

## **Does Your Wellness Program Meet the Alternative Standard Rules?**

Martha L. Hutzelman  
Law Office of Martha L. Hutzelman

If your company offers a wellness or health promotion program that offers financial rewards to your employees, you need to be sure that you are meeting the alternative standard rules that apply to these programs.

### **What is a Wellness Program?**

A wellness program is designed to provide financial incentives to employees (and their dependents) if they participate in certain health promotion or disease prevention programs. For example, if an employee completes a health assessment survey, he may be awarded \$50 in cash under his employer's wellness program. Similarly, if the employee and his spouse participate in a newborn care class, he may receive reimbursement for the cost of the class. As another example, if an employee works out on a regular basis in a fitness center, he may receive reduced health insurance premiums.

### **What is the Purpose of the Alternative Standard Rules?**

The alternative standard rules that apply to wellness programs were included in the final nondiscrimination regulations issued under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") in 2006. The purpose of these rules is to make sure that the rewards offered under a wellness program are available to all types of individuals, even those who may not be able to satisfy certain health standards or criteria. To accomplish this, the rules provide that, among other things, a wellness program must offer alternative standards that can be met by individuals who are unable to satisfy the health standards that the wellness program would normally require. In other words, the wellness program may not discriminate against individuals who cannot satisfy certain health standards or criteria.

These rules were effective for plan years that began on or after July 1, 2007. Thus, as of January 1, 2008, calendar year wellness programs must comply with these rules.

How do these rules work? Assume that your wellness program previously offered a reward only if an individual satisfies a certain health standard, such as quitting smoking or walking or running a certain distance each week. Under the alternative standard rules, you would need to also offer the same reward to individuals who cannot quit smoking or walk or run if those individuals accomplish other alternative tasks, such as attending a monthly health education seminar.

## Wellness Programs Offering Rewards Conditioned on Satisfying Health Standards

If your wellness program previously offered rewards that are conditioned on the employee satisfying certain health standards, you would need to make changes to the wellness program so that it meets the alternative standard rules. To satisfy these rules, the documents and operations of the wellness program would have to be changed so that the program would meet the following five (5) additional new rules:

- (1) **Limited Reward** – The total rewards offered under your wellness program may not exceed 20% of the cost of employee-only coverage under your group health plan. In determining the cost, both employee and employer contributions are considered.
- (2) **Reasonably Designed to Promote Health or Prevent Disease** – Your wellness program must be reasonably designed to promote good health or prevent disease. To meet this standard, the program must have a reasonable chance of improving the health of or preventing disease in participants. The wellness program may not be overly burdensome, a subterfuge to discriminate based on a health factor or use highly suspect methods to promote health or prevent disease.
- (3) **Reward Available Once Per Year** – Individuals eligible for the wellness program must be permitted to qualify for the rewards under the program at least once per year.
- (4) **Waiver or Alternative Standard** – The rewards offered under the wellness program must be made available to all similarly situated individuals. If the individual has a medical condition that makes it unreasonably difficult or medically inadvisable to meet the health standard required to obtain the reward, the wellness program must offer a waiver or a reasonable alternative standard to meet to obtain the reward. For example, if a reward is made available to individuals who walk 10,000 steps a month, then an alternative must be made available for those unable or not in condition to walk. The alternative could be that the same reward will be given to those who attend monthly classes or video presentations about the importance of fitness and exercise. The wellness program is permitted to require a physician's statement verifying that a health factor makes it unreasonably difficult or medically inadvisable for an individual to meet a wellness program standard.
- (5) **Disclosure Rules** – A description of the terms of the reasonable alternative standard for obtaining the wellness program reward must also be disclosed in plan materials that describe the terms of the wellness program. Model language for this disclosure is available.

## **Wellness Programs Not Offering Rewards Conditioned on Health Standard**

If your wellness program does not offer rewards that are conditioned on the individual satisfying a health standard or criteria, the wellness program does not have to be changed to meet the alternative standard rules. Some examples of wellness programs that are not conditioned on satisfaction of a health standard are:

- (1) a wellness program that reimburses the cost of membership at a fitness center without requiring proof that the employee or his dependents actually use the fitness center;
- (2) a wellness program that reimburses the cost of smoking cessation classes regardless of whether the employee or his dependent actually quits smoking;
- (3) a wellness program that waives the co-payment or deductible under the employer's group health plan for prenatal care or well-baby visits; and
- (4) a wellness program that provides a reward to any employee who attends a monthly health education seminar.

## **Non-Smoker Premium Discounts are Wellness Programs That Must Offer Alternatives**

The alternative standard rules clarify that group health plans that offer premium discounts for non-smokers or premium surcharges for smokers are wellness programs that condition the receipt of the reward on the employee meeting a health standard. As a result, these group health plans must now comply with the alternative standard rules.

To comply with the rules, a reasonable alternative standard for obtaining the reward must be offered to individuals for whom it is unreasonably difficult to quit smoking. For example, as an alternative standard, the employee may attend a different smoking cessation class each year in order to receive the premium discount. As another example, the plan may permit the individual to undergo nicotine replacement therapy during the year or to view a 12-hour video series on health problems associated with tobacco use over a 12-month period in order to receive the premium discount.

The alternative standard rules provide that the plan may require a physician's statement verifying that a health factor, such as addiction to nicotine, makes it unreasonably difficult or medically inadvisable for an individual to meet the wellness program standard.

## **Compliance With Other Laws**

Wellness programs must comply not only with the HIPAA nondiscrimination rules, but also with other federal and state laws, such as the Americans with Disabilities Act ("ADA"), Title VII of the Civil Rights Act of 1964, the Consolidated Omnibus

Budget Reconciliation Act of 1986 (“COBRA”) and the Family and Medical Leave Act of 1993 (“FMLA”). Compliance with the HIPAA alternative standard rules does not guarantee that the wellness program also complies with these other requirements.

For example, the Equal Employment Opportunity Commission (“EEOC”) has indicated that the offering of a “substantial” premium discount or other reward to an employee who completes an extensive medical questionnaire under a wellness program may violate the ADA requirement that any medical inquiry must be voluntary, because the amount of the monetary reward is so significant as to nullify the voluntary nature of the program.

Thus, when you are making changes to the documentation and operations of your wellness program, you must also keep in mind the requirements of these other federal and state laws.

### **Implementing the Wellness Program Rules**

In order to implement the wellness program rules, you must confirm that your group health plan document and summary plan description are amended to include the alternative standard wellness rules, as well as any plan document and employee communications regarding the wellness program. The day-to-day administration of the wellness program should also be revised to incorporate the alternative standard requirements.

This article provides an overview of the alternative standard rules, but it does not address all of the requirements that a wellness program must satisfy in order to comply with these rules or the interface of these rules with other requirements, such as the ADA. Therefore, it is recommended that employers seek legal assistance when amending plan documents and operations to satisfy the wellness program alternative standard requirements.

Martha L. Hutzelman is an employee benefits / ERISA attorney with the Law Firm of Martha L. Hutzelman in Columbus, Ohio. For more information, please contact Ms. Hutzelman at (614) 775-9134 or [mhutzelman@hutzelmanlaw.com](mailto:mhutzelman@hutzelmanlaw.com). This article is published for general information purposes and does not constitute legal advice.