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Proposed Wellness Program Incentive Rules Reflect Concerns Related to Discrimination Based on Health Status

In joint rules issued November 20, the U.S. Departments of the Treasury, Labor, and Health and Human Services (collectively, "the Departments") updated their 2006 regulations on wellness programs to account for changes made by the Affordable Care Act (ACA).[1] While permitting plans to provide larger wellness discounts, the proposed rules appear to reflect a concern that wellness programs could be used to discriminate against individuals with health conditions.

The proposed rules were published in the *Federal Register* on November 26 and comments are due January 25, 2013.

Executive Summary

Participatory wellness programs, such as gym memberships and health risk assessments, are common in group health plans. Much less common are the health outcome-based wellness programs such as those providing discounts on health coverage for participants who quit smoking or lose weight, which are the focus of the proposed rules.

The ACA increases the maximum permissible reward for achieving a particular health outcome to 30% of the cost of health coverage, from the current level of 20%. The Departments propose to increase the permissible discount for participants in tobacco cessation programs to 50%. Yet the proposed rules reflect caution by the Departments that outcome-based wellness programs may be a means to discriminate against those with health conditions and propose new measures to limit this possibility:

- Under the existing rules, plans must offer a reasonable alternative standard if it is medically unreasonable for an individual to achieve the initial outcome of the wellness program, such as losing a certain amount of weight. Under the new rules, when any participant fails to achieve the required score on the initial measure, the plan must automatically offer an alternative; the participant need not demonstrate that achieving the required score would be medically unreasonable.

- Plans are not permitted to require verification that it is medically unreasonable for a participant to complete the wellness program before offering a reasonable alternative when it is apparent from the individual's condition that he or she is not able to complete the original wellness program.

- When a reasonable alternative standard is offered, such as participating in a diet class, the plan must pay the cost of the program, such as tuition, although the plan may impose normal cost-sharing for medical items and services.

The Departments solicit comment on whether evidence-based standards should be used to determine whether a wellness program is truly designed to promote health or is instead subterfuge for underwriting.

[1] "Incentives for Nondiscriminatory Wellness Programs in Group Health Plans," 77 Fed. Reg. 70620 (Nov. 26, 2012); *see* Public Health Service Act § 2705(j), as added by Affordable Care Act § 1201.

Key Provisions

Scope of the rules: "participatory" vs. "health contingent" programs

The 2006 rules, the ACA, and the new proposed rules all treat "participatory" wellness programs differently than "health contingent" wellness programs. Health contingent programs condition a reward, such as a discount on health coverage, on achieving a certain outcome, such as lowering one's cholesterol or quitting smoking. Health contingent programs are highly regulated and are the focus of the proposed rules. Participatory wellness programs are not contingent on achieving particular outcomes, such as a program that provides free gym memberships. These programs continue to be permissible as long as they are offered to all similarly situated individuals.

Maximum discount increases

Under the 2006 rules, the maximum reward for achieving the outcome in a health contingent program was 20% of the combined employer and employee contribution to the cost of coverage. The ACA increased that maximum to 30% and gave the Departments the option of extending it to 50%. Most wellness programs today do not offer discounts close to the current maximum of 20%. Therefore, the Departments do not expect that a significant number of plans will take advantage of the new maximum discount of 30% permitted by the ACA, when they are not utilizing the lower maximum discount permitted today.

However, the Departments are proposing to extend the reward to 50% of the cost of coverage for individuals who participate in tobacco cessation wellness programs. The Departments have chosen to do this in order to ensure the regulation of group health plans under these rules is consistent with the rules the Department of Health and Human Services ("HHS") has proposed for group health insurance coverage sold to group health plans.[2] Under the HHS rules, insurers are able to apply a 50% tobacco surcharge to premiums in the small group market only if they provide tobacco users the option of participating in a wellness program to eliminate that surcharge. Increasing the permissible wellness discount to 50% for tobacco cessation programs permits group health plans that buy health insurance coverage to pass on the actual cost of the coverage to their participants when insurers impose the tobacco surcharge permitted by the HHS rules.

Reasonable alternative standard

For individuals for whom it is unreasonably difficult, or medically inadvisable, to complete a health contingent wellness program because of a health condition, a group health plan must provide a reasonable alternative standard to obtain the same reward. This requirement, which first appeared in the 2006 rules and was repeated in the ACA, is designed to ensure group health plans are not using wellness programs as a subterfuge to discriminate against individuals with health conditions. In the proposed rules, the Departments announce a new bright-line rule: When a plan participant fails to achieve the goal of a wellness program that is based on a test or screening, the participant is not obliged to demonstrate that achieving the goal is unreasonably difficult. Instead, the plan must immediately offer a reasonable alternative standard.

Reasonable alternatives could include completing an educational program that an employer makes available to plan participants without charge; a free diet program; or treatments or medications, as long as the participant's personal physician does not state the treatments or medications are medically

[2] HHS released proposed rules for regulating the individual and group health insurance markets contemporaneously with the wellness proposed rules. "Patient Protection and Affordable Care Act; Health Insurance Market Rules; Rate Review," 77 Fed. Reg. 70584 (Nov. 26, 2012). Manatt has prepared a separate analysis of the health insurance market rules.

inappropriate for the participant. The proposed rules make clear that the plan must pay for any alternative program offered to participants, although the plan may impose standard cost-sharing on items or services prescribed as part of the alternative.

The ACA permits plans to seek verification from the participant's physician that a particular wellness program would be medically unreasonable, if seeking such verification would be reasonable under the circumstances. The Departments interpret this limitation to mean that while verification is permitted in cases that require medical judgment, it cannot be required where it is obvious to a layperson that a medical condition prevents the person from completing a wellness program.

Reasonable program design

The proposed rules also preserve the requirement from the 2006 rules that the wellness program be reasonably designed to improve health or to prevent disease, not be a subterfuge to discriminate against the sick, and not be overly burdensome. One element of a reasonable program design is that participants must be given the opportunity to qualify for the discount at least once a year. In the proposed rules, the Departments solicit comments on whether new evidence- or practice-based standards are needed to determine whether a program design is reasonable. The proposed rules permit plans to target wellness programs to certain populations, such as those with high cholesterol or smokers, as long as those without those conditions have a reasonable alternative method to qualify for the discount.

New model notice language

The proposed rules maintain the 2006 requirement that plans provide notice of the availability of a reasonable alternative when they announce the terms of a wellness program. The Departments are proposing new sample language to attempt to rectify confusion generated by the sample language in the 2006 rules. The Departments seek comment on the proposed notice. The new language is:

> *Your health plan is committed to helping you achieve your best health status. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at [insert contact information] and we will work with you to find a wellness program with the same reward that is right for you in light of your health status.*

Applicability to grandfathered health plans

Although most provisions of the ACA do not apply to grandfathered group health plans that predate the ACA, the Departments have proposed to apply the revised wellness rules to grandfathered plans, relying on their existing authority to implement the Health Insurance Portability and Accountability Act of 1996. This is intended to ensure that the rules can be applied simply and uniformly across group health plans.

Conclusion

The Departments' proposal would establish more clear boundaries for acceptable wellness programs and may signal that the Departments are becoming more concerned that wellness programs could be a vehicle for discrimination against those with health conditions. The Departments solicit comments on whether to adopt even more restrictive rules and will consider comments received by January 25, 2013.

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