



Changes to Employee Wellness Programs Effective in 2014

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Employers offering wellness programs in conjunction with their group health plans should take note that final regulations governing wellness program incentives were published on May 29, 2013. In addition to increasing the maximum incentive that may be offered under a wellness program, the final regulations provide employees additional opportunities to earn incentives under the wellness programs offered by their employers and clarify when employers are required to make available alternative means for earning an incentive.

No Changes for Participatory Wellness Programs

For employers with wellness programs that do not offer a reward or the reward is tied to participation rather than a standard related to a health factor, the rules have not changed. Such "participatory wellness programs" merely need to be offered to all similarly situated individuals in order to not be considered discriminatory. Examples include a program that reimburses employees for all or part of the cost of a gym membership or a reward based on completion of a health risk assessment, without regard to the results or level of activity.

New Categories for Health-Contingent Wellness Programs

In response to comments received on the proposed regulations that were issued in November 2012, the final regulations divide health-contingent wellness programs into two categories: activity-only wellness programs and outcome-based wellness programs.

An activity-only wellness program is a program that requires an individual to complete an activity related to a health factor in order to obtain a reward, but does not require the individual to attain or maintain a specific health outcome. Examples include walking, diet or exercise programs, which some individuals may be unable to participate in or complete due to a health factor.

In contrast, an outcome-based wellness program is a program that requires an individual to attain or maintain a specific health outcome in order to obtain a reward. These programs generally consist of two tiers: an initial screening and, for individuals who do not satisfy the requirements to earn the reward under the initial screening, another way to earn the reward by participating in an educational program or activity or satisfying a different standard. Examples of outcome-based wellness programs include a program that applies a premium surcharge to smokers or individuals who do not attain specified results under a health risk assessment or screening, such as targets related to body mass index or cholesterol, unless they complete a targeted wellness program, such as a weight-loss program.

Regardless of the type, all health-contingent wellness programs, including activity-only programs, must satisfy the following requirements:

- Employees must be given the opportunity to qualify for the reward at least once per year;
- The total amount of the reward under all health-contingent wellness programs cannot exceed 30% (or 50% for programs designed to prevent or reduce tobacco use) of the cost of coverage under the group health plan;



- The program must be reasonably designed to promote health or prevent disease;
- The full reward must be available to all similarly situated individuals; and
- The plan must disclose in all plan material 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. For outcome-based wellness programs, this disclosure must also be included in any notice that an individual did not satisfy an initial outcome-based standard.

Clarification of Reasonable Alternative Standard Requirement

The final regulations clarify that in order to meet the requirement that a wellness program be reasonably designed to promote health or prevent disease and uniformly available to all similarly situated individuals, outcome-based wellness programs must offer a reasonable alternative standard (or waiver of the otherwise applicable standard) to a broader group of individuals than is required for activity-only wellness programs.

For activity-only wellness programs, a reasonable alternative standard must be made available only to those individuals for whom it is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard or it is medically inadvisable to attempt to satisfy the otherwise applicable standard. For example, if a group health plan provides a reward to individuals who participate in a walking program, the plan must make available a reasonable alternative standard or waive the otherwise applicable standard for any individual for whom it is unreasonably difficult due to a medical condition, or it is medically inadvisable for the individual to attempt, to participate in the program.

For outcome-based wellness programs, a reasonable alternative standard must be provided to all individuals who do not meet the initial standard. For example, if a group health plan provides a reward to individuals who achieve a body mass index that is 26 or lower, the group health plan must make available a reasonable alternative standard for earning the reward to any individual who does not satisfy that standard for any reason. The reasonable alternative standard could be a requirement that the individual participate in a walking program. If the alternative standard is itself a health-contingent wellness program, such as the walking program, it must also satisfy the five-part standard discussed above. If the alternative standard is another outcome-based wellness program, the final regulations set forth additional requirements, including that the alternative standard cannot be a requirement to meet a different level of the same standard without giving the individual additional time to satisfy the standard based on the individual's circumstances.

Involvement of Individual's Personal Physician

For any type of health-contingent wellness program, if an individual's personal physician states that a plan standard is not medically appropriate for that individual, the plan must provide a reasonable alternative standard that accommodates the recommendations of the individual's personal physician with regard to medical appropriateness or waive the otherwise applicable standard. Under an activity-only wellness program, it is permissible for a plan to seek verification from an individual's doctor as to the need for a reasonable alternative standard.

As employers begin to design their wellness programs for the 2014 plan year, they should review their existing wellness programs and make any necessary adjustments for compliance with the final regulations, which are effective for plan years beginning on or after January 1, 2014.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors:

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