

## Final HIPAA Nondiscrimination Regulations Issued

February 16, 2007

At the end of 2006, the Departments of Treasury, Labor, and Health and Human Services (the Departments) issued the joint final regulations on the HIPAA nondiscrimination rules, which modify and clarify the previously published interim and proposed rules and apply for plan years beginning on or after July 1, 2007. The HIPAA nondiscrimination rules generally prohibit group health plans from discriminating against participants or beneficiaries on the basis of health factors. This means that group health plans generally may not condition individuals' eligibility for coverage on health factors, charge similarly situated individuals different premiums or contributions, or impose different deductibles or copayments based on health factors.

### Wellness Programs

The primary exception to the HIPAA nondiscrimination rules is the wellness program provisions. These provisions allow plans to offer financial incentives, in the form of premium discounts or rebates, or reduced copayments or deductibles, to individuals who participate in health-promotion and disease-prevention programs. The 1997 interim rules permitted "bona fide wellness programs" and applied a good-faith compliance standard. The final regulations eliminate the "bona fide wellness program" concept and also end the Departments' nonenforcement policy for good faith interpretations that differ from the regulation requirements. All health promotion and disease prevention programs are considered wellness programs, but certain wellness programs are required to meet additional standards to comply with the nondiscrimination rules. In particular, (as long as participation in the program is available to all similarly situated individuals) programs that do not condition obtaining a reward on an individual satisfying a standard related to a health factor and programs that do not offer a reward meet the nondiscrimination requirements without having to meet any additional standards. Examples include programs that reimburse the cost of a gym membership, reimburse the cost of smoking cessation classes regardless of whether an individual actually quits, or provide a reward to any employee who attends a monthly health education seminar.

Wellness programs that condition obtaining a reward on an individual satisfying a standard related to a health factor, however, are required to meet five additional requirements to satisfy the HIPAA nondiscrimination rules. Those five requirements are:

1. **Limit on the Reward.** The total reward for all of a group health plan's wellness programs may not exceed 20% of the cost of employee-only coverage under the plan.

2. **Reasonably Designed.** The wellness program must be reasonably designed to promote good health or prevent disease, which means the program has to have a reasonable chance of improving participants' health or preventing disease, not be overly burdensome, not be a ploy to discriminate based on a health factor, and not use highly suspect methods to promote health or prevent disease.
3. **Once Per Year.** Individuals eligible for the wellness program must have the opportunity to qualify for the reward at least once per year.
4. **Reasonable Alternative.** Because a reward must be available to all similarly situated individuals, a wellness program must provide an alternative standard (which may be a waiver of or an adjustment to the original standard) by which individuals for whom a medical condition makes it unreasonably difficult or medically inadvisable to meet the original standard may qualify for the reward. The final regulations clarify that a plan may require a physician's statement that the participant has a health factor that makes it unreasonably difficult or medically inadvisable to meet the standard.
5. **Disclosure Requirements.** All plan materials that describe the terms of the wellness program must disclose the availability of a reasonable alternative standard. The regulations provide model language for plans to use in their disclosures.

The final regulations also include significant HIPAA nondiscrimination rules that are not related to wellness programs, such as:

- **Source-of-Injury Exclusions.** The final regulations continue to provide that coverage for the treatment of a particular injury cannot be excluded because the injury was the result of domestic violence or a medical condition (physical or mental). The final regulations also continue to permit group health plans to have source-of-injury exclusions related to highly dangerous activities, such as bungee jumping, motorcycle riding, snowmobiling, and so forth. However, the fact that an individual participates in highly dangerous activities cannot affect his/her eligibility to enroll in a group health plan.
- **Actively-at-Work Provisions.** As established by the interim rules, group health plans may not establish eligibility rules or set an individual's premium or contribution rate based on whether the individual is actively at work, unless individuals who are absent from work due to health factors are treated as though they are at work for purposes of health coverage. However, plans may require individuals to report for the first day of work for coverage to become effective, and plans may distinguish between groups of similarly situated individuals for eligibility purposes (e.g., full-time vs. part-time employees, seasonal vs. permanent employees).
- **Application to Health Reimbursement Arrangements (HRAs).** HRAs reimburse employees for medical expenses up to a maximum amount for a period based on the employer's contribution to the plan. HRAs often permit employees to carry forward unused amounts to reimburse medical expenses in later periods, which may result in employees being entitled to varying maximum reimbursement levels in a particular period based on their claims experience. The final regulations clarify that such carryforward provisions do not violate the HIPAA

nondiscrimination rules as long as the formulae used to calculate the reimbursement amounts available are uniformly applied.

- **Exclusion/Limitation of Benefits for Certain Conditions/Treatments.** The final regulations warn that, while the HIPAA nondiscrimination rules allow plans to exclude or limit certain benefits, those exclusions or limitations may violate other laws, such as the Americans with Disabilities Act, certain sections of ERISA, Title VII, the Public Health Service Act, or the Family Medical Leave Act. As such, the Departments suggest that plans and plan sponsors consider the applicability of other laws before adopting benefits exclusions or limitations.

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