

Publications

Labor and Employment Alert: Changes for Wellness Programs

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Summary

New final regulations for wellness programs apply to plan years beginning on and after January 1, 2014. If you have a wellness program and a health plan operating on a calendar year, you will want to consider the new requirements in preparing for 2014 open enrollment. Most significantly, if you have an outcomes-based wellness program: (1) you must offer a reasonable alternative standard to all participants; (2) you cannot require that a participant provide physician verification of the need for the alternative standard; and (3) your wellness program materials must include a new form of notice of the availability of the alternative standard.

Types of wellness programs

A wellness program is, generally, a program of health promotion or disease prevention. Application of the [new regulations](#) (published May 29, 2013) depends on whether the wellness program is classified as a participatory wellness program, an activity-only wellness program, or an outcomes-based wellness program.

Participatory Wellness Programs

A participatory wellness program is a wellness program for which there is no reward or, if there is a reward, the reward is for an activity that is not related to a health factor. Common participatory wellness programs include filling out a health risk assessment or having a diagnostic test performed, where a reward is provided without regard to the outcome or any further action.

Activity-Only Wellness Programs

An activity-only wellness program is a wellness program that provides a reward for an activity related to a health factor. Examples include a diet and/or exercise program or attending a nutrition class, where the reward is provided for participation and not an outcome or meeting any standard before or after the activity.

Outcomes-Based Wellness Programs

An outcomes-based wellness program is a wellness program that provides a reward for attaining or maintaining a specific health outcome. Examples include rewards for having normal body mass index (BMI) or not using tobacco products.

Changes to the regulation of wellness programs

Still only minimal requirements for participatory wellness programs

For participatory wellness programs, only the name has changed. A participatory wellness program still needs to be made available to all similarly situated individuals but otherwise has no design limitations (but see “Continued uncertainty as to the application of the ADA,” below).

Five requirements for activity-only and outcomes-based wellness programs

Activity-only wellness programs and outcomes-based wellness programs must meet five requirements, summarized in the following table.

| Activity-Only Wellness Programs | Outcomes-Based Wellness Programs |
|--|--|
| 1. <u>Opportunity to qualify</u> : At least once per year. | 1. <u>Opportunity to qualify</u> : At least once per year. |
| 2. <u>Size of the reward</u> : Limited to 30% of the cost of coverage, plus an additional 20% for non-tobacco use (for a maximum total of 50%). Note: The new regulations do not address the definition of tobacco use for purposes of the increased limit on the size of the reward. While not entirely clear, we think this means wellness programs need not use the definition of tobacco use applicable to insurers selling individual insurance policies (four or more times per week over six months). | 2. <u>Size of the reward</u> : Limited to 30% of the cost of coverage, plus an additional 20% for non-tobacco use (for a maximum total of 50%). Note: The new regulations do not address the definition of tobacco use for purposes of the increased limit on the size of the reward. While not entirely clear, we think this means wellness programs need not use the definition of tobacco use applicable to insurers selling individual insurance policies (four or more times per week over six months). |
| 3. <u>Reasonable design</u> : Program must not be overly burdensome or a subterfuge for discrimination based on health status. | 3. <u>Reasonable design</u> : Program must not be overly burdensome or a subterfuge for discrimination based on health status. <i>In addition, the program must offer a reasonable alternative standard to qualify for the reward to every individual who does not meet the initial standard.</i> |
| 4. <u>Uniform availability</u> : An alternative to qualify for the full reward (or waiver of the standard) must be offered to individuals for whom the activity would be medically inadvisable or unreasonable due to a medical condition. | 4. <u>Uniform availability</u> : An alternative to qualify for the full reward (or waiver of the standard) must be offered to individuals for whom the activity would be medically inadvisable or unreasonable due to a medical condition. |

1. The plan is permitted to require verification from the individual’s physician.
 2. If the alternative is an education program, the plan must arrange and pay for the program.
 3. The time commitment must be reasonable.
 4. If an individual’s physician states that a plan standard is not medically appropriate for the individual, the plan must provide a reasonable alternative standard that accommodates the recommendations of the individual’s physician.
4. Uniform availability: An alternative to qualify for the full reward (or waiver of the standard) must be offered to individuals who do not meet the initial standard.
 1. The plan *is not* permitted to require verification from the individual’s physician.
 2. If the alternative is an education program, the plan must arrange and pay for the program.
 3. The time commitment must be reasonable.
 4. If an individual’s physician states that a plan standard is not medically appropriate for the individual, the plan must provide a reasonable alternative standard that accommodates the recommendations of the individual’s physician.
 5. Notice of alternative standard: The plan must provide notice of the availability of the alternative standard in all materials describing the program. The notice must include

contact information and a statement that recommendations from the individual's physician will be accommodated. 5. Notice of alternative standard: The plan must provide notice of the availability of the alternative standard in all materials describing the program *and in disclosures informing an individual that he or she did not satisfy the initial outcomes-based standard*. The notice must include contact information and a statement that recommendations from the individual's physician will be accommodated.

New notice for activity-only and outcomes-based wellness programs

As noted in the chart above, activity-based wellness programs and outcomes-based wellness programs must include a notice of the availability of an alternative standard in all materials describing the wellness program. In addition, an outcomes-based wellness program must include the notice in communications informing an individual that he or she did not meet the initial standard for the reward. The regulations include the following sample notice:

Your health plan is committed to helping you achieve your best health. 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 (and, if you wish, with your doctor) to find a wellness program with the same reward that is right for you in light of your health status.

Continued uncertainty as to the application of the ADA

The new regulations – issued jointly by the IRS, DOL and HHS – do nothing to address the continued uncertainty as to the EEOC's view of the application of the Americans with Disabilities Act (ADA) to wellness programs. The EEOC has not yet provided official guidance although EEOC representatives have indicated that significant financial rewards for participation in a wellness program may violate the ADA's prohibition on involuntary medical examinations and inquiries. The EEOC held a hearing on wellness programs on May 8, 2013 – a sign that the EEOC may be moving toward formalizing its views as to when a reward for participation in a wellness program is so large as to render participation involuntary. Of course, the courts may ultimately resolve the issue differently. In the one case decided to date (*Seff v. Broward County*, 691 F.3d 1221 (11th Cir. 2012)), the court found a wellness program to be a legitimate exercise of the plan sponsor's administration of health plan risks.

This alert is a summary and cannot include all details that may be relevant to your situation. As always, please contact us if you want more information on these developments or other employee benefits matters.