

C.M. SMITH AGENCY, INC.

BENE BULLETIN

HIPAA NON-DISCRIMINATION REGULATIONS FOR WORKPLACE WELLNESS PROGRAMS

The final rules on nondiscrimination under the Health Insurance Portability and Accountability Act go into effect the first day of the plan year beginning on or after July 1, 2007. The new rules make clear that some, but not all, wellness programs are subject to HIPAA's nondiscrimination rules.

The new rules prohibit the use of health factors as the basis for discrimination when determining enrollment eligibility or premium contributions under a group health plan. Although the employer is not required to provide wellness coverage, once benefits are provided they must be uniformly available to all similarly situated individuals.

What are the "health factors?"

- health status;
- medical condition, including both physical and mental illnesses;
- claims experience;
- receipt of health care;
- medical history;
- genetic information;
- evidence of insurability; and
- disability.

How are groups of similarly situated individuals determined?

Distinctions between groups of similarly situated participants must be based on valid employment-based classifications consistent with the employer's standard practice for determining benefits eligibility. They cannot be based on health factors.

For instance, employees that are full-time versus part-time or salaried versus hourly can be treated as distinct groups of similarly situated individuals, with different eligibility provisions, benefit restrictions, or costs, provided the distinction is consistent with the employer's standard practice. However, an employer cannot develop a classification targeting individual participants or beneficiaries based on one or more of the health factors.

Which programs are subject to HIPAA's additional nondiscrimination requirements?

Programs are subject to the HIPAA nondiscrimination requirements only if receipt of a reward is contingent upon satisfying a standard that is related to a health factor, or if they offer a reward for participating in the program.

Programs that are subject to the HIPAA non-discrimination standards must meet five requirements:

1. There must be limitations on the size of the reward.
2. The program must be reasonably designed to promote good health or prevent disease.
3. The program must provide individuals eligible for the program an opportunity to qualify for the established reward annually.
4. The reward must be available to all similarly situated individuals unless the program provides for a reasonable alternative standard or waiver for individuals who have difficulty meeting the standard due to a medical condition.
5. All plan materials describing the terms of the program must disclose the existence of a reasonable alternative standard or possibility of a waiver. If plan materials mention that a program is available, without describing its terms, disclosing the reasonable alternative standard is not required.

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The regulations provide the following examples of programs that are **not** subject to the HIPAA non-discrimination standards (this assumes participation is available to all similarly situated individuals):

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

What if the program is not in compliance with regulations?

Failure to comply with the HIPAA nondiscrimination requirements will subject the plan to excise taxes. The excise tax can amount to \$100 for each day the plan is not compliant with respect to each individual to whom the failure relates.

C.M. Smith Agency, Inc. is not a law firm and therefore we are not able to give legal advice. You should consult with legal counsel if you have specific questions on this subject matter.