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FAQs Part 74: Departments Confirm No Retroactive "Full Reward" Required for Wellness Programs

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During the last week of August, the Departments of Labor, Treasury, and Health and Human Services (the "Departments") issued FAQs Part 74, addressing HIPAA nondiscrimination and wellness program rules.

In the FAQs, the Departments confirmed that sponsors of group health plans have considerable flexibility in crafting wellness programs and should not be penalized for declining to pay a wellness program reward retroactively to the first day of the plan year when a participant satisfies a reasonable alternative standard mid-year. They announced immediate enforcement relief for that approach until further guidance or regulations are issued. Although the Departments' pronouncement may seem dry and technical on its face, this guidance may have implications for the several dozen group health plan fiduciaries currently mired in ERISA class action litigation about tobacco premium surcharges.

Remind me: What are the rules that apply to wellness programs?

By way of brief background, HIPAA (and later the Affordable Care Act) generally prohibits discrimination in eligibility, benefits, or premiums based on a health factor, but permits an exception for rewards tied to programs of health promotion and disease prevention. Wellness programs come in two types. A participatory wellness program does *not* condition any reward on satisfying a health-factor standard (*e.g.*, gym reimbursement). A health-contingent wellness program *does* condition the reward on satisfying a health-related objective standard (*e.g.*, not using tobacco or achieving certain biometric screening results) and may be structured as "activity-only" or "outcome-based."

Under final regulations issued by the Departments in 2013, health-contingent wellness programs must satisfy five requirements: (1) an annual opportunity to qualify for the reward; (2) a reward capped at 30% of the total cost of employee-only coverage (50% for programs designed to prevent or reduce tobacco use); (3) reasonable design to promote health or prevent disease; (4) availability of the “full reward” to all similarly situated individuals, including through a reasonable alternative standard or waiver; and (5) disclosure of the availability of a reasonable alternative standard in plan materials describing the wellness program’s terms.

How do these rules intersect with the tobacco premium surcharge litigation?

Consistent with the rules summarized above, some group health plans impose a premium surcharge on tobacco users. Over the past few years, group health plan fiduciaries have faced putative class actions in connection with such programs alleging: (1) the plan’s failure to reimburse tobacco premium surcharges retroactive to the beginning of the plan year for an individual who satisfies the reasonable alternative standard mid-year violates the wellness program rules requiring that the “full reward” be available to similarly situated individuals; and (2) group health plan fiduciaries have failed to sufficiently disclose the availability of a reasonable alternative standard in plan materials describing the wellness program.

Plaintiffs have relied heavily on language in the preamble to the 2013 final regulations to support their contention that the “full reward” requires retroactive reimbursement of premium surcharges for periods before completion of the reasonable alternative standard mid-year. Courts have split on whether the wellness program rules require a retroactive reward in the manner urged by the plaintiffs.

Does the “full reward” require retroactive reimbursement of premium surcharges?

Not under FAQs Part 74. Acknowledging that "the regulatory text of the 2013 final rules does not clearly require retroactive application of the reward," the Departments state that until further guidance or regulations are issued, they will not take enforcement action against a group health plan for failing to provide the reward retroactively to the beginning of the plan year, so long as the plan: (1) provides the reward corresponding to the period after the reasonable alternative standard is satisfied, and (2) otherwise satisfies the wellness program requirements. The Departments indicated that further guidance is forthcoming but that they are "committed to ensuring that plans and issuers have the flexibility to promote health through wellness programs in a nondiscriminatory manner" and that "plans and issuers should have the freedom to establish innovative programs that motivate individuals to make efforts to improve their health."

The Departments emphasized that the enforcement relief does not disturb any of the other wellness program rules. Group health plans relying on this relief must still provide sufficient time for individuals to complete the alternative standard and receive a reward.

Must the reasonable alternative standard be disclosed alongside every reference to the wellness program?

Probably not. The availability of a reasonable alternative standard must be disclosed in all plan materials describing the terms of a health-contingent wellness program, and, for outcome-based programs, in any notice that an individual did not satisfy the initial standard. Materials that merely mention that a wellness program is available (for example, a passing reference in a summary of benefits and coverage (SBC)), without describing its terms or standards, do not trigger the disclosure obligation related to the reasonable alternative standard.

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Takeaways for plan sponsors and employers: FAQs Part 74 provide helpful guidance to plan sponsors with health-contingent wellness programs and clarifies the Departments' interpretation of the "full reward" requirement. However, given the plethora of active ERISA class action litigation on the meaning of "full reward" and the fact that the FAQs announce enforcement discretion (and not a rule change), plan sponsors may wish to sit tight for the moment before making adjustments to current wellness program practices in reliance on this guidance.

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