

● Rules for Wellness Program Incentives Tied to Group Health Plan Coverage





KEY POINTS

If you are already familiar with the existing 2006 rules, be aware of the following important changes in these new rules:

- The maximum allowable size of the incentive is now 30%, and smoking now has a it's own separate limit (50%).
- Health contingent programs are now defined by two subcategories; most of the rules for both categories are the same, but there are a few differences.
- In outcomes-based programs, every employee can now request an alternative to get the full reward.
- Employees can now involve their physician at any time to personalize the requirements for receiving the reward.

Rules for Wellness Program Incentives Tied to Group Health Plan Coverage

On May 29, 2013, the U.S. Departments of the Treasury, Labor, and Health and Human Services issued new regulations that make important changes to the 2006 HIPAA nondiscrimination wellness rules. This paper summarizes the final rules.

Effective Date:

These rules apply to group health plans for plan years that start on or after January 1, 2014.

Plans and Programs Impacted by the Final Rules

- **Plans Impacted:** The rules apply to grandfathered, non-grandfathered, insured, and self-insured group health plans.
- **Wellness Incentives Impacted:** The rules apply when an employer ties wellness incentives or rewards to a group health plan. This means that the employee contribution of a health plan, or a plan-related reward that the employee receives, is determined based on whether that employee meets the criteria of a wellness program. Such plan-related incentives are usually in the form of a reduced insurance premium, but may involve other components like copays, HSA contributions, discounts, rebates, or a waiver of all or part of a cost-sharing mechanism.
- **Wellness Programs Impacted:** The rules apply to Health-Contingent wellness programs, which require the employee to have, achieve or maintain a certain level of health, whether by participating in activity programs like exercise or weight loss programs, or actually achieving health status benchmarks like a specific blood pressure value.



Maximum Size of Incentive

The maximum allowable size of the incentive is 30% of the total cost of coverage under the plan, taking into account both employer and employee contributions.

For tobacco status only, the maximum allowable size of the incentive is 50% of the total cost of coverage.



Types of Wellness Programs

The rules categorize wellness programs into the following types:

1. Participatory Programs - in these programs, which are largely excluded from the rules, an employee's health does not affect their ability to participate. Examples include programs that:

- Reimburse all or part of the cost of fitness center membership.
- Reward for participating in a biometric health screening or a health risk assessment, provided the reward is not based on outcomes or results.
- Encourage preventive care by waiving the copayment or deductible for visits.
- Reimburse the cost of participating in a smoking cessation program without regard to whether the employee quits smoking.
- Reward employees for attending a monthly, no-cost health education seminar.



2. Health-Contingent Programs - these are programs where an employee's health could potentially affect their ability to participate. There are now two subcategories:

a. Activity-Only Programs - these are specific activity-oriented programs, such as walking, diet, or exercise programs, in which individuals with certain medical conditions might not be able to participate. However, these programs do not require any participant to attain or maintain a specific standard based on test or screening results.

b. Outcome-Based Programs - these have two tiers: first, a measurement, test, assessment, or screening to identify who meets an initial standard, such as not smoking or specific biometric benchmarks; and second, additional wellness programs or activities for all individuals who do not meet the first-tier standard. (See examples, page 9.)



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Overall Rationale

The intent of the final regulations is to ensure that corporate wellness programs tied to health plans are reasonably designed to promote health or prevent disease; have a reasonable chance of improving the health of participating individuals (or preventing disease); are not overly burdensome; and are not a subterfuge for discriminating based on a health factor.



The intent of the final regulations is that, regardless of the type of wellness program, every individual participating in the program should be able to receive the full amount of any reward or incentive, regardless of any health factor. This includes Outcome-Based Programs. Therefore, programs consisting solely of a measurement, test, or screening are NOT reasonably designed to promote health and prevent disease. Instead, if an individual does not meet an outcomes-based program's initial standards (such as



target biometrics), that individual must be provided with a reasonable alternative.

This is an important change from the 2006 rules. For Outcome-Based Programs, the final rules require that an alternative program be available to everyone who fails an outcomes criteria. Any individuals who complete the alternative must receive the full reward. This changes how incentive plans are designed compared to previous years.

This approach is intended to ensure that Outcome-Based Programs are more than mere rewards in return for results in biometric screenings or the results of a health risk assessment, and are instead part of a larger wellness program designed to promote health and prevent disease.

