

## Publications

# Recent Lawsuits Target Health Plan Premium Surcharges Based on Tobacco Use

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There is a new series of putative class action lawsuits in which the plaintiffs allege that employers that sponsor self-funded health plans with health plan premium surcharges related to tobacco use or vaccination status violate the HIPAA non-discrimination requirement notwithstanding the exception for “outcome-based wellness programs” that provides a basis for plans to apply such surcharges. Given the prevalence of these types of premium surcharges, additional lawsuits against sponsors of self-funded plans may follow. This alert summarizes the HIPAA non-discrimination requirement, the [wellness program rules](#), key allegations in the lawsuits, and the status of the lawsuits.<sup>[1]</sup>

## HIPAA Non-Discrimination Requirement and Wellness Program Rules

Under the HIPAA nondiscrimination rules, group health plans are generally prohibited from requiring enrollees to pay a premium or contribution that is greater than one charged to a similarly situated enrollee based on a health-status related factor. Agency guidance has said that tobacco use is a health-status related factor because it may involve nicotine addiction, and vaccination status may be a health-status related factor because there are health reasons someone may not be able to have a vaccine.

However, HIPAA provides an exception that allows employers to offer incentives, such as premium discounts, in return for participation in a wellness program, *i.e.*, “programs of health promotion and disease prevention.” Depending on the type of wellness program, there are certain requirements to qualify for the exception. Under the HIPAA wellness rules, there are two types of wellness programs: participatory and health-contingent programs:

- Participatory programs – programs that do not impose a condition for obtaining a reward based on an individual satisfying a standard that is related to a health-status factor. Examples include a program that reimburses employees for all or part of their membership in a fitness center or a diagnostic testing program that provides a reward

for participation, does not base any part of the reward on outcomes, and where there is not a health reason someone could not engage in the program.

- Health-contingent wellness programs – programs that require an individual to satisfy a standard related to a health factor to obtain a reward. Health-contingent wellness programs are either activity-only wellness programs or outcome-based wellness programs. Activity-only wellness programs require an individual to take part in an activity where there could be a health reason someone cannot engage in the program, such as walking, diet or exercise programs. Outcome-based wellness programs require an individual to achieve a specific health outcome, such as losing weight, having a favorable glucose rating, or not smoking.

The recently-filed lawsuits specifically target health-contingent, outcome-based wellness programs, and allege that the programs do not meet the regulatory requirements that such programs must meet to be considered nondiscriminatory under HIPAA. Those requirements include:

- The plan must offer participants the opportunity to qualify for the reward at least once per year;
- The size of the reward cannot exceed a certain percentage of the total cost of coverage under the plan;
- The program must be reasonably designed to promote health or prevent disease;
- The “full reward” must be available to all similarly situated participants. A reward is “available to all similarly situated individuals” where the wellness program offers a “reasonable alternative standard” to individuals who do not meet the initial standard to obtain the reward. Completing an educational program is one example of a reasonable alternative standard. The plan must provide the same, full reward regardless of whether an individual earns the reward because they met the initial standard or they met the reasonable alternative.
- Plans must disclose in “all plan materials describing the terms of an outcome-based wellness program, and in any disclosure that an individual did not satisfy an initial outcome-based standard,” the availability of the reasonable alternative standard. The notice is not required where the plan materials “merely mention” that the wellness program is available, without describing its terms. Where required, the notice must include contact information for obtaining the reasonable alternative standard and a statement that any recommendation of an individual’s personal physician will be accommodated. The rules provide sample language.

## Litigation by the Department of Labor

The Department of Labor (“DOL”) has brought several cases related to health plan premium surcharges. In 2023, for example, DOL filed a lawsuit against an employer for, among other things, imposing a \$20 per month premium surcharge on participants who disclosed tobacco use on health benefit enrollment forms. Among other things, DOL alleged the plan (i) did not provide *any* alternative standard (reasonable or otherwise) by which participants who used tobacco could obtain the premium discount and (ii) failed to disclose to participants the availability of a reasonable alternative standard to qualify for the premium discount. The Court entered a consent judgment that required the employer to reimburse its plan participants the amounts that they paid for the surcharges and assessed a civil monetary penalty against the employer.

Further, DOL is currently litigating another case regarding a tobacco surcharge, in which the Department also contends that the health plan did not satisfy the outcome-based wellness program requirements because the program did not provide a reasonable alternative standard. The employer recently challenged the wellness program rule as contrary to ERISA section 702(b) (the HIPAA nondiscrimination rule) pursuant to the [Supreme Court’s decision](#) in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). The district court in that case recently held that the employer’s argument regarding the validity of wellness program rule warrants “full consideration” by the parties and the Court and has allowed the employer to file a new motion to dismiss briefing that issue.

