



Legal Aspects of Wellness Programs

Healthy Ohio Business Council
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Today's Presentation

- Wellness programs are popular ways to encourage employee health and reduce plan costs
 - ▣ No uniform definition of “wellness programs”
- Competing governmental interests
 - ▣ Encouraging wellness
 - ▣ Discouraging discrimination
- Today's presentation will
 - ▣ Focus on group health plans
 - ▣ Examine the layers of laws applicable to wellness programs

Wellness Program Design Example

Option	Employee Only Non-Tobacco Cost	Employee Only Tobacco Cost	Family Non-Tobacco Cost	Family Tobacco Cost
A	\$200	\$700	\$400	\$1,400
B	\$180	\$630	\$360	\$1,260
C	\$150	\$525	\$300	\$1,050

- Employee must certify with open enrollment elections that the employee and all covered dependents are tobacco free and must notify the plan of any change in tobacco status
- Open enrollment materials state: “Stop smoking today! We can help! If you are a smoker, we offer a smoking cessation program. If you complete the program, you can qualify for the non-tobacco premium.”

HIPAA

- Generally prevents discrimination based on a health factor
- Exception for wellness programs that condition rewards on satisfying a standard based on a health factor (“health-contingent wellness programs”)
 - ▣ Examples of health-contingent wellness programs:
 - ▣ Smoker surcharges
 - ▣ Premium reductions for employees with BMI under 30
 - ▣ Exception applies to premiums and benefits – not eligibility
- Participatory wellness programs need only be offered to all similarly situated individuals
 - ▣ Example: Health plan premium discount for completing a health risk assessment

HIPAA

- Requirements for health-contingent wellness program exception
 - ▣ Individuals must be able to qualify for the reward at least once per year
 - ▣ The reward may not exceed 30 percent of the cost of coverage
 - ▣ 50 percent for certain tobacco-related programs
 - ▣ The program must be reasonably designed to promote health or prevent disease
 - ▣ The reward must be available to all similarly situated individuals
 - ▣ Any materials describing the program must disclose the availability of a reasonable alternative

HIPAA

- The reward for a program designed to reduce or prevent tobacco use may not exceed 50 percent of the cost of coverage
- The reward for other health-contingent wellness programs may not exceed 30 percent of the cost of coverage
 - ▣ “Cost of coverage” includes both employee and employer contributions
 - ▣ Generally use employee-only level of the applicable option
 - ▣ If any dependents must also satisfy the requirements, may use the coverage level in which the employee and dependents are enrolled
 - ▣ Aggregate all wellness incentives that are subject to HIPAA

HIPAA

Example 1: If the tobacco premium is the only covered wellness program

Option	Employee Only Non-Tobacco Cost	Employee Only Tobacco Cost	Employee Only Total Cost	Family Non-Tobacco Cost	Family Tobacco Cost	Family Total Cost
A	\$200	\$700 $\$700 - \$200 = \underline{\$500}$	\$1,000 $50\% \text{ of } \$1,000 = \underline{\$500}$	\$400	\$1,400 $\$1,400 - \$400 = \underline{\$1,000}$	\$2,000 $50\% \text{ of } \$2,000 = \underline{\$1,000}$
B	\$180	\$630 $\$630 - \$180 = \underline{\$450}$	\$900 $50\% \text{ of } \$900 = \underline{\$450}$	\$360	\$1,260 $\$1,260 - \$360 = \underline{\$900}$	\$1,800 $50\% \text{ of } \$1,800 = \underline{\$900}$
C	\$150	\$525 $\$525 - \$150 = \underline{\$375}$	\$750 $50\% \text{ of } \$750 = \underline{\$375}$	\$300	\$1,050 $\$1,050 - \$300 = \underline{\$750}$	\$1,500 $50\% \text{ of } \$1,500 = \underline{\$750}$

HIPAA

- Example 2: If the employer offers a tobacco-related wellness program and another wellness program
 - ▣ Employer provides a \$150 premium discount for non-smokers and a \$100 premium discount for individuals with a BMI under 30
 - ▣ The total reward (\$150 + \$100) may not exceed 50 percent of the total cost of coverage
 - ▣ The non-tobacco reward (\$100) may not exceed 30 percent of the total cost of coverage

