

Cooley

June 4, 2013

On May 29, 2013, the United States Departments of Health & Human Services ("HHS"), Labor and Treasury (collectively, the "Departments") issued a final rule (the "Final Rule") regarding incentives for nondiscriminatory wellness programs in group health coverage pursuant to the Patient Protection and Affordable Care Act ("ACA"). The Final Rule is designed to prohibit discriminatory practices based on health factors while promoting flexibility and innovation in the types of wellness programs offered through employer-sponsored group health plans. The Final Rule takes effect for group health coverage for plan years beginning on or after January 1, 2014.

The nondiscrimination requirements under the Final Rule differ depending on whether the wellness program is considered to be "participatory" or "health-contingent." A participatory wellness program does not offer a reward or financial incentive to plan members, nor does it include conditions for obtaining a reward based on a health factor. Examples of participatory wellness programs include discounts on health club memberships, free health education programs and diagnostic testing where the reward is not based on the outcome of the test.

Conversely, health-contingent wellness programs offer an award or financial incentive to plan members who satisfy a standard related to a health factor. Health-contingent wellness programs can be broken down into two types: activity-only and outcome-based. Activity-only programs reward a plan member for completing an activity related to a health factor (such as smoking cessation, walking and diet programs). Whereas, outcome-based programs reward plan members for attaining or maintaining a specific health outcome (such as quitting smoking or attaining certain results on biometric screenings).

As previously set forth in ACA, a health-contingent wellness program must fulfill the following program design requirements in an effort to avoid prohibited discrimination: (1) be reasonably designed to promote health or prevent disease; (2) have a reasonable chance of improving the health of, or preventing disease in, participating individuals; (3) not be overly burdensome; (4) not be a subterfuge for discriminating based on a health factor; and (5) not be highly suspect in the method chosen to promote health or prevent disease. The Departments considered requiring health-contingent plans to be based on specific evidenced-based clinical guidelines or national standards. However, ultimately, under the Final Rule, a determination whether a wellness program is reasonably designed will be based on all relevant facts and circumstances.

In addition, health-contingent wellness programs must offer plan members a "reasonable alternative standard" to qualify for the same incentive if the plan member does not meet the initial health-related standard. The proposed nondiscrimination regulations created confusion among the industry regarding the group of individuals that must be offered the reasonable alternative standard. In an effort to provide clarity to the industry, the Departments addressed the confusion in the Final Rule.

Pursuant to the Final Rule, the group of individuals that must be offered a reasonable alternative standard differs depending on whether health-contingent wellness program is an activity-only or an outcome-based wellness program. For an activity-only wellness program, a reasonable alternative standard for obtaining the reward must be provided for any individual for whom, during that applicable period, it is either unreasonably difficult due to a medical condition to meet the otherwise applicable standard, or for whom it is medically inadvisable to attempt to satisfy the otherwise applicable standard.

In contrast, for outcome-based wellness programs, which generally provide rewards based on whether an individual has attained a certain health outcome, a reasonable alternative standard must be provided to all individuals who do not meet the initial standard. The Final Rule does not require plans to create a particular reasonable alternative from the outset, provided the plan offers one upon an individual's request. Further, a plan may waive the health standard and provide the reward instead of providing a

reasonable alternative standard.

In an effort to further promote health and prevent disease, the Departments increased the maximum permissible reward under a health-contingent wellness program offered in connection with a group health plan (and any related insurance coverage) from 20% to 30% of the total cost of employee-only coverage under the plan. Additionally, the Departments exercised their discretion, as provided for in ACA, to increase the permissible reward for wellness programs designed to prevent or reduce tobacco use to 50% of the total cost of employee-only coverage.

The Final Rule requirements for participatory wellness programs are more straightforward. To comply with the nondiscrimination requirements under the Final Rule, participatory wellness programs must be made available to all similarly situated individuals in the plan, regardless of their health status. Unlike health-contingent wellness programs, the Final Rule places no limits on the financial incentives a plan can offer under a participatory wellness program.

Multi-dimensional wellness programs may be subject to requirements governing both types of programs. The Final Rule is intended to ensure that each person participating in either type of wellness program is able to receive the full amount of any incentive offered under the program, regardless of any health factor. Failure to comply with these nondiscriminatory wellness program requirements can subject plans to excise taxes.

Employers and plans should be aware that compliance with the nondiscrimination requirements under the Final Rule is not determinative of compliance with other existing federal and state laws and regulations that may affect the design and implementation of their wellness programs, such as the fiduciary provisions of ERISA, the Privacy Rule under HIPAA, and the Americans with Disabilities Act.

Further, the Departments recognize that confusion may still exist within the industry regarding these nondiscrimination requirements despite the additional guidance provided in the Final Rule. The Departments anticipate issuing future subregulatory guidance to provide additional clarity and, if necessary, potentially proposing modifications to the Final Rule. Plans and employers offering wellness programs must keep abreast of any future developments to ensure that their wellness programs remain compliant with these nondiscrimination requirements. Tremendous opportunities exist for payors and plans to collaborate with technology and other companies for the delivery of employer-sponsored wellness programs.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as “Cooley”). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. This content may be considered **Attorney Advertising** and is subject to our [legal notices](#).

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.

