
Potomac Current

The Monthly Advocacy Newsletter of the ASMBS

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HEADLINES

**Feds Issue Bevy of ACA Regulations on:
Essential Health Benefits
Employer Wellness Programs
Multi-State Health Plans**

**Obesity Community Participates in EEOC
Meeting on Employer Wellness Programs**

Feds Issue Bevy of ACA Regulations

HHS Issues Proposed Regulations on Essential Health Benefits and Employer Wellness Programs

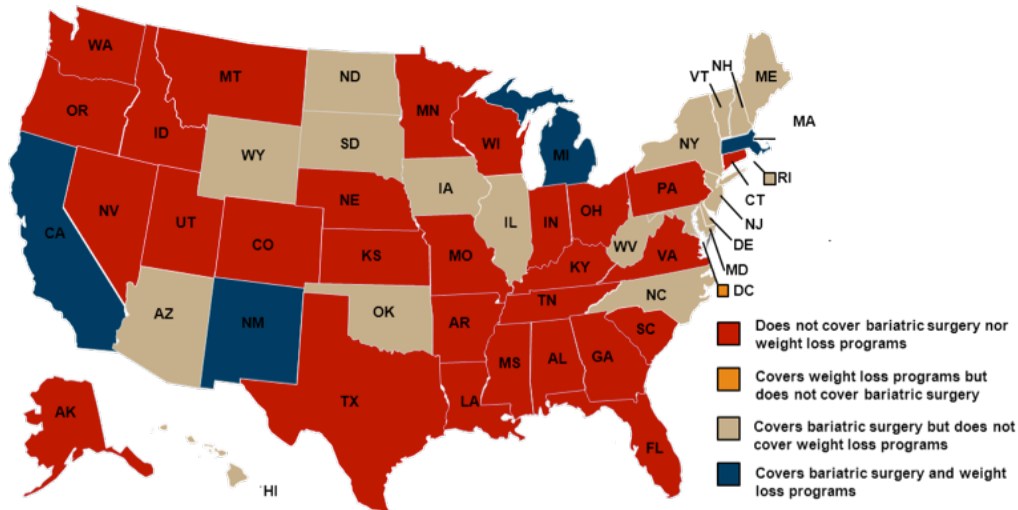
On November 20, 2012, the U.S. Department of Health and Human Services (HHS) released proposed regulations for public comment regarding state health exchanges and additional details regarding essential health benefit (EHB) requirements. In addition, HHS also issued a proposed rule surrounding criteria for employer wellness programs.

In reviewing the [EHB proposed rule](#), it appears that HHS will continue to remain silent regarding any disease-specific benefit categories beyond those specifically enumerated in the Affordable Care Act (ACA). Therefore, many in the obesity community are holding out hope that language in the proposed regulations regarding discriminatory benefit designs may afford protections for individuals seeking medically necessary obesity treatment.

For example, the proposed rule includes language that, “prohibit(s) benefit and network designs that discriminate on the basis of an individual’s medical condition, or against specific populations”. Treatment of obesity, as a clinical medical condition, should fall under this language. However, [a review of state benchmark coverage by the STOP Obesity Alliance and the Obesity Action Coalition](#) reveals that current benefit designs provide limited coverage of obesity treatment services.

This review was based on coverage summaries for all 50 state benchmark plan selections – provided by HHS as an appendix to the proposed rule. The HHS summary was based on states’ current EHB benchmark plan selection, with states that have not selected an EHB benchmark plan defaulting to the largest small-group employer plan in the state.

State Benchmark Plan Coverage of Obesity Treatment Services



Source: CCIIO summary of EHB benchmark plans based on 2012 benefits
 Note: “Weight-loss programs” is a category that insurers are required to report to CCIIO; we were unable to identify what, if any, criteria plans have to meet in order to claim they cover weight-loss programs.

Summary of Coverage

Twenty-two states chose benchmark plans that cover bariatric surgery (AZ, CA, DE, HI, IL, IA, ME, MD, NH, NJ, NM, NY, NC, ND, MA, MI, OK, RI, SD, VT, WV, and WY).

Five states chose benchmark plans that cover weight loss programs (CA, DC, NM, MA, and MI).

Twenty-eight states chose benchmark plans that cover neither bariatric surgery nor weight loss programs (AL, AK, AR, CO, CT, FL, GA, ID, IN, KS, KY, LA, MN, MS, MO, MT, NE, NV, OH, OR, PA, SC, TN, TX, UT, VA, WA, WI)

One state covers weight loss programs but not bariatric surgery (DC)

One final aspect of the proposed rule that could be problematic is that HHS is proposing that EHB benefit designs remains static through 2016. HHS “chose this approach for establishing a consistent set of benefits for two years in order to directly reflect current market offerings and limit market disruption in the first years of the Exchanges.” At press time, the obesity community was finalizing public comments on the proposed regulations.

HHS Proposed Regulations on Employer Wellness Programs Include Additional protections but Many Questions Remain

HHS also unveiled [proposed regulations](#) on November 20, 2012 regarding employer wellness incentive programs – designed to “reward” employees for meeting specific goals related to health indicators such as cholesterol, smoking cessation and weight (BMI).

A critical element of these proposed regulations is the requirement that the reward under a health-contingent wellness program be available to all similarly situated individuals. To meet this requirement, a “reasonable alternative standard” (or waiver of the otherwise applicable standard) for obtaining the reward must be provided for any individual for whom, for that period, it is either unreasonably difficult due to a medical condition to meet the otherwise applicable standard, or for whom it is medically inadvisable to attempt to satisfy the otherwise applicable standard.

