News Flash: May 30, 2013 – Final Regulations on Wellness Programs

Federal agencies have issued final regulations on wellness programs, which modify the permissible incentives for meeting wellness standards and the conditions under which plans may provide those incentives.

Background

HIPAA, among many other things, prohibits certain types of discrimination based on health factors by group health plans and insurers providing group health plan coverage. Health plans can run afoul of the HIPAA nondiscrimination standards if they give premium discounts or enhanced benefits to individuals who meet certain health criteria (e.g., cholesterol below 200 or body mass index below 25). For several years, however, regulations have allowed health plans to include such variations in the form of limited plan rewards under wellness programs if these programs met several conditions. For more information on these requirements as they are currently in effect, see Willis Employee Benefits *Alert*, January 2007, "Final Nondiscrimination Regulations: How Do They Affect Wellness Programs?"

The health care reform law includes a provision that allows non-grandfathered group health plans to provide greater incentives for meeting certain wellness standards than are permitted under current regulations. The law specified an allowable incentive percentage of 30 (increasing from 20) and allowed the relevant agencies to issue regulations allowing for an incentive percentage as high as 50. (The application of these percentages is explained in greater detail below.) The agencies issued proposed regulations last November confirming the increase from 20 to 30 for plan years starting in 2014 and allowing a further increase to 50 with respect to tobacco-related standards. Those proposed regulations also included other changes to the current rules.

New Final Regulations

The new final regulations explain how the health care reform law provision changes the rules that currently apply to wellness programs. The new rules confirm that the changes are effective for plan years starting on or after January 1, 2014. They also make the rules uniformly applicable to both grandfathered and non-grandfathered health plans.

For those familiar with the proposed regulations, the final rules generally include the same changes to the current rules, but also clarify a number of points on which the agencies received comments. Willis' National Legal & Research Group will provide a more detailed explanation of the new final regulations in a future publication. Highlights are noted below.

- The final regulations are similar to existing guidance regarding wellness programs, in that they identify two types of wellness programs that a health plan might include – participatory and health-contingent – and apply different rules to each.
- "Participatory wellness programs" either provide no incentives or provide incentives solely for participating in a program that is unrelated to an individual's health status (e.g., a program that

provides the same reward to all health plan participants who complete a health risk assessment, regardless of the health status reported and without any further requirement).

  - The new final rules (as well as current rules) require only that these participatory programs be available to all similarly situated participants.
  - The rules do not limit the incentives that may apply under these programs (but other authorities (e.g., the ADA) may make it unwise to apply very large incentives under these programs).

- The final regulations make several changes for "health-contingent wellness programs," which generally are defined as programs providing a reward based on either:
  - Performing or completing an activity relating to a health factor (e.g., participating in a walking program)
  - Attaining or maintaining a specific health outcome (e.g., cholesterol levels within certain limits)
- As under current rules and the proposed regulations, the new final rules require health-contingent wellness programs to comply with several conditions, including limitations on the amount of the reward.
  - As under current rules, the reward generally cannot exceed a percentage of the total cost of employee-only coverage (or, if dependents may participate in the wellness program, the cost of the coverage category in which the employee and any dependents are enrolled).
  - The new final regulations confirm that this percentage will be 30% (increased from 20%), effective for plan years beginning during 2014. In addition, the total percentage may be increased to 50% if the additional 20 percentage points are an incentive under a program designed to reduce or prevent tobacco use.
  - For information on the incentive cap as it is currently in effect, see Willis Employee Benefits *Alert*, March 2008, "More Guidance, More Flexibility on Wellness Programs").
- The final rules make some important modifications to the conditions that health-contingent wellness programs must meet, including:
  - With respect to the requirement under current rules that a health-contingent program provide a "reasonable alternative" for obtaining a reward to certain individuals, the plan must identify and bear any cost of that alternative if it is an educational or other program.
  - The final regulations vary the standard for offering a reasonable alternative by dividing health-contingent wellness programs into two classes – outcome-based and activity-only.
  - As the name implies, an outcome-based program conditions a reward on attaining or maintaining a specific health outcome (e.g., BMI less than 25).

- Under an outcome-based program, an individual who does not meet the criteria specified must *automatically* be offered a reasonable alternative standard for receiving the reward (e.g., participation in a weight reduction program for those with BMI higher than 24).
- Current rules allow plans to be more restrictive in offering alternatives to those who do not meet health criteria. The current rules require offering the alternative only to those for whom it would be unreasonably difficult due to a health condition or medically inadvisable to meet the specified health outcome.
- If the reasonable alternative is participation in an activity (e.g., a weight reduction program) the standards for activity-only wellness programs must be met (see below).

o An activity-only program bases a reward on performing or completing an activity, such as a diet or exercise program, but does not condition the reward on attainment of any particular health outcome.

- In the case of an individual for whom, during the relevant period, the activity is unreasonably difficult due to a health condition or medically inadvisable, a reasonable alternative for obtaining the reward (or waiver of the requirement) must be offered.
- The plan may condition the availability of the alternative on receipt of verification (e.g., from a health care provider) "with respect to requests for a reasonable alternative standard for which it is reasonable to determine that medical judgment is required to evaluate the validity of the request."