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Understanding the Recent Wave of Litigation Targeting Tobacco-Free Wellness Programs

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Until recently, cases challenging wellness programs offered by employers were relatively rare. This is no longer the case. Over the last several months, putative class actions have been filed against companies of all sizes alleging that their tobacco-free wellness programs are noncompliant with the Employee Retirement Income Security Act (ERISA) and that plan fiduciaries are violating their fiduciary duties when they impose and collect tobacco surcharges. Accordingly, it is important that companies review their plan wellness programs to ensure they are ERISA-compliant.

Relevant Statutory Background

ERISA Section 702(b) allows a plan to charge a participant an insurance premium based on a health-status related factor if that participant fails to adhere to a program "of health promotion and disease prevention," i.e., a wellness program.[1] A health status-related factor includes health status, medical condition, claims experience, receipt of healthcare, medical history, genetic information, evidence of insurability or disability.

An Overview of Tobacco-Free Wellness Programs

A tobacco-free wellness program is a program designed to incentivize employee-participants to quit using tobacco and help offset the higher healthcare costs associated with a participant's tobacco use. The reward is typically avoidance of an increased insurance premium (i.e., a surcharge). The standard is to be tobacco-free. Plan participants who do not use tobacco products automatically obtain the reward. Typically, tobacco-free wellness programs offer plan participants who use tobacco products the opportunity to attend a tobacco cessation program to obtain the reward and avoid the surcharge.

Are Tobacco Surcharges Permissible?

Tobacco surcharges can be permissible if the tobacco-free wellness program complies with ERISA. A tobacco-free wellness program, which is an outcome-based wellness program, complies with ERISA Section 702(b) if:

(1) The employer has a compliant wellness program that has a tobacco cessation

program and allows the person the opportunity to qualify for the "reward" (e.g., avoidance of the insurance premium surcharge);
(2) The surcharge cannot be more than 50 percent of the total cost of the employee's premium;
(3) The tobacco cessation program must be reasonably designed to promote health or prevent disease and cannot be overly burdensome;
(4) The promise of a lower health insurance premium must be available to all similarly situated employees; and
(5) Plan materials discussing the wellness program should communicate the requirements of the tobacco cessation program.[2]

Has the Government Issued A Regulation on Wellness Programs?

Yes, the U.S. Department of Labor, U.S. Department of the Treasury and U.S. Department of Health and Human Services issued a regulation (the Regulation) that applies to wellness programs. This Regulation has been revised over the years and was last updated in 2013.[3]

According to the Regulation, a smoking cessation program is a reasonable alternative standard to a program's tobacco-free standard; however, requiring a participant to actually stop smoking is not. The Regulation also requires that the "reward" made available to participants must be the "full reward." According to the Labor Department, the "full reward" is not available to a participant if he or she is penalized for electing not to commence the tobacco cessation program until several months after the beginning of the plan's calendar year.[4]

What Impact Does the Regulation Have on the Recent Wave Of Tobacco Surcharge Litigation?

In the new wave of tobacco-free wellness program litigation, plaintiffs are claiming that the wellness program at issue discriminates against them on the health status-related factor of tobacco use because:

(1) It does not provide a reasonable alternative standard to being tobacco-free because it requires a participant to quit smoking;
(2) The reasonable alternative standard to the surcharge was not disclosed in all plan materials discussing the wellness program; and/or
(3) It does not offer the participant an opportunity to obtain the "full reward."

The first and third theories of liability arise exclusively from the Regulation.

Will the U.S. Supreme Court's Decision In *Loper Bright* Impact The New Wave of Litigation?

The U.S. Supreme Court in *Loper Bright v. Raimondo*[5] overruled the *Chevron* doctrine and its requirement that courts defer to the federal agency's regulation as the controlling interpretation of the statute. As *Loper Bright* made clear, it is for the court to determine the best reading of the statute at issue. Thus, under *Loper Bright*, the Regulation is no longer the controlling legal rule; rather, it is the court's interpretation of the statute that controls. Thus, challenges to the applicability of the Regulation and theories of liability arising from it may be forthcoming.

In Summary

- ERISA prohibits employers who offer health and welfare benefit plans from discriminating against plan participants on the basis of a health status-related factor, such as a medical condition, unless the employer offers an ERISA-compliant program of health promotion and disease prevention (i.e., a wellness program).
- A new wave of ERISA class action litigation is targeting companies that charge an additional insurance premium (i.e., surcharge) for participants who use tobacco products by claiming that the wellness programs violate ERISA's nondiscrimination test.
- Employers who have established wellness programs (or intend to implement wellness programs in 2025) should review them to ensure they comply with ERISA and the applicable regulations prior to implementation.

Conclusion

Though plan sponsors and plan fiduciaries are expected to challenge the Regulation, it remains on the books. As such, employers who are looking to minimize liability associated with implementing a tobacco-free cessation wellness program should review their wellness program with their legal counsel.

Notes

1. See 29 U.S.C. § 1182(b).
2. See 42 U.S.C. § 300gg-4(j)(3)(D)-(E).
3. 29 C.F.R. § 2590.702(f), 78 Fed. Reg. 33158-01.
4. 78 Fed. Reg. at 33163 ("For example, if a calendar year plan offers a health-contingent wellness program with a premium discount and an individual who qualifies for a reasonable alternative standard satisfies that alternative on April 1, the plan or issuer must provide the premium discounts for January, February, and March to that individual.").
5. Loper Bright v. Raimondo, 144 S. Ct. 2244 (2024).

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