Requirements for Participatory vs Health Contingent Programs

The only requirement of Participatory Programs (or a participatory component of a program) is that it be made available to all similarly situated individuals, regardless of health status. Historically, these programs have been described as “wellness programs that comply with the HIPAA nondiscrimination requirements without having to satisfy any additional standards.”

Therefore, the final rules apply primarily to Health-Contingent Programs, as outlined in the remainder of this document. In general, the original 5 criteria for Health-Contingent Programs from 2006 are still upheld, with some additional clarifications.

The 5 Wellness Criteria for Health-Contingent Programs

1. Eligible individuals must be given the opportunity to qualify for the reward at least once per year.
2. The total reward cannot exceed 30% of the total cost of employee-only coverage under the plan (or 50% for tobacco status), taking into account both employer and employee contributions towards the cost of coverage. If dependent spouses and children may participate in the health-contingent wellness program, the same total reward limits based on employee-plus-one or family coverage also apply.
3. Programs must be reasonably designed to promote health or prevent disease. Programs can not be overly burdensome or a subterfuge for discriminating based on a health factor.
4. The full reward must be available to all similarly situated individuals.
5. Employers must disclose the availability of an alternative standard to qualify for the reward in all plan materials describing the terms of a Health-Contingent Program.



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Alternative Standards for Health-Contingent Programs

A key aspect of meeting criteria 3, 4 and 5 is that alternative programs and standards must be made available to qualifying individuals. The new rules have a number of clarifications about such alternatives.



Who Qualifies for the Alternative: On this point, there is an important distinction between the two types of Health-Contingent Program:

- **Activity-Only Programs** - An alternative must be available to any individual for whom it is unreasonably difficult due to a medical condition. For example, an individual may be unable to participate in a walking program due to a recent surgery or pregnancy, or may have difficulty participating due to severe asthma.
- **Outcome-Based Programs** - An alternative must be available to all individuals who do not meet the initial outcome standard. The alternative must offer the same reward. Example alternatives include:
 - An educational program
 - Talking to a health coach
 - Taking a health or fitness course
 - Adhering to a health improvement action plan
 - Complying with a walking or exercise program
 - Complying with a health care provider's plan of care
 - Reduce the individual's BMI by a small amount or small percentage, over a realistic period of time, such as within a year

Timing of Full Reward. For both types of Health-Contingent Program, an individual may take some time to request, establish, and satisfy an alternative standard. After satisfying the alternative, the individual must receive the same reward as the initial standard provided. Regardless of timing, it must be the full amount:

- If a calendar year health plan offers a premium discount in January and an individual satisfies an alternative on April 1, the individual must receive the premium discounts for January, February, and March.
- Employers can select a reasonable payment method for the period before the alternative was satisfied. The payment could be for the retroactive period or pro rata over the remainder of the year. However, the individual must receive the full amount within that same year.



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Employer Flexibility. For both types of Health-Contingent Program, employers can:

- Wait until an individual specifically requests an alternative to determine what it shall be, rather than planning or communicating a specific alternative in advance.
- Waive the applicable standard and just provide the reward, rather than providing an alternative.
- Base an alternative on each individual's specific circumstances or provide the same alternative for an entire group. (A personal physician can always override it, as noted below.)

Burden Considerations. For both types of Health-Contingent Program:

- The employer must make the alternative program available or assist the employee in finding one (instead of requiring an individual to find such a program unassisted).
- The time commitment for the alternative must be reasonable. (For example, requiring nightly attendance at a one-hour class would NOT be reasonable.)
- The employer may not require the employee to pay for the alternative program. If the alternative is a diet program, the employer is not required to pay for the food, but must pay any membership or participation fee.

Success Not a Factor. Employers cannot cease to provide an alternative under any Health-Contingent Program merely because an individual was not previously successful. Employers must continue to offer an alternative, whether it is the same or different. For example:

- For an initial outcome-based standard that an individual not use tobacco, a reasonable alternative in Year 1 may be to attend an educational seminar. An individual who attends the seminar, but continues smoking, is entitled to the reward. In Year 2, the employer may require a new alternative, such as a recommendation from the individual's personal physician or nicotine replacement therapy.



The Personal Physician's Role In Alternative Requirements

When an employee requests an alternative, the employer's right to require documentation from the employee's physician depends on the type of program:

- **Activity-Only Programs:** if an employee states that they cannot participate for medical reasons, the employer can require the



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employee to provide a statement from a personal physician verifying that an alternative is needed because it unreasonably difficult or medically inadvisable for the employee to attempt to satisfy the requirement.

