

Tobacco Surcharge Lawsuits Test Employee Wellness Programs

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In the past few months, group health plans have experienced a surge of litigation challenging premium surcharges based on participants' tobacco use. As we have previously [noted](#), the Health Insurance Portability and Accountability Act of 1996 (HIPAA), as amended by the Affordable Care Act (ACA), allows group health plans to offer as much as a 50% incentive, or surcharge, for wellness programs designed to prevent or reduce tobacco use. In light of this litigation, plan sponsors should review their group health plans for compliance with regulations affecting these tobacco incentives/surcharges.

REGULATORY BACKGROUND

In order to comply with applicable wellness program rules under HIPAA and the ACA, for "outcome-based" wellness programs, any reduced premium (including those applicable to non-tobacco users) must be made available to all similarly situated plan participants. Reduced premiums are not available to a similarly situated plan participant unless the program allows a "reasonable alternative standard" to any individual who does not meet the initial standard based on a test or screening that is related to a health factor. [Regulations](#) issued in 2013 by the United States Departments of Treasury, Labor, and Health and Human Services (Regulations) specifically highlight that group health plans that offer a tobacco cessation program must meet the reasonable alternative standard for imposing a tobacco surcharge. The Regulations also require a group health plan to disclose the availability of its reasonable alternative standard in all plan materials describing the terms of the wellness program.

THE LAWSUITS

The recent lawsuits challenging tobacco surcharges have generally alleged two types of violations:

1. First, plaintiffs argue the group health plans are not reasonably designed because they fail to provide reasonable alternative standards.

For example, the Secretary of the United States Department of Labor (the Secretary) sued a group health plan sponsor in an Ohio federal court alleging that the plan failed to offer a reasonable alternative standard. The Secretary took the position that the Defendant's wellness plan did not qualify as a "reasonably designed" program because it required the employee to be smoke-free at the conclusion of the tobacco cessation program before the employee could qualify for the lower premium.

The court is expected to consider a renewed motion by the group health plan's sponsor to dismiss the lawsuit after the parties reevaluate the case in light of the Supreme Court of the United States' decision in *Loper Bright Enterprises v. Raimondo* (2024). As we previously noted in our [client alert](#), *Loper Bright* overturned longstanding precedent requiring courts to defer to administrative agencies' reasonable interpretations of the statutes they administer. Based on *Loper Bright*, the Regulations and judicial scrutiny of the regulators' interpretation makes the outcome of these lawsuits less predictable.

2. Second, the lawsuits allege that even if reasonable alternative standards are available, group health plans have failed to clearly communicate the alternatives to plan participants, violating the disclosure requirement element of the Regulations.

Group health plans have already incurred substantial costs from these lawsuits. For example, Bass Pro Shops recently agreed to a \$4.95 million settlement in a proposed class action. The complaint alleged that to avoid a tobacco surcharge, employees could complete a tobacco cessation program. But to qualify to have the surcharge removed, participants had to stop using tobacco for 90 days. Even then, under the terms of the program, the surcharge would only be removed prospectively, without reimbursing past amounts deducted from employees' paychecks. The complaint argued that Bass Pro Shops' policy of removing the tobacco surcharge on a prospective basis only and failure to notify employees about the tobacco cessation program in all communications about the surcharge violated the HIPAA/ACA wellness program rules.

NEXT STEPS

Plan sponsors with wellness programs or group health plans that include a tobacco surcharge should evaluate whether the plan design meets the requirements under the Regulations, including providing a reasonable alternative standard and refunding premiums to participants who meet such standards. In addition, plan materials and participant communications that describe the availability of any alternative standards should be reviewed, and updated if necessary. Please contact a member of the Winston & Strawn Employee Benefits and Executive Compensation Practice, our Labor & Employment Practice, or your Winston relationship attorney for further information.

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