

# Wellness Programs and the Affordable Care Act: Administration Issues Final Rules on Employment-Base

By Jessica Summers

With the increasing national focus on preventable health problems, there is growing interest among employers to find ways to promote healthy behavior among their employees as a means of increasing productivity and cutting health costs. Taking another step towards the full implementation of the Affordable Care Act (ACA), the U.S. Departments of Health and Human Services, Labor and Treasury on May 29 issued final rules on employment-based wellness programs (available here). While these regulations maintain the essential elements of the prior wellness program rules adopted in 2006 and 2012 pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the clarifications and modifications they provide will be meaningful for those employers seeking to utilize their health plans to take affirmative measures to incentivize healthy behavior among their employees.

As under the previous wellness rules, the new rules divide wellness programs into two categories, *participatory* wellness programs and *health-contingent* wellness programs. Participatory wellness programs are those that are generally available to any employee, such as health education seminars or reimbursement for gym memberships. Health-contingent wellness programs on the other hand “require an individual to satisfy a standard related to a health factor to obtain a reward[.]” such as rewarding an employee for exercising or not using tobacco.

Both participatory and health-contingent wellness programs must be structured to comply with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) nondiscrimination requirements. Under HIPAA, group health plans or insurance issuers are generally prohibited from discriminating against participants or beneficiaries based on health factors. HIPAA includes an exception to this rule for premium discounts, rebates or other modifications that are provided in return for an individual’s participation in or adherence to a health promotion or disease prevention program. The ACA extends the HIPAA nondiscrimination protections to the individual health insurance market, but does not similarly extend exception for wellness programs to the individual market. Thus, while insurance purchased on the individual market can not include health based incentives, insurance provided as part of a group plan (such as that provided by an employer) can include incentives such as offering lower premiums or rebates to employees who quit smoking or exercise for a certain amount of time each day.

The regulations on participatory wellness programs remain essentially unchanged by the new rules. Under these regulations, participatory wellness programs meet the nondiscrimination requirements so long as the program is made available to all similarly situated participants, regardless of their health status, and there are no additional standards that the participant must meet.

The new rules do however introduce a few notable changes to the regulations on health-contingent wellness programs, which are subject to significantly more restrictions because they, by their inherent nature, distinguish between employees based upon specific health factors. Under the new rules, health-contingent wellness programs are further divided into two categories – *activity-only* wellness programs which reward the participant for performing or completing a health activity (i.e., exercising for a set amount of time each day) and *outcome-based* programs which reward the participant only for achieving or maintaining a specific health outcome (ex. not smoking or quitting smoking).

As set forth in the final rules, both types of health-contingent wellness programs must meet five requirements in order to satisfy the HIPAA nondiscrimination rule. First, the program must give eligible individuals an opportunity to qualify for the program’s reward at least once a year. Second, the new rules increases the limit on the total reward that any one employee may receive from health-contingent wellness programs to 30 percent (up from 20 percent) of the total cost of employee-only coverage under the health plan or 50 percent of the total cost of employee-only coverage if the program is targeted at

preventing or reducing tobacco use. Third, the program must be “reasonably designed to promote health or prevent disease.” Fourth, all similarly situated individuals must be eligible for the reward and an alternative standard must be offered for individuals for whom a medical condition makes it unreasonably difficult for them to satisfy the standard for the reward. The new rules expand upon the preexisting regulations in setting forth clear guidelines for the development of alternative standards for both activity-only and outcome-based programs. Finally, the plan must disclose all materials describing the terms and alternative standards for qualifying for the reward.

The new rules do not deviate significantly in structure and content from the original wellness program rules. Nonetheless, the guidance they contain will likely make it easier, and thus more appealing, to comply in structuring these programs. Further, the increase in the maximum rewards a participant may receive suggests a recognition by the administration that, when appropriately structured, wellness programs have the potential to have a positive public health impact.