June 26, 2013

FINAL REGULATIONS ISSUED FOR HIPAA WELLNESS PROGRAMS UNDER THE AFFORDABLE CARE ACT

The Internal Revenue Service, on June 3rd, released final regulations with respect to nondiscriminatory wellness programs in group health coverage. The final regulations will be effective on August 2, 2013 and will be applicable for plan years beginning on or after January 1, 2014.

The final regulations apply to wellness programs offered under all group health plans regardless of size, whether they are fully insured or self-insured or whether the plan is grandfathered under the Patient Protection and Affordable Care Act ("ACA"). The final regulations allow for the maximum permissible reward of a health-contingent wellness program offered through a group health plan to be increased from 20% to 30% of the cost of employee-only coverage, or up to 50% if the wellness program is designed to either prevent or reduce tobacco use. These regulations also include other clarifications regarding the reasonable design of health-contingent wellness programs and the reasonable alternatives they must offer in order to avoid prohibited discrimination.

BACKGROUND

Prior to the ACA, group health plans and group health issuers could not discriminate against individual participants and beneficiaries regarding eligibility, benefits and premiums based upon a health factor. Final Health Insurance Portability and Accountability Act ("HIPAA") regulations issued in 2006 created certain exceptions for wellness programs that base eligibility or receipt of a reward on satisfaction of a health factor. Under these 2006 regulations, wellness programs subject to HIPAA's standards must limit the size of the reward to 20% of the cost of employee-only coverage under the plan.

TYPES OF WELLNESS PROGRAMS

Wellness programs will continue to be segregated into two groups for compliance with the nondiscrimination provisions of HIPAA: participatory wellness programs and health-contingent wellness programs.

(Continued on page 2)
PARTICIPATORY WELLNESS PROGRAMS

Participatory wellness programs are defined under the final regulations as "programs that either do not provide a reward or do not include any conditions for obtaining a reward that are based on an individual satisfying a standard that is related to a health factor". The final regulations contain a number of examples including, but not limited to, programs which reimburse employees for all or a part of health club memberships and programs which provide rewards for employees who participate in diagnostic testing programs; regardless of the outcomes. These programs, under the final regulations, will now have to be made available to all similarly situated employees regardless of their health status.

HEALTH-CONTINGENT WELLNESS PROGRAMS

Health-contingent wellness programs offer a reward or financial incentive to plan members who satisfy a standard related to a health factor. These programs are required to meet the following guidelines to ensure they are nondiscriminatory:

1. All members must be given an equal opportunity to qualify for the reward annually;
2. The total reward cannot exceed 30% of the total cost of coverage of an employee under the plan, or 50% to the extent the program is designed to prevent or reduce tobacco use;
3. The program must be designed to have a reasonable chance of improving health or preventing disease;
4. The full reward must be available to all similarly situated individuals; and
5. The program must disclose the availability of a reasonable alternative standard to qualify for the reward in all plan materials describing the health-contingent waiver program and in all oral communications.

As outlined in the final regulations, there are two types of health-contingent wellness programs, activity- based and outcome-based.

Activity-based programs must provide an alternative to achieve the reward to individuals for whom it is unreasonably difficult to satisfy the standard due to a medical condition or for whom it is medically inadvisable to attempt to satisfy the standard. It is not necessary for the program sponsor to determine the reasonable alternative standard in advance, but may do so upon an individual's request. Additionally, a program sponsor may choose to waive achievement of an alternative standard and provide the reward to those individuals, for whom it is unreasonably difficult or medically inadvisable to meet the standard.

Outcome-based programs must offer a reasonable alternative standard to all individuals who do not meet the designated initial standard, regardless of whether the individual has a medical condition that contributed to the failure. Such programs should include additional

(Continued on page 3)
conditions for those who were unable to successfully complete the initial standards and, upon successful completion; these individuals will be offered the same reward. An example of this type would be programs which require the participants to undergo particular screenings. For those individuals who fail such screenings health education classes may be made available to attend and, upon successful completion of the class, the individual would be eligible for the full reward.

**CONCLUSION**

All employers should review the structure of both their current wellness programs and any initiatives that they may be considering implementing to ensure compliance with these new regulations.

A copy of the final regulations entitled may be accessed at the healthcare services section of our firm's website.