

## Wellness Plans Currently Under Scrutiny

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Employers who sponsor a wellness plan and service providers that offer wellness plans to their customers should be aware of recent enforcement activity by the U.S. Department of Labor (DOL), as well as a recent court ruling regarding Equal Employment Opportunity Commission (EEOC) regulations applicable to wellness plans.

### DOL Enforcement Activity – *Acosta v. Macy's*

#### **DOL Files Suit Against Macy's Wellness Plan**

The DOL recently brought suit for various violations under the Employment Retirement Income Security Act of 1974, as amended (ERISA) against Macy's Inc.—along with the third-party administrators of Macy's health plan. The suit alleges that Macy's wellness plan does not meet the applicable wellness plan non-discrimination requirements because the plan failed to provide a reasonable alternative standard for participants to avoid the tobacco surcharge levied by the wellness plan, and continued to charge participants a tobacco surcharge even when they participated in the tobacco cessation program offered under the plan.

The non-discrimination rules under the Health Insurance Portability and Accountability Act (HIPAA), as amended by the Affordable Care Act (ACA), require participatory wellness programs to offer a reasonable alternative standard to participants who cannot meet the initial standard. According to the complaint, the Macy's plan did not offer an alternative to the tobacco cessation program for those individuals for whom it was unreasonably difficult to complete the offered tobacco cessation program due to a medical condition, or for whom it was medically inadvisable to attempt to achieve the standards of the tobacco cessation program. In addition, the complaint alleges that the plan continued to charge the tobacco surcharge to participants who entered a tobacco cessation program. The only way for a participant to avoid the surcharge was to remain tobacco free for six consecutive months during the plan year. The DOL claims that amounts collected by the plan in the form of tobacco surcharges were used by Macy's to pay claims and administrative expenses associated with its self-insured medical plan. The complaint asserts that these actions resulted in Macy's violating several of ERISA's fiduciary and prohibited transaction requirements, including (i) failing to act solely in the interest of the participants and beneficiaries of the medical plan and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of plan administration, and (ii) engaging in transactions that constituted a direct or indirect transfer to, or use by or for the benefit of a party in interest, of plan assets. The DOL also alleged HIPAA non-discrimination violations in Macy's

requiring participants to pay a premium or contribution that was greater than the premium or contribution for a similarly situated participant enrolled in the medical plan on the basis of a health status-related factor.

The suit also alleges that Macy's and the third-party administrators of its health plan breached their fiduciary duties under ERISA based on changes made to the plan's methodology for calculating reimbursement of out-of-network claims. We will further discuss this aspect of the case in a future client alert.

In the complaint's prayer for relief, the DOL requests that Macy's be ordered to reimburse all participants who paid a tobacco surcharge during the time period at issue, with interest, and be enjoined from collecting any tobacco surcharge until it revises its wellness plan to comply with the nondiscrimination requirements for wellness plans, including the requirement to offer a reasonable alternative standard. In addition, the DOL requests that Macy's be required to disgorge all unjust enrichment or profits received as a result of the alleged fiduciary breaches it committed or for which it is liable.

#### **Impact on Wellness Plan Sponsors and Service Providers**

The Macy's suit may signal an increased focus on wellness plans by the DOL. Accordingly, employer sponsors of wellness plans and service providers should review their current wellness plan designs and administrative procedures to ensure that both the design and administration adhere to current law and guidance. In particular, if the wellness plan is an outcome-based, health-contingent plan that contains a tobacco surcharge, plan sponsors and administrators should ensure that participants who satisfy any plan requirements for avoiding the surcharge (such as participating in a tobacco cessation program) are excused from the surcharge for the entire period of coverage.

## **EEOC Regulations Applicable to Wellness Plans Remanded to the EEOC for Reconsideration**

In May 2016, the EEOC issued final regulations under the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA) applicable to wellness plans that make disability-related inquiries or require participants to undergo medical examinations, and/or ask an employee's spouse to provide information about the spouse's current or past health status. These EEOC regulations were intended to address uncertainty regarding the interplay between the wellness program requirements under the ADA and GINA and those requirements under HIPAA and the ACA. In particular, in order for a wellness program to meet the "voluntary" standard under the EEOC rules, the EEOC regulations permit wellness plans to offer an incentive or a disincentive of up to 30% of the cost of self-only medical coverage to participants in the employer's wellness program.

In *AARP v. United States Equal Employment Opportunity Commission*, a case brought in the United States District Court for the District of Columbia, the AARP argued that the 30% permitted incentive/disincentive was too large to be considered voluntary, and thus was inconsistent with the ADA and GINA requirements that wellness plan participation be voluntary. The district court judge held that the EEOC did not adequately explain its reasoning for determining the 30% incentive level as a means of meeting the "voluntary" requirements of the ADA and GINA, and remanded the regulations to the EEOC for reconsideration. However, the court left the current regulations in effect during the reconsideration period in order to avoid potential "disruption and confusion" for existing wellness plans designed in accordance with the regulations.

#### **Impact on Wellness Plan Sponsors and Service Providers**

It is unclear what this case means for the future of the EEOC wellness plan regulations, given the change in presidential administration since the regulations were finalized. Of note, President Trump's nominee for commissioner and chair of the EEOC has not yet been confirmed by the Senate, and the current commissioner's term is about to conclude. Such transition issues will likely delay any reconsideration of these regulations. Thus, employer wellness plan sponsors should continue to adhere to the rules set forth in the final regulations unless and until the EEOC releases further guidance.

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