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## **Final HIPAA Nondiscrimination and Wellness Program Regulations**

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On December 13, 2006, the Departments of Labor, Treasury, and Health and Human Services issued final nondiscrimination and wellness program regulations under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). On that same date, the Department of Treasury published final regulations governing the exception to the HIPAA nondiscrimination requirements for certain grandfathered church plans. These final regulations are applicable to plan years beginning on or after July 1, 2007. These regulations differ only moderately from the interim final nondiscrimination regulations, proposed wellness program regulations, and proposed regulations governing the limited church plan exception to the nondiscrimination rules, which were all issued in 2001.

### Nondiscrimination Rules

The HIPAA nondiscrimination rules generally prohibit group health plans from establishing rules for eligibility that discriminate against similarly-situated individuals based on a health factor.<sup>1</sup> However, a plan is permitted to distinguish among groups of similarly-situated individuals provided that the distinction is based on “a bona fide employment-based classification consistent with the employer’s usual business practice,” such as full-time versus part-time status. The final regulations include the following specific rules:

- Source-of-Injury Exclusions. Like the 2001 interim regulations, the final regulations prohibit a plan from denying benefits based on the source of the injury if the injury results from domestic violence or a medical condition. In addition, the final regulations clarify that benefits may not be denied for injuries resulting from a medical condition, even if the medical condition was not diagnosed prior to the injury. However, a plan is permitted to include a source-of-injury exclusion related to highly dangerous activities, such as bungee jumping and sky-diving.
- Prohibited Discrimination in Premiums or Contributions. The final regulations retain the rule prohibiting a group health plan from requiring an individual to pay a higher premium than a similarly-situated individual because of a health factor. Further, the final regulations continue to prohibit a group health plan from “list billing” (i.e., quoting or charging an employer a different premium for an individual in a group of

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<sup>1</sup> “Health factors” include health status, medical condition (including both physical and mental illnesses), claims experience, receipt of health care, medical history, genetic information, evidence of insurability (including conditions arising out of acts of domestic violence), and disability.

similarly-situated individuals based on a health factor) even if the plan did not require the individual to pay the higher premium.

- Nonconfinement Clauses. Like the 2001 interim regulations, the final regulations prohibit nonconfinement clauses, which are plan provisions denying benefits based on the individual's confinement to a hospital at the time coverage was to become effective. In addition, the final regulations clarify the interaction between HIPAA's nonconfinement rule and a state's extension of benefits laws. Many states require insurers to continue coverage beyond the date on which coverage under the policy would have ended if an individual is hospitalized beyond that date. Therefore, in a situation where a hospitalized individual changes coverage in the middle of a hospital stay, the prior issuer may have an obligation under state law and the succeeding issuer may have an obligation under HIPAA to continue coverage during the individual's hospitalization. In such a case, the final regulations clarify that the state's coordination of benefits law applies to determine the order of payment and prevent reimbursement of more than 100% of the cost.
- Actively-at-Work Clauses. The final regulations continue to prohibit plans from conditioning an employee's eligibility based on being actively at work on the day coverage commences. However, these so-called "actively-at-work clauses" are allowed if individuals who are absent from work because of a health factor are treated as being actively-at-work for purposes of plan coverage. The preamble to the final regulations encourages plans and insurers to "clarify, in writing, how employees on various types of leave are treated for purposes of interpreting a service requirement" to prevent inconsistent applications of its rules which could lead to violation of this regulatory provision.
- More Favorable Treatment of Individuals with Adverse Health Conditions Permitted. The final regulations retain the rule allowing group health plans to establish more favorable rules for eligibility for individuals with an adverse health factor. Further, an employer may charge a higher premium during an extended period of coverage if the individual would not be eligible for the extended coverage period but for the adverse health factor. For example, a plan may permit disabled children to continue coverage even after they have reached the plan's age limit for dependent coverage. In this situation, the continued coverage, even at a higher cost, is permissible.
- No Effect on Other Laws. The preamble to the final regulations specifically provides that certain plan practices or benefits permitted under the HIPAA regulations may violate other laws, such as the Americans with Disabilities Act of 1990 or Title VII of the Civil Rights Act of 1964. For example, a benefit limitation applied to individuals with AIDS or an exclusion from coverage for prescription contraceptives but not other preventive treatments could violate other federal laws. The final regulations clarify that compliance with the HIPAA nondiscrimination rules are not determinative of compliance with other laws.

