HIPAA Rules on Nondiscrimination and Wellness Programs

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") rules provide that health plans may not discriminate against individuals with respect to health coverage based on health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability or disability. The HIPAA rules also clarify how wellness programs must be structured to comply with HIPAA’s nondiscrimination requirements. Some of these rules are affected by changes made by the Patient Protection and Affordable Care Act (PPACA), the health care reform law enacted in 2010.

This Employer Flexible Legislative Brief provides a high-level overview of the HIPAA rules on nondiscrimination and wellness programs and outlines related changes made by the health care reform law.

**HIPAA RULES**

**Nondiscrimination Rules**

Under the HIPAA rules, prohibited discrimination includes excluding individuals from coverage, denying benefits or charging more for coverage based upon a health factor. Health factors include health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability and disability.

Plans may limit or restrict benefits only if the limitation is applied equally to all similarly-situated individuals and not to specific individuals based on a health factor. However, the HIPAA rules allow plans to provide different benefits to different groups of employees, if there is a legitimate employment-based distinction between the groups. In addition, a health insurance issuer may charge a higher premium to one group health plan (or employer) covering individuals, some of whom have adverse health factors, than it charges another group health plan comprised of fewer individuals with adverse health factors.

Plans may not require an individual to pass a physical exam for enrollment, though they may require individuals to complete a health care questionnaire. Information gathered from health care questionnaires may not be used to deny, restrict or delay eligibility or benefits or to determine premiums. Plans may not exclude individuals from coverage because they participate in dangerous activities or have a history of high health claims. However, plans may exclude coverage for a specific disease if the restriction applies uniformly to all similarly-situated individuals.

The final rules address several questions regarding HIPAA’s nondiscrimination requirements and provide the following guidance:

- Health reimbursement arrangements (HRAs) that allow carryovers of unused amounts from year-to-year do not violate the nondiscrimination rules;
- Plans must treat special enrollees the same as regular enrollees, but may treat late enrollees differently;
- Source-of-injury exclusions may not be used to deny benefits that would otherwise be provided under the plan if the injury results from a physical or mental medical condition (including suicide attempts caused by depression) or an act of domestic violence;
• Preexisting condition exclusions that meet HIPAA’s requirements are permissible;
• HIPAA’s prohibition of nonconfinements clauses and state law may result in overlapping coverage for individuals; and
• Plans may provide more favorable treatment to individuals with adverse health factors.

Wellness Programs

The final rules also clarify whether wellness programs will violate the nondiscrimination rules. The rules state that so-called “participation only” wellness programs are consistent with the nondiscrimination requirements. These programs reward participants for taking part in the program and do not base rewards on the outcome. However, wellness programs that base rewards on a participant’s ability to meet a health-related goal must satisfy the following conditions:

• The value of the reward may not exceed 20 percent of the value of coverage under the plan;
• The program must be reasonably designed to promote health or prevent disease;
• Participants must be able to qualify for the reward at least once a year;
• The reward must be available to all similarly-situated individuals and there must be an alternative standard for those with adverse health factors that affect their ability to meet the standard requirements; and
• The plan must disclose the alternative standard in plan materials.

HEALTH CARE REFORM CHANGES

The 2010 health care reform law, PPACA, includes provisions that affect HIPAA’s nondiscrimination and wellness plan rules. The health care reform changes have staggered effective dates, with some relevant provisions already in effect and others going into effect in 2014. More agency guidance is needed on some of the changes, particularly those that go into effect in 2014.

To highlight, PPACA makes the following changes impacting HIPAA’s nondiscrimination and wellness program rules:

• Effective for plan years beginning on or after Sept. 23, 2010, health plans may not impose preexisting condition exclusions for enrollees under age 19. Effective in 2014, preexisting condition exclusions for all enrollees will be prohibited.
• Effective in 2014, health insurance issuers will not be permitted to charge higher rates due to health status, gender or other factors in the small group market. Premiums will be able to vary based only on age (no more than 3:1), geography, family size and tobacco use. This requirement does not apply to grandfathered plans.
• Effective in 2014, health plans may not establish rules for eligibility or continued eligibility based on health status factors. This requirement does not apply to grandfathered plans.
• Health insurance issuers that offer health coverage in the small group market must provide the essential benefits package required of plans sold in the state-run health insurance exchanges, effective in 2014. This requirement does not apply to grandfathered plans.
• The wellness program incentive limit increases to 30 percent of the premium, effective in 2014. Following a governmental study on wellness programs, the incentive may be increased to as much as 50 percent.
Employer Flexible will continue to monitor legal developments and will provide updated information as it becomes available.