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Recent Litigation Places Tobacco Surcharge and Wellness Plans Under Fire

Wellness programs have become a popular tool for promoting healthy behaviors among employees and for managing rising healthcare costs. A recent wave of litigation is challenging whether these programs comply with key federal regulations, particularly the Employee Retirement Income Security Act (“ERISA”) and the Health Insurance Portability and Accountability Act (“HIPAA”).

Common features of tobacco surcharges being challenged in litigation include:

- The programs either fail to offer a reasonable alternative standard or do not adequately communicate its availability to participants, such as by excluding it from the Summary Plan Description or “burying” references to it in vague language at the end of lengthy benefit publications.
- The programs don’t include language that the plans would consider alternative recommendations by the participant’s individual physician if the participant wasn’t able to complete the program.
- The programs provide tobacco surcharge relief only on future benefit premium payments after the employee completes a cessation program, which plaintiffs contend violates the requirement to provide the “full reward”. *I.e.*, plaintiffs contend they should be reimbursed for surcharges paid during the benefit year once they complete the cessation or alternative program.

These elements were at issue in the cases of *Ruiz v. Bass Pro Group, LLC*, a Missouri class action where the court just approved a \$4.95 million settlement, and *Bokma v. Performance Food Group*, a class action pending in Virginia, where the court just last month denied the employer’s motion to dismiss.

While neither of these cases definitively decides that the employer tobacco cessation programs were not in compliance with HIPAA or ERISA, employers can avoid getting dragged into similar litigation by evaluating how well their plan(s) handle the following:

- **Transparency** –Plans should clearly disclose the availability of reasonable alternatives in all wellness-related materials and Plan documents. Employers should review their Plan descriptions in employment documents as highly-detailed descriptions of the primary cessation program without mention of alternatives may run afoul of ERISA.
- **Individualized Accommodation** - Plans must consider individualized proposals supported by the participant’s physician where the participant is unable to complete the standard or the reasonable alternative. Plans must disclose the availability of the individual alternative.

- **Retroactive Reimbursement** – If employees complete a cessation program or other reasonable alternative standard mid-year, employers risk litigation and uncertain outcomes if they do not refund premium tobacco use surcharges previously paid in the benefit year.

If your company uses a tobacco surcharge as part of a wellness program, now is the time to review your plan documents, communication strategy, and reimbursement policies. This includes ensuring that a reasonable alternative standard is offered for employees to earn the full reward and that the surcharge is clearly communicated across all relevant materials. Please refer to [Part 1, Understanding HIPAA and ACA Wellness Program Requirements](#), for additional information, and reach out to counsel with specific questions or concerns.

If you have any questions or would like additional information, please contact McKenzie Meade at 205-323-9279 or mmeade@lehrmiddlebrooks.com.