## Allegations in Recently-Filed Complaints

The recently-filed complaints generally allege the employers charged tobacco and/or vaccine premium surcharges that violate the HIPAA non-discrimination provision. Specifically, the lawsuits allege that the plans charged monthly premium surcharges to participants who identified themselves as tobacco users or not fully vaccinated. Further, the lawsuits allege that the plans do not meet the wellness program requirements for the following reasons:

- **The plans do not offer reasonable alternative standards because the premium reductions for participating in the wellness program are only available on a prospective basis.** For example, one of the recently-filed complaints alleges that employees

were eligible to have the tobacco surcharge removed upon completion of the tobacco cessation program, but the adjustments to the premium charged were only made on a prospective basis. The plaintiffs allege that only offering a prospective adjustment to the premium surcharge violates the regulatory requirement that the “full reward” be made available to individuals who satisfy the reasonable alternative standard (*i.e.*, completion of the tobacco cessation program).

- **The plans do not communicate the existence of such alternatives in “all plan materials.”** For example, one of the recently-filed complaints alleges that a plan’s annual enrollment guide asks the employee to identify whether they are a tobacco user and, if so, whether the employee is willing to participate in a tobacco cessation program. The complaint alleges that the enrollment guide does not contain any discussion of the tobacco premium surcharge or how an employee can avoid the surcharge through a reasonable alternative standard (*i.e.*, participation in the tobacco cessation program).
- **The employers’ collection of the surcharge amounted to a breach of fiduciary duty.** The plaintiffs allege that, by collecting the surcharge, the employers reduced the amount that they contributed towards the funding of the self-funded plan’s claims and administrative expenses, which benefitted the employers and harmed the plan.

## Parties

The plaintiffs in the lawsuits are current and former employees who allege to have paid the premium surcharges arising out of their tobacco use and/or vaccination status. The lawsuits define the putative class to be all individuals who paid the premium surcharges in connection with their participation in the health plans sponsored by the defendant employers during the applicable statute of limitations.

The defendants in the lawsuits are the employer plan sponsors of the self-funded health plans.

## Claims for Relief

The lawsuits generally assert the following claims for relief: (i) unlawful imposition of discriminatory surcharges in violation of ERISA section 702; (ii) failure to notify participants of reasonable alternative standards for avoiding the premium surcharges in violation of ERISA section 702 and 29 C.F.R. § 2590.702; and (iii) breach of fiduciary duty in violation of ERISA section 404.

In some cases, the plaintiffs also have asserted claims for relief against the defendant employer arising out of other alleged violations of ERISA. For example, one complaint asserts ERISA claims related to the management of the employer-sponsored 401(k) plan in addition to claims related to the tobacco surcharge.

## Relief Demanded

The lawsuits describe that the plaintiffs seek various form of relief, including: (i) declaratory and injunctive relief, including declaratory judgments that the surcharges violate ERISA and that the defendant employers breached their ERISA fiduciary duties by charging the surcharges; (ii) an order instructing the defendant employers to reimburse all persons who paid the surcharges, plus interest; (iii) an order requiring the defendant employers to provide an accounting of all prior payments of the surcharges to determine the amounts the employers must make good to the plan and to plan participants and beneficiaries; (iv) disgorgement of any benefits of profits the defendant employers received or enjoyed; (v) restitution of all amounts the defendant employers charged for the surcharges; (vi) surcharge from the defendant employers totaling the amounts owed to participants and/or the amount of unjust enrichment obtained by the defendant employers as a result of the collection of the surcharges; and (vii) attorneys’ fees and costs.

## Status of Pending Cases

To date, no court has ruled on a dispositive motion testing the complaints’ allegations. In some cases, the defendant employers have asserted that plaintiffs agreed to arbitrate ERISA claims, and also agreed to waive their ability to assert such claims on a class-wide basis. The enforceability of such agreements is currently being litigated.

At least one case has settled on a class-wide basis, and the parties in another case have notified the court they are in the process of finalizing a settlement that should result in the dismissal of the case on a class-wide basis. In the case that settled, the employer agreed to pay approximately 62% of the tobacco surcharges that the plaintiffs alleged were deducted from employee wages in violation of ERISA.

**GROOM INSIGHT:** Similar to the recent wave of lawsuits filed against employers predicated on allegedly deficient COBRA notices, we anticipate that plaintiffs' firms may file additional lawsuits against employers related to premium surcharges given that many self-funded health plans have wellness programs that impose tobacco surcharges. At least one plaintiffs' firm is currently soliciting plaintiffs for similar putative class action lawsuits against other employers. And similar to the COBRA notices cases, many of these allegations may not be accurate based on the facts.

Properly administered, surcharges related to tobacco use and vaccination status are permitted under the HIPAA non-discrimination rules. Employers may wish to review and evaluate whether their particular wellness programs are being operated and administered in compliance with the legal requirements discussed above. We also will continue to monitor developments in this area.