

## *Employer Wellness Programs: Final Rules Under The Affordable Care Act*

BY GLOBAL COMPENSATION, BENEFITS, AND ERISA PRACTICE

### **INTRODUCTION**

Many employers offer wellness programs in conjunction with their health plans (such as a \$50 per month credit against premiums for completing a health risk assessment). On May 29, 2013, the Departments of Health and Human Services, Labor, and Treasury issued final rules implementing Affordable Care Act rules regarding group health plan related employment-based wellness programs. These rules generally apply to all group health plans and take effect on January 1, 2014. Although wellness programs are extremely common among larger employers, whether they are economically sensible is open to question and difficult to quantify empirically.<sup>1</sup> Employers that will offer wellness programs after 2013 should prepare now for compliance, and keep an eye out for future EEOC guidance.

### **BACKGROUND ON WELLNESS PROGRAMS**

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) prohibits group health plans from discriminating based on health factors as to eligibility, premiums, or benefits, unless pursuant to a bona fide "wellness program" that satisfies the applicable regulations. The purpose of wellness programs is generally both paternalistic (to promote a healthier workforce) and practical (to improve productivity and reduce health costs). The applicable regulatory standards reflect administrative support for incentives that all employees can obtain. As a result, they vary as follows depending on whether the wellness program is merely participatory or health-contingent:

- o Participatory wellness programs do not offer a reward or do not require satisfaction of a specific standard related to a health factor to obtain the reward. These programs are permissible if available to all similarly situated individuals regardless of their health status.
- o Health-contingent wellness programs offer a reward to employees meeting a specific standard related to a health factor, whether by completing an activity (activity-based) or achieving a health outcome (outcome-based). This type of program must satisfy the five standards described below.

The chart on the next page categorizes several examples of wellness programs.

	Participatory	Health-Contingent
Gym membership reimbursement	✓	
Diagnostic tests that do not require any specific result or outcome	✓	
Attending a health seminar	✓	
Walking, diet, or exercise programs		✓
Reducing or eliminating tobacco use		✓
Attaining or maintaining a specific health outcome such as weight, blood pressure, or cholesterol or glucose level		✓
Reward for taking other healthy actions		✓

## SPECIAL RULES APPLICABLE TO HEALTH-CONTINGENT WELLNESS PROGRAMS

Unlike participatory programs, health-contingent programs must satisfy the following five standards:

- Provide an opportunity to qualify for the reward at least annually.
- Reward cannot exceed 30% of cost-of-coverage, except that a program designed to prevent or reduce tobacco use cannot exceed a total of 50% of cost-of-coverage.
- Reasonably designed to promote health or prevent disease, and not be overly burdensome, a subterfuge for discrimination based on a health factor, or highly suspect in the method promoting health or preventive disease. For outcome-based programs, a reasonable alternative standard must be provided to anyone who does not meet the initial standard as noted in the following bullet.
- Full reward must be available to all similarly situated individuals. To be uniformly available, a program must provide a reasonable alternative standard or a waiver of the otherwise applicable standard, at the individual's request, under the following circumstances:
  - for activity-based programs, for any individual (a) if the standard is unreasonably difficult due to a medical condition, or (b) it would be medically inadvisable to attempt to satisfy the standard, and
  - for outcome-based programs, for any individual who does not meet the initial standard.

For an activity-based program, a plan may require verification in a form such as a statement from the individual's physician that clause (a) or (b) applies.

- All plan materials describing the terms of the program must disclose the availability of the alternative standard or the possibility of waiver. The rules provide content requirements and sample language.

Whether a reasonable alternative has been provided is a facts and circumstances test. The rules offer the following specific guidance: (1) Educational programs must be free, and the plan must offer

assistance finding the program; (2) Completion of the alternative must not require an unreasonable time commitment; (3) For a diet program, the plan must pay participation fees, but not for food, and (4) If an individual's physician deems a plan standard medically inappropriate, the reasonable alternative must accommodate the physician's recommendations.

## DO'S AND DON'TS FOR WELLNESS PROGRAMS

- Ensure that employees understand that reasonable alternatives are available and implement procedures for employees to communicate their need.
- Comply with other laws imposing limitations on wellness programs, including the ADA and GINA, and any EEOC directives. For wellness programs not related to group health plans, these other sources of law will provide the primary guidance for how such programs must be structured.
- Do not offer programs likely to fail the reasonable design requirement, discourage participation, or require alternatives that may be unreasonable, such as a reward based on participation in a week-long juice cleanse, an office weight-loss competition where people's weights are publicly displayed, or a reward for completing an Olympic triathlon.



*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:*

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<sup>1</sup> See, e.g., *Workplace Wellness Programs Study, Final Report*, RAND Health 2013, at 18, 20-21.