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Final HIPAA Nondiscrimination Rules Released

The following is an excerpt from SPBA Update (Society of Professional Benefit Administrators).

The IRS, the DOL's Employee Benefits Security Administration, and the Department of Health and Human Services jointly released final rules governing the provisions prohibiting discrimination based on a health factor for group health plans. The final rules, enacted as part of the "Health Insurance Portability and Accountability Act" (HIPAA), Public law 104-191, are effective for plan years beginning on or after July 1, 2007. The final rules make a number of clarifications but no sweeping changes to the interim final rules on HIPAA nondiscrimination released in 2001. This article focuses on the clarifications and will not provide a comprehensive explanation of the final rule.

Wellness Programs – 20 Percent Limit

The HIPAA nondiscrimination provisions do not prevent a plan from establishing premium discounts or modifying copayments or deductibles in return for adherence to programs of health promotion and disease prevention. The "bona fide wellness" rules, released in 2001, proposed three alternative percentages (10, 15 or 20 percent) for a reward based on achieving a health status standard. The final rules eliminate the term "bona fide" in connection with wellness programs because the agencies thought it was confusing and adopt the 20 percent threshold.

The final rules define a wellness program as any program designed to promote health or prevent disease and categorize wellness programs into two types: 1) wellness programs that provide rewards without regard to achieving a health status standard; 2) wellness programs that provide rewards based on achieving a health status standard.

Wellness Programs Not Subject to Requirements

Wellness programs that provide rewards without regard to satisfying a health status factor and are made available to all similarly situated individuals are NOT subject to the HIPAA wellness program requirements. Note: Similarly situated individuals are a distinct group of individuals based on a bona fide employment-based classification (such as full-time versus part-time, or current employee versus former employee or geographic location).

The final rules provide the following examples of wellness programs that are NOT subject to the HIPAA wellness requirements.

- >> A program that reimburses all or part of the cost for membership in a fitness center.
- >> A diagnostic testing program that provides a reward for participation and does not base any part of the reward on outcomes.
- >> A program that encourages preventive care through the waiver of the copayment or deductible requirement under a group health plan for the costs of, for example, prenatal care or well-baby visits.
- >> A program that reimburses employees for the costs of smoking cessation programs without regard to whether the employee quits smoking.
- >> A program that provides a reward to employees for attending a monthly health education seminar.

Wellness Programs Subject to Requirements

Wellness programs that provide rewards based on an individual achieving a health status standard (e.g., cholesterol level) are subject to the HIPAA wellness program requirements. These requirements are listed below.

1. The reward for the wellness program, coupled with the reward for other wellness programs un-

der the plan that require the satisfaction of a health status factor, must not exceed 20 percent of the cost of employee-only coverage under the plan. The final rule was changed to permit plans to base the 20 percent on the cost of family coverage if, in addition to employees, spouses or dependents may participate in the wellness program. In this case, the reward must not exceed 20 percent of the cost of the coverage in which an employee and any dependents are enrolled. The cost of the coverage is determined based on the total amount of employer and employee contributions for the benefit package under which the employee is (or the employee and any dependents are) receiving coverage.

2. The program must be reasonably designed to promote health or prevent disease. A program satisfies this standard if it has a reasonable chance of improving health or preventing disease in participating individuals and is not a subterfuge for discriminating based on a health factor.

3. The program must give individuals eligible for the program the opportunity to qualify for the reward under the program at least once per year.

4. The reward under the 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) A reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual for whom it is unreasonably difficult due to a **medical condition** to satisfy the standard; and B) A reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual for whom it is **medically inadvisable** to attempt to satisfy the standard.

Note: According to the final rule, a plan may seek verification such as a statement from an individual's physician, that a health factor makes it unreasonably difficult or medically inadvisable for the individual to satisfy or attempt to satisfy the standard.

5. The plan must disclose in all plan materials describing the terms of the program the availability of a reasonable alternative standard (or the possibility of a waiver). The rules give plans the option to simply mention the availability of an alternative standard without describing the terms. There is an assumption that the specific terms would then be described in another document readily available to plan participants. The following language, or substantially similar language, can be used to satisfy the requirement that the terms of the program be described.

"If it is unreasonably difficult due to a medical condition for you to achieve the standards for the reward under this program, or if it is medically inadvisable for you to attempt to achieve the standards for the reward under this program, call us at (insert telephone number) and we will

work with you to develop another way to qualify for the reward." The final rule provides other sample language that would satisfy this requirement in the examples of wellness programs. See the December 13, 2006 Federal Register, Vol. 71, No. 236, page 75044.

Wellness Program Examples

The wellness program examples in the final rule provide more details than those in the proposed rule, which will be of value to designing wellness programs. According to the preamble, the examples serve as safe harbors and plan sponsors may feel confident in adopting a wellness program identical to one of the examples and knowing that the HIPAA wellness program requirements have been satisfied. The agencies do not want plans to feel constrained by the relatively narrow range of programs described by the examples and they encourage plans to design innovative programs to motivate individuals to improve health. Three of the examples from the final rule are set forth below.