HIPAA

- The reward must be available to all similarly situated individuals
 - ▣ Requirements apply differently to “activity-only” and “outcome-based” programs
 - ▣ Activity-only: Individual must perform or complete an activity relating to a health factor, regardless of the outcome
 - ▣ Examples: Walking program, diet/exercise program
 - ▣ Outcome-based: Individual must attain or maintain a specific health outcome
 - ▣ Generally involves a measurement, test or screening
 - ▣ Examples: Not smoking, achieving certain results on a biometric screening

HIPAA

- Outcome-based programs must provide a reasonable alternative (or waive the requirement) for anyone who does not meet the standard
 - ▣ Alternative cannot require the individual to meet a different level of the same standard without providing additional time to comply
 - ▣ Individual must be permitted to comply with recommendations of his/her personal physician as an alternative, if the individual and the physician make the request
- Activity-only programs need only provide a reasonable alternative (or waive the requirement) if:
 - ▣ It is medically inadvisable to attempt to meet the standard
 - ▣ It is unreasonably difficult due to a medical condition to meet the standard
 - ▣ May require a doctor's note to verify if reasonable under the circumstances

HIPAA

- Reasonable alternative need not be developed until requested
- Plans may offer different reasonable alternatives to different people
- Time commitment to complete the alternative must be reasonable
- If the alternative is an educational program:
 - ▣ Plan must make the program available or help employee find a program
 - ▣ Employee cannot be forced to pay for the program
- If the alternative is a diet program:
 - ▣ Plan must pay the membership fee
 - ▣ Employee can be required to pay for the cost of food

HIPAA

- If the employee's personal physician believes the requirement for reward or reasonable alternative is not medically appropriate for the employee, the reasonable alternative must accommodate the personal physician's recommendations
 - ▣ Plan can impose cost-sharing for medical items/services furnished under the physician's recommendation
- If the reasonable alternative is an activity-only wellness program, the reasonable alternative must follow the rules of activity-only wellness programs
- If the reasonable alternative is an outcome-based wellness program, the reasonable alternative must follow the rules of outcome-based wellness programs

HIPAA

- Example: Employer offers a \$50 monthly premium discount for individuals with a BMI under 30
 - ▣ Individuals with a BMI of 30 or higher must be offered a reasonable alternative, such as
 - ▣ Walking program
 - ▣ Individuals must be provided a reasonable alternative if it is medically inadvisable or unreasonably difficult to participate in the program due to a medical condition
 - ▣ If reasonable, plan can require a physician's note to verify need for alternative
 - ▣ Following diet/exercise recommendations of a plan-appointed provider
 - ▣ Must take into account the recommendations of the individual's physician if that physician states it is not medically appropriate to comply with the plan-appointed provider's recommendations
 - ▣ Following medication/testing recommendations of the individual's provider

HIPAA

- The same, full reward must be provided to individuals who complete a reasonable alternative and to individuals who meet the initial standard for that plan year
 - ▣ Example: Monthly premiums for a calendar-year health plan are \$100 for employees with a BMI under 30 and \$150 for employees with a BMI of 30 or more
 - ▣ Employee A has a BMI of 31 and completes a reasonable alternative walking program by February 15
 - ▣ Employee A can be required to pay \$150 for coverage until the walking program is completed
 - ▣ Once the walking program is completed on February 15, Employee A is retroactively entitled to the \$100 premium for January and February

HIPAA

- Any materials describing the program must disclose the availability of a reasonable alternative
 - ▣ Examples:
 - ▣ Your health plan wants to help you take charge of your health. Rewards are available to all employees who participate in our Cholesterol Awareness Wellness Program. If your cholesterol count is under 200, you will receive the reward. If not, you will still have an opportunity to qualify for the reward. We will work with you and your doctor to find a Health Smart program that is right for you.
 - ▣ Fitness is Easy! Start Walking! Your health plan cares about your health. If you are considered overweight because you have a BMI of over 26, our Start Walking program will help you lose weight and feel better. We will help you enroll. (If your doctor says that walking isn't right for you, that's okay too. We will work with you (and, if you wish, your own doctor) to develop a wellness program that is.)
 - ▣ Your health plan is committed to helping you achieve your best health. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at ___ and we will work with you (and, if you wish, with your doctor) to find a wellness program with the same reward that is right for you in light of your health status.

Wellness Program Design Example

- Employer provides a \$50/month premium discount to each employee who completes a health risk assessment and undergoes a biometric screening
- Health risk assessment includes questions about family medical history of certain conditions
- The family medical history questions are at the end of the questionnaire following this statement: “The following questions are voluntary. You do not need to complete these questions to qualify for the premium reduction.”

