



Employer Wellness Programs Compliance Update

The HIPAA nondiscrimination regulations aren't new to most employers with wellness programs. Employers who offer health-contingent wellness programs are especially familiar with the requirement to provide a reasonable alternative standard as part of their wellness program compliance.

Currently, a pending district court case, *Secretary of Labor v. Macy's, Inc. et al*, has placed a greater focus on the reasonable alternative standard portion of the HIPAA nondiscrimination regulations. This focus is specific to health-contingent wellness programs that are outcomes based. These wellness programs require individuals to attain or maintain a certain health outcome (or outcomes) to receive a reward. A tobacco health plan premium surcharge is one example. Although this is an active case, with no official judgements or rulings, the flag has been raised by the Department of Labor specific to the reasonable alternative standard and outcomes-based programs.

There are three immediate takeaways from this case worth further consideration by employers, especially those offering health-contingent/outcomes-based wellness programs:

1. A reasonable alternative standard must be offered and a notice describing the terms of the standard must be disclosed in ALL plan materials. Employers should consider the list of all plan materials used for wellness program communication. For example:

- All written documents
- Digital and electronic communication mediums
- Plan documents (Summary Plan Descriptions or Wrap Plan Documents)

2. The reasonable alternative standard must be an actual "alternative" to the standard requirement and cannot be satisfaction of the standard itself. For example, if the wellness standard is participants are required to abstain from tobacco use (or pay a premium surcharge), the alternative offered cannot be to ask participants to abstain from tobacco use for a certain period of time (e.g. six months). The same is true if blood, saliva or urine testing is used to establish the standard for a wellness program. A re-test of the above for a participant cannot be considered as an alternative, because the test itself is the standard.

3. Completion of the reasonable alternative standard according to the plan requirements equates to the participant being excused from the surcharge or higher premium for the entire period of coverage. The nondiscrimination rules do allow employers the flexibility to determine how to provide the portion of the reward for the period before an alternative was satisfied. For example, this could be payment for the retroactive period or pro rata over the remainder of the year.

Regulatory agencies are sending a clear message to employers that compliance with wellness programs is important. This message may be frustrating to some, however program compliance should not overshadow the significant value that improved health has on businesses. When organizations integrate their health and wellness strategies into the overall plan for the business, issues specific to incentives and associated compliance will become less complex, more streamlined and easier to administer. Finally, please note that employer wellness programs should always be reviewed by a qualified benefits and labor attorney for compliance.

Sources: *Winston & Strawn, LLP; Center for Wellness Law; Zywave, Inc.; WELCOA*

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