

## EMPLOYMENT SERVICES ALERT

9/24/14

### Does Your Wellness Plan Meet the Reasonable Alternative Standard?

As fall open enrollment approaches, now is the time for Plan Sponsors to reevaluate their wellness programs and confirm that they comply with the regulations issued under the Affordable Care Act. The Departments of Labor, Treasury, and Health and Human Services have issued regulations governing the conditions of wellness programs associated with employer-sponsored health plans. In 2014, the regulations raised the maximum permissible reward offered in connection with a health-contingent wellness program to 30 percent and 50 percent for programs that seek to reduce tobacco use. Recent Equal Employment Opportunity Commission (the "EEOC") lawsuits against employers related to employer maintenance of wellness programs serve as a cautionary tale against instituting wellness programs without the guidance of an attorney.

#### The Reasonable Alternative Standard

Wellness programs can come in two forms: "outcome based" and "activity-only." Outcome-based wellness programs reward employees for meeting certain goals. Activity-only wellness programs require individuals to complete an activity related to a health factor in order to obtain a reward, although a particular outcome is not required.

Plan Sponsors of activity-only wellness programs need to offer a "reasonable alternative standard" (or waive the standard requirements) to any individual who cannot satisfy the program's requirements because of a medical condition. The wellness program can seek verification, such as a statement from an individual's personal physician that a health factor makes it unreasonably difficult or medically inadvisable for the individual to attempt to satisfy the program's requirements to earn the reward. The plan must provide a reasonable alternative standard that accommodates the recommendations of the individual's personal physician.

An outcome-based wellness program requires broader access to reasonable alternative standards for participants. If an individual does not meet the plan's standards, he or she must have access to a reasonable alternative standard regardless of any medical condition or other health status. A reasonable alternative standard can be another outcome-based program (for example, an alternative for a program requiring an individual to achieve a BMI of 23 or less might be requiring an individual to lose a certain percentage of body weight) or an activity-only wellness program (for example, the alternative to the program requiring a BMI of 23 or lower might be participation in a walking program). A reasonable alternative standard must be provided for all individuals who do not meet the outcome-based standard, to ensure that the program is reasonably designed to improve health and is not an excuse for underwriting or reducing benefits based on health status.

Unlike an activity-based wellness program, an outcome-based wellness program may not require verification, such as a statement from an individual's personal physician, before offering a reasonable alternative standard. (An exception applies if the reasonable alternative standard is an activity-only wellness program.)

#### Penalties for Noncompliance

Aside from any participant lawsuit concerning whether a wellness program impermissibly discriminates against people based on health status—which could result in damages and attorneys' fees—there are statutory penalties for noncompliance. The U.S. Department of Labor is actively auditing plans for compliance and can bring a civil action against an employer to enforce these requirements. Additionally, under the Health Insurance Portability and Accountability Act (HIPAA), the Internal Revenue Service may

impose on the sponsoring employer an excise tax penalty of \$100 per each day of noncompliance per each affected individual.

For assistance in the establishment of an employer sponsored wellness program or to confirm compliance with an existing one, please contact one of the Roetzel attorneys below:

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