

# Update

March 12, 2008



## DOL wellness program checklist targets HIPAA compliance issues

### Summary

Employer efforts to curb health benefit spending have boosted the popularity of wellness programs as tools to prevent disease and promote healthier lifestyles. But this increased interest in wellness has also raised concerns about compliance with the nondiscrimination requirements of the Health Insurance Portability and Accountability Act (HIPAA). Under final HIPAA regulations, wellness programs offered through a group health plan must meet specific criteria to avoid illegal discrimination based on health factors. (For details about HIPAA's nondiscrimination rules for wellness programs, see [Update](#), Jan. 24, 2007.)

In response to these concerns, the US Department of Labor (DOL) has issued a wellness program checklist designed to answer employers' basic questions about HIPAA compliance. Below, this *Update* reproduces an abbreviated version of the DOL checklist. The full checklist is available on DOL's website: <http://www.dol.gov/ebsa/pdf/fab2008-2.pdf>.

### Threshold for HIPAA coverage of wellness programs

Questions A through D address whether a wellness program must comply with HIPAA. A "no" answer to any of these four questions means the wellness program is exempt from HIPAA and employers can skip the rest of this checklist – though other laws may apply to wellness programs, regardless of HIPAA exemption or coverage (see [Update](#), March 7, 2007). If the answer to all four questions is "yes," then employers should continue the checklist.

**A. Is the first day of the current plan year after July 1, 2007?** The wellness program final rules apply for plan years beginning on or after July 1, 2007.

## Examples for questions D and E

### **Reward tied to a health factor**

Plan participants who have a cholesterol level under 200 will receive a premium reduction of 20 percent. This plan requires individuals to meet a standard related to a health factor to obtain a reward.

### **Reward not tied to a health factor**

A plan requires all eligible employees at enrollment to complete a computerized health risk assessment, which identifies risk factors and appropriate educational information. This requirement does not raise HIPAA issues as long as the plan does not use the self-reported health details to discriminate in individual eligibility, benefits or premiums.

### **Benign discrimination**

A plan waives the annual deductible for participants with diabetes who enroll in a disease management program that involves attending educational classes and following their doctor's recommendations on exercise and medication. This is benign discrimination that offers a reward to individuals who have an adverse health factor.

**B. Does the plan have a wellness program?** Wellness programs include a variety of initiatives to promote health and prevent disease. Examples include programs that reduce cost sharing for participants who comply with a preventive care plan; diagnostic testing programs for health problems; and rewards for attending educational classes, adhering to healthy lifestyle recommendations, or meeting certain biometric targets (such as weight, cholesterol, nicotine use or blood pressure targets). Disease management, smoking cessation and case management programs are other types of wellness programs.

**C. Is the wellness program part of a group health plan?** Only wellness programs that are part of a group health plan must comply with HIPAA. Wellness programs offered under an employment policy separate from the group health plan are not subject to HIPAA.

**D. Does the wellness program discriminate based on a health factor?** A wellness program discriminates based on a health factor if it rewards individuals for meeting a standard related to a health factor. A reward can take the form of a discount or rebate of a premium or contribution; a waiver of all or part of a cost-sharing mechanism (such as deductibles, copayments or coinsurance); the absence of a surcharge; or the value of a benefit that would otherwise not be provided under the plan. (See sidebar for examples of wellness rewards that are or are not tied to a health factor.)

### **Exception for 'benign discrimination'**

Question E covers HIPAA's "benign discrimination" exception for wellness programs that offer more favorable treatment to individuals with particular health factors. Wellness programs that qualify for this exception are in compliance with HIPAA.

**E. Is the wellness program saved by the benign discrimination provisions?** HIPAA regulations permit discrimination in favor of an individual because of a health factor. (See sidebar for an example of benign discrimination.)

**Tip:** The benign discrimination exception is **NOT** available if the plan asks someone with a health factor (such as diabetes) to meet a standard related to a health factor (for example, maintaining a certain body mass index) to get a reward. This would introduce intervening discrimination, so the plan could not rely solely on the benign discrimination exception.

## Key HIPAA compliance issues

For programs that don't meet the conditions for exemption or the benign discrimination exception, Part F contains five questions to help employers assess whether a wellness program complies with HIPAA. A "yes" answer to all five questions means the wellness program complies with relevant HIPAA rules. A "no" answer to any question means the program has compliance issues with HIPAA's rules barring discrimination based on health factors.

### F. Compliance criteria

- 1. Is the total reward limited to 20 percent of the cost of coverage?** The reward's value must not exceed 20 percent of the cost of coverage for the employee and, if applicable, any dependents. This limit applies to all of a plan's wellness programs that require individuals to meet a standard related to a health factor.
- 2. Is the plan reasonably designed to promote health or prevent disease?** The program must have a reasonable chance of improving health or preventing disease without imposing an undue burden. In addition, the program cannot be a subterfuge for discrimination based on a health factor or use a highly suspect method to promote health or prevent disease.
- 3. Do all eligible participants have a chance to qualify at least once per year?**
- 4. Is the reward available to all similarly situated individuals? Does the program offer a reasonable alternative standard?** For a reward to be available to all similarly situated individuals, the program must waive the standard or offer a reasonable alternative when meeting the standard would be medically inadvisable or unreasonably difficult because of an individual's medical condition. The plan or issuer can seek verification, such as a physician's note, that an individual needs a waiver or an alternative to the standard.
- 5. Do all plan materials describing the program disclose the availability of a reasonable alternative?** The plan or issuer must disclose the availability of a reasonable alternative standard in all plan materials describing the program. If plan materials merely mention the program without describing its terms, disclosure of an alternative standard is not required.

**Tip:** The disclosure can simply say that a reasonable alternative is available without specifying what that alternative is. This allows a plan to tailor the standard on a case-by-case basis for each individual.

### Disclosure of alternative wellness standard

The following sample language can be used to satisfy this requirement:

*"If it is unreasonably difficult due to a medical condition for you to achieve the standards for the reward under this program, call us at [insert telephone number] and we will work with you to develop another way to qualify for the reward."*



## For more information

For additional information, please contact your Mercer consultant.

*This **Update** is for information only and does not constitute legal advice; consult with legal and tax advisers before applying this information to your situation.*

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