Tobacco Surcharges – Legal Rules

Employers may consider implementing a smoking cessation program to encourage their employees to stop smoking or using tobacco products. To motivate employees, these programs often include a tobacco surcharge. The surcharge is an extra charge on health plan premiums for tobacco users or a discount on health plan premiums for participants who do not smoke or use tobacco.

Smoking cessation programs that include tobacco surcharges must comply with federal rules for **workplace wellness programs**. Depending on how the program is structured, employers will need to consider their compliance obligations under two main federal laws—the Health Insurance Portability and Accountability Act (HIPAA) and the Americans with Disabilities Act (ADA).

and Accountability Act (HIPAA) and the Americans with Disabilities Act (ADA). Employers that do not comply with these federal rules may be subject to employee lawsuits and federal enforcement action by the Department of Labor (DOL) or Equal Employment Opportunity Commission (EEOC).

LINKS AND RESOURCES

- Final rules on HIPAA's requirements for wellness programs
- Final rule on the ADA's requirements for wellness programs that include disability-related inquiries or medical exams
- EEOC's removal of the incentive limit from the final rule under the ADA

Tobacco Surcharges

Many employers implement smoking cessation programs to encourage their employees to stop smoking or using tobacco products. To engage employees in the program, employers often incorporate a **tobacco surcharge** in the form of:

- An extra charge on health plan premiums; or
- A discount on health plan premiums.

Smoking cessation programs are sometimes designed so that employees are rewarded for participating (for example, attending a smoking cessation class), regardless of whether they quit smoking or using tobacco. However, many programs offer a reward only to participants who do not smoke or use tobacco.

Federal Legal Requirements

Smoking cessation programs that include tobacco surcharges must comply with federal rules for **workplace wellness programs**. Depending on how the program is structured, employers will need to consider their compliance obligations under two main federal laws—HIPAA and the ADA.

LAW	APPLICABILITY
HIPAA	Applies to smoking cessation programs that include a tobacco surcharge or otherwise relate to a group health plan.
ADA	Applies to smoking cessation programs that use a medical test (such as a blood or urine test) to detect participants' smoking or tobacco use.

Programs that fail to follow these federal rules may subject employers to employee lawsuits and federal enforcement action by the DOL or EEOC.

Key Compliance Points

Employers that impose tobacco surcharges should review their smoking cessation programs to confirm that they comply with HIPAA and, if applicable, the ADA. Key compliance points that employers should consider include the following:

- If the program imposes a tobacco surcharge based on whether participants smoke (or otherwise use tobacco), participants who request an **alternative standard** must be offered a reasonable one, or a waiver of the nonsmoking standard. Participants who meet the alternative standard must receive the full reward under the program.
- For programs that do NOT use a medical test to screen for tobacco or nicotine (for example, a program that asks employees to sign affidavits about their tobacco use), the maximum tobacco surcharge allowed is 50% of the total cost of employee-only health coverage. If dependents are also eligible to participate, the surcharge cannot exceed 50% of the total cost of coverage in which the employee and any dependents are enrolled.
- Smoking cessation programs that use a medical test to screen for tobacco or nicotine are subject to the ADA's rules for voluntary wellness programs. The EEOC previously established a 30% incentive limit for voluntary wellness programs. However, effective Jan. 1, 2019, the EEOC rescinded this incentive limit to be consistent with a federal court ruling that invalidated the limit. **It is currently unclear how much of a tobacco surcharge can be charged when a medical test is used to screen for tobacco or nicotine.**

In addition, employers should become familiar with any applicable **state laws regarding discrimination protections for smokers** when reviewing their smoking cessation programs for legal compliance. Note, however, that many of these nondiscrimination laws contain exceptions allowing employers to charge higher health insurance premiums to employees who smoke.

HIPAA Rules

A wellness program that incorporates a group health plan reward, such as a discount on insurance premiums for nonsmokers, must comply with HIPAA's nondiscrimination rules. For compliance purposes, HIPAA divides wellness programs into two categories—participatory wellness programs and health-contingent wellness programs. A smoking cessation program that offers a tobacco surcharge will fall under one of these categories, depending on how the program's surcharge is designed.

PARTICIPATORY WELLNESS PROGRAMS

These wellness programs do not require individuals to meet a health-related standard to obtain a reward (or do not provide any reward).

