

LEGISLATIVE BRIEF:

NEWS RELATED TO THE AFFORDABLE CARE ACT

FINAL REGULATIONS FOR WELLNESS PROGRAM INCENTIVES

Federal agencies have issued [final regulations](#) on an Affordable Care Act provision that increases the maximum permissible rewards for health-contingent wellness programs starting in 2014. Under the rule, employers can offer a maximum reward of 30 percent of the total cost of employee-only coverage (employer and employee share) for most health-contingent wellness programs that require an individual to meet a specific health standard to obtain a reward. Rewards can be as high as 50 percent of the cost of coverage for wellness programs designed to prevent or reduce tobacco use. If family members are eligible to participate in the rewards program, then rewards can be based on the total cost of the family premium. In this case, employers may use any reasonable method to allocate rewards between employees and dependents as long as the plan adheres to the limit in aggregate.

The final regulation confirms that the term "reward" includes both positive incentives (such as a premium discount) or the avoidance of penalties. They also clarify that the regulations do not apply to all types of programs or information technology platforms that could be labeled a wellness program or disease management program. Rather, the agencies say the regulations are in place to provide criteria for an exception to non-discrimination rules and an affirmative defense against a claim of discrimination based on health status.

Reasonable Alternative Standards

The major difference between the proposed rule and the final rule relates to standards for "reasonable alternatives" that apply to health contingent wellness programs but do not apply to participatory-only wellness programs. To give plans more flexibility in designing alternatives, the final regulations split health contingent wellness programs in two categories: activity-only and outcome-based. With activity-only programs, plans may require a physician to verify that it is not medically advisable for a person to participate in a wellness program before triggering an alternative standard requirement. Outcome-based programs must offer an alternative to any individual that does not meet a standard for reward, regardless of any health or medical condition.

The chart on the next page of this document will help plans determine if their wellness program falls into either one of the two health contingent categories or is participatory-only in nature. It also describes in brief the regulations that apply by category. The final regulations offer some examples of "reasonableness" of alternatives that are the same as the proposed rules, but add a new requirement that the time commitment must be reasonable for meeting an alternative standard.

Notice Requirement

Any plan materials that describe the terms of a wellness program (ie. premium differentials) must describe the availability of a reasonable alternative standard to qualify for the reward or the possibility of a waiver. The final regulations added new requirements that contact information be included along with a statement that the recommendations of a personal physician will be accommodated. New sample language is provided in the rule.

More Information

The final rules are in effect for plan years starting on or after January 1, 2014. Non-compliant programs may be subject to a \$100 per day penalty per individual affected. In the preamble to the rule, the agencies state that they are still open to making modifications to the rules via subregulatory guidance as questions are asked and addressed. Questions should be directed to the Employee Benefits Security Administration hotline at 1-866-444-EBSA. Additional information is available from the [Groom Law Group](#) through The Alliance's partnership with the American Benefits Council.

If you have questions about your plan's compliance with these requirements or how to implement them, please contact your attorney.

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Type of Wellness Program	Applicable Regulations	Examples
<p>Participatory Only</p> <ul style="list-style-type: none"> › No health factor involved › There should be no medical reason a person cannot participate 	<ul style="list-style-type: none"> › No reasonable alternative required › Other HIPAA wellness requirements do not apply, but with all wellness programs need to be aware of other regulations (ADA, GINA, etc) › No limit on reward and not aggregated with health contingent limits 	<ul style="list-style-type: none"> › Become fitness center member › Get diagnostic test or preventive health visit › Participate in a HRA › Visit with health coach › Attend smoking cessation or watch health video/seminar
<p>Health Contingent – Activity Only</p> <ul style="list-style-type: none"> › Complete an activity related to a health factor. › Specific outcome not required. › There may be a medical reason a person cannot participate. 	<ul style="list-style-type: none"> › Individuals must be given opportunity to qualify at least once per year › Reward limited to 30% (or 50% for tobacco) › Must be reasonably designed to promote health or prevent disease, not overly burdensome and not a subterfuge for discrimination › Must provide a reasonable alternative (or waive the requirement) upon the request of an individual for whom it would be medically advisable to satisfy the standard or whose medical condition would make it unreasonably difficult to participate › Physician verification may be required › If the individual's personal physician says that the alternative is not medically appropriate, the plan must accommodate the recommendation of the physician for a second alternative program › Plan alternative may fall into another category and adhere to the standards that apply to that category › Plan must provide notice of the availability of alternatives, updated sample language is available 	<ul style="list-style-type: none"> › Walk certain number of times per week › Diet Program (Plan must pay fees but not for cost of food) › Exercise program
<p>Health Contingent – Outcome Based</p> <ul style="list-style-type: none"> › Tied to a health factor and outcome › Requirements differ after measurement – those that don't meet a target must do more than others that do. 	<p>Requirements that apply to health contingent - activity only programs (above) apply, except for these key differences:</p> <ul style="list-style-type: none"> › The plan must provide an alternative for any individual that does not meet the initial standard based on measurement, test for screen related to a health factor <u>regardless of medical need</u> › It is impermissible for the plan to require physician verification › Participants may request that alternative be to comply with personal physician recommendations › Notice of alternative standard must be included in any disclosure to participant that he or she did not satisfy an outcome based standard 	<ul style="list-style-type: none"> › Take HRA, and participate in health coaching only if at risk. › Reach target cholesterol numbers › Lose weight › Be tobacco free