

Healthcare Re-FORUM

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Part II: Additional Guidance for Implementing the PPACA

New Frequently Asked Questions (FAQs) (Part V) were issued on December 22, 2010, by the Departments of Health and Human Services (HHS), Labor and Treasury (the Departments) (<http://www.dol.gov/ebsa/faqs/faq-aca5.html>) to help clarify the implementation of reforms required by the Patient Protection and Affordable Care Act (PPACA). The FAQs specifically address section 2705 of the Public Health Service Act (PHSA) regarding nondiscrimination rules based on health factors and wellness programs:



Nondiscrimination Rules Based on Health Factors and Wellness Programs

In 2006, the Health Insurance Portability and Accountability Act (HIPAA) was amended to prohibit health plans from discriminating against individuals in matters of eligibility, benefits or premiums based on a health factor, other than in the case of certain wellness programs.

Section 2705 of the PHSA incorporates the final regulations published by the Departments, which divided wellness programs into two categories:

Wellness programs not obligating an individual to meet a requirement related to a health factor to earn a reward (e.g., a fitness center reimbursement program or a well baby check where cost sharing is waived). These types of wellness programs are not considered discriminatory.

Wellness programs obligating participants to meet certain requirements related to a health factor to earn a reward (i.e., being a non-smoker or exercising a defined amount). Even if these health-contingent wellness programs discriminate based on a health factor, they are still allowed if a program complies with the following HIPAA safeguards:

- The total reward for participation in the wellness program is no more than 20 percent of the total cost of employee-only coverage under the employer's health plan. (If dependents can participate in the program, the limit on the reward is modified so the 20 percent is calculated based on the total cost of coverage for the enrolled employee and dependents.)
- The program must be reasonably designed to promote health or prevent disease and must not be a pretense for discrimination based on health status.
- The program gives eligible individuals an opportunity to qualify for the reward at least once per year.
- The program must provide an alternative requirement for individuals with a medical condition that makes the original requirement unreasonable. The alternative requirement must take into account the health factor that causes the original requirement to be medically inadvisable. The alternative requirement (or waiver of the original requirement) must be disclosed in all materials describing the terms of the program.

According to the FAQs, Section 2705 increases the maximum reward that can be provided under a health-contingent wellness program from 20 percent to 30 percent, effective in 2014. The Employee Benefits Security Administration (EBSA) and HHS plan to propose regulations that will address raising the maximum reward and preventing discrimination based on health status before 2014.

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Are all employment-based wellness programs required to check for compliance with the HIPAA nondiscrimination provisions?

No. If an employer operates a wellness program separate from its group health plan (i.e., the wellness program is not part of the group health plan), it does not need to comply with the HIPAA nondiscrimination provisions, though it may need to comply with other federal or state nondiscrimination laws.

Do the following types of wellness programs violate the HIPAA nondiscrimination requirements?

1. A wellness program that gives an annual premium discount of 50 percent of the cost of employee-only coverage to participants who attend a monthly health seminar.

No. This program is not subject to HIPAA nondiscrimination rules because it is not based on an individual satisfying a requirement related to a health factor.

2. A wellness program that gives an annual premium discount of 20 percent of the cost of employee-only coverage to participants who take an annual cholesterol exam and achieve a cholesterol count under a specified amount. This plan will also make available a reasonable alternative that takes an individual's relevant medical condition into account.

Yes. This program is subject to HIPAA nondiscrimination rules but is not in violation because the plan provides a reasonable alternative and the discount does not exceed 20 percent of the cost of employee-only coverage.

3. A plan that offers two wellness programs to all full-time employees. The first program requires a cholesterol test and provides a 20-percent premium discount for those whose results indicate normal cholesterol levels. The second program reimburses for the cost of a fitness center membership.

Federal nondiscrimination requirements are not violated by offering two distinct programs to employees. The program that tests cholesterol levels must comply with HIPAA rules because it involves a requirement based on a health factor. The program that reimburses for a fitness membership is not contingent upon specific health-related results and is therefore not subject to the HIPAA rules.

Delay in Application of the PPACA's Rules Against Salary-Based Discrimination

In addition to publishing Part V of the FAQs, the Departments have determined that sections of the PPACA applying to nondiscrimination rules for group health plans are too complex and leave too many questions to enforce. Therefore, the Departments will not require compliance with these rules until after regulations or other administrative guidance has been issued. The delay of the application of these rules is explained in [IRS Notice 2011-01](#) (pages 3-4), issued December 23, 2010. Once the regulations and/or guidance have been issued, the Departments anticipate allowing a grace period to give group health plan sponsors time to implement the changes required, during which the plan sponsor will not be required to file the specific IRS forms.