GINA

- Generally prohibits discrimination on the basis of genetic information
 - ▣ Prior to enrollment
 - ▣ For underwriting purposes
 - ▣ Includes calculating premiums
- Genetic information
 - ▣ Excludes manifested medical conditions of the individual
 - ▣ Includes manifested medical conditions of family members
- Exception for voluntary wellness programs
 - ▣ “Voluntary wellness program” not defined
 - ▣ Prohibition on incentives in exchange for genetic information

GINA

- Options for dealing with family medical history questions
 - ▣ Do not ask them

OR

 - ▣ Do not provide incentives for completion of the health risk assessment

OR

 - ▣ Make the family medical history questions voluntary and include a statement clearly explaining that they are voluntary
- Ensure that no other questions solicit family medical history

GINA

- Open question:

- Can an employer provide incentives for a spouse's completion of a health risk assessment?

Wellness Program Design Example

- Employer charges employees \$20/paycheck if they do not complete a health risk assessment and undergo a biometric screening
- Health risk assessment does not include questions about family medical history
- Employees who are identified with certain conditions are offered disease management programs at no additional cost
- Employer receives aggregate data and uses information to assess design of health plan

ADA

- ADA generally prohibits medical examinations or disability-based inquiries unless done as part of a voluntary wellness program
- Program is voluntary if an employer neither requires participation nor penalizes employees who do not participate
- Informal EEOC letter
 - ▣ Initially blessed financial incentives that satisfied HIPAA
 - ▣ Later rescinded blessing
 - ▣ “The Commission is continuing to examine what level, if any, of financial inducement to participate in a wellness program would be permissible under the ADA”

ADA

■ *Seff v. Broward Co.*

- ▣ Did not address whether plan was a voluntary wellness program
- ▣ Relied on ADA safe harbor
 - ▣ Intended to protect the insurance industry from parts of the ADA
 - ▣ “[S]hall not be construed to prohibit or restrict . . . a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classification risks, or administering such risks that are based on or not inconsistent with state law.”

ADA

- *EEOC v. Orion Energy Systems, Inc.*

- ▣ Case filed by the EEOC in the Eastern District of Wisconsin
- ▣ Employer wellness program included a health risk assessment and a fitness component
 - ▣ Employer paid 100 percent of the health plan premium for employees who completed the wellness program
 - ▣ Employer paid none of the health plan premium for employees who did not complete the HRA and charged a \$50 penalty for employees who did not complete the fitness component

ADA

- *EEOC v. Orion Energy Systems, Inc.*

- The only employee who complained about the program was fired

- “The employee was told that she was not to express any opinions about the wellness program to her coworkers. She was further told that the purpose of the meeting was to quash any potential ‘attitude’ issue of hers relating to the wellness program.”

ADA

- *EEOC v. Flambeau, Inc.*

- ▣ Case filed by the EEOC in the Western District of Wisconsin
- ▣ Employer wellness program included a health risk assessment and a biometric screening
 - ▣ Employer mandated that employees complete HRA and biometric screening to be eligible for the health plan
 - ▣ Employees who did not complete their HRA and biometric screening at the appointed time would be subject to disciplinary action

ADA

- *EEOC v. Flambeau, Inc.*

- ▣ An employee on medical leave was unable to complete the HRA and biometric screening at the appointed time
 - ▣ The employee asked to complete the HRA and biometric screening upon return and was denied
 - ▣ The employer terminated the employee's coverage but offered the employee the choice to continue coverage at COBRA rates

ADA

■ *EEOC v. Honeywell International, Inc.*

- Case filed by the EEOC in the Western District of Wisconsin
- Employer wellness program included a health risk assessment and a biometric screening
 - If an employee did not complete biometric testing:
 - The employee would lose employer contributions (up to \$1,500) to his HSA
 - A \$500 surcharge would apply to health insurance
 - It would be assumed that the employee used tobacco and therefore must pay a \$1,000 tobacco surcharge for health coverage
 - If an employee's spouse also did not complete the biometric testing, the employee would be required to pay another \$1,000 tobacco surcharge for health coverage

ADA

■ *EEOC v. Honeywell International, Inc.*

- Two employees complained to the EEOC
- EEOC asked Honeywell to:
 - Inform employees that Honeywell will not impose a cost on employees who fail to complete the biometric screening
 - Not impose a cost or surcharge on (or reduce HSA contributions for) employees who fail to complete the biometric screening
 - Not impose a cost or surcharge on employees whose spouses fail to complete the biometric screening
 - Not provide any inducement to an employee's spouse to participate in the biometric testing
- Honeywell refused
- The court did not grant the EEOC's request for a TRO

