

# HALL | FARLEY

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

## Encouraging Workplace Wellness in the New Year!

*By Sally J. Reynolds*

*Each year thousands of Americans resolve to quit smoking, but most will be unsuccessful. Some employers have begun implementing financial incentives to motivate their health plan participants to stop using tobacco. One such reward may be a discount on health insurance premiums for those employees who do not use tobacco or are actively trying to quit. There are several names for such a program: Tobacco Cessation Program, Tobacco Sur-charge, and Tobacco Premium. Federal law, as set out, in the Health Insurance Portability and Accountability Act (HIPAA) regulations, provides very specific criteria for those employers wishing to embark on such a plan. The following is a guide for those employers.*

The Centers for Disease Control and Prevention reports that more deaths are caused each year by tobacco use than by all deaths from HIV, illegal drug use, alcohol use, motor vehicle injuries, suicides, and murders combined.<sup>1</sup> Smoking increases the risk of dying from cancers of the lung, esophagus, larynx, and oral cavity, and smokeless tobacco causes cancer and may increase the risk for sudden death from ventricular arrhythmias.<sup>2</sup> In addition to the diseases directly caused by smoking, smokers also face increased health risks for conditions such as coronary heart disease, stroke, bronchitis and emphysema, vascular diseases, numerous types of cancers, and aortic aneurysm.<sup>3</sup>

As a result of rising cost of health care costs, as well as additional long-term benefits such as increased productivity, reduced absenteeism, and improved morale and loyalty, employers may save money in the long run by implementing health and wellness programs for their employees.

Accordingly, having employees who do not use tobacco could save employers substantial costs, including costs related to their group health plans.

Employer group health plans and group health insurance issuers may wish to implement effective wellness programs which set specific health targets. Though this type of program may sound like prohibited discrimination against smokers and other tobacco users, the federal rules interpreting HIPAA permit some limited exceptions for properly designed “wellness programs.” Wellness programs which may be offered by employers are not limited to tobacco cessation, but may include fitness programs, such as gym memberships, diagnostic testing programs for health problems, and rewards for attending educational classes or weight loss programs or following healthy lifestyle recommendations.

To encourage tobacco cessation, one option available to employers is a premium differential between smokers and nonsmokers. However, careful consideration must be given by a group health plan that wishes to maintain a premium differential between smokers and nonsmokers. In order for that plan not to be considered discriminatory, and thus a violation of HIPAA, employers must be cognizant of the Federal requirements for wellness programs.

---

<sup>1</sup> [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/health\\_effects/tobacco\\_related\\_mortality/index.htm](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/index.htm)

<sup>2</sup> Id.

<sup>3</sup> Id.

In December 2006, the United States Department of Labor Employee Benefits Security Administration (EBSA), United States Department of Health and Human Services, and the Treasury Department issued final regulations on the nondiscriminatory provisions of the HIPAA. These regulations describe how the nondiscrimination provisions apply to wellness programs, and are applicable to plan years beginning on or after July 1, 2007. The regulations provide an exception to the HIPAA nondiscrimination regulations which permits group plans to vary benefits and premiums/contributions based on whether a plan participant has met the standards of a wellness program that complies with paragraph (f) of the regulations.

While the regulations prohibit a plan from charging similarly situated individuals different premiums or contributions based on a health condition, the department has crafted an exception which permits a plan or issuer to establish wellness programs which allow individuals to be eligible for discounts, rebates, or other incentives when an individual adheres to a program that promotes wellness or prevents disease.

To clarify the conditions of the nondiscrimination requirements, the Department of Labor has issued further guidance in the form of a checklist, reproduced below. This checklist is intended to educate employers as to what types of health promotion or disease prevention programs offered by a group health plan must comply with these regulations, and how to determine whether such programs comply with the regulations.

### Wellness Program Checklist

- Insert the first day of the current plan year: \_\_\_\_\_. Is the date after July 1, 2007?  Yes  No
  - *(The wellness program rules are applicable for plan years beginning on or after July 1, 2007)*
- Does the plan have a wellness program?  Yes  No
  - *(The plan does not have to be entitled “wellness” to qualify, but must be a program that promotes health or prevents disease subject to the regulations)*
- Is the wellness program part of a group health plan?  Yes  No
  - *(The program is only subject to part 7 of ERISA—the HIPAA nondiscrimination regulations—if it is part of a group health plan. If the employer operates the program as an employment policy separate from the group health plan, it is not subject to the rules discussed here)*
- Does the program discriminate based on a health factor?  Yes  No
  - *(A plan discriminates based on a health factor if it requires an individual to meet a standard related to a health factor in order to obtain a reward. Rewards can be a rebate or discount on a premium or contribution, a waiver of all or part of cost-sharing mechanism (deductibles, copayments, or coinsurance), the absence of a surcharge, or the value of a benefit not otherwise available under the plan.)*

If you answered “No” to any of the above questions, stop. The plan does not maintain a program subject to the group health plan wellness program rules.

