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Alert

Employee Benefits and Executive Compensation
Client Service Group

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To: Our Clients and Friends

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Departments Issue Final Regulations on Wellness Program Incentives

Today, the Departments of Labor and Health and Human Services and Treasury (the "Departments") jointly published final regulations on incentives for nondiscriminatory wellness programs in group health plans. These regulations are effective for plan years beginning on or after January 1, 2014 and apply equally to grandfathered and non-grandfathered health plans.

Background

In 2006, the Departments published final regulations ("2006 Regulations") implementing the nondiscrimination and wellness provisions under the Health Insurance Portability and Accountability Act ("HIPAA"). The 2006 Regulations categorized wellness programs as either participatory wellness programs or health-contingent wellness programs. Participatory wellness programs could comply with the HIPAA nondiscrimination requirements by simply making participation available to all similarly situated individuals, regardless of health status. Health-contingent wellness programs that varied the cost or benefits based on satisfaction of a standard were required to meet certain additional requirements.

Last November, the Departments published proposed regulations implementing the increase in the maximum permissible reward as provided under the Affordance Care Act and outlining the requirements for health-contingent wellness programs:

1. Opportunity to qualify for the reward at least once per year.

2. The maximum reward under all health-contingent wellness programs cannot exceed 30% of the cost of employee-only coverage (50% for wellness programs designed to prevent or reduce tobacco use).

3. The reward is available to all similarly situated individuals, which requires the availability of a reasonable alternative standard (or waiver of the applicable standard) to any individual for whom, during that period, it is unreasonably difficult due to a medical condition to satisfy the applicable standard (or for whom it is medically inadvisable to attempt to satisfy the standard).

4. The program is reasonably designed to promote health or prevent disease (i.e., has a reasonable chance of improving the health of, or preventing disease in, participating individuals, and is not overly burdensome or a subterfuge for discriminating based on a health factor and is not highly suspect in the method chosen to promote health or prevent disease). To the extent the program's initial standard for obtaining a reward (or portion of a reward) is based on the results of a measurement, test, or screening that is related to a health factor (such as a biometric exam or a health risk assessment), any individual who does not meet the standard must be provided with a different, reasonable means of qualifying for the reward.

5. Disclosure in all plan materials describing the terms of the program, the availability of other means of qualifying for the reward or the possibility of waiver of the applicable standard.

Final Regulations

The new final regulations generally follow the proposed regulations with numerous clarifications. One such clarification addresses the interaction between the requirements that a health-contingent wellness program provide:

1. a reasonable alternative standard and

2. a different, reasonable means of qualifying for a reward if the initial standard for obtaining the reward is based on the results of a measurement, test or screening that is related to a health factor.

Maximum Rewards

The size of permissible awards remain the same as under the proposed regulations; however, the final regulations also provide that to the extent dependents (as well as employees) may participate in a health-contingent wellness program, the reward cannot exceed the applicable percentage (30% or 50%) of the total cost of the coverage in which the employee and any dependents are enrolled. The final regulations do not address the apportionment of a reward, but rather, provide that plans have flexibility to determine the apportionment of the reward among family members so long as the method is reasonable. The Departments noted that if questions persist or if they become aware of apportionment designs that seem unreasonable, additional guidance may be provided.

Reasonable Design

Health-contingent wellness programs require an individual to satisfy a standard related to a health factor to obtain a reward or require an individual to undertake more than a similarly situated individual based on a health factor in order to obtain the same reward. This standard may involve performing or

completing an activity relating to a health factor, or it may require attainment or maintenance of a specific health outcome. Under the regulations, health-contingent wellness programs are either activity-only wellness programs or outcome-based wellness programs.

- Activity-Only Wellness Programs: Individual must perform or complete an activity related to a health factor in order to obtain a reward (e.g., walking, diet, or exercise program).
- Outcome-Based Wellness Programs: Individual must attain or maintain a specific health outcome in order to obtain a reward. These programs generally involve (i) a measurement, test or screening as part of the initial standard and (ii) a larger program that then targets individuals who do not meet the initial standard with wellness activities. Examples include a program that tests individuals for specified medical conditions or risk-factors (e.g., high cholesterol or high blood pressure) and provides a reward to employees identified within a normal range, while requiring individuals outside the normal range to take additional steps to obtain the same reward.

An outcome-based wellness program must provide a reasonable alternative standard to qualify for the reward for all individuals who do not meet the initial standard. In contrast, a reasonable alternative standard for obtaining a reward is required under an activity-only wellness program only for those individuals for whom it is either unreasonably difficult due to a medical condition to meet the standard or for whom it is medically inadvisable. Under an activity-only wellness program, a plan may request verification, such as statement from the individual's physician that a health factor makes it unreasonably difficult for the individual to satisfy the applicable standard. A plan cannot require similar verification under an outcome-based wellness program since a reasonable alternative standard must be provided to all individuals who do not meet or achieve the particular health outcome. However, if the plan provides an activity-only wellness program as an alternative to the otherwise applicable measurement, test or screening of the outcome-based wellness program, then the plan, if reasonable under the circumstances, may seek verification with respect to the activity-only component.