- Effect on Health Reimbursement Arrangements. The preamble to the final regulations clarifies that the carry-forward of unused employer-provided medical care reimbursement amounts to later years under a health reimbursement arrangement does not violate the nondiscrimination rules as long as employees who have participated in the plan for the same length of time are eligible for the same total benefit over that period of time.

### Wellness Program Rules

HIPAA's nondiscrimination provisions allow plans to establish rewards for adherence to a wellness program, which is defined as "any program designed to promote health or prevent disease."<sup>2</sup> Like the proposed regulations, the final regulations state that a wellness program may condition a reward on satisfying a standard that is based on a health-related factor, as long as the program satisfies the following five conditions:<sup>3</sup>

- Limit on the Amount of the Reward. The total amount of the reward for all wellness programs offered under the plan is limited to 20% of the cost of employee-only coverage under the plan.<sup>4</sup> However, if the employee's dependents may also participate in the wellness program, the total reward is limited to 20% of the cost of coverage in which the employee and dependents are enrolled.
- Reasonably Designed Requirement. The program must be reasonably designed to promote health or prevent disease and may not be overly burdensome, a subterfuge for discriminating based on a health factor, or highly suspect in the method chosen to promote health or prevent disease. The preamble to the final regulations states that this standard is intended to be easy to satisfy.
- Annual Opportunity to Qualify. The program must give eligible individuals the opportunity to qualify for the reward at least once per year.
- Reasonable Alternative Standard. A wellness program must provide a reasonable alternative for obtaining the reward to any individual for whom it is unreasonably

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<sup>2</sup> The proposed regulations allowed plans to maintain "bona fide wellness programs." The final regulations specifically dropped the term "bona fide," due to a concern that some wellness programs that satisfied the HIPAA nondiscrimination requirements did not fall within the narrow definition of a "bona fide wellness program" as defined under the 2001 proposed regulations. Under the final regulations, all programs of health promotion or disease prevention are treated as wellness programs.

<sup>3</sup> Under the proposed regulations, the second and third requirements were combined into one single requirement. The change in the final regulations was made to emphasize that a wellness program must satisfy both rules.

<sup>4</sup> The proposed regulations sought comments on whether wellness program rewards should be capped at 10%, 15%, or 20%. The final regulations cap the wellness program reward at 20%.

difficult or medically inadvisable to satisfy the standard. A plan need not establish a reasonable alternative before the program commences, but it must make a reasonable alternative available if requested. The final regulations clarify that a reasonable alternative includes waiving the standard or allowing the individual to follow the recommendations of the individual's physician. In addition, the final regulations clarify that the plan may seek verification, such as a statement from the individual's physician, that the health factor makes it unreasonably difficult or medically inadvisable for the individual to attempt to satisfy the standard.

- Disclosure of Reasonable Alternative Requirements. The plan must disclose the availability of an alternative standard in all plan materials describing the terms of the program. The regulations include sample language that can be used to satisfy this requirement, which is the same language that was provided in the proposed regulations.

The final regulations also clarify that wellness programs do not have to satisfy the additional conditions described above if the requirements for obtaining a reward under the program are not based on a health factor and participation in the program is available to all similarly-situated individuals. The final regulations provide the following examples of programs that would not have to satisfy additional conditions to comply with the nondiscrimination regulations:

- A program that reimburses membership costs at a fitness center;
- A diagnosis testing program that bases the reward on participation and not on the outcome;
- A program that encourages preventative care by waiving the copayment or deductible under a group health plan (e.g., for prenatal care or well-baby visits);
- A program that reimburses employees for smoking cessation programs without regard to whether the employee actually quits smoking; and
- A program rewarding employees for attending a monthly health education seminar.

#### Exception to the HIPAA Nondiscrimination Requirements for Certain Grandfathered Church Plans

The final regulations provide an exception to the nondiscrimination rules for certain church plans. These final regulations mirror the statutory language in the Internal Revenue Code of 1986. The final regulations provide that church plans may require evidence of good health for coverage of individuals if, on July 15, 1997 and continuously thereafter, the plan contains either of the following provisions:

- A provision requiring evidence of good health of both any employee of an employer of ten or fewer employees and any self-employed individual; or

- A provision requiring evidence of good health of any individual who enrolls after the first ninety days of initial eligibility under the plan (cannot be a shorter or longer period than ninety days).