Smoking Example

A group health plan provides a form for participants to certify that they have not used tobacco products in the preceding 12 months. Participants who do not provide the certification are assessed a surcharge that is 20 percent of the cost of employee-only coverage. However, all plan materials describing the terms of the wellness program include the following statement: "If it is unreasonably difficult due to a health factor for you to meet the requirements under this program (or if it is medically inadvisable for your to attempt to meet the requirements of this program), we will make available a reasonable alternative standard for you to avoid this surcharge."

It is unreasonably difficult for Individual B to stop smoking cigarettes due to an addiction to nicotine (a medical condition). The plan accommodates Individual B by requiring B to participate in a smoking cessation program to avoid the surcharge. Individual B can avoid the surcharge for as long as B participates in the program, regardless of whether B stops smoking (as long as B continues to be addicted to nicotine).

Analysis: In this example, the premium surcharge is permissible as a wellness program because it satisfies the five wellness program requirements. First, the program complies with the limits on rewards under a program. Second, it is reasonably designed to promote health or prevent disease. Third, individuals eligible for the program are given the opportunity to qualify for the reward at least once per year. Fourth, the reward under the program is available to all similarly situated individuals because it accommodates individuals for whom it is unreasonably difficult due to a medical condition (or for whom it is medically inadvisable to attempt) to quit using tobacco products by

providing a reasonable alternative standard. Fifth, the plan discloses in all materials describing the terms of the program the availability of a reasonable alternative standard. Thus, the premium surcharge does not violate this section.

Example on Rewarding Cholesterol Level

A group health plan gives an annual premium discount of 20 percent of the cost of employee-only coverage to participants who adhere to a wellness program. The wellness program consists solely of giving an annual cholesterol test to participants. Those participants who achieve a count under 200 receive the premium discount for the year. The plan provides that if it is unreasonably difficult due to a medical condition for a participant to achieve the targeted cholesterol count (or if it is medically inadvisable for a participant to attempt to achieve the targeted cholesterol count) within a 60-day period, the plan will make available a reasonable alternative standard that takes the relevant medical condition into account. In addition, all plan materials describing the terms of the program include the following statement: "If it is unreasonably difficult due to a medical condition for you to achieve a cholesterol count under 200, or if it is medically inadvisable for you to attempt to achieve a count under 200, call us at the number below and we will work with you to develop another way to get the discount."

Individual D begins a diet and exercise program but is unable to achieve a cholesterol count under 200 within the prescribed period. D's doctor determines that D requires prescription medication to achieve a medically advisable cholesterol count. In addition, the doctor determines that D must be monitored through periodic blood tests to continually reevaluate D's health status. The plan accommodates D by making the discount available to D, but only if D follows the advice of D's doctor regarding medication and blood tests.

Analysis: The program is a wellness program that satisfies the five requirements (explained above). First, the program complies with limits on rewards. Second, it is reasonably designed to promote health or prevent disease. Third, individuals eligible for the program are given the opportunity to qualify for the reward at least once per year. Fourth, the reward under the program is available to all similarly situated individuals because it accommodates individuals for whom it is unreasonably difficult due to a medical condition to achieve the targeted count (or for whom it is medically inadvisable to attempt to achieve the targeted count) in the prescribed period by providing a reasonable alternative standard. Fifth, the plan discloses in all materials describing the terms of the program the availability of a reasonable alternative standard. The premium discount is in compliance.

Body Mass Index Example

A group health plan will waive the \$250 annual deductible (which is less than 20 percent of the annual cost of employee-only coverage under the plan) for the following year for participants who have a body mass index (BMI) between 19 and 26, determined shortly before the beginning of the year. However, any participant for whom it is unreasonably difficult due to a medical condition to attain this standard (and any participant for whom it is medically inadvisable to attempt to achieve this standard) during the plan year is given the same discount if the participant walks for 20 minutes three days a week. Any participant for whom it is unreasonably difficult due to a medical condition to attain either standard (and any participant for whom it is medically inadvisable to attempt to achieve either standard) during the year is given the same discount if the individual satisfies an alternative standard that is reasonable in the burden it imposes and is reasonable taking into consideration the individual's medical situation.

All plan materials describing the terms of the wellness program include the following statement: "If it is unreasonably difficult due to a medical condition for you to achieve a body mass index between 19 and 26 (or if it is medically inadvisable for you to attempt to achieve this body mass index) this year, your deductible will be waived if you walk for 20 minutes three days a week. If you cannot follow the walking program, call us at the number above and we will work with you to develop another way to have your deductible waived."

Due to a medical condition, Individual E is unable to achieve a BMI of between 19 and 26 and is also unable to follow the walking program. E proposes a program based on the recommendations of E's physician. The plan agrees to make the discount available to E if E follows the physician's recommendations.

Analysis: This program satisfies the five requirements of a wellness program.

The wellness provisions can be found in §2590.702(f) of the rule. Federal Register, Vol. 71, No. 239, December 13, 2006, page 75043, bottom of the third column.