

## What the Final Regulations on Employee Wellness Programs Mean for Employers

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The implementation of wellness programs are one way that employers can attempt to mitigate rising health care costs. Under the Affordable Care Act (ACA), wellness program discounts will increase in 2014 from 20% to 30% for most wellness programs, and will increase to up to 50% for smoking or tobacco cessation programs. Recently, the U.S. Departments of Health and Human Services, Labor, and the Treasury issued final regulations on how employers should implement these types of programs on a non-discriminatory basis. Employers should note, however, that these regulations involve only non-discrimination involving healthy and unhealthy populations; the final regulations offer no further guidance on the overall nondiscrimination rules involving highly compensated employees that also will be effective in 2014.

The final regulations maintain the two classifications of wellness programs set forth in the proposed regulations — participatory wellness programs and health-contingent wellness programs. Participatory wellness programs are those programs that do not provide rewards for obtaining certain health outcomes. For example, an employer may create a participatory wellness program in which it pays a certain percentage of every employee's gym membership, or offers employees the opportunity to attend classes on healthy lifestyle choices. The final regulations require that participatory programs be available to all similarly situated individuals regardless of health status, but provide no further restrictions for these types of programs.

Health-contingent wellness programs provide a reward based upon a certain health outcome in an effort to promote health and/or prevent disease. Health-contingent programs are divided into two categories: activity-only wellness programs and outcome-based wellness programs. Under an activity-only wellness program, an employee is required to perform or complete an activity related to a health factor to obtain a reward. Conversely, an outcome-based wellness program requires the individual to obtain a specific health outcome to obtain the reward. Both types of health-contingent wellness programs are required to meet the following guidelines:

1. Individuals eligible for the program must be given the opportunity to qualify for the reward at least once per year;

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2. The total reward available to an individual for all wellness programs offered cannot exceed the applicable percentage (generally 30% or 50% for tobacco cessation programs) of the total cost of employee-only coverage under the plan. This takes into account both employer and employee contributions towards the cost of coverage for the benefit package under which the employee and/or any dependents are receiving coverage;
3. The programs must be reasonably designed to promote health or prevent disease;
4. They must be uniformly available to all similarly situated individuals and allow for a reasonable alternative standard. However, activity-only wellness programs must offer a reasonable alternative standard for obtaining a reward for any individual for whom it is either unreasonably difficult or inadvisable, due to a medical condition, to attempt to satisfy the applicable standard. Outcome-based wellness programs, which provide rewards based on whether or not an individual has attained a certain health standard, must provide a reasonable alternative standard to all individuals who do not initially meet the targeted standard, to ensure that the program is reasonably designed to improve health, as opposed to being a subterfuge for underwriting or reducing benefits based on health status; and
5. Notice of the availability of a reasonable alternative standard to qualify for the reward must be placed in all plan materials, along with the possibility of a waiver of the standard, if applicable. This must include contact information for obtaining the alternative and a statement that recommendations of an individual's personal physician will be accommodated. For outcome-based wellness programs, the notice also must be included in any disclosure to an individual that he or she did not satisfy the initial outcome-based standard.

The regulations clarify that it is not up to the participant to choose the “reasonable alternative.” The employer can provide the same reasonable standard to everyone, or it may adjust the standard on a case-by-case basis. Additionally, an employer may waive the reasonable alternative standard and provide the reward to all participants in the program regardless of the each individual's outcome. Employers should be aware, however, that compliance with these regulations does not insure compliance with all federal and/or state discrimination laws. Companies should consider having any proposed wellness programs reviewed by counsel to insure compliance with not only these regulations, but also any other applicable federal or state law.

*If you have any questions regarding this or any other labor and employment law issue, please contact [Lynn V. Luther](mailto:lvluther@eastmansmith.com) (419-247-1746; [lvluther@eastmansmith.com](mailto:lvluther@eastmansmith.com)), [Melissa A. Ebel](mailto:maebel@eastmansmith.com) (614-564-1776; [maebel@eastmansmith.com](mailto:maebel@eastmansmith.com)), or visit our web site at [www.eastmansmith.com](http://www.eastmansmith.com).*

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