

# **The Final HIPAA Nondiscrimination Regulations and Other Wellness Program Issues**

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# HIPAA Nondiscrimination Rules

**General rule:** Health care plans cannot have eligibility requirements that discriminate against similarly situated individuals based on a health factor (no individual medical underwriting).

**Exception:** Plan can set eligibility rules that distinguish among groups of similarly situated individuals based on a “bona fide employment-based classification consistent with the employer’s usual business practice” (full-time vs. part-time, for example).

# Nondiscrimination Provisions

Highlighted provisions from the final regulations:

- “Source of injury” exclusions not permitted if injury results from domestic violence or a medical condition.
- Plan cannot require an individual to pay a higher premium than a similarly situated individual because of health factor (no “list billing”).
- Nonconfinement clauses and actively-at-work clauses are prohibited.

# Nondiscrimination Provisions

- Individuals with adverse health conditions can be treated more favorably; such individuals can also be charged a higher premium than other eligible participants if they would not otherwise be eligible for coverage.
- Compliance with the final HIPAA nondiscrimination regulations is not determinative for purposes of other laws (for example, the Americans with Disabilities Act or Title VII of the Civil Rights Act).
- Carry-forward of unreimbursed amounts in an HRA does not violate the HIPAA nondiscrimination rules.

# Wellness Programs

Wellness programs – questions to ask:

1. Does the program's incentive relate to a health plan (i.e., affect the plan's benefit design or cost to participants)?

Answer: If no, HIPAA nondiscrimination rules do not apply. If yes, go to #2.

2. Does the program offer a financial incentive (discounts, lower premiums or contributions, waivers of part or all of deductibles or co-pays, cash, etc.)?

Answer: If no, HIPAA nondiscrimination rules do not apply. If yes, go to #3.

# Wellness Programs

Wellness programs – questions to ask (cont'd):

3. Does the availability of the financial incentive depend on an individual's ability to satisfy a standard related to a health status factor (e.g., losing weight, meeting specified blood pressure levels or cholesterol counts, or going in for periodic tests)?

Answer: If no, HIPAA nondiscrimination rules do not apply. If yes, go to #4.

# Wellness Programs

Wellness programs – questions to ask (cont'd):

4. Is the program only offered to individuals with an adverse health factor (the “benign discrimination” rule)?

Answer: If so, and if the incentive is not based on achieving a specific health status outcome, then the program is HIPAA compliant. If not, then the program must qualify as a “wellness program” as that term is defined in the final regulations.

# Wellness Programs

Qualified wellness program requirements:

- Limit on amount of reward – 20% of total cost of employee-only coverage of plan (or cost of family coverage, if dependents are eligible for program).
- Program must be reasonably designed to promote health or prevent disease and may not be overly burdensome, a subterfuge for discriminating on the basis of a health factor or be highly suspect in the method chosen to promote health or prevent disease.
- Individuals must be able to qualify for the rewards once each year.

# Wellness Programs

Qualified wellness program requirements (cont'd):

- Reward must be attainable through a reasonable alternative for any individual for whom attaining the standard is unreasonably difficult or medically inadvisable.
  - Reasonable alternative can be to waive the standard or follow a physician's recommendations; plan can seek physician verification.
- The availability of a reasonable alternative standard for securing the reward must be disclosed in all plan materials describing the program; sample language is included in the final regulations for this purpose.

# Wellness Programs

Wellness programs do not have to satisfy the conditions just described if:

- Requirement for obtaining reward is not based on a health status factor; and
- Participation is available for all similarly situated individuals.

# Wellness Programs

Examples of compliant wellness programs that do not have to satisfy HIPAA's conditions for qualified wellness programs:

- Reimbursing fitness center dues;
- Diagnostic testing program where reward is based on participation and not outcome;
- Encouraging preventive care through waiving deductibles or co-pays (prenatal care or well baby visits);
- Reimbursing employee for cost of smoking cessation programs whether or not employee quits smoking;
- Rewarding employees for attending a monthly health seminar.

# State Laws

State insurance law issues for wellness programs:

- A few states do not permit use of contributions and co-payment incentives in a wellness program; health status cannot be used for either eligibility purposes or in connection with other terms of a plan.
- Some states permit eligibility to be conditioned only on factors related to the employment relationship (salaried/hourly or full-time/part-time).
  - Would not permit requirement of taking a health assessment for plan eligibility even if no one is denied plan eligibility due to results.
- Applicability to self-insured church health care plans?

# Americans with Disabilities Act

Americans with Disabilities Act issues:

- No discrimination against “qualified individuals with disabilities;” discrimination present if plan contains a “disability based distinction.”
  - Wellness program targeting diabetes would appear to do this; program targeting employees who fail to complete a stress test would not.
- Reasonable accommodations requirement:
  - If a disability prevents an employee from earning a reward, then employer must work with the employee to have an alternative means for doing so.

# Americans with Disabilities Act

## Americans with Disabilities Act issues (cont'd):

- Under the ADA, employers cannot conduct medical exams or inquire about disabilities of current employees (all, not just disabled), unless exams or inquiries are job related and consistent with business necessity.
- Asking about prescription drug use is a disability inquiry; asking if an employee drinks alcohol is not.
- CT scan is a medical exam; a physical agility test usually is not.

# Americans with Disabilities Act

Americans with Disabilities Act issues (cont'd):

- The “no medical exam” or “not inquiring about disabilities” rules do not apply to a wellness program if the program is “voluntary.”
  - No formal guidance from EEOC on what “voluntary” means; informal guidance said program may not be voluntary if:
    - Significant financial incentives are offered; or
    - Employees are required to pay significantly higher premiums if they do not participate in program or do not meet the program’s goals.

# Americans with Disabilities Act

Finally, remember the ADA's requirements are independent of those of HIPAA.

- ADA applies to a wellness program whether or not its incentives involve a group health plan.
- Unless wellness program is “voluntary,” ADA prohibits employer from conducting medical exams or disability inquiries unless they are job-related or justified by business necessity.