ADA

■ Proposed regulations

- ▣ A wellness program will not violate the ADA if it
 - ▣ Is reasonably designed to promote health or prevent disease
 - ▣ Is voluntary
 - ▣ Is confidential
 - ▣ Otherwise complies with the ADA
 - ▣ Reasonable accommodations may be necessary
- ▣ A wellness program that is offered as part of a group health plan must also
 - ▣ Limit incentives to no more than 30 percent of the cost of coverage
 - ▣ Provide notice

ADA

- The program must be reasonably designed to promote health or prevent disease
 - ▣ Must have a reasonable chance of improving health of or preventing disease in participating employees
 - ▣ May not be overly burdensome
 - ▣ May not be a subterfuge for discrimination
 - ▣ May not be highly suspect in the method chosen to promote health or prevent disease

ADA

- The program must be voluntary
 - ▣ Employees cannot be required to participate
 - ▣ Eligibility for health coverage cannot be conditioned on participation
 - ▣ Eligibility for a particular health coverage option cannot be conditioned on participation
 - ▣ The employer may not take adverse employment action against employees

ADA

- The program must be confidential
 - ▣ Medical information can be shared with the employer only in aggregated form
 - ▣ Except to the extent necessary to administer the program
 - ▣ If the wellness program is a group health plan, may be able to rely on HIPAA certification and compliance

ADA

- A wellness program that is offered as part of a group health plan must limit incentives to no more than 30 percent of the cost of coverage
 - ▣ “Cost of coverage” includes both employee and employer contributions
 - ▣ Use employee-only level of the applicable option
 - ▣ Unlike the HIPAA rules, may not use a different level of coverage in which the employee and dependents are enrolled
 - ▣ Aggregate all wellness incentives that involve medical examinations or disability related inquiries
 - ▣ Certifications of tobacco use are not disability-related inquiries

ADA

■ Compare to the HIPAA incentive limitation rules

HIPAA Regulations	ADA Proposed Regulations
Applies to health-contingent programs, not participatory programs	Applies to any program involving medical examinations or disability related inquiries
Applies to tobacco-cessation related programs	Applies to tobacco-cessation related programs that involve a medical examination
Incentives limited to 30 percent or 50 percent for tobacco-cessation incentives	Incentives limited to 30 percent
If the program is offered to dependents, incentive percentage can be calculated using the cost of coverage in which the employee is enrolled	Incentive percentage is calculated using employee-only coverage
Outcome-based programs must offer reasonable alternative; activity-only programs must offer reasonable alternative in limited circumstances; participatory programs need not offer reasonable alternative	Reasonable accommodations must be provided absent undue hardship

ADA

■ Example:

- ▣ \$200 premium discount if the employee completes a health risk assessment and biometric screening
- ▣ \$100 premium discount if the employee certifies that the employee and all covered dependents are tobacco-free

HIPAA Regulations	ADA Proposed Regulations
The non-tobacco-related reward (\$200) may not exceed 30 percent of the cost of coverage	The HRA/screening reward (\$200) may not exceed 30 percent of the cost of employee-only coverage
The total reward (\$200 + \$100) may not exceed 50 percent of the cost of coverage	The tobacco reward is not limited by these rules

ADA

- A wellness program that is offered as part of a group health plan must provide notice that
 - ▣ Is written in a manner the employee is likely to understand
 - ▣ Describes the type of medical information that will be obtained
 - ▣ Describes how the medical information will be used
 - ▣ Describes the restrictions on the disclosure of the medical information
 - ▣ Describes the persons with whom the information will be shared
 - ▣ Describe the methods the employer will use to ensure that medical information is not improperly disclosed

ADA

■ Preserving Employee Wellness Programs Act

▣ Proposed March 2, 2015 with identical House and Senate bills

Proposed Legislation	EEOC Proposed Regulations
Wellness programs that provide incentives generally will not violate the ADA or GINA if the program complies with the HIPAA wellness program rules	Wellness programs that provide incentives generally will not violate the ADA or GINA if the incentives do not exceed 30 percent of the cost of employee-only coverage; however, additional requirements apply
Wellness programs that offer health risk assessments and biometric screenings for spouses do not violate GINA	Not addressed in the proposed regulations
The law would not impact use of the underwriting safe harbor relied upon in <i>Seff</i>	The EEOC indicates in the preamble that the safe harbor cannot be used to save a wellness program that fails to meet the requirements of the regulations
Wellness programs can require that reasonable alternatives be requested and completed by a specific deadline (up to 180 days)	Not addressed in the proposed regulations