- If the program discriminates based on a health factor, is the program saved by the benign discrimination provisions?  Yes  No
  - *(Discrimination in favor of an individual based on a health factor is permitted. The program may offer a reward to individuals based on an adverse health factor. However, this benign discrimination exception is not available if the program asks diabetics to meet a standard related to a health care factor in order to get a reward, such as requiring maintenance of a certain body mass index.)*

If you answered “Yes” to the previous question, stop. There are no violations of the wellness program rules.

If you answered “No” to the previous question, the wellness program bases the receipt of a reward on satisfying a standard related to a health factor and it must meet the following five compliance criteria.

- Compliance Criteria
  - Is the amount of the reward offered under the plan limited to 20% of the applicable cost of coverage?  Yes  No
  - *(If only employees are eligible for participate, the amount of the reward must not exceed 20% of the cost of the employee-only coverage. If employees and dependants are eligible to participate, the reward must not exceed 20% of the cost of coverage in which an employee and dependants are enrolled. When more than one reward is offered, all wellness programs are combined in calculating this 20% limit.)*
  - Is the plan reasonably designed to promote health or prevent disease?  Yes  No
  - *(The program should have a reasonable chance of improving the health of or preventing disease in participating individuals. It may not be: overly burdensome, a subterfuge for discriminating based on a health factor, or highly suspect in the method chosen to promote health or prevent disease.)*
  - Are individuals who are eligible to participate given a chance to qualify at least once per year?  Yes  No
  - Is the reward available to all similarly situated individuals? Does the program offer a reasonable alternative standard?  Yes  No
  - *(A reasonable alternative standard or waiver must be available which provides the reward for any individual for whom: (a) it is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard; or (b) it is medically inadvisable to attempt to satisfy the otherwise applicable standard. The reasonable alternative standard may be tailored to each individual, on a case-by-case basis. It is permissible for the plan or issuer to seek verification, such as a statement from the individual's physician, that a health factor makes it unreasonably difficult or medically inadvisable for the individual to satisfy or attempt to satisfy the otherwise applicable standard.)*
  - Does the plan disclose the availability of a reasonable alternative in **all** plan materials describing the program?  Yes  No
  - *(“If it is unreasonably difficult due to a medical condition for you to achieve the standards for the reward under this program, call us at [telephone number] and we will work with you to develop another way to qualify for the reward.”)*

If you answered “Yes” to **all** of the five questions on wellness program criteria, there are no violations of the HIPAA wellness program rules.

If you answered “No” to **any** of the five questions on wellness program criteria, the plan has a wellness program compliance issue.

### **May Idaho employers test for nicotine use as part of wellness plan enforcement?**

As part of the implementation of a tobacco cessation program, Idaho employers may have questions regarding options available to them as far as enforcement of such a policy. Idaho does not have specific case law or regulations governing nicotine testing.

Idaho does, however, have statutes governing how drug testing may be conducted. These laws must be followed for nicotine testing as well. An employer's nicotine testing program must comply with Idaho Code

Sections 72-1701 *et al.* This means that the testing program must be in writing and expressly state that any testing shall be deemed work time for purposes of compensation, and that all costs of testing shall be paid by the employer. This includes a requirement that the employer cover the costs of the test, perform all testing under “reasonable and sanitary conditions” and “with due regard to the privacy of the individual being tested.” The written drug testing policy must be available for review by prospective employees. Employees who test positive must be given written notice of such and must be given an opportunity to discuss and explain a positive test result and may request a re-test of the same sample. The employer must also keep the results of the testing confidential, and results may only be used for “internal business” of the employer. Many employers have already contracted with a testing laboratory or specialized testing business for drug testing.

*As this article shows, employers may encourage employee good health and wellness by implementing tobacco cessation programs that give health insurance premium discounts to non-smokers. Employers must ensure that such wellness programs comply with Federal law—competent legal counsel should review the program prior to implementation. Nicotine testing may be part of such a program, but if it is, the employer must have a clear and comprehensive written policy. This policy should be included in employee manuals or handbooks and the group health plan documents.*