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New Flurry of Litigation Challenging Wellness Programs

More than one dozen class action lawsuits were filed this year challenging wellness programs that increased group health plan premiums for participants who use tobacco. Employers should take steps to ensure their wellness programs are up-to-date and in compliance with federal law.

The Health Insurance Portability and Accountability Act ("HIPAA") nondiscrimination rules prohibit group health plans from charging higher premiums to participants based on any health factor unless certain exceptions are met. One exception is a compliant wellness program, which allows a plan to charge tobacco users a higher premium for their health plan as compared to non-tobacco users. This wellness program must meet specific requirements, including offering a reasonable alternative standard ("RAS") to avoid the surcharge, providing notices of the RAS, and making the full reward available if the RAS is met.

These tobacco surcharge lawsuits largely stem from alleged deficiencies in the RAS requirement or its implementation, including failing to provide the notice of a RAS in all plan materials, communicating misleading information regarding the RAS, failing to provide a RAS altogether, and failing to make the full wellness program reward available to individuals who complete the RAS.

This is not an unexpected development. Our prior publication from 2018 warned employers of the risks associated with administering wellness programs, including significant civil monetary penalties levied against plan sponsors and even against plan fiduciaries personally.

Employers offering wellness programs should review their programs to ensure compliance with HIPAA and other laws.

Specifically, employers should:

- Ensure the wellness program properly documents and includes all requirements, such as those under HIPAA, the ADA, and GINA;
- Review all surcharges to verify that participants are offered a RAS to earn the full reward (avoid the surcharge);
- Include information on the RAS in plan documents and participant communications related to the wellness program;
- Ensure participants are provided the opportunity to earn the wellness program reward (e.g., avoid the surcharge) at least once per plan year;

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- Provide the full reward to participants who complete the RAS;
- Consider creating a fiduciary committee responsible for overseeing wellness programs offered in conjunction with the group health plan; and
- Review fiduciary liability insurance policies to ensure they cover fiduciaries of the wellness program.

If you have any questions related to tobacco surcharge litigation or these action items, or if you would like assistance in structuring your wellness program to comply with HIPAA and other applicable law, please contact a member of Kutak Rock's Employee Benefits and Executive Compensation group, including the ERISA Fiduciary and Benefits Litigation team.