HHS also included a number of examples of compliant wellness programs. Following is one possible scenario specific to BMI goals offered by HHS:

Example 4. (i) Facts. A group health plan will provide a reward to participants who have a body mass index (BMI) that is 26 or lower, determined shortly before the beginning of the year. Any participant who does not meet the target BMI is given the same discount if the participant complies with an exercise program that consists of walking 150 minutes a week. Any participant for whom it is unreasonably difficult due to a medical condition to comply with this walking program (and any participant for whom it is medically inadvisable to attempt to comply with the walking program) during the year is given the same discount if the individual satisfies an alternative standard that is reasonable taking into consideration the individual’s medical situation, is not unreasonably burdensome or impractical to comply with, and is otherwise reasonably designed based on all the relevant facts and circumstances. All plan materials describing the terms of the wellness program include the following statement: “Fitness is Easy! Start Walking! Your health plan cares about your health. If you are overweight, our Start Walking program will help you lose weight and feel better. We will help you enroll. (**If your doctor says that walking isn’t right for you, that’s okay too. We will develop a wellness program that is.)” Individual E is unable to achieve a BMI that is 26 or lower within the plan’s timeframe and is also not reasonably able to comply with the walking program. E proposes a program based

on the recommendations of E's physician. The plan agrees to make the discount available to E, but only if E actually follows the physician's recommendations.

Conclusion. In this Example 4, the program satisfies the requirements of paragraphs (f)(3)(iii), (iv), and (v) of this section. The program's initial standard for obtaining a reward is dependent on the results of a BMI screening, which is related to a health factor. However, the plan complies with the requirements of paragraph (f)(3)(iv) of this section because it makes available to all individuals who do not satisfy the BMI standard a different reasonable means of qualifying for the reward (a walking program that is not unreasonably burdensome or impractical for individuals to comply with and that is otherwise reasonably designed based on all the relevant facts and circumstances). In addition, the plan complies with the requirements of paragraph (f)(3)(iii) of this section because, if there are individuals for whom it is unreasonably difficult due to a medical condition to comply, or for whom it is medically inadvisable to attempt to comply, with the walking program, the plan provides a reasonable alternative to those individuals. Moreover, the plan satisfies the requirements of paragraph (f)(3)(v) of this section because it discloses, in all materials describing the terms of the program, the availability of other means of qualifying for the reward or the possibility of waiver of the otherwise applicable standard. Thus, the plan satisfies paragraphs (f)(3)(iii), (iv), and (v) of this section.

OPM Releases Proposed Regulations on Multi-State Health Plans

On November 30, 2012, the U.S. Office of Personnel Management (OPM) released long waited [proposed regulations](#) that will govern multi-state health plans. The Affordable Care Act requires at least two insurers or more to operate in each state's health exchange as a multi-state health plan. This provision was included in the ACA to ensure that every state had robust insurance options. It would particularly benefit people who live in more than one state, such as members of Congress, or small businesses that operate in several states but want to offer their employees uniform benefits. The program would be overseen by OPM, which currently covers about 8 million workers and their families through the Federal Employee Health Benefit Program.

The Multi-State Plan Program (MSPP) proposed rule includes a key provision that, if finalized, could result in guaranteed access to critical obesity treatment services, such as bariatric surgery and nutritional counseling across all 50 states. In the rule, OPM proposes *"allowing potential MSPP issuers to offer a benefits package, in all States, that is substantially equal to either (1) each State's EHB-benchmark plan in each State in which it operates; or (2) any EHB-benchmark plan selected by OPM."*

Under the second option, OPM is proposing that their selected EHB benchmark plan would be *"the three largest FEHBP plan options by enrollment that are open to Federal employees,"* which would be either the Blue Cross Blue

Shield (BCBS) Standard Option, BCBS Basic Option, or Government Employees Health Association (GEHA) Standard Option. In reviewing the coverage language for both the BCBS and GEHA plans, individuals choosing the BCBS plans would have access to both bariatric surgery and nutritional counseling. Those opting for GEHA would only have access to bariatric surgery. In addition, these Multi-State Plans would be required to cover intensive behavioral counseling for obesity as recommended by the United State Preventive Services Task Force. Unfortunately, like most health plans, both the BCBS plans and GEHA do not provide coverage for obesity drugs.

Plan	Obesity Counseling	Weight Loss Programs	Obesity Drugs	Bariatric Surgery
BCBS Standard	Covered	Excluded (other than nutritional counseling)	Excluded	Covered
BCBS Basic	Covered	Excluded (other than nutritional counseling)	Excluded	Covered
GEHA Option 40	Non-covered	Excluded	Excluded	Covered

Obesity Community Participates in Equal Employment Opportunity Commission Meeting on Employer Wellness Programs

On November 30, 2012, representatives from the obesity community (TOS, OAC, ASBP and ASMBS) participated in a Families USA coordinated meeting with Chai Feldblum, Commissioner of the Equal Employment Opportunity Commission (EEOC) to discuss issues surrounding employer wellness incentive programs. Specifically, advocates discussed how the Americans with Disabilities Act could possibly afford protections to those affected by employer wellness programs.

The meeting was very productive with issues surrounding those affected by obesity comprising a major portion of the discussion. TOS Advocacy Committee Chair Ted Kyle spoke for the obesity community – outlining what works, and what doesn’t work, regarding employer wellness incentive programs targeted at obesity. In addition, obesity advocates urged policymakers to, at a minimum, ensure that there is parity in coverage for obesity treatments compared to treatment avenues for other conditions subject to wellness programs such as high blood pressure, high cholesterol and smoking cessation.

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