U.S. Department of Labor Employee Benefits Security Administration
Washington, D.C. 20210

FIELD ASSISTANCE BULLETIN NO. 2008-02

DATE: FEBRUARY 14, 2008

MEMORANDUM FOR: VIRGINIA C. SMITH, DIRECTOR OF ENFORCEMENT
REGIONAL DIRECTORS

FROM: DANIEL J. MAGUIRE
DIRECTOR OF HEALTH PLAN STANDARDS AND COMPLIANCE ASSISTANCE

SUBJECT: WELLNESS PROGRAM ANALYSIS

ISSUE:

What types of health promotion or disease prevention programs offered by a group health plan must comply with the Department's final wellness program regulations and how does a plan determine whether such a program is in compliance with the regulations?

BACKGROUND:

On December 13, 2006, the Departments of Labor, the Treasury, and Health and Human Services published joint final regulations on the nondiscrimination provisions of the Health Insurance Portability and Accountability Act (HIPAA). See 29 CFR 2590.702. The final regulations include guidance on the implementation of wellness programs.

HIPAA's nondiscrimination provisions generally prohibit a group health plan or group health insurance issuer from denying an individual eligibility for benefits based on a health factor and from charging an individual a higher premium than a similarly situated individual based on a health factor. Health factors include: health status, medical condition (including both physical and mental illnesses), claims experience, receipt of health care, medical history, genetic information, evidence of insurability (including conditions arising out of acts of domestic violence), and disability. An exception provides that plans may vary benefits (including cost-sharing mechanisms) and premiums or contributions based on whether an individual has met the standards of a wellness program that complies with paragraph (f) of the regulations.

The regulations apply to group health plans and group health insurance issuers on the first day of the plan year beginning on or after July 1, 2007. Accordingly, for calendar year plans, the new regulations began to apply on January 1, 2008.

Since the issuance of the final regulations, the Department has received questions concerning what types of programs must comply with the standards of 29 CFR 2590.702(f) and how to apply these standards to particular wellness programs. The following checklist provides further guidance.

WELLNESS PROGRAM CHECKLIST:

Use the following questions to help determine whether the plan offers a program of health promotion or disease prevention that is required to comply with the Department's final wellness program regulations and, if so, whether the program is in compliance with the regulations.

A. Insert the first day of the current plan year: _____.

Is the date after July 1, 2007? .....☐Yes ☐No

The wellness program final rules are applicable for plan years beginning on or after July 1, 2007.

B. Does the plan have a wellness program? .....☐Yes ☐No

A wide range of wellness programs exist to promote health and prevent disease. However, these programs are not always labeled "wellness programs." Examples include: a program that reduces individual's cost-sharing for complying with a preventive care plan; a diagnostic testing program for health problems; and rewards for attending educational classes, following healthy lifestyle recommendations, or meeting certain biometric targets (such as weight, cholesterol, nicotine use, or blood pressure targets).

TIP: Ignore the labels – wellness programs can be called many things. Other common names include: disease management programs, smoking cessation programs, and case management programs.

C. Is the wellness program part of a group health plan?.....☐Yes ☐No

The wellness program is only subject to Part 7 of ERISA if it is part of a group health plan. If the employer operates the wellness program as an employment policy separate from the group health plan, the program may be covered by other laws, but it is not subject to the group health plan rules discussed here.

Example: An employer institutes a policy that any employee who smokes will be fired. Here, the plan is not acting, so the wellness program rules do not apply. (*But see* 29 CFR 2590.702, which clarifies that compliance with the HIPAA nondiscrimination rules, including the wellness program rules, is not determinative of compliance with any other provision of ERISA or any other State or Federal law, such as the Americans with Disabilities Act.)

D. Does the program discriminate based on a health factor?.....☐Yes ☐No

A plan discriminates based on a health factor if it requires an individual to meet a standard related to a health factor in order to obtain a reward. A reward can be in the form of a discount or rebate of a premium or contribution, a waiver of all or part of a cost-sharing mechanism (such as deductibles, copayments, or coinsurance), the absence of a surcharge, or the value of a benefit that would otherwise not be provided under the plan.

Example 1: Plan participants who have a cholesterol level under 200 will receive a premium reduction of 20%. In this Example 1, the plan requires individuals to meet a standard related to a health factor in order to obtain a reward.

Example 2: A plan requires all eligible employees to complete a health risk assessment to enroll in the plan. Employee answers are fed into a computer that identifies risk factors and sends educational information to the employee's home address. In this Example 2, the requirement to complete the assessment does not, itself, discriminate based on a health factor. However, if the plan used individuals' specific health information to discriminate in individual eligibility, benefits, or premiums, there would be discrimination based on a health factor.

If you answered "No" to **ANY** of the above questions, **STOP**. The plan does not maintain a program subject to the group health plan wellness program rules.

E. If the program discriminates based on a health factor, is the program saved by the benign discrimination provisions?.....☐Yes ☐No

The Department's regulations at 29 CFR 2590.702(g) permit discrimination ***in favor*** of an individual based on a health factor.

