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Q&A FROM ASSUREX GLOBAL WEBINAR

TOBACCO-RELATED WELLNESS PROGRAMS

NOVEMBER 29, 2018

Q. Is it okay to offer a reasonable alternative standard program ONLY if they complete the biometric screening/tobacco testing. Or does the RAS program have to be offered to a participant without doing the testing?

A. If the employer is requiring medical testing, EEOC wellness rules require a "reasonable accommodation" for anyone who cannot participate due to a disability (e.g. hemophilia, pregnancy).

Specifically for tobacco testing, if the individual refuses to submit to testing, the employer can assume the individual is a smoker or tobacco user, but would have to offer a reasonable alternative standard to earn the incentive to such individuals.

Q. What are you seeing companies do with regard to nicotine (as opposed to tobacco), and allowing vaping and still receiving non-tobacco benefits?

A. There has been no guidance specific to e-cigarettes or vaping related to the wellness incentive rules in HIPAA and the ACA. Therefore, absent subsequent guidance in this regard plan sponsors are free to include or exclude recognition of e-cigarette or vaping use as they deem appropriate. If the employer would like to include e-cigarette use and/or vaping when imposing a surcharge, the recommendation would be to clearly include that in the description of what triggers a surcharge.

Q. What is a "reasonable time commitment" for a cessation program? For example if they screen this January, how many calls could we require them to make to Quit Line Iowa each month and for how long?

A. There is no specific criteria for what is considered "reasonable" - the regulations just state that the time commitment for a reasonable alternative standard cannot be "unreasonable" and provide the example of a requirement for nightly attendance at a 1-hour smoking cessation class as an unreasonable commitment.

Q. What about a wellness offering that puts money into an HSA account for meeting walking goals? Does that need to be HIPAA compliant?

A. No - as long as the wellness program is not itself a group health plan (i.e., as long as it doesn't provide or pay for the provision of medical care), then providing an incentive in the form of an HSA contribution would not invoke HIPAA requirements. Note that employers who wish to make incentives in the form of HSA contributions should ensure that they do so through a Section 125 plan in order to avoid violating the HSA comparability rules.

Q. Does the tobacco surcharge apply to voluntary life insurance rates that have tobacco and non-tobacco rates?

A. No - life insurance companies may underwrite risk and charge premiums accordingly based on a person's smoking status/health risk. HIPAA wellness rules do not have to be followed because life insurance is not a group health plan.



Q. If they don't complete the alternative standard can you take away the incentive?

A. Yes. The incentive is only required for those that either (i) meet the original requirement; or (ii) complete the reasonable alternative standard.

Q. I would like to confirm. If the EE completes a reasonable alternative standard, but starts smoking again in 6 months, the employer can't start charging the higher premium correct?

A. That is correct. Under HIPAA rules for a health-contingent wellness program (e.g. tobacco surcharge), then the full incentive must be made available to (i) those who are not tobacco users; and (ii) those who satisfy the reasonable alternative standard. The full incentive must be available to those who complete the reasonable alternative standard even if they don't actually quit using tobacco, or if they stop and then begin using again. However, the employer can impose the requirement again the following year (requiring the employee to either satisfy the standard or complete another reasonable alternative standard) in order to avoid the premium surcharge.

Q. Can we require a person be tobacco free for 6 months before giving them the discount?

A. This is permitted, but the employer would need to offer a reasonable alternative standard. And the reasonable alternative standard couldn't just be a provision of additional time to meet the non-smoking standard.

Q. Are there additional factors to consider when attempting to implement tobacco related wellness programs with unionized workforces?

A. Any such program may or may not be permitted under the collectively bargained agreement (CBA), so it would be necessary to consider the CBA terms and/or negotiate otherwise if the employer is offering benefits to the union employees (rather than the benefits being handled by the union) and wants to put a wellness program in place.

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