Reasonable Alternative Standards

The regulations provide that although it may take an individual some time to request, establish and satisfy a reasonable alternative standard under a health-contingent program (activity-only or outcome-based wellness program), the same full reward must be provided to that individual as is provided to other individuals who meet the initial standard for that plan year. However, plans have flexibility to determine how to provide the portion of the reward corresponding to the period before an alternative was satisfied as long as the method is reasonable and the individual receives the full reward.

> **EXAMPLE:** A calendar year plan offers a health-contingent wellness program with a premium discount and the individual who qualifies for a reasonable alternative standard satisfies that standard on April 1. The plan must still provide the premium discount for January, February and March. If the individual does not satisfy the alternative standard until the end of the year, the plan may provide a retroactive payment of the reward for that year within a reasonable period of time after the end of the year, but cannot provide pro-rata payments over the following year.

Plans are not required to establish a particular reasonable alternative standard in advance as long as a reasonable alternative standard is provided upon an individual's request. A plan can provide the same reasonable alternative standard for an entire class of individuals or on an individual-by-individual basis.

Whether an alternative standard is reasonable will be based on the specific facts and circumstance, including but not limited to the following factors:

- If the alternative is the completion of an educational program, the plan must make the educational program available or assist the individual in finding such a program. The plan may not require the individual to pay for the cost of the program.
- The time commitment must be reasonable (e.g., requiring attendance nightly at a one-hour class is unreasonable).
- If the alternative is a diet program, the plan is not required to pay for the cost of food but must pay any membership or participation fee.
- If an individual's personal physician states that a plan standard is not medically appropriate for the individual, the plan must provide a reasonable alternative standard that accommodates the physician's recommendations with regard to medical appropriateness. Normal cost sharing can be imposed for medical items and services furnished pursuant to the physician's recommendations.

A plan cannot cease to provide a reasonable alternative standard merely because an individual was unsuccessful in satisfying the initial standard before. The Departments suggest that for plans with an initial outcome-based standard that an individual be tobacco-free, a reasonable alternative standard in Year 1 may be to try an educational seminar. In Year 2, the plan may require completion of a different reasonable alternative standard, such as complying with a new recommendation from the individual's personal physician or a new nicotine replacement therapy.

To the extent a reasonable alternative standard under an outcome-based wellness program is itself another outcome-based wellness program, it must comply with the requirements for outcome-based wellness programs as well as certain special rules. First, the reasonable alternative standard cannot be a requirement to meet a different level of the same standard without additional time to comply that takes into account the individual's circumstances.

> **EXAMPLE:** If the initial standard is to achieve a BMI of less than 30, requiring achievement of a BMI of less than 31 on the same date is not a reasonable alternative standard. However, if the initial standard is a BMI of less than 30, a reasonable alternative standard would be to reduce the individual's BMI by a small percentage over a realistic period of time, such as within a year.

Second, an individual must be given the opportunity to comply with the recommendations of the individual's personal physician as a second reasonable alternative standard, but only if the physician joins in the request. An individual can make the request to involve a personal physician's recommendations at any time and the physician can adjust the recommendations at any time, consistent with the medical appropriateness.

The regulations clarify that an adverse benefit determination based on whether an individual is entitled to a reasonable alternative standard is considered to involve medical judgment and is eligible for federal external review.

Disclosure Notice

A plan must disclose the availability of a reasonable alternative standard to qualify for a reward (and if applicable, the possibility of a waiver) in all plan materials describing the terms of a health-contingent wellness program (both activity-only and outcome-based). Such disclosure must include contact information for obtaining the alternative and a statement that the recommendations of an individual's personal physician will be accommodated. For outcome-based wellness programs, such notice must also be included in any disclosure that an individual did not satisfy the initial outcome-based standard. If the plan materials merely mention that the health-contingent wellness program is available, without describing its terms, the disclosure is not required. Sample language for meeting the disclosure requirement is provided in the final regulations.

> **EXAMPLE:** A summary of benefits and coverage notes that cost sharing may vary based on participation in a diabetes wellness program but does not describe the standards. No disclosure is required. However, a plan disclosure referencing a premium differential based on the results of a biometric exam is considered to describe the terms of a health-contingent wellness program and the disclosure notice must be included.

Benign Exception

The preamble to the regulations confirms that nothing prevents a plan from establishing more favorable rules for eligibility or premium rates (including rewards for adherence to certain wellness programs) for individuals with an adverse health factor than for individuals without the adverse health factor.

Action Items

Employers who sponsor or who are considering implementing a wellness program for the 2014 plan year should evaluate whether their program will comply with the new regulations. It may also be a good time to consider what types of reasonable alternative standards may be appropriate for any health-contingent wellness programs.

If you have any questions regarding anything discussed in this Alert, the attorneys and other professionals of the Employee Benefits and Executive Compensation group of Bryan Cave LLP are available to answer your questions.

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