Example: Plan grants participants who have diabetes a waiver of the plan's annual deductible if they enroll in a disease management program that consists of attending educational classes and following their doctor's recommendations regarding exercise and medication. *This is benign discrimination because the program is offering a reward to individuals based on an adverse health factor.*

TIP: The benign discrimination exception is ***NOT*** available if the plan asks diabetics to meet a standard related to a health factor (such as maintaining a certain BMI) in order to get a reward. In this case, an ***intervening discrimination*** is introduced and the plan cannot rely solely on the benign discrimination exception.

If you answered "Yes" to the previous question, **STOP**. There are no violations of the wellness program rules.

If you answered "No" to the previous question, the wellness program must meet the following 5 criteria.

F. Compliance Criteria

(1) Is the amount of the reward offered under the plan limited to 20% of the applicable cost of coverage? (29 CFR 2590.702(f)(2)(i)).....☐Yes ☐No

Keep in mind these considerations when analyzing the reward amount:

Who is eligible to participate in the wellness program?

If only employees are eligible to participate, the amount of the reward must not exceed 20% of the cost of employee-only coverage under the plan. If employees and any class of dependents are eligible to participate, the reward must not exceed 20% of the cost of coverage in which an employee and any dependents are enrolled.

Does the plan have more than one wellness program?

The 20% limitation on the amount of the reward applies to all of a plan's wellness programs *that require individuals to meet a standard related to a health factor.*

Example: If the plan has two wellness programs with standards related to a health factor, a 20% reward for meeting a body mass index target and a 10% reward for meeting a cholesterol target, it must decrease the total reward available from 30% to 20%. However, if instead, the program offered a 10% reward for meeting a body mass index target, a 10% reward for meeting a cholesterol target, and a 10% reward for completing a health risk assessment (regardless of any individual's specific health information), the rewards do not need to be adjusted because the 10% reward for completing the health risk assessment does not require individuals to meet a standard related to a health factor.

(2) Is the plan reasonably designed to promote health or prevent disease? (29 CFR 2590.702(f)(2)(ii)) .....☐Yes ☐No

The program must be reasonably designed to promote health or prevent disease. The program should have a reasonable chance of improving the health of or preventing disease in participating individuals, not be overly burdensome, not be a subterfuge for discriminating based on a health factor, and not be highly suspect in the method chosen to promote health or prevent disease.

(3) Are individuals who are eligible to participate given a chance to qualify at least once per year? (29 CFR 2590.702(f)(2)(iii)) .....☐Yes ☐No

(4) Is the reward available to all similarly situated individuals? Does the program offer a reasonable alternative standard?
(29 CFR 2590.702(f)(2)(iv)) .....□Yes □No

The wellness program rules require that the reward be available to all similarly situated individuals. A component of meeting this criterion is that the program must have a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual for whom, for that period:

- It is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard; OR
- It is medically inadvisable to attempt to satisfy the otherwise applicable standard.

It is permissible for the plan or issuer to seek verification, such as a statement from the individual's physician, that a health factor makes it unreasonably difficult or medically inadvisable for the individual to satisfy or attempt to satisfy the otherwise applicable standard.

(5) Does the plan disclose the availability of a reasonable alternative in all plan materials describing the program?
(29 CFR 2590.702(f)(2)(v)) .....□Yes □No

The plan or issuer must disclose the availability of a reasonable alternative standard *in all plan materials describing the program.* If plan materials merely mention that the program is available, without describing its terms, this disclosure is not required.

TIP: The disclosure does not have to say what the reasonable alternative standard is in advance. The plan can individually tailor the standard for each individual, on a case-by-case basis.

The following sample language can be used to satisfy this requirement: "If it is unreasonably difficult due to a medical condition for you to achieve the standards for the reward under this program, call us at [insert telephone number] and we will work with you to develop another way to qualify for the reward."

If you answered "Yes" to **ALL** of the 5 questions on wellness program criteria, there are no violations of the HIPAA wellness program rules.

If you answered "No" to **any** of the 5 questions on wellness program criteria, the plan has a wellness program compliance issue. Specifically,

Violation of the general benefit discrimination rule (29 CFR 2590.702(b)(2)(i)) – If the wellness program varies benefits, including cost-sharing mechanisms (such as deductible, copayment, or coinsurance) based on whether an individual meets a standard related to a health factor and the program does not satisfy the requirements of 29 CFR 2590.702(f), the plan is impermissibly discriminating in benefits based on a health factor. The wellness program exception at 29 CFR 2590.702(b)(2)(ii) is not satisfied and the plan is in violation of 29 CFR 2590.702(b)(2)(i).

Violation of general premium discrimination rule (29 CFR 2590.702(c)(1)) – If the wellness program varies the amount of premium or contribution it requires similarly situated individuals to pay based on whether an individual meets a standard related to a health factor and the program does not satisfy the requirements of 29 CFR 2590.702(f), the plan is impermissibly discriminating in premiums based on a health factor. The wellness program exception at 29 CFR 2590.702(c)(3) is not satisfied and the plan is in violation of 29 CFR 2590.702(c)(1).

Additional compliance information regarding the other provisions in Part 7 of ERISA, including the HIPAA portability provisions and the rest of the HIPAA nondiscrimination provisions, is available on the Department's website at: http://www.dol.gov/ebsa/pdf/CAGAppA.pdf.

Questions concerning the information contained in this Bulletin may be directed to the Office of Health Plan Standards and Compliance Assistance at 202-693-8335.