Wellness Program Design Example

- An employee who completes a health risk assessment will receive a \$100 contribution to a health savings account (HSA)

Internal Revenue Code

- Employers generally must make comparable contributions to the HSAs of comparable participating employees

	Current full-time	Current part-time	Former employees
Self-only			
Self plus one			
Self plus two			
Self plus three			

- ▣ Exception if employees can contribute to HSAs on a pre-tax basis through the employer's cafeteria plan
- HSA contributions are limited
 - ▣ If cafeteria plan permits pre-tax HSA contributions, aggregate wellness reward with elected pre-tax contributions

Internal Revenue Code

- Participation in wellness program should not impact individuals' eligibility to contribute to an HSA unless the wellness program provides significant medical care benefits
- Rewards could be taxable for federal income tax purposes
 - ▣ Health plan premium discounts – not taxable
 - ▣ Cash awards and gift cards – taxable
 - ▣ De minimus fringe benefits – not taxable
 - ▣ HSA/HRA/FSA contributions – not taxable unless they impact nondiscrimination testing

Other Legal Considerations

- HIPAA privacy
 - ▣ May require that certain actions be taken
 - ▣ Business associate agreements with vendors
 - ▣ Safeguards to ensure employer receives little/no protected health information (PHI)
 - ▣ Prohibits an employer from making adverse employment decisions based on PHI received from the health plan
- ERISA implications (including market reform requirements under PPACA)
- COBRA implications (and Form W-2 reporting)
- FSA contributions could impact HIPAA excepted benefit status
 - ▣ Would have to provide extended COBRA coverage

Other Legal Considerations

- State laws might impact wellness program design
- Changes could impact grandfathered status
- Could be subject to the PCORI fee/transitional reinsurance contribution
- Incentives could be subject to the Cadillac Tax
- Could be impacted by a collective bargaining agreement
- Could impact a health plan's affordability or minimum value under PPACA

One big ogre of an example . . .

Wellness Program Design

- Health plan premiums include a tobacco surcharge if the employee does not certify that the employee and any covered dependents are tobacco-free

PROPOSED 2014 Options	Employee Only Non-Tobacco Employee Cost	Employee Only Tobacco Employee Cost	Employee Only Total Cost	Family Non-Tobacco Employee Cost	Family Tobacco Employee Cost	Family Total Cost
A	\$200	\$550	\$1,000	\$400	\$1100	\$2,000
B	\$150	\$415	\$750	\$300	\$825	\$1,500

- Employer will condition eligibility for the A plan on completion of a health risk assessment/biometric screening
- Employer will make a \$200 contribution to an FSA or HSA if the employee takes the biometric screening and has BMI under 30

HIPAA

- Does not satisfy the 30 percent/50 percent requirement
 - \$200 FSA/HSA contribution meets 30 percent requirement

Option	Employee Only Total Cost
A	\$1,000 30% of \$1,000 = <u>\$300</u> $\$200 \leq \300
B	\$750 30% of \$750 = <u>\$225</u> $\$200 \leq \225

HIPAA

- Does not satisfy the 30 percent/50 percent requirement
 - ▣ Tobacco surcharge alone satisfies the 50 percent requirement
 - ▣ Must aggregate tobacco surcharge with \$200 FSA/HSA contribution

Option	Employee Only	Employee Only	Employee Only	Family	Family	Family
	Non-Tobacco Employee Cost	Tobacco Employee Cost	Total Cost	Non-Tobacco Employee Cost	Tobacco Employee Cost	Total Cost
A	\$200	\$550	\$1,000	\$400	\$1,100	\$2,000
		$\$550 - \$200 = \$350$	$50\% \text{ of } \$1,000 = \500		$\$1,100 - \$400 = \$700$	$50\% \text{ of } \$2,000 = \$1,000$
			$\$350 + \$200 = \$550$			$\$700 + \$200 = \$900$
B	\$150	\$415	\$750	\$300	\$825	\$1,500
		$\$415 - \$150 = \$265$	$50\% \text{ of } \$750 = \375		$\$825 - \$300 = \$525$	$50\% \text{ of } \$1,500 = \750
			$\$265 + \$200 = \$465$			$\$525 + \$200 = \$725$