- **Outcome-Based Programs:** the employer can NOT require verification by the individual's physician that an alternative is needed.

However, for both types of Health-Contingent Program, an employee can elect to involve their personal physician at any time. If the physician states that any program, standard, or alternative is not medically appropriate for that employee, the employer must provide an alternative that accommodates the recommendations of the physician. The physician can adjust the recommendations at any time.

Disclosing the Alternative

Employers must disclose the availability of an alternative in all plan materials that describe the terms of a Health-Contingent Program. For example, if the materials refer to a “premium differential based on tobacco use” or “premium based on the results of a biometric exam,” a disclosure is needed. In contrast, a disclosure is not needed in plan materials that just mention a program, without describing the standards or rewards of the program.

For Outcome-Based Programs, the disclosure notice must also be included in any communication that an individual did not satisfy an initial outcome-based standard.

Disclosures must include the following:



- Contact information for obtaining the alternative
- A statement that the recommendations of an individual's personal physician will be accommodated

Example disclosures:

- “Your employer is committed to helping you achieve your best health. 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 [contact information] and we will work with you (and, if you wish, with your doctor) to find a wellness program with the same reward that is right for you in light of your health status.”



- “Your employer wants to help you take charge of your health. Rewards are available to all employees who participate in our Cholesterol Awareness Wellness Program. If your total cholesterol count is under 200, you will receive the reward. If not, you will still have an opportunity to qualify for the reward. Contact us at [contact information] and we will work with you and your doctor to find a Health Smart program that is right for you.”

In the above program, when any participant is notified that the cholesterol count is 200 or higher, the notice must include a statement like the following:

- “Your employer offers a Health Smart program under which we will work with you and your doctor to try to lower your cholesterol. If you complete this program, you will qualify for a reward. Please contact us at [contact information] to get started.”

Small Employers and False Smoking Status

Small employers may not rescind coverage on the basis that an enrollee is found to have reported false or incorrect information about their tobacco use. (For purposes of the rules, a “small employer” is one that employed 100 or fewer employees, on average, during the preceding calendar year.) This does not apply to self-insured group health plans and large insured group health plans. Whether self-insured group health plans and large insured group health plans can recoup the applicable premiums or benefits is determined under the plan terms and other applicable law, such as ERISA.

Other Applicable Laws

The Departments recognize that many other laws may regulate plans and issuers in their provision of benefits to participants and beneficiaries. These laws include, but are not limited to:

- Americans with Disabilities Act (ADA)
- Title VII of the Civil Rights Act of 1964, Code section 105(h)
- PHS Act section 2716 (prohibiting discrimination in favor of highly compensated individuals)
- Genetic Information Nondiscrimination Act of 2008
- Family and Medical Leave Act
- ERISA’s fiduciary provisions
- State law

Employers should consider the applicability of these laws to their coverage and contact legal counsel or other government agencies, such as the Equal Employment Opportunity Commission and State Departments of Insurance, if they have questions about those laws.





Examples of Outcomes-Based Programs

Example 1

- An employer rewards participants who have a body mass index (BMI) that is 26 or lower, determined shortly before the beginning of the plan year.
- All plan materials describing the terms of the wellness program include the following statement: “Fitness is Easy! Start Walking! Your employer cares about your health. If you are considered overweight because you have a BMI of over 26, our Start Walking program will help you lose weight and feel better. We will help you enroll. If your doctor says that walking isn’t right for you, that’s okay too. We will work with you (and, if you wish, your doctor) to develop a wellness program that is. Call [contact information] for details.”
- Any participant who does not meet the target BMI within the specified timeframe is notified about an alternative being available.
- In the alternative, participants are given the same discount if they comply with an exercise program that consists of walking 150 minutes a week.
- Any participant for whom it is unreasonably difficult due to a medical condition to comply with this walking program is given the same discount if the participant satisfies an alternative standard that is reasonable, taking into consideration the participant’s medical situation.
- A participant can propose a program based on the recommendations of their physician. The employer must give that participant the same discount that is provided for meeting the BMI standard or complying with the alternative walking program, but only if the participant actually follows their physician’s recommendations.