HEALTH-CONTINGENT WELLNESS PROGRAMS

These wellness programs require individuals to satisfy a health-related standard to qualify for a reward.

Participatory Wellness Programs

A smoking cessation program that does not provide a reward or rewards employees for participating, regardless of whether they smoke or use tobacco, is a participatory wellness program. Participatory wellness programs comply with HIPAA's nondiscrimination requirements without having to satisfy any additional standards, as long as participation in the program is available to all similarly situated individuals, regardless of health status. There is no limit on financial incentives for participatory wellness programs.

Health-contingent Wellness Programs

A smoking cessation program that r**ewards participating employees for not smoking or using tobacco** is a health-contingent wellness program. Health-contingent wellness programs are required to follow five standards related to nondiscrimination, including a standard that **limits the maximum reward**. Also, these types of wellness programs must offer a **reasonable alternative standard** for participants who do not stop smoking or using tobacco to qualify for the reward.

The following table summarizes the five nondiscrimination standards for health-contingent wellness programs:

Standard	Description
Frequency of opportunity	Health-contingent wellness programs must provide eligible individuals with an opportunity to qualify for the reward at least once per year.
Size of reward	The total reward offered to an individual under an employer's health-contingent wellness programs cannot exceed 30% of the total cost of coverage under the plan. For wellness programs that are designed to prevent or reduce tobacco use, the total reward cannot exceed 50% of the total cost of coverage under the plan. See below for more information.
Reasonable alternative	The full reward under a health-contingent wellness program must be available to all similarly situated individuals. To meet this requirement, all health-contingent wellness programs must provide a reasonable alternative standard (or waiver of the otherwise applicable standard) in certain circumstances. See below for more information.
Reasonable design	Health-contingent wellness programs must be reasonably designed to promote health or prevent disease. A wellness program is reasonably designed if it has a reasonable chance of improving the health of (or preventing disease in) participating individuals and is not overly burdensome, a subterfuge for discrimination based on a health factor or highly suspect in the method chosen to promote health or prevent disease.

Standard	Description
Employee notice	Plans must disclose the availability of a reasonable alternative standard to qualify for the lower premium (and, if applicable, the possibility of a waiver of the otherwise applicable standard) in all plan materials describing the terms of a health-contingent wellness program. See below for more information.

Size of Reward

Under HIPAA, wellness programs that are designed to **prevent or reduce tobacco** use may incorporate of a reward of up to **50% of the total cost of employee-only health coverage**. Total cost includes both employer and employee contributions for the benefit package under which the employee is receiving coverage.

Anti-vaping Programs

Due to the increasing popularity of e-cigarettes, employers may want to include an anti-vaping requirement in their smoking cessation programs. The 50% reward limit under HIPAA specifically applies to programs that are "designed to prevent or reduce tobacco use." There is no official guidance on how this limit applies to anti-vaping programs. However, e-cigarettes are regulated by the federal Food and Drug Administration (FDA) as a tobacco product.

If, in addition to employees, any class of dependents (such as spouses) may participate in the health- contingent wellness program, the reward cannot exceed the specified percentage of the total cost of the coverage in which the employee and any dependents are enrolled (such as family coverage or employee-plus-one coverage). For health-contingent wellness programs that allow a class of dependents to participate, there are no special rules regarding apportionment of the reward among family members. Plans and issuers have flexibility to determine whether, and how, the maximum allowed reward or incentive will be prorated based on the portion of the premium or contribution attributable to that family member, as long as the method is reasonable.

Reasonable Alternative Standard

To comply with HIPAA, health-contingent wellness programs must provide a reasonable alternative standard (or waiver of the otherwise applicable standard) to qualify for the full reward for anyone who does not meet the initial standard (that is, those who smoke or use tobacco products). For example, the reasonable alternative standard could include attending educational classes or trying a nicotine patch.

Although an individual may take some time to request and satisfy a reasonable alternative standard, the same, full reward must be available to that person as is provided to individuals who satisfy the initial standard.

