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Employee Benefits Compliance

Lawsuits Challenging Tobacco Cessation Programs Provide Strong Reminder of HIPAA's Wellness Program Rules

In what seems like the latest trend in group health plan litigation, a number of large and/or well-known employers are facing lawsuits challenging their wellness programs, almost all of which required tobacco users to pay more for health coverage than non-tobacco users (a tobacco use surcharge or tobacco-free incentive). The lawsuits allege that the plans required this increased premium for tobacco users without offering a compliant reasonable alternative standard (or waiver) as required by HIPAA. In at least one case, the employer did allow employees to complete a tobacco cessation program as a reasonable alternative standard but then only eliminated the tobacco premium surcharge on a moving forward basis. This approach is a violation of the "full reward" rule, which requires participants who complete a reasonable alternative standard to earn the complete full reward that would have been available if they had met the initial standard. That means that once the individual has completed the reasonable alternative standard, e.g., a smoking cessation program, the plan must provide the premium discounts (or other payout) for those months the surcharge was applied, as opposed to just removing the surcharge on a going forward basis. As a reminder, wellness programs that offer a reward to employees meeting a standard related to a health factor, such as not using tobacco, are regulated under HIPAA in a way that expressly requires these programs to provide a reasonable alternative standard or waiver of the standard. Again, completion of a reasonable alternative standard entitles participants to the full reward that would have been available if they had met the initial standard. Reasonable alternative standards that are easy to implement include attending a free tobacco use counseling appointment with a primary care provider, calling a free quit line (800-QUIT-NOW connect directly to a state's free quit line), or downloading the QuitGuide free app. For a detailed discussion of tobacco cessation programs under HIPAA and the full reward rule see [101 Wellness Plan Compliance Obligations](#).

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