THOMPSON COBURN LLP

insights

TYPES NOT MAPPED YET October 11, 2024 | TTR not mapped yet | Michael D. Lane, Michael T. Graham

New Wave of ERISA Lawsuits Attack Self-Funded Health Care and Wellness Plans on Tobacco Surcharges

In the past decade, there have been many issues that have been the subject of dozens of lawsuits challenging employee benefits – retiree medical benefit challenges, pension plan calculation cases over use of old mortality tables, challenges to COBRA notices, 401(k) and 403(b) plan administrative fee and investment challenges, and employee stock ownership plan adoption suits. Over the past several months, a new and unprecedented wave of putative class action complaints have been filed under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), targeting a common feature of many employer-sponsored health care plans – challenges to tobacco-user surcharges.

Many employers have enacted wellness programs as part of their health care benefit plans, and many of these employers have added tobacco-user surcharges that require tobacco-using plan participants to pay higher medical premiums than others who certify that they are tobacco-free. These new class action complaints target these tobacco surcharges as violations of ERISA's fiduciary duty rules as well as the discrimination rules under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Given the wide use of surcharges such as these, employers should be aware that additional lawsuits against plan sponsors of health care plans will likely follow.

HIPAA generally prohibits group health plans from discriminating on health status. This prohibition is intended to ensure that all plan participants have access to the same medical benefits regardless of their health status. Under HIPAA's nondiscrimination rules, a group health care plan is generally prohibited from requiring participants to pay a premium or contribution that is greater than one charged to a similarly situated enrollee based on a health-status related factor. However, HIPAA contains an exception that allows health care plans to charge different premiums in return for adherence to "programs of health promotion and disease prevention."

The recent putative class actions target health-contingent, outcome-based wellness programs that are part of self-funded group health plans. These complaints allege that the wellness programs do not meet HIPAA's regulatory requirements that the programs must satisfy to be considered nondiscriminatory. These requirements include: (i) the plan must offer participants the opportunity to qualify for the award at least once per year; (ii) the reward's size cannot exceed a certain percentage of the total coverage cost under the plan; (iii) the program must be reasonably designed to promote health or prevent disease; (iv) the "full reward" must be available to all participants; and (v) plans must disclose in "all plan materials describing the terms of an outcome-based wellness program, and in any disclosure that an individual did not satisfy an initial outcome-based standard," the reasonable alternative standard's availability. The HIPAA regulatory rules provide sample language to satisfy the reasonable alternative standard.

The recent complaints generally claim that the plan sponsors and fiduciaries charged tobacco surcharges that violate HIPAA's nondiscrimination provision. Specifically, the complaints challenge that the group health care plans charged monthly premium surcharges to participants who admitted to being tobacco users. The complaints almost universally raise three causes of action. *First*, they allege the plans do not offer reasonable alternative standards because the premium reductions for participating in the wellness plans are only available on a prospective bases in violation of ERISA Section 702. *Second*, the plans do not communicate the existence of such alternatives in "all plan materials" violating ERISA Section 702 and 29 C.F.R. §2590.702. And, *third*, the employers' collection of the surcharge is a breach of their ERISA-based fiduciary duties under ERISA Section 404.

The complaints seek a variety of remedies under ERISA and HIPAA: (i) declaratory and injunctive relief that the surcharges violate ERISA and the plan fiduciaries breached their fiduciary duties; (ii) an order instructing the employers to reimburse all persons who paid the surcharges, with interest; (iii) an order requiring the employers to

provide an accounting of all prior payments of the charges to determine how much the employers would need to reimburse the plan; (iv) disgorgement of any benefits of profits the employers received; (v) restitution of all surcharge amounts charged; (vi) surcharge totaling the amounts owed to participants as a result of the surcharge collection; and (vii) attorneys' fees and costs.

To date, no court has ruled on a motion to dismiss or motion for summary judgment challenging the complaints' allegations. At least one case has settled on a class-wide basis, and in another case the parties have informed the court that they are finalizing a settlement that will result in a class-wise dismissal. Given the number of complaints being filed weekly – at times daily – it is highly possible that any group health plan that applies tobacco surcharges as discussed faces the possibility of a class action lawsuit. Employers may wish to review and determine whether changes need to be made to their wellness programs to ensure compliance with HIPAA, as properly administered tobacco surcharges are permitted under HIPAA's nondiscrimination rules.

We will continue to monitor the status of these tobacco surcharge lawsuits as more are filed and dismissals are sought. In the meantime, please contact anyone in our Labor & Employment practice group or our Employee Benefits practice group with questions.

authorsTest

michael

Michael D. Lane

michael

Michael T. Graham