Plans have flexibility to determine how to provide the portion of the reward for the period before an alternative was satisfied (for example, payment for the retroactive period or pro rata over the remainder of the year), as long as the method is reasonable and the individual receives the full amount of the reward. If an individual does not satisfy the alternative standard until the end of the year, the plan may provide a retroactive payment within a reasonable time after the end of the year, but may not provide pro rata payments over the following year

All facts and circumstances are taken into account in determining whether a plan or issuer has provided a reasonable alternative standard, including, but not limited to:

- If the reasonable alternative standard is completion of an educational program, the plan or issuer must make the educational program available or assist the employee in finding a program (instead of requiring an individual to find a program unassisted) and cannot require an individual to pay for the cost of the program.
- The time commitment required must be reasonable (for example, requiring attendance nightly at a one-hour class would be unreasonable).

Enforcement Example

The DOL is actively enforcing HIPAA's requirements for health-contingent wellness programs. As an example, the DOL filed a lawsuit against an employer in September 2018, alleging that the employer violated HIPAA's requirements by imposing a tobacco surcharge without providing a reasonable alternative standard. Under a settlement agreement, the employer agreed to pay $145,635 to employees who paid the tobacco surcharge. It also agreed to pay a penalty to the federal government of $14,563 for the violation.

Employee Notice

Plan materials describing the terms of the premium differential must disclose the availability of a reasonable alternative standard to qualify for the lower premium. This disclosure must also be included in any notice that an individual did not satisfy the wellness plan's standard of not smoking or using tobacco products. The disclosure must include contact information for obtaining the alternative standard and a statement that recommendations of an individual's personal physician will be accommodated.

The following sample language, or substantially similar language, can be used to satisfy this notice requirement:

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 [insert contact information] 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.

ADA Rules

The ADA prohibits employers with **15 or more employees** from discriminating against individuals with disabilities. Wellness programs that collect health information or involve medical exams must comply with the EEOC's requirements for voluntary wellness programs, as described below.

The EEOC has provided guidance on how these requirements apply to wellness programs designed to prevent or reduce smoking or tobacco use:

- A wellness program that **asks employees whether they smoke or use tobacco** (for example, through an affidavit) is not a wellness program that includes disability-related inquiries or medical examinations. Thus, the ADA's requirements for voluntary wellness programs (described below) do not apply to this type of program.
- By contrast, a wellness program that **tests for the presence of nicotine or tobacco** (for example, through a blood or urine test) includes a medical examination. The ADA's requirements for voluntary wellness programs (described below) apply to a wellness program that includes this type of screening.

Incentive Limits for Wellness Programs

The EEOC's final rule provided that a wellness program could be considered voluntary under the ADA if the program's incentives did not exceed 30% of the total cost of self-only health plan coverage. However, a federal court ruled that this 30% limit was not well reasoned by the EEOC and vacated the limit, effective Jan. 1, 2019. Consistent with the court's ruling, the EEOC removed the incentive limit from its final rule, effective Jan. 1, 2019. On Jan. 7, 2021, the EEOC issued a proposed rule on wellness programs to address the incentive limit in light of the court's ruling. The proposed rule adopts the view that allowing too high of an incentive would make employees feel coerced to disclose protected medical information to receive a reward or avoid a penalty and, therefore, states that most wellness programs that include disability-related inquiries and/or medical examinations may offer no more than de minimis incentives to encourage employees to participate. The rule proposes that, under the ADA's safe harbor provision, health-contingent wellness programs that are part of, or qualify as, group health plans to which the wellness regulations apply are an exception to the de minimis standard. Therefore, this proposed rule interprets the safe harbor as permitting health-contingent wellness programs that are part of, or qualify as, group health plans to offer the maximum allowed incentive under existing HIPAA regulations (currently, 30% of the total cost of coverage, or 50% to the extent that the wellness program is designed to prevent or reduce tobacco use), as long as they comply with HIPAA requirements for those plans.

Requirements for Voluntary Wellness Programs

The following requirements apply to wellness programs that collect health information or include medical exams:

Requirement	Description
Reasonable design	The wellness program must be reasonably designed to promote health or prevent disease..
Voluntary	Employees' participation in a wellness program must be voluntary to comply with the ADA. This means that: •Employees cannot be required to participate in the program; •Employers cannot deny access to health coverage under any of their group health plans (or particular benefits packages within a group health plan) or limit the extent of benefits for employees who do not participate in the program; and •Employers cannot take any other adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten employees who choose not to answer disability-related questions or undergo medical exams.
Employee notice	Employers must provide employees with a notice that describes what medical information will be collected, who will receive it, how the information will be used and how it will be kept confidential. The EEOC has provided a sample notice to help employers comply with this ADA requirement.