

# Employee Benefit ■ Plan Review

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## When Does a Wellness Program Comply with the HIPAA Nondiscrimination Regulations?

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The Department of Labor (DOL) recently issued Field Assistance Bulletin No. 2008-02 covering:

- What types of health promotion or disease prevention programs (wellness programs) offered by a group health plan must comply with the HIPAA nondiscrimination regulations; and
- How to determine whether a company's wellness program complies.

### BACKGROUND

On December 13, 2006, the DOL, the Treasury, and Health and Human Services published joint regulations regarding the nondiscrimination provisions of the Health Insurance Portability and Accountability Act (HIPAA), including how the nondiscrimination provisions apply to wellness programs.<sup>1</sup> The regulations apply to group health plans and group health insurance issuers for plan years beginning on or after July 1, 2007 (or beginning January 1, 2008, for calendar year plans).

The regulations generally prohibit group health plans and insurance issuers from denying an individual eligibility for benefits based on a health factor and from charging an

individual a higher premium than a similarly situated individual based on a health factor. Examples of health factors include: health status, medical condition (including both physical and mental illnesses), claims experience, receipt of health care, medical history, genetic information, evidence of insurability, and disability.

The regulations provide an exception that permits plans to vary benefits (including cost-sharing arrangements) and premiums or contributions based on whether an individual has met the standards of a wellness program that complies with the HIPAA nondiscrimination regulations.

The purpose of the DOL bulletin is to clarify what types of programs must comply with the HIPAA nondiscrimination regulations and how to apply the standards in the regulations to particular wellness programs. Plan sponsors must still be mindful of other applicable law (*e. g.*, tax considerations, the Americans with Disabilities Act (ADA), Age Discrimination in Employment Act of 1967 (ADEA), Title VII of the Civil Rights Act, and other state employment related laws).

The DOL bulletin includes a checklist and related analysis, which are summarized below.

### WELLNESS PROGRAM CHECKLIST

The checklist is designed to help plan sponsors determine whether the plan offers a wellness program that is required to comply with the HIPAA nondiscrimination regulations, and if so, whether the program complies.

YES  NO  A. Has a new plan year started after July 1, 2007?

The HIPAA nondiscrimination regulations apply to wellness programs for plan years beginning on or after July 1, 2007.

YES  NO  **B. Does the plan have a wellness program?**

Generally *any program*, regardless of its title, that promotes health or prevents disease may be a wellness program subject to the regulations.

*Examples include:* a program that reduces an individual's cost-sharing for complying with a preventive care plan; diagnostic testing for health problems; and rewards for attending health education classes, following healthy lifestyle recommendations, or meeting certain biometric targets (such as weight, cholesterol, nicotine use, or blood pressure targets).

YES  NO  **C. Is the wellness program part of a group health plan?**

The wellness program is only subject to the HIPAA nondiscrimination regulations if it is part of a group health plan. If the company operates the wellness program as an employment policy separate from the group health plan, the program may be covered by other laws, but it is not subject to the HIPAA nondiscrimination regulations.

*For example:* an employer adopts a policy that any employee who smokes will be fired. The employment policy is not a part of the group health plan, so the HIPAA nondiscrimination regulations do not apply.

YES  NO  **D. Does the program discriminate based on a health factor?**

A plan discriminates based on a health factor if it requires an individual to meet a standard related to a health factor in order to obtain a reward. A reward can be a discount or rebate of a premium or contribution, a waiver of all or part of cost-sharing arrangements (such as deductibles, copayments, or coinsurance), the absence of a surcharge, or the value of a benefit not otherwise available under the plan.

*For example:* a reduced premium for plan participants who have a cholesterol level under 200.

If you answered **NO** to **ANY** of the above questions, **STOP**. The HIPAA nondiscrimination regulations do not apply to the wellness program.

YES  NO  **E. If the program discriminates based on a health factor, is the program saved by the benign discrimination provisions?**

The HIPAA nondiscrimination regulations permit discrimination *in favor* of an individual based on a health factor. The program may offer a reward to individuals based on an adverse health factor.

*For example:* a plan may grant participants who have diabetes a waiver of the plan's annual deductible if they attend educational classes and follow their doctor's recommendations regarding exercise and medication.

This exception is *not* available if the plan requires diabetics to meet a standard related to a health factor in order to get a reward (*e.g.*, the plan cannot require the individual to maintain a certain body mass index).

If you answered **YES** to the previous question, **STOP**. The program does not violate the HIPAA nondiscrimination regulations.

If you answered **NO** to the previous question, the wellness program must meet the following five criteria.

**F. What are the compliance criteria for a wellness program subject to the HIPAA nondiscrimination regulations?**

The following five criteria must be satisfied:

YES  NO  **1. Is the amount of the reward offered under the plan limited to 20 percent of the applicable cost of coverage?**

The reward amount cannot exceed 20 percent of the coverage elected by the participant (*e.g.*, single or family). When more than one reward is offered, all wellness programs are aggregated in calculating this 20 percent limit.

YES  NO  2. Is the program reasonably designed to promote health or prevent disease?

The program must be reasonably designed to promote health or prevent disease. The program cannot be overly burdensome and cannot be a subterfuge for discrimination.

YES  NO  3. Are individuals who are eligible to participate given a chance to qualify at least once per year?

YES  NO  4. Is the reward available to all similarly situated individuals? Does the program offer a reasonable alternative standard?

The program must contain a reasonable alternative standard to obtain the reward for any individual for whom, for that period: (i) it is unreasonably difficult due to a medical condition, or (ii) it is medically inadvisable, to attempt to satisfy the otherwise applicable standard to obtain the reward.

YES  NO  5. Does the plan disclose the availability of a reasonable alternative in all plan materials describing the program?

ALL plan materials that describe the program must disclose the availability of a reasonable alternative standard. The reasonable alternative can be individually tailored for each participant. The bulletin includes the following sample language that may be used to satisfy this requirement:

“If it is unreasonably difficult due to a medical condition for you 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.”

A company that answers **YES** to **ALL** of the five questions on wellness program criteria satisfies the HIPAA nondiscrimination wellness program rules.

The wellness program of a company that answers **NO** to **ANY** of the five questions on wellness program criteria has HIPAA nondiscrimination compliance issues that need to be addressed.

#### **WHAT SHOULD PLAN SPONSORS DO?**

As soon as possible, plan sponsors should:

- Evaluate all group health plans (including medical, dental, vision, and employee assistance programs) and determine if they offer a reward based on a health factor.
- Use the above checklist to determine if the reward complies with the HIPAA nondiscrimination regulations.
- Contact health and welfare benefits counsel as to how the HIPAA nondiscrimination regulations apply to the plans and how to address any potential noncompliance issues. ☺

#### **NOTE**

1. See 29 C.F.R. § 2590.702.

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