HIPAA

- Options for correcting include:
 - ▣ Reduce tobacco surcharge and/or FSA/HSA contribution so the aggregate reward does not exceed 50 percent of the cost of coverage
 - ▣ Provide FSA/HSA contribution to anyone who completes screening, regardless of BMI

HIPAA

- Employer must be willing to offer reasonable alternatives
 - ▣ If the employee or any dependent uses tobacco; or
 - ▣ If an employee's BMI is 30 or greater
- If the reasonable alternative is an activity-only or outcome-based wellness program, additional reasonable alternatives may be necessary
- Communications (including notices that an employee failed to meet one of the standards) must describe availability of a reasonable alternative
- If the reasonable alternative is a class or program, employer must help the employee find the program and pay for it
 - ▣ The employer need not pay for food under a diet program

GINA

- If the health risk assessment includes family medical history questions, it will need to clearly state that the individual can qualify for the A plan and the FSA/HSA contribution even if the family medical history questions are not answered
- Ensure no other questions solicit genetic information

ADA

- If the ADA regulations are finalized as proposed, this program would violate the ADA
 - ▣ Cannot condition eligibility for the A plan on completion of a health risk assessment/biometric screening
- Options for correcting include:
 - ▣ Eliminate the eligibility requirement
 - ▣ Replace the eligibility requirement with a financial incentive
 - ▣ Must comply with 30 percent rule

ADA

- Satisfies the 30 percent requirement of the proposed regulations
 - \$200 FSA/HSA contribution meets 30 percent requirement

Option	Employee Only Total Cost
A	\$1,000 30% of \$1,000 = <u>\$300</u> $\$200 \leq \300
B	\$750 30% of \$750 = <u>\$225</u> $\$200 \leq \225

- Tobacco surcharge is not included in this analysis because no medical examination is required

ADA

- To comply with the proposed regulations
 - ▣ Employer may receive only aggregate data
 - ▣ Employer may receive individualized data regarding whether an employee's BMI is under 30
 - ▣ Employer should actually use aggregate data from health risk assessment or provide results and explanation to employee
 - ▣ Employer may not take adverse employment action against employees who fail to participate or complain about the program
 - ▣ Employer must provide notice to employees

Internal Revenue Code

- If the cafeteria plan does not permit pre-tax HSA contributions, design violates the HSA comparable contribution requirements
- If the cafeteria plan permits pre-tax HSA contributions, check contribution limit
 - ▣ If the plan document permits employees to contribute up to the statutory maximum, the employee's contributions and the \$200 wellness reward together could exceed the maximum
 - ▣ Employer would need to monitor and withhold/report as appropriate
 - ▣ Plan could be drafted to limit contributions to \$200 under the statutory maximum
- Contributions to FSAs (and HSAs if pre-tax HSA contributions are permitted) will need to be included in cafeteria plan nondiscrimination testing

Other Legal Considerations

- Would not separately be subject to ERISA or COBRA
- FSA contributions should not cause the FSA to cease to be a HIPAA excepted benefit if the employer makes no other contributions
 - ▣ \$500 safe harbor
- State laws may affect ability to impose premium surcharge
- Could cause loss of grandfathered status
- Will not separately be subject to the PCORI fee or transitional reinsurance contribution
- FSA/HSA contributions will likely be included when determining application of the Cadillac Tax

Other Legal Considerations

- May impact affordability of the health plan
 - ▣ Tobacco standard deemed met
 - ▣ FSA/HSA contributions do not affect affordability
- May impact the health plan's minimum value determination
 - ▣ Premium surcharges and FSA contributions do not affect minimum value
 - ▣ Standard for HSA contribution is unrelated to tobacco and therefore deemed unmet
- Conditioning eligibility on completion of the health risk assessment could be viewed as a failure to offer coverage under the PPACA “pay or play” rules

Additional Considerations

- Will the employer attempt to verify tobacco-free status?
 - ▣ If through certification, HIPAA may prevent adverse employment actions in response to a falsified certification
 - ▣ If through a blood draw, ADA rules may apply
- Would the employer change premiums mid-year if tobacco status changes?
 - ▣ Check cafeteria plan document for mid-year premium election changes
- Who will review communications to determine whether they contain appropriate language about the reasonable alternative?

Additional Considerations

- Does the employer have a business associate agreement in place with the wellness program vendor?
- How will the employer limit the information it receives (e.g., only aggregate non-identifiable data)?
- If an employer has union members, does the wellness program violate the collective bargaining agreement or open the door for bargaining?



Questions?

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