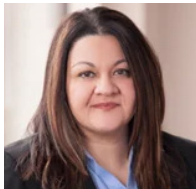


Tobacco Surcharge Lawsuits: Considerations for Plan Sponsors

A Practical Guidance® Article by
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A growing number of class action lawsuits have been filed against employer-sponsored self-insured group health plans alleging that tobacco cessation wellness programs violate key provisions of the Employee Retirement Income Security Act (ERISA) and the Health Insurance Portability and Accountability Act (HIPAA). These lawsuits challenge tobacco cessation programs on the grounds that they do not comply with the HIPAA nondiscrimination rules and ERISA's fiduciary duties. As litigation on this issue continues to evolve, plan sponsors may consider proactive steps to ensure their tobacco cessation wellness programs comply with legal requirements to mitigate potential litigation risks.

Regulatory Framework

Tobacco cessation wellness programs are designed to incentivize employees to quit using tobacco products. Typically, these programs offer lower health insurance premiums for tobacco-free employees, while employees who use tobacco products can avoid a surcharge by participating in a tobacco cessation program. The goal of these wellness

programs is to promote health and prevent disease caused by using tobacco products.

The HIPAA nondiscrimination rules generally prohibit group health plans from discriminating against individuals based upon a health status. The rules include an exception; however, that allows group health plans to offer incentives, such as a premium discount, to encourage participation in a wellness or disease management program. There are different types of wellness programs, and the typical tobacco cessation program is designed to be a health-contingent wellness program. Health-contingent wellness programs must be created within the framework of the HIPAA nondiscrimination rules, which include the following requirements:

- **Reasonable design.** The program must be reasonably designed to promote health or prevent disease
- **Size of reward.** The maximum incentive limit cannot exceed 50% of the total cost of coverage
- **Uniform availability and reasonable alternative standard.** The full reward must be available to all similarly situated participants; a reward is available to all similarly situated individuals if the wellness program offers a reasonable alternative standard to individuals who do not meet the initial standard to obtain the reward (i.e., smokers in a tobacco premiums surcharge wellness program)
 - A reasonable alternative standard can include, for example, an education seminar on quitting smoking
 - The full reward must be available to anyone who completes the reasonable alternative standard
- **Frequency of the reward.** The plan must offer participants the opportunity to qualify for the reward at least once per year
- **Notice of availability.** The plan must disclose in all plan materials that describe the tobacco cessation program, the terms of the wellness program and the availability of

the reasonable alternative standard, including contact information for obtaining the reasonable alternative standard and a statement that any recommendation of an individual's personal physician will be accommodated

Recent Litigation

Recent lawsuits allege that certain tobacco cessation wellness programs fail to meet the wellness requirements because

- The wellness program does not offer or properly communicate the reasonable alternative standard
- The wellness program removes the tobacco surcharge upon completion of the tobacco cessation program, but the surcharge is removed on prospective basis; plaintiffs allege that only offering a prospective adjustment to the premium surcharge violates the requirement that the "full reward" must be made available to individuals who complete the reasonable alternative standard and that the premium adjustment should be made retroactively –and–
- The collection of a surcharge is a breach of fiduciary duty because it allows the plan sponsor to reduce its cost toward the plan, which benefits the plan sponsor while harming the plan participants.

Plan Sponsor Action Items

It remains to be seen how courts will interpret the regulations as applied to allegations made by plaintiffs. In the meantime, to mitigate risk, plan sponsors may (1) review their tobacco cessation programs and overall wellness platforms for legal compliance, (2) review all communications that describe the tobacco cessation program to evaluate whether the included disclosures regarding the availability of the reasonable alternative standard satisfy applicable regulations, and (3) provide clear, accessible alternatives that allow employees to qualify for the full reward retroactively.

How We Can Help

Our team stands ready to answer questions employers may have about the design of tobacco cessation wellness programs, whether their tobacco cessation wellness programs are like those under challenge, or otherwise related to any of the information in this post, please feel free to contact the authors of this blog post or your usual Morgan Lewis contacts.

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Related Content

Practice Notes

- [Wellness Program Design and Compliance](#)

Template

- [HIPAA Non-discrimination Notice for Wellness Programs](#)

Cases

- *Sec'y of Lab. v. Macy's, Inc.*, No. 1:17-cv-541, 2024 U.S. Dist. LEXIS 174600 (S.D. Ohio 2024)

Agency Announcements

- [DOL, News Release, Flying Food Group Will Reimburse Health Plan Participants More Than \\$134,000 for Diagnostic Deductibles, Tobacco Surcharges, After Federal Investigation](#) (Sept. 26, 2023).

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