

**Final HIPAA Rule**

- Administered by Department of the Treasury, Department of Labor and Department of Health and Human Services
- Authorized by ERISA and HIPAA
- Published 12/13/2006
- Effective 7/1/07

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**2001 Proposed Rule**

- Created category of "bona fide wellness program" as one exception to the nondiscrimination rule
- Also created an exception for rewards that are not contingent on achieving a health factor

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**First some background:**

- HIPAA was enacted in 1996 and prohibits discrimination based on any of the following:
  - 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 terrorism)
  - Disability

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**Bona fide wellness program**

- The amount of the reward may not exceed 10/15/20% of the total cost of employee-only coverage
- Must be reasonable designed to promote good health
- Reward must be available to all similarly situated individuals (must include reasonable alternative for those with medical conditions)
- Must disclose existence of the alternative

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**1997 Regulations asked for comment on whether we need Regs for wellness programs**

- No enforcement action against plans that make good faith effort to comply with statute

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**Rewards under a bona fide wellness program may include**

- Discounts
- Rebate of premium
- Reduction in copays, etc., or
- Absence of a surcharge

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**NOW THE NEW RULE**

- Published December 13, 2006
- Effective for plan years beginning on or after July 1, 2007
- No radical changes
- Some clarification and more examples

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**Wellness Program #1**

- All plan participants regardless of their medical conditions are asked to complete a health risk assessment and if they refuse their health premium contribution increases 20%
- Deemed by the EEOC to be "risky" as a penalty makes participation not "voluntary"

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**Related changes / clarifications**

- "Source of Injury" exclusions
- "Actively at Work" requirements
- "Non-confinement" clauses

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**Wellness Program #2**

- All prospective plan participants regardless of their medical conditions are asked to complete a health risk assessment and if they refuse, they are not permitted to enroll in the health plan
- Deemed by the EEOC to be "highly risky" due to the severity of the penalty

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**Basic structure remains but terminology is new**

- Two categories of programs
- What were called "bona fide wellness programs" are now "programs not subject to additional standards"

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**Wellness Program #3**

- The health plan provides that an individual selected to participate in a chronic disease management program will lose coverage for that condition if the individual fails to participate in the program
- Deemed by the EEOC to be "highly risky" because of the penalty
- If better benefits were given to participate, not a problem as coverage for a specific disease can always be better than standard benefits and not violate HIPAA or ADA

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- Keeping your Wellness Program legal
  - Apply HIPAA rules first
  - If satisfying a health factor is a condition, meet the following five conditions
    - Total value of rewards does not exceed 20% of premium contribution based on single or family coverage
    - Program must be reasonably designed to promote health or prevent disease

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- Keeping your Wellness Program legal
  - Lastly, determine if any other federal, state or local law or regulation may be impacted
    - Ex: Does a penalty for being a smoker violate state law?
    - Ex: Does the program favor highly compensated employees in violation of IRS Code Section 105(h)?

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- Must permit individuals to qualify at least annually
- Must be available to all similarly situated individuals and permit reasonable alternative if participation is unreasonably difficult or not medically advisable
- Disclosure in all plan materials of the reasonable alternative standard

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- As always:

Seek the advice of competent legal counsel in the development of any Wellness Program if you have any doubts that it is compliant

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- Keeping your Wellness Program Legal
  - Next, consider impact of program on protected classifications
    - Determine if program has inquiries that would elicit responses linked to a protected class
    - If "yes," determine if the program is "voluntary"
    - If not "voluntary" because penalties are involved measure your tolerance for risk before proceeding

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- Rule prohibits discrimination in premiums or contributions based on a health factor
  - Cannot have different premiums within a group based on health factors
  - Wellness programs are an exception to this portion of the rule

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- Programs not subject to additional requirements
  - Programs without a standard related to a health factor
  - Fitness club memberships
  - Participation in testing program (without regard to testing results)

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- New rule defines a "health factor"
  - Health status
  - Medical condition (physical or mental)
  - Claims experience
  - Receipt of health care
  - Medical history
  - Genetic information
  - Evidence of insurability
  - Disability

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- Programs not subject to additional requirements (more)
  - Waiver of copays or premiums for preventive care
  - Reimbursement for smoking cessation programs (without regard to outcome)
  - Rewards for participating in educational programs

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- Wellness Program
  - A program designed to promote health or prevent disease

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- Programs SUBJECT TO additional requirements
  - If satisfying a health factor is a condition
  - Must meet five additional conditions

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- **First:** The total value of all rewards must not exceed 20% of the cost of employee-only coverage.
  - If family members can participate, use that cost
  - Total cost includes employer and employee cost
  - Rewards include discounts, rebates, waivers, etc.

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- **Fourth:** Must be available to all similarly situated individuals
  - Must permit reasonable alternative if it is unreasonably difficult due to a medical condition, or if it is medically inadvisable
  - It is permissible to seek verification from a physician

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- **Second:** Must be reasonably designed to promote health or prevent disease
  - Reasonableness standard
  - Cannot be overly burdensome
  - Cannot be subterfuge
  - Cannot be highly suspect

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- **Fifth:** Disclosure in all plan materials of the reasonable alternative standard
  - Safe harbor language: "If it is unreasonably difficult due to a medical condition for you to achieve the standards for a reward under this program, or if it is medically inadvisable for you to attempt to achieve the standards for a reward under this program, call us at (xxx) and we will work with you to develop another way to qualify for this reward."

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- **Third:** Must permit individuals to qualify at least annually

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- **What do I need to do?**
  - Review your existing plan
  - Are there any incentives or rewards?
  - Do they depend on a health factor?
  - If Yes, does the plan meet the five tests?

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**Wellness Plans and the EEOC**

**Wallace T. Gray, General Counsel**  
**Key Benefit Administrators, Inc.**

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- **General rules under the ADA**
  - No disability-related inquiries or medical examinations pre-offer of employment
  - After offer, may make disability-related inquiries and require medical exams if required of everyone in same job category
  - After employment, may make disability-related inquiry and medical exams only if job related and there is a business necessity.

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- **Caveat under the new rule: What may pass for HIPAA may not pass for EEOC**
  - Americans with Disabilities Act (ADA)
  - Title VII (Age Discrimination Act, etc.)
  - Family and Medical Leave Act (FMLA)
  - ERISA's fiduciary provisions
  - State laws

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- **There can be no differentiation in terms of employment benefits due to real or perceived disability**

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- **Guidance from the EEOC under ADA**
  - No formal regulations are on the EEOC schedule
  - Facts and circumstances test will be used
  - There is some general guidance

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- **Can an employer make disability related inquiries or conduct medical exams as a part of a "voluntary" wellness program?**

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- Yes, as long as:
  - Part of a "voluntary" employee wellness program
  - Medical records must be kept confidential and separate from personnel records.
  - Can not be used for employment purposesQuestions need not be job-related or consistent with business needs

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- Definition of "Voluntary" wellness program
  - Employer does not requires participation, and
  - Employer does not penalize employees who do not participate (EEOC Notice 915.002, Enforcement Guidance on Disability-Related Inquiries and Medical Exams, QA 22)

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- Some Wellness Programs will be "Problematic" for the EEOC

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