FAQ Guidance Issued on Nondiscrimination and Wellness Programs

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September 2026

Key Takeaways

- The Departments of Labor, Treasury, and Health and Human Services (the Departments) issued frequently asked questions (FAQs) Part 74 on nondiscrimination and wellness programs in response to continuing litigation challenging tobacco surcharge designs.
- The Departments announced enforcement relief for health-contingent wellness programs on whether the "full reward" must be applied retroactively when a participant completes a reasonable alternative standard (RAS) midyear.
- The FAQs also clarify when plan materials must include RAS language (i.e., materials describing the terms of a health-contingent wellness program must include the disclosure, while materials that only reference the existence of a wellness program generally do not).

Background

Under the Health Insurance Portability and Accountability Act (HIPAA) group health plans are prohibited from discriminating with respect to eligibility, benefits, or premiums in a group health plan based on a participant's health status. An exception to this general prohibition allows plans to provide certain premium discounts, cost-sharing reductions, or benefits in return for complying with certain wellness program requirements.

The Departments have issued regulations and guidance over the past two decades addressing wellness programs and implementing these requirements. The 2013 final rules established two primary categories of wellness programs: participatory wellness programs and health-contingent wellness programs. Health-contingent wellness programs are subject to specific requirements, including that the program give eligible individuals an opportunity to qualify for the reward, comply with applicable reward limits, be reasonably designed to promote health or prevent disease, make the full reward available to all similarly situated individuals, and disclose the availability of a RAS where required. Because tobacco-related premium differentials (i.e., tobacco surcharges) are health-contingent wellness programs, any tobacco surcharge design must comply with these requirements.

Over 80 lawsuits have been filed nationally against employers challenging the use of tobacco surcharges in wellness programs. These cases generally focus on two key requirements for health-contingent wellness programs: (i) the obligation to provide the "full reward" and (ii) the requirement to disclose the availability of a RAS. A central issue is whether an employer may remove a tobacco-related premium surcharge only on a prospective basis after a participant completes the RAS — typically a tobacco cessation program — or whether the employer must reimburse the participant for surcharges paid earlier in the plan year. Plaintiffs have argued that the “full reward” requirement requires retroactive reimbursement for the entire plan year. They have also alleged that some employers failed to provide required disclosures describing the program terms, including the availability of a RAS, in participant communications.

Details on the New FAQs

Enforcement Relief

Although the preamble to the 2013 final wellness program regulations indicated that an individual who completes a RAS midyear should receive the full reward for the entire plan year, including retroactively for the period before completion, the FAQs acknowledge that the regulatory text does not clearly impose that retroactive application requirement. The FAQs go on to provide that until further guidance is issued, the Departments will not take enforcement action solely because a plan applies the reward prospectively from the date the RAS is satisfied, provided the wellness program otherwise complies with the applicable nondiscrimination and wellness program rules. Plans must still ensure the wellness program is reasonably designed to promote health or prevent disease, is not a subterfuge for discrimination or underwriting based on a health factor, and gives individuals sufficient time to complete the RAS and receive a reward.

> ***CPC Comment:*** *This enforcement position may reduce regulatory audit risk, but it does not eliminate litigation risk. Plaintiffs may continue to assert that the “full reward” requirement requires retroactive relief, and to date, certain courts have agreed with those claims. Therefore, plan sponsors should continue to evaluate tobacco surcharge designs and RAS administration with legal counsel.*

Disclosure Requirement

The FAQs also clarify which disclosures are required to include the availability of a RAS for participants in a health-contingent wellness program. Plan materials that describe the terms of a health-contingent wellness program must disclose the availability of a RAS (or if applicable, a waiver), include contact information, and state that recommendations from an individual’s personal physician will be accommodated. Materials that merely mention the availability of a wellness program without describing its terms do not trigger this disclosure requirement.

> ***CPC Comment:*** *Existing compliant notices used in connection with a client’s wellness program should generally continue. This clarification should not be read to discourage use of the RAS model language or, where applicable, the EEOC wellness program notice language in participant-facing materials.*

Key Takeaways

In light of these FAQs, employers may have more flexibility to apply a wellness reward prospectively after a participant completes a RAS and not provide a retroactive reimbursement. However, the FAQs are not a broad relaxation of the wellness program rules and employers should consider the ongoing litigation risk with respect to these programs.

Employers should continue to review their wellness programs to ensure overall compliance with HIPAA and other wellness program requirements, including processing of rewards, notice requirements, and plan communications.

Please direct any questions on this topic to the CPC team.

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