Example 2

- In conjunction with an annual open enrollment period, an employer provides a premium differential based on tobacco use, determined using a health risk assessment.
- The plan accommodates smokers by providing a free smoking cessation program.
- All plan materials describing the premium differential include the following statement: “Stop smoking today! We can help! If you are a smoker, we offer a smoking cessation program. If you complete the program, you can avoid this surcharge.” It includes contact information and the option to involve a personal physician.
- Any participant can avoid the surcharge for the plan year by participating in the program, regardless of whether the participant stops smoking.
- The employer requires a smoker who wants to avoid the surcharge in a subsequent year to complete the smoking cessation program again, or complete a different alternative (such as a new recommendation from a personal physician or a new nicotine replacement therapy).



Examples of Allowable Incentive Size

Example 1. The annual premium for employee-only coverage is \$6,000 (of which the employer pays \$4,500 per year and the employee pays \$1,500 per year). The employer offers a Health-Contingent Program with several components, focused on exercise, blood sugar, weight, cholesterol, and blood pressure. The reward for meeting the standards is an annual premium rebate of \$600.

Bottom Line: The program is in compliance because the reward does not exceed 30 percent of the total annual cost of employee-only coverage. $\$6,000 \times 30\% = \$1,800$.

Example 2. The annual premium for employee-only coverage is \$6,000 (of which the employer pays \$4,500 per year and the employee pays \$1,500 per year). The employer offers a Health-Contingent Program based on tobacco prevention. Employees who have used tobacco in the last 12 months and who are not enrolled in the plan's tobacco cessation program are charged a \$1,000 premium surcharge.

Bottom Line: The program is in compliance because the reward does not exceed 50 percent of the total annual cost of employee-only coverage. $\$6,000 \times 50\% = \$3,000$.



Example 3. The annual premium for employee-only coverage is \$6,000 (of which the employer pays \$4,500 per year and the employee pays \$1,500 per year). The employer offers employees a Health-Contingent Program with several components, focused on exercise, blood sugar, weight, cholesterol, and blood pressure. The reward is an annual premium rebate of \$600. In addition, the employer also imposes a \$2,000 tobacco premium surcharge on employees who have used tobacco in the last 12 months and who are not enrolled in the tobacco cessation program.

Bottom Line: The program is in compliance because 1.) the total of all rewards, including absence of a surcharge for participating in the tobacco program, is $\$600 + \$2,000 = \$2,600$, which does not exceed 50% of the total annual cost of employee-only coverage; and 2.) tested separately, the \$600 reward for the wellness program unrelated to tobacco use does not exceed 30% of the total annual cost of employee-only coverage.



Example 4. The total annual premium for employee-only coverage is \$5,000. The employer provides a \$250 reward to employees who complete a health risk assessment, without regard to the health issues identified as part of the assessment. The employer also offers a Healthy Heart program, which is a Health-Contingent Program, with an opportunity to earn a \$1,500 reward.

Bottom Line: In this example, only the reward offered for the Health-Contingent Program (\$1,500) is taken into account in determining whether the rules are met. The \$250 offered in connection with a Participatory Program is not taken into account. Therefore the reward does not exceed 30 percent of the total annual cost of employee-only coverage. $\$5,000 \times 30\% = \$1,500$.

When Dependents are Eligible. If spouses or dependents are involved, those rewards should not exceed the maximum allowable size, either. For example, if an employee can receive a \$1,000 reward, and a spouse can receive another \$1,000, verify that \$2,000 does not exceed 30% of employee+one coverage. When checking which family members passed the criteria, the final regulations do not provide detailed apportionment rules; employers have flexibility to determine whether or not every covered family member needs to pass the criteria for any of them to receive the reward.

Practicle Considerations

The final rules do not provide extensive examples of wellness program components and incentive scenarios, so there are likely to be some gray areas that the rules do not appear to specifically address. As these issues come to light, the Departments may issue further clarifications if they feel that this is necessary. In the meantime, companies should take a prudent, conservative approach to interpretation and incentive design and stay within the spirit of the rules.

For example, the rules do not say whether health coaching should be classified as a Participatory Program or an Activity-Only Program. Until such time as further clarification is provided, consider what the program is asking the employees to do. If the program is asking employees to do little more than make a phone call and discuss open-ended, personal health goals, then the employee can keep it within a participatory framework. But if the coach encourages the individual to follow pre-determined, activity-oriented recommendations, such as getting more active or losing weight, it may be prudent to consider this an Activity-Only Program.

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REFERENCE: THE COMPLETE FINAL RULES

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beBetter Health, Inc.
325 West Huron Street, Suite 711
Chicago, IL 60654
866.634.6542
sales@bebetter.net
www.bebetter.com