

Agencies to Raise Wellness Incentive Threshold

The federal HIPAA portability agencies will propose raising the monetary wellness incentive threshold from 20 percent to 30 percent of coverage costs, according to guidance issued Dec. 22 by the U.S. Department of Labor (DOL).

The recent health reform law includes such a change, effective in 2014, but DOL and the U.S. Departments of Health and Human Services (HHS) and Treasury “intend to propose regulations that use existing regulatory authority under HIPAA to raise the percentage for the maximum reward that can be provided under a health-contingent wellness program to 30 percent before the year 2014,” according to a frequently-asked-questions (FAQ) document that also addresses mental health parity and health reform.

The percentage limit applies to wellness program incentives that require an individual to meet a health-related factor (such as quitting smoking or losing a certain amount of weight). Merely “participatory” incentives, such as paying for gym memberships or voluntary smoking cessation classes, are not subject to the limit (see ¶530 of the *Guide*). DOL provided some FAQs clarifying the distinction and interaction between the two.

Example 1. A plan provides a 20-percent premium discount (the current regulatory limit) to participants with cholesterol

counts under 200, and also reimburses participants for the cost of monthly fitness center membership.

This does not violate HIPAA, DOL indicated, even though the total reward is more than 20 percent for an individual who gets both. The gym membership does not count toward the limit because it does not “require satisfaction of a standard related to a health factor,” the agency explained.

“The Departments are also considering what accompanying consumer protections may be needed to prevent the program from being used as a subterfuge for discrimination based on health status,” DOL noted. The Patient Protection and Affordable Care Act (PPACA) enacted in March 2010 added a new section to HIPAA on health nondiscrimination and wellness, which largely incorporates the final rules issued in 2006 by DOL, HHS and Treasury except for the change to the incentive limit.

Implications

These rules could be proposed by the end of 2011, agency officials have indicated informally. It is unclear whether employers will be able to rely on these proposed rules immediately, or whether the regulations would not take effect until finalized, most likely in 2012.

In a related development, on Dec. 28 the agencies issued a “request for information” regarding value-based insurance design in connection with preventive care services. This notice (75 Fed. Reg. 81544) sought comments on how plans are seeking to encourage employees to use special preventive care services or providers (for example, in connection with a wellness program). The comment period closed Feb. 28; the agencies plan to use this input to develop guidelines for value-based plan designs to comply with PPACA’s preventive care rules.

Mental Health Parity

Some FAQs also address questions about the Mental Health Parity and Addiction Equity Act (MHPAEA) and the implementing rules that the agencies issued in February 2010 — in particular, the requirement to disclose medical necessity criteria and the process for obtaining an increased-cost exemption.

A plan administrator or insurer must make its medical necessity criteria for mental health or “substance use disorder” benefits available to a participant, beneficiary or participating health care provider, DOL indicated. A participant who suspects that medical necessity is being applied more strictly to mental health than to medical/surgical benefits may request the medical/surgical criteria through the standard ERISA procedures.

See *Wellness Incentives*, p. 5

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