

Employer Wellness Programs: Wellness in Mind, Body, Spirit . . . and Wallet

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Practice Area: Business and Corporate Law & Compensation and Benefits/ERISA

The cost of health insurance is high. The average annual premiums for employer-sponsored health insurance in 2014 are \$6,025 for single coverage and \$16,834 for family coverage.¹ Those figures are 2% and 3% higher than the 2013 average premiums, respectively.² Moreover, employers, on average, contributed more than 70% of the 2014 family coverage premium.³

Accordingly, it is no surprise that employers are looking for ways to buck the expensive trend of employer-sponsored health insurance. Many employers are utilizing wellness programs as a method to help lower health insurance premiums.

Employer wellness programs are not new, but federal regulations that mandate what constitutes a legally compliant wellness program are relatively new. Employers should be aware of the requirements of the regulations.

The regulations divide wellness programs into two categories: (i) participatory wellness programs; and (ii) health-contingent wellness programs.

Participatory Wellness Programs

A participatory wellness program is one that either: (i) does not condition a reward based on an individual satisfying a standard that is related to a health factor, or (ii) does not provide a reward. Participatory wellness programs include, for example:

- Reimbursement for all or part of the cost of a gym/fitness center membership;
- A reward for participation in diagnostic testing or biometric screening that does not base any part of the reward on the outcome(s) of the test or screen;
- A waiver of copayment or deductible for preventative care (*e.g.*, prenatal care or well-baby visits) (please note that the Affordable Care Act requires that non-grandfathered health plans cover certain preventive health services without cost sharing);
- Reimbursement for participation in a smoking cessation program without regard to whether the employee quits smoking;
- A reward for attending a monthly, no-cost health education seminar; and
- A reward for completion of a health risk assessment without requiring any further action (educational or otherwise) based on the issues identified in the assessment.

A participatory wellness program will satisfy the requirements of the regulations provided the program is made available to all similarly situated individuals, regardless of health status.

Employees can be divided into different groups of "similarly situated individuals" if the distinction among the groups is based upon a bona fide employment-based classification that is consistent with the employer's usual business practice and that is not based upon a health factor. Whether a classification is bona fide depends upon the facts and circumstances. For example, a classification used for determining eligibility for employee benefits other than health benefits might be bona fide. Distinctions between full-time and part-time employees, union and non-union employees, current and former employees and distinctions based on work location are examples of distinctions that might be acceptable in establishing groups of similarly situated individuals.

Health-Contingent Wellness Programs

Health-contingent wellness programs require an individual to satisfy a standard related to a health factor to obtain a reward or, based upon a health factor, require an individual to undertake more than a similarly situated individual to obtain a reward. Examples of a health factor are health status and medical condition. Health-contingent wellness programs are subdivided into: (i) activity-only programs, and (ii) outcome-based programs.

Activity-only Programs

Under an activity-only program, an individual is required to perform or complete an activity related to a health factor but is not required to attain or maintain a specific health outcome. For example, an activity-only program may require an individual to walk, diet, or participate in some other exercise program but does not require an individual to attain any particular outcome from participation in the program.

Certain individuals may not be able to participate in the program due to a health factor. For example, an individual may not be able to participate in a walking program due to a recent surgery or pregnancy. Accordingly, activity-only programs must meet certain criteria to comply with the regulations.

Outcome-based Programs

Under an outcome-based program, an individual must attain or maintain a specific health outcome in order to obtain a reward. To comply with the regulations (see below), an outcome-based program usually consists of: (i) a measurement, test, or screening as part of an initial standard, and (ii) a second component that targets individuals who do not meet the initial standard. For example, an outcome-based program might test individuals for specified medical conditions or risk factors, such as high cholesterol, high blood pressure, or abnormal BMI, and provide a reward to employees identified as within a normal or healthy range, while requiring employees who are identified as outside the normal or healthy range to take additional steps to obtain a reward. Such additional steps may be, for example, meeting with a health coach, taking a health or fitness course, or complying with a health care provider's plan of care.

Like activity-only programs, certain individuals may not be able to satisfy the initial standard under the outcome-based program. Accordingly, outcome-based programs must meet certain criteria to comply with the regulations.

Criteria for Health-Contingent Wellness Programs

All health-contingent wellness programs, whether activity-only or outcome-based, must satisfy the following criteria:

- *Frequency of Opportunity to Qualify*: Individuals must be given the opportunity to qualify for the reward at least once per year.
- *Size of Reward*: The total reward under all of the employer's health contingent wellness programs cannot exceed 30% of the total cost of employee-only coverage (up to 50% for smoking cessation programs). If the wellness program allows dependents (e.g., spouses, children, etc.) to participate, the reward cannot exceed the applicable percentage of the total cost of the coverage in which the employee and any dependents are enrolled (e.g., family coverage or employee-plus-one coverage).
- *Reasonable Design*: A program must be reasonably designed to promote health or prevent disease. Whether a program meets this criterion is based on the facts and circumstances.
- *Uniform Availability and Reasonable Alternative*: The full reward for the health-contingent wellness program must be available to all similarly situated individuals. In addition, in the case of an activity-only program, the program must offer a reasonable alternative standard (or waiver of the initial standard) for any individual for whom it would be unreasonably difficult due to a medical condition or medically inadvisable to perform the activity otherwise required. In the case of an outcome-based wellness program, the program must offer a reasonable alternative standard (or waiver of the initial standard) for any individual who does not meet the initial standard based upon the measurement, test, or screening. While an employer is not required to determine a particular reasonable alternative standard before an individual requests one, a reasonable alternative standard must be provided upon request or the individual must receive the reward without regard to the initial standard. Whether an alternative standard is reasonable depends on the facts and circumstances.

The following are some examples of steps that might be considered reasonable alternative standards under appropriate facts and circumstances: participating in health coaching, participating in nutrition classes, or participating in a diet program. In addition, if an employee's personal physician states that a standard is not medically appropriate, the program must accommodate recommendations provided by the employee's personal physician with regard to what is medically appropriate. That is, if the personal physician recommends an alternative and the employee follows the recommendation, the employee must receive the reward.

- *Notice of Availability of Reasonable Alternative*: Employers must disclose in all materials describing the health-contingent wellness program and in any disclosure to an individual that he/she did not satisfy the initial standard: (i) the availability of a reasonable alternative standard (and contact information for obtaining the alternative standard), and (ii) that recommendations of the individual's personal physician will be accommodated.

In addition to the above requirements, employers that sponsor wellness programs should confirm that they comply with other applicable Federal or State laws, which may impose additional requirements.

¹ The Kaiser Family Foundation and Health Research & Educational Trust, *Employer Health Benefits 2014 Annual Survey 14* (2014).

² *Id.*

³ *Id.* at 98.

