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Employee Benefits | Life Insurance | Risk Management

TO: Clients of Sitzmann Morris & Lavis Insurance Agency

RE: Wellness Program Health Care Reform Rules

On November 26th proposed regulations by the Departments of Health and Human Services (HHS), Labor (DOL) and the Treasury (IRS) were entered into the Federal Register. The proposed regulations would increase the maximum reward under a health-contingent wellness program from 20 percent to 30 percent of the cost of coverage and would further increase the maximum reward to 50 percent for wellness programs designed to prevent or reduce tobacco use. The regulations would apply to both grandfathered and non-grandfathered group health plans and group health insurance coverage for plan years beginning on or after Jan. 1, 2014. The term “group health plan” includes both insured and self-insured group health plans.

Key Provisions:

Categories of wellness programs

Employment-based wellness programs can be divided into two general categories – participatory wellness programs and health-contingent wellness programs. This distinction is important because participatory wellness programs are not required to meet the nondiscrimination standards.

Participatory wellness programs do not require an individual to meet a standard related to a health factor in order to obtain a reward or do not offer a reward at all. Examples of these programs include a fitness center reimbursement program, a diagnostic testing program that does not base any reward on outcomes, a program that reimburses employees for the costs of smoking cessation programs, regardless of whether the employee quits smoking, and a program that provides rewards for attending a free health education seminar.

Participatory wellness programs comply with the nondiscrimination requirements without having to satisfy any additional standards, as long as participation in the program is made available to all similarly situated individuals. There is no limit on financial incentives for participatory wellness programs.

Health-contingent wellness programs require individuals to satisfy a standard related to a health factor in order to obtain a reward. This category includes wellness programs that require an individual to attain or maintain a certain health outcome in order to obtain a reward (for example, not smoking, attaining certain results on biometric screenings or meeting exercise targets).

Standards for health-contingent wellness programs

HIPAA currently prohibits group health plans and group health insurance issuers from discriminating against individual participants and beneficiaries in eligibility, premiums or benefits based on a health factor. An exception to this rule allows benefits (including cost sharing), premiums or contributions to vary based on participation in a wellness program, if the program complies with certain nondiscrimination standards.

In 2006, the Departments released final regulations regarding HIPAA's nondiscrimination and wellness provisions. The regulations prescribed five nondiscrimination standards for health-contingent wellness programs. ACA codified the existing HIPAA regulations for wellness programs, while also increasing the maximum permissible reward that can be offered under health-contingent wellness programs. The proposed regulation generally would maintain the five requirements for health-contingent wellness programs with one significant modification relating to the size of the reward.

(1) Frequency of Opportunity to Qualify. Consistent with the HIPAA regulations, the proposed regulations would require health-contingent wellness programs to provide eligible individuals with an opportunity to qualify for the reward at least once per year.

(2) Size of Reward. Like the 2006 HIPAA regulations, the proposed regulations would limit the total amount of the reward for health-contingent wellness programs with respect to a plan, whether offered alone or coupled with the reward for other health-contingent wellness programs.

In addition, the proposed regulations would implement ACA's changes by increasing the maximum permissible reward from 20 percent to 30 percent of the cost of health coverage. In addition, the regulations propose to increase the maximum permissible reward to 50 percent of the cost of health coverage for programs designed to prevent or reduce tobacco use. If any class of dependent may participate in the program, the reward could not exceed the applicable percentage of the total cost of the coverage in which the employee and any dependents are enrolled. The regulations propose that with respect to family coverage, any premium variation for tobacco use must be applied to the portion of premium attributable to each family member.

The Departments invite comments on apportionment of rewards. For example, should the reward be prorated if only one family member fails to qualify for it? Also, comments are solicited on possible definitions of "tobacco use".

(3) Uniform Availability and Reasonable Alternative Standards. Consistent with the HIPAA regulations, the proposed regulations would require the reward under a health-contingent wellness program to be available to all similarly situated individuals. To meet this requirement, a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward must be provided to any individual for whom it is unreasonably difficult due to a medical condition to meet the otherwise applicable standard, or for whom it is medically inadvisable to attempt to satisfy the otherwise applicable standard.

