, is there ever a time when the plan can put the onus on the participant to tailor the RAS?

• Remember: Need reasonable design!
QUESTIONS?

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Proposed Minimum Value / Affordability Rules (IRS)

- Under ACA “play or pay” rules, if employer offers coverage, but coverage does not meet affordability and minimum value tests; and

- An employee receives premium assistance under Exchange -

- Must pay annual fee that is the lesser of:
  - $3,000 for each full-time employee receiving premium assistance; or
  - $2,000 for each full-time employee, minus first 30 employees.
Proposed Minimum Value / Affordability Rules (IRS)

- Safe harbor from penalty if employer offers affordable, minimum value coverage to at least 95% of full-time employees and dependents

- Affordability Test
  - If employee cost for self-only coverage in lowest-cost minimum value plan is no more than 9.5% of household income

- Minimum Value (MV) Test
  - Plan’s share of costs must be at least 60% (generally measures cost-sharing)
Proposed Minimum Value / Affordability Rules (IRS)


- If wellness incentive is premium credit, may be able to count toward affordability test

- If wellness incentive affects deductible, copayment, cost sharing, may be able to count toward minimum value test
MV / Affordability - General Rule Tobacco Use Programs

- Employer allowed to count tobacco use incentives, but must disregard other incentives.

- Allowed to count for all employees, regardless of whether earned incentive.

- **Example**: Premium is $1,000. Employer offers $300 premium credit for meeting BMI standard and $200 premium credit for not smoking.

- For affordability, employer can count tobacco incentive so can consider employee premium to be $800 ($1,000 - $200 tobacco credit). Can count even for employees who did not earn credit.
For 2014 only, may count other (non-tobacco) programs, but only:

- (1) To extent of reward in place as of 5/3/13 (date of regulation);
- (2) Under terms of wellness program as of 5/3/13; and
- (3) With respect to eligible classification of employees as of 5/3/13.

**Example**: In 2013, wellness program offered 20% incentive for favorable BMI. In 2014, wellness program increased incentive to 30%, as allowed under HIPAA wellness rules.

For 2014 only, transition rule allows employer to count 20% incentive for affordability or minimum value (to extent of reward in place as of 5/3/13), as long as rest of program remains unchanged. Some question about how much program can change and still fall under transition rule.
Other Wellness Compliance Issues

- ERISA
- ADA
- GINA
- Tax & Cafeteria Plan
- Privacy
Is program an ERISA plan?

- If employer is involved and program provides “medical care,” program likely is an ERISA plan.

- “Medical care” if individualized and provided by trained professionals.

- Not “medical care” if general education (for example, articles about risk factors, health condition, nutrition).

- If an ERISA plan, must comply with HIPAA wellness rules, SPD & SBC requirements, COBRA & some provisions of ACA.
Where is the “ERISA” line?

- Probably Not ERISA Benefit
  - Health Newsletter
  - Email Appointment Reminders
  - Weight Watchers Class
  - Fitness Center
  - Subsidy for Healthy Options in Cafeteria
  - Pedometers

- Probably ERISA Benefit
  - Traditional Employee Assistance Program
  - Comprehensive, Individualized Coaching
  - Disease Management
  - Flu Shot?
  - Biometric Screenings?
  - Smoking Cessation? (Smoking cessation is medical care for tax purposes.)
Americans With Disabilities Act (ADA)

- ADA prohibits “medical examinations and inquiries” unless voluntary
- For example, a biometric screening or Health Risk Assessment may trigger this rule
- Could make a difference if structure as “carrot” or “stick” (EEOC has said carrot may be okay because voluntary)
- EEOC has said compliance with HIPAA wellness rules does not mean compliance with ADA (it is separate law)
- Safe harbor for bona fide plans (but EEOC may not recognize)
- Recent caselaw supports safe harbor (good news for plans)
- EEOC recently held hearing on issue
Genetic Information Nondiscrimination Act (GINA)

- Two Parts
  - Enforced by DOL, IRS, HHS (for health plans)
  - Enforced by EEOC (for employers)

- Plan cannot offer any type of incentive (even a t-shirt) for completion of a Health Risk Assessment that asks family history.

- Plan cannot collect genetic information prior to or in connection with enrollment.

- Some question on whether can collect spouse’s information (is that genetic information?)
Is reward taxable?

- Cash reward is taxable
- Gift certificates / gift cards are taxable
- Gifts are taxable (unless below de minimus)
- Premium holidays, lower deductibles, contribution to HRA/HSA not taxable
HIPAA Privacy

- May need privacy procedures to safeguard information
- May need business associate contract with wellness program vendors
- May need authorization to disclose PHI (for example, to employer to pay incentive)
- Also watch out for rules related to marketing if wellness program is promoting a product or service
Update on Wellness

QUESTIONS?