

BULLETIN

THE SEGAL COMPANY

February 2001

INTERIM FINAL REGULATIONS ON HIPAA NONDISCRIMINATION AND PROPOSED RULES ON WELLNESS PLANS ISSUED

Interim final regulations have been issued interpreting the nondiscrimination requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).¹ HIPAA prohibits group health plans from discriminating against individuals with respect to health coverage based on health factors. Under proposed rules issued at the same time as the final rules, plans may reward individuals for participating in wellness programs, but only if the program meets the criteria spelled out in the proposed rule for a “bona fide wellness plan.”

The two sets of rules provide guidance on issues concerning common plan designs, such as actively at work clauses, “dangerous activity” exclusions, and preferential treatment for nonsmokers. While the nondiscrimination rules allow some flexibility for plan design, most current benefit plans will need to make some technical changes in order to comply fully. Therefore plan sponsors must review their plans’ terms to see how they match up with the new requirements. The rules apply to all health benefit plans and to health insurance issuers (insurance companies and HMOs, for example) offering group health insurance coverage in connection with a group health plan.²

Effective Date

The rules are generally effective for plan years beginning on or after July 1, 2001. There is no delayed effective date for collectively bargained plans. Some provisions (those that are substantially the same as regulations issued in 1997 or address issues that, to the agencies, seem self-evident) are effective March 9, 2001.³ In addition, a transition rule requiring notice and an opportunity to enroll to people who may have been improperly denied benefits, is effective March 9, 2001. Comments on the proposed rules are due by April 9, 2001.

Highlights of the Nondiscrimination Rules

The **interim final** HIPAA rules clarify what constitutes prohibited discrimination and what are permissible benefit arrangements. Some of the highlights are noted on the following page.

¹ These regulations, which were issued by the three agencies responsible for HIPAA implementation (the Pension and Welfare Benefits Administration of the Department of Labor, the Internal Revenue Service and the Health Care Financing Administration), were published in the *Federal Register*, Vol. 66, No. 5 (January 8, 2001). The table of contents for that issue is available online at the following address: http://www.access.gpo.gov/su_docs/fedreg/a010108c.html. The Segal Company is preparing a more complete discussion of the rules in a forthcoming issue of our publication *In Depth*. **To request that *In Depth*, “Implementing HIPAA’s Nondiscrimination Requirements,” contact your Segal Company consultant.**

² Plans that were generally excepted from HIPAA’s rules on preexisting condition limitations and special enrollment, including “limited scope” dental and vision plan, and non-federal governmental health plans that “opt-out,” are also excepted from HIPAA’s nondiscrimination requirements, as are certain grandfathered church plans.

³ A White House Memorandum issued January 20, 2001, immediately after President Bush took office, states that regulations that had been published in the *Federal Register* but were not yet effective were temporarily postponed for 60 days. It is not clear how that affects these rules, but plan sponsors should not delay in considering the impact on their health plans.

- The HIPAA nondiscrimination rules govern *enrollment and eligibility* in the plan, but not specific benefits. Therefore, plans may provide different levels of benefits for different services and treatment, as long as they are applied uniformly to people covered by the plan, even though the differences may affect people with health problems more severely than others. However, people with health problems may not be subject to less favorable enrollment or eligibility standards. Other federal laws that affect benefits such as the Americans with Disabilities Act continue to apply.
- Nonconfinement clauses that deny eligibility to individuals who are confined to a hospital or unable to engage in normal life activities are not permissible under HIPAA. (The agencies state that this is self-evident.) Health plans cannot apply “actively at work” clauses, restricting coverage to people who are on the job when a new benefit program takes effect, to people who are absent from work for health reasons. However, those restrictions can be applied to people who are absent due to a non-health factor, such as jury duty or a vacation.
- Plan sponsors may not amend a plan to reduce benefits for a specific treatment or service in response to a specific individual’s claim for those benefits. However, a plan amendment that is effective the first day of the next plan year is presumed not to be directed at a particular individual.
- A plan cannot deny enrollment or eligibility in the plan because a participant engages in dangerous activities, such as motorcycle riding, extreme skiing or bungee jumping. However, a plan may deny benefits for injuries that result from these dangerous activities.
- A plan cannot deny benefits for an injury that resulted from an act of domestic violence or a medical condition (physical or mental). For example, a plan may contain an exclusion for attempted suicide or self-inflicted injury. However, if the individual took the action that caused the attempted suicide or injury due to depression (a mental condition) the plan must pay the claim.

The **proposed** rules clarify that wellness programs may provide a reward to individuals who meet criteria related to a health factor. So, for example, the plan may provide a discount on contributions to participants who certify that they do not use tobacco products. However, an acceptable wellness program must meet a four-part test: (1) the reward must not be more than a percentage of the required employee contribution for the health plan (the percentage will be specified in the final regulation, at 10, 15 or 20%); (2) the program must be reasonably designed to promote good health or prevent disease; (3) the reward must be available to all similarly situated individuals, with a reasonable alternative available for those who, for medical reasons, cannot meet the general criteria (for example, in the case of a contribution discount for nonsmokers, the discount might also be offered to smokers who complete a smoking cessation program even if the effort is unsuccessful); and (4) all plan materials describing the program must disclose the availability of the alternative for those who try but cannot reach the wellness goals.



As with all issues involving the interpretation or application of laws and regulations, plan sponsors should rely on their attorneys for authoritative advice on the interpretation and application of these final and proposed HIPAA regulations. The Segal Company can be retained to work with plan sponsors and their attorneys to determine whether they have any obligations under the transition provisions and to determine what provisions must be implemented immediately.

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