The proposed regulations would clarify that plans and issuers are not required to establish an alternative standard in advance of an individual's specific request for one. However, a reasonable alternative standard would have to be provided upon an individual's request. Also, plans and issuers cannot cease to provide a reasonable alternative standard merely because one was not successful before. They must continue to offer a reasonable alternative standard, whether it is the same standard or a new one (such as a new weight loss class or a new nicotine replacement therapy).

In addition, the proposed regulations would include factors for determining whether a plan or issuer has provided a reasonable alternative standard:

- If the reasonable alternative standard is completion of an educational program, the proposed regulations would provide that the plan or issuer must make the program available instead of requiring an individual to find this type of program unassisted and may not require an individual to pay for the program's cost.
- If the reasonable alternative standard is a diet program, the plan or issuer is not required to pay for the cost of food but must pay any membership or participation fee.
- If the reasonable alternative standard is compliance with the recommendations of a medical professional who is an employee or agent of the plan or issuer, and an individual's personal physician states that the medical professional's recommendations are not medically appropriate for that individual, the plan or issuer must provide a reasonable alternative standard that accommodates the recommendations of the individual's physician with regard to medical appropriateness. Plans and issuers may impose standard cost sharing under the plan or coverage for medical items and services furnished in accordance with the physician's recommendations.

The proposed regulations also would clarify that, if reasonable under the circumstances, a plan or issuer may seek verification (such as a statement from an individual's physician) that a health factor makes it unreasonably difficult for the individual to satisfy, or medically inadvisable for the individual to attempt to satisfy, the otherwise applicable standard. It would not be reasonable for a plan or issuer to seek verification of a claim that is obviously valid based on the nature of the individual's medical condition that is known to the plan or issuer. However, the proposed regulations would permit plans and issuers to seek verification of claims that require the use of medical judgment to evaluate.

(4) Reasonable Design. The proposed regulations, like the HIPAA regulations, would require that health-contingent wellness programs be reasonably designed to promote health or prevent disease and not be overly burdensome for individuals or a subterfuge for discrimination based on a health factor. The proposed regulations would continue to give plans and issuers flexibility to consider innovative programs for encouraging wellness. However, to be considered reasonably

designed to promote health or prevent disease, the proposed regulations would require the wellness program to offer a different, reasonable means of qualifying for the reward to any individual who does not meet the standard based on a measurement, test or screening related to a health factor (such as a biometric examination or health risk assessment).

(5) Notice of Other Means of Qualifying for the Reward. Consistent with the HIPAA regulations, the proposed regulations would require plans and issuers to disclose the availability of other ways to qualify for the reward in all plan materials describing the terms of the wellness program. If plan materials merely mention that a wellness program is available, without describing its terms, this disclosure is not required. For example, a summary of benefits and coverage (SBC) that notes that cost sharing may vary based on participation in a diabetes wellness program, without describing the standards of the program, would not trigger the disclosure.

In addition, the proposed regulations include the following sample language intended to be simpler for individuals to understand and increase the likelihood that those who qualify for an alternative means of obtaining the reward will contact their plan or issuer:

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 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.

Application to grandfathered plans

ACA's nondiscrimination provisions for health-contingent wellness programs do not apply to grandfathered plans. However, these plans are required to comply with the 2006 HIPAA regulations, which essentially include the same requirements for wellness programs, but have a lower maximum reward.

However, because the Departments believe that the provisions of the proposed regulations would be authorized under either HIPAA or ACA, they propose to apply the same set of standards to both grandfathered and non-grandfathered plans. According to the Departments, this approach is intended to avoid inconsistency across group health coverage and to provide grandfathered plans the same flexibility to promote health and prevent disease as non-grandfathered plans.

What's Next:

Comments on the proposed regulations are due by Jan. 25, 2013. We will provide you with more detail as it becomes available. As always, contact your SML Account team if you have any questions.

The information provided in this legislative update for our clients and colleagues is for general guidance only and is not intended to be, and does not constitute, tax or legal advice. We recommend that you consult with your tax and legal advisors for the interpretation or application of any laws for your particular circumstances and situation.