

# Employers Association of New Jersey

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## **Affordable Care Act revisions and clarifications to Workplace Wellness Regulations under the Health Insurance Portability and Accountability Act (HIPAA)**

**Effective:** January 1, 2014

### **Summary:**

The Internal Revenue Service, U.S. Department of Labor and U.S. Department of Health and Human Services have jointly proposed a rules implementing and expanding employment-based wellness programs (participatory and health-contingent) to promote health and help control healthcare spending. The proposed rules also implement changes in the Affordable Care Act that increase the maximum permissible reward under a workplace wellness program from 20 percent to 30 percent of the cost of health coverage, and that further increase the maximum reward to as much as 50 percent for programs designed to prevent or reduce tobacco use. Among other things, the proposed regulations would require workplace wellness programs to follow certain rules, including:

- Programs must be reasonably designed to promote health or prevent disease. To be considered reasonably designed to promote health or prevent disease, a program would have to offer a different, reasonable means of qualifying for the reward to any individual who does not meet the standard based on the measurement, test or screening. Programs must have a reasonable chance of improving health or preventing disease and not be overly burdensome for individuals.
- Programs must be reasonably designed to be available to all similarly situated individuals. Reasonable alternative means of qualifying for the reward would have to be offered to individuals whose medical conditions make it unreasonably difficult, or for whom it is medically inadvisable, to meet the specified health-related standard.

- Individuals must be given notice of the opportunity to qualify for the same reward through other means. These proposed rules provide new sample language intended to be simpler for individuals to understand and to increase the likelihood that those who qualify for a different means of obtaining a reward will contact the plan or issuer to request it.

### **Proposed Regulations in Detail:**

HIPAA prohibits discrimination against health plan participants and beneficiaries based on "health status-related factors." These factors include medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, and disability. In many cases, however, the essence of a wellness program is to discriminate against plan participants, based on health status, by giving rewards to employees who satisfy a standard related to a health factor or who attain or maintain a certain health outcome to receive a reward, such as not smoking, attaining certain results on biometric screenings, attaining a certain body-mass index, blood pressure or glucose level, or meeting a target for weight loss or exercise. These wellness programs are considered "health-contingent" programs.

### **HEALTH-CONTINGENT WELLNESS PROGRAMS**

Health-contingent wellness programs are typically part of a self-insured health care plan that is governed by a summary plan description.

HIPAA provides that a health plan can vary a deductible, co-payment or co-insurance as a reward under a health contingent wellness program ~~can~~ as long as the following requirements are met:

#### 1. Frequency of Opportunity to Qualify

The program must give individuals eligible for the program the opportunity to qualify for the reward at least once a year.

#### 2. Size of Reward

The reward under the program, when added to all other program rewards, which are based on health status-related factors, may not exceed 30% of the total cost of employee-only coverage under the employer's health plan, taking into account both employer and employee contributions toward the cost of coverage. To reduce smoking the reward can be as high as 50%.

If spouses or beneficiaries participate in the wellness arrangement, this reward can be increased to 30% of the total cost of their coverage as well.

The reward limit is based on total cost of the relevant coverage, not just what employees pay for their share of coverage. The reward can come in the form of discounts or rebates of premiums, waivers of all or part of a cost-sharing mechanism under the plan (such as deductibles, co-payments or coinsurance), the absence of a surcharge, or the value of a benefit, which would otherwise not be provided under the plan.

This limitation is imposed to avoid having a reward so large that it has the effect of denying coverage or creating too heavy a financial burden on individuals who do not meet initial wellness program standards that are related to a health factor.

### 3. Uniform Availability and Reasonable Alternative Standards

A reward must be available to all "similarly situated" individuals.

If someone's medical condition keeps him or her from achieving a reward under the program, or if it is medically inadvisable for him or her to try to achieve the reward, then an alternative way to achieve the reward must be made available. Generally, the costs of an alternative are incurred by the employer. The alternative need not be available in advance but must be provided upon an individual's request.

If necessary, the wellness program may require verification if reasonable under the circumstances, including a statement from an individual's physician, unless the condition is own or obvious. For example, the health care plan may already know the individual's health condition.

### 4. Reasonable Design

Programs must be reasonably designed to promote health or prevent disease. Thus, the program must be designed so that it has a "reasonable chance" of improving health, is not overly burdensome, is not a subterfuge for discrimination based on a health factor, and is not "highly suspect" in the method chosen to promote health. A plan is not reasonably designed unless it makes available to all individuals who do not meet the standard a different, reasonable means of qualifying for the reward.

A plan can always waive a standard as an alternative.

## 5. Notice of Other Means of Qualifying for the Reward

Plan materials describing the terms of the program must disclose the availability of the reasonable alternative standard for similarly situated individuals or that the standard will be waived upon request. The following language can be used:

*"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 that 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."*

### **Participatory Wellness Programs**

The following participatory wellness programs need not comply with the above referenced standards since they already comply with HIPAA (they do not discriminate on the basis of "health status-related factors"):

- A program that reimburses all or part of the cost for memberships in a fitness center.
- A diagnostic testing program that provides a reward for participation and does not base any part of the reward on testing outcomes.
- A program that encourages preventive care by waiving co-payments or deductibles under a group health plan for the cost of such programs as prenatal care or well-baby visits.
- A program that reimburses employees for the cost of smoking cessation programs without regard to whether the employee quits smoking.
- A program that rewards employees for attending a monthly health education seminar.