Arnall Golden Gregory LLP

Client Alert

Contact Attorneys Regarding This Matter:

H. Carol Saul
404.873.8694 - direct
carol.saul@agg.com

Diane R. Lukin
404.873.8516 - direct
diane.lukin@agg.com

Is Your Wellness Program Healthy? New Final Rules for Wellness Program Compliance under the Affordable Care Act and Health Insurance Portability and Accountability Act of 1996

Overview

On May 29, 2013, the Departments of Health and Human Services, Labor and Treasury (the Departments) issued final regulations implementing the wellness provisions added under the Affordable Care Act (ACA).[1] The new final rules apply to both grandfathered and non-grandfathered group health plans and group health insurance coverage for plans years beginning on or after January 1, 2014. While the Departments intend compliance with the final rules to act as an affirmative defense against discrimination challenges made under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), other federal and state laws, including the Genetic Information Nondiscrimination Act of 2008 and the Americans with Disabilities Act of 1990, continue to apply independently to wellness programs despite the lack of clear and consistent rules or other guidance. Plan sponsors should review their wellness programs and employee communications in light of these final rules.

History

Under HIPAA, group health plans and group health insurance issuers are prohibited from discriminating against participants and dependents on the basis of certain health factors.[2] Initially, the prohibition applied to eligibility, enrollment, benefits and premium requirements for self-insured and insured group health plans, with an exception available for rewards offered under wellness programs.

While the ACA now applies HIPAA's prohibition against discrimination on the basis of certain health factors to health policies offered in the individual

1 The Departments issued official joint regulations on December 13, 2006, which provide regulatory guidance on the Health Insurance Portability and Accountability Act of 1996 nondiscrimination prohibitions and wellness incentive exception, as included in IRC § 9802, ERISA § 702 and PHSA § 2702. *See also* 26 C.F.R. § 54.9802-1; 29 C.F.R. § 2590.702; and 45 C.F.R. § 146.121. The new final regulations replace section (f) of the former regulations.

2 The eight health factors include: (1) health status; (2) physical or mental medical condition; (3) claims experience; (4) receipt of health care; (5) medical history; (6) genetic information; (7) evidence of insurability (which includes evidence of domestic violence); and (8) disability. *See IRC* § 9802 and 26 C.F.R. § 54.9802-1; ERISA § 702 and 29 C.F.R. § 2590.702; PHSA § 2705 (formerly PHSA § 2702) and 45 C.F.R. § 146.121.

Arnall Golden Gregory LLP
Attorneys at Law

171 17th Street NW
Suite 2100
Atlanta, GA 30363-1031

Two South Biscayne Boulevard
One Biscayne Tower 2690
Miami, FL 33131

1775 Pennsylvania Avenue NW
Suite 1000
Washington DC 20006

www.agg.com

market, the wellness rules implemented under former and new final regulations do not apply. In addition, as with the original 2006 HIPAA regulations, the new final rules continue to classify wellness programs into participatory and health-contingent categories.

Participatory Wellness Programs

Under former and final regulations, a participatory wellness program either does not offer a reward or does not require certain health-based standards to be satisfied. Examples include programs that reimburse gym memberships, voluntary participation in biometric screening tests without making a reward contingent on a health outcome, smoking cessation programs without regard to whether the participant actually quits smoking, attending health seminars, etc. While not subject to all the health-contingent wellness rules discussed below, participatory wellness programs remain subject to HIPAA nondiscrimination rules and must be available to all similarly-situated employees. Therefore, alternatives to participation may be required if an individual is medically unable to participate in a participatory wellness program (e.g., the participant has asthma or a physical condition that prohibits participation in a walking program).

Health-Contingent Wellness Programs

Under the final regulations, a wellness program is based on a health-contingent design if it requires an individual to perform or complete an activity related to a health factor or requires the individual to maintain a certain health standard to receive a reward. Two typical health-contingent designs are activity-only and outcome-based wellness programs. Regardless of type, all activity-only and outcome-based wellness programs are required to satisfy five conditions under the new final rules:

- Health-contingent wellness programs must be reasonably designed to promote health or prevent disease and must permit enrollment at least once a year.
- Rewards may not exceed 30% of the total cost of coverage under the plan (50% if the program is designed to prevent or reduce tobacco use).
- Like participatory wellness programs, rewards must be available to all similarly-situated individuals.
- Health contingent programs must provide a reasonable chance to improve health or prevent disease and cannot be overly burdensome or a ruse to discriminate against individuals based on a health factor. Reasonable alternatives must be provided to individuals who cannot satisfy the initial health standards under an activity-only or outcome-based wellness program.
- Contact information and a statement regarding the availability of reasonable alternative standards and/or waiver, if provided, must be included in the plan materials that discuss the program, including a statement that alternative options offered by a personal physician will be accommodated.

Activity-Only Wellness Programs

Activity-only wellness programs require their participants complete certain activities or tasks, such as walking, dieting, or exercise programs, but do not require the individual achieve and maintain certain health standards. Unlike outcome-based programs, activity-based wellness programs may require individuals to verify that they are unable to attain the initial health standard.

Outcome-Based Wellness Programs

Outcome-based wellness programs require participants to reach or sustain a particular health outcome. Examples include programs which prohibit participants from smoking or programs that require participants to satisfy certain biometric measurements, etc. Unlike activity-only wellness programs, the new final rules expressly prohibit outcome-based wellness programs from requiring verification from individuals who cannot attain the health standard. In addition, any reasonable alternatives offered must be more than a different level of the original measurement standard. For example, as discussed in the final regulations, an alternative to an initial BMI requirement of less than 30 cannot be a BMI requirement of less than 31, but can be an alternative that participants who fail to satisfy the standard lower their BMI by a small percentage over the course of the plan year.

Additional Considerations

Employers subject to ACA's employer mandate should remember that, except in the case of smoking incentives and for purposes of a limited exception in 2014, wellness rewards cannot be factored into determining whether employee-only coverage satisfies affordability requirements.

Related Event: Wednesday, June 26, 2013 from 12:00 pm - 1:30 pm EST

The attorneys of Arnall Golden Gregory's Employee Benefits and Executive Compensation Practice Group invite you to attend a complimentary webinar entitled *"2014 Health Care Reform: Be Prepared! What You Need to Know and Do Now to Avoid Significant Penalties,"* on Health Care Reform, its impact on your business and steps you need to take to deal with it. Get up to date on Health Care Reform as it stands today: post-election, post-Supreme Court decision, and mid-stream in its implementation.

Please click **here** for more information.