

## WHITEPAPER:

### HEALTH LAW ALERT: EMPLOYEE WELLNESS PROGRAMS

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#### Health Law Alert: Employee Wellness Programs:

On May 29, 2013, the U.S. Department of Health and Human Services, Department of The Treasury, and the Department of Labor issued the final rule governing employee wellness programs under the Affordable Care Act (ACA). This rule is intended to provide comprehensive guidance with respect to the general requirements for wellness programs by restructuring the regulations proposed by the Departments in November of 2012. These regulations replace the wellness program provisions of paragraph (f) of the 2006 HIPAA nondiscrimination and wellness provisions jointly published by HHS and the Treasury and implement section 2705 of the Public Health Service Act (PHS). As amended by the ACA, the nondiscrimination and wellness provisions of the PHS Act largely reflect the 2006 regulations and extend the HIPAA nondiscrimination protections to the individual market. The rule applies to group health insurance coverage for plan years starting on or after January 1, 2014.

The final regulations divide wellness programs into two categories: participatory wellness programs and health-contingent wellness programs. The regulations differ depending on the classification of the program. Regardless of classification, no wellness program can discriminate against individual participants and beneficiaries in eligibility, benefits, or premiums based on a health factor.

**I. Participatory Wellness Programs** either do not provide a reward or do not include any conditions for obtaining a reward that are based on an individual satisfying a standard that is related to a health factor. For example, a program that reimburses employees for all or part of the cost of an employee fitness center. Simply participating in the program suffices. Participatory programs are considered to comply if they are offered to all similarly situated individuals regardless of health status. If factors other than health status limit an individual's ability to take part in a program, that does not mean that the plan has violated the general rule prohibiting discrimination because the program was not discriminatory under the HIPAA nondiscrimination rules to begin with.

**II. Health-Contingent Wellness Programs** require an individual to satisfy a standard related to a health factor to obtain a reward. This standard may be performing or completing an activity relating to a health factor, or it may be attaining or maintaining a specific health outcome. Health-contingent programs are divided into two subcategories, activity-only and outcome-based.

- Activity-only programs require an individual to perform or complete an activity related to a health factor, but not attain or maintain a specific health outcome. For example, walking, dieting, or exercise programs.
- Outcome-based programs require an individual to attain or maintain a specific health outcome, such as attaining certain results on biometric screening. For example, a program that tests individuals for high blood pressure and provides a reward to those employees identified as within a normal or healthy range, while requiring employees who are identified as outside the normal or healthy range to take additional steps (such as meeting with a health coach) to obtain the same reward. All health-contingent plans must comply with all of the criteria laid out in the regulations.

#### A. Criteria for Activity-Only Wellness Programs

**1. Frequency of Opportunity to Qualify:** Individuals eligible for the program should be given the opportunity to qualify for the reward at least once per year.

**2. Size of Reward:** The reward for health-contingent wellness plans must not exceed 30% of the total cost of the employee-only coverage under the plan, except that the plan is increased by an additional 20% (up to 50%) to the extent that the additional percentage is in connection with a program designed to prevent or reduce alcohol use. However, if, in addition to employees, any class of dependents may participate in the wellness program, the reward must not exceed the applicable percentage of the total cost of the coverage in which an employee and any dependents are enrolled. For purposes of this paragraph, the cost of coverage is determined based on the total amount of employer and employee contributions towards the cost of coverage for the benefit package under which the employee is (or the employee and any dependents are) receiving coverage.

**3. Reasonable Design:** The program must be reasonably designed to promote health or prevent disease. A program satisfies this standard if it; (i) has a reasonable chance of improving the health of, or preventing disease in, participating individuals; (ii) it is not overly burdensome; (iii) is not a subterfuge for discriminating based on a health factor; and (iv) is not highly suspect in the method chosen to promote health or prevent disease. The determination is based upon relevant facts and circumstances.

**4. Uniform Availability and Reasonable Alternative Standards:** The full reward under the activity-only wellness program must be available to all similarly situated individuals. A reward is not available to all similarly situated individuals for a period unless the program allows a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual for whom, for that period, it is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard. If it is medically inadvisable for an individual to attempt to satisfy the otherwise applicable standard for that period, a

reasonable alternative standard must also be allowed. Plans and issuers are not required to determine a particular alternative standard in advance, but must furnish one upon an individual's request.

**5. Notice of Availability:** The plan or issuer must disclose in all plan materials describing the terms of the program the availability of a reasonable alternative standard to qualify for the reward, including contact information for obtaining a reasonable alternative standard and a statement that recommendations of an individual's personal physician will be accommodated.

**6. Example:** A group health plan provides a reward to individuals who participate in a reasonably specified walking program. If it is unreasonably difficult due to a medical condition for an individual to participate, the plan will waive the requirement and provide the reward. This type of program is sufficient because it is reasonably designed to promote health and prevent disease. It accommodates individuals for whom it is unreasonably difficult to participate in the program due to a medical condition by providing them with the reward even if they do not participate.

## **B. Criteria for Outcome-Based Wellness Programs**

**1. Frequency of Opportunity to Qualify:** Same criteria as activity-only program.

**2. Size of Reward:** Same criteria as activity-only program.

**3. Reasonable Design:** Same criteria as activity-only program. In addition, to ensure that an outcome-based wellness program is reasonably designed to improve health and does not act as a subterfuge for underwriting or reducing benefits based on a health factor, a reasonable alternative standard to qualify for the reward must be provided to any individual who does not meet the initial standard based on a measurement, test, or screening that is related to a health factor.

**4. Uniform Availability and Reasonable Alternative Standards:** Same criteria as activity-only program.

**5. Notice of Availability:** Same criteria as activity-only program.

**6. Example:** A group health plan will provide a reward to participants who have a body mass index that is 26 or lower, determined shortly before the beginning of the year. Any participant who does not meet the target BMI is given the same discount if the participant complies with an exercise program that consists of walking 150 minutes a week. Any participant for whom it is unreasonably difficult due to a medical condition to comply with this walking program during the year is given the same discount if the participant satisfies an alternative standard that is reasonable taking into consideration the participant's medical situation, is not unreasonably burdensome or impractical to comply with, and is otherwise reasonably designed

based on all the relevant facts and circumstances. This program suffices because it is reasonably designed to promote health and prevent disease. It also makes a reasonable alternative standard available to all who fail to satisfy the BMI standard.

**Implications:**

The regulations increase an employer's power in implementing wellness programs, particularly health-contingent wellness programs. Companies now have more flexibility to reward their employees based upon health factors, so long as the programs do not discriminate against the unhealthy. The maximum permissible reward is now set at 30% of the cost of coverage and up to 50% for programs intended to prevent or reduce tobacco use. These numbers are increases from the 20% ceiling that has been in place since 2006. Employers are required to provide a reasonable alternative standard so that employees can qualify for rewards if they do not meet the initial standard. These standards can be set with the help of the employee's physicians. Most importantly, an employee wellness plan cannot discriminate against employees who might have medical conditions that make it difficult or impossible for them to achieve specific clinical goals. It is important to keep in mind that these final regulations are only implementing the provisions regarding wellness programs in the Affordable Care Act. Other State and Federal laws may apply with respect to privacy, disclosure, confidentiality, disability, etc.