How To Avoid Having Your Wellness Program Making You Sick?

• Studies of three recent cases that may cure what ails your wellness plan:

  ➢ Acosta v. Macy’s, et al. (filed 8/16/17)
  ➢ Acosta v. Dorel Juvenile Group (filed 9/28/18)
  ➢ Acosta v. ChemStation International, Inc. (filed 10/15/18)
Acosta v. Macy’s, et al.

Symptoms (violations) alleged:
• Macy’s tobacco surcharge allegedly violated requirements for a non-discriminatory wellness program under HIPAA wellness rules by not offering a reasonable alternative standard for avoiding a surcharge to those who couldn’t meet the initial standard
• Possible violations of ERISA’s exclusive benefit rule, fiduciary rule against self-dealing and engaging in transactions constituting transfer of plan assets to a party in interest

Tests (facts) revealed:
• Since 2011 Macy’s tobacco surcharge constituted a “health-contingent outcome based wellness program”
Macy’s continued

- Macy’s had contracted with Anthem & CIGNA to provide claims adjudication & both had discretionary authority to manage the health plan.
- Macy’s imposed a $35/$45 a month premium surcharge on participants who disclosed tobacco use on a FAQ & deposited the surcharge in its welfare benefits trust to defray medical & administrative costs.
- Surcharge viewed by DOL as “plan assets” - ERISA §406 - as such impermissible higher premiums permitted Macy’s to reduce its health-related expenses.
- It provided self-identified smokers free access smoking cessation programs thru CIGNA & Anthem.
Macy’s continued

• CIGNA & Anthem changed their reimbursement methods for provider claims but participants were not informed of such nor were plan documents amended to reflect such changes
• Anthem & CIGNA also failed to follow Macy’s plan document in adjudicating claims
• Macy’s failed to provide notice to participants of a reasonable alternative standard (“standard”) or waiver of such to avoid the surcharge and that they would be eligible for the full reward even if they couldn’t meet the standard.
Diagnosis:
• No decision yet...but DOL’s view of HIPAA nondiscrimination regs, as amended to reflect ACA requirements, make it clear you can’t require participants to stop smoking in order to avoid a surcharge.
• It’s advisable offer to all who fail a health-outcome based standard a reasonable alternative standard regardless of medical necessity
• What that alternative standard might be for smokers is unclear
Acosta v. Dorel Juvenile Group

Symptoms (violations) alleged:

• Dorel’s tobacco surcharge allegedly violated ERISA §702 by: discriminating against individuals in eligibility for benefits & in individual premium/contribution rates on the basis of a “health-related status” and

• by failing to offer a reasonable alternative reward for similarly situated persons by allowing for a reasonable alternative reward (or waiver) for obtaining the reward for any person for whom it is either unreasonably difficult to participate due to a medical condition or inadvisable to attempt to satisfy such a program requirement.
**Dorel continued**

- Dorel’s plan documents failed to disclose the terms of the program and Dorel potentially violated ERISA’s exclusive benefit rule, fiduciary rule against self-dealing and engaging in transactions constituting transfer of plan assets to a party in interest

**Tests (facts) revealed:**
- Dorel’s tobacco surcharge constituted a “health-contingent outcome-based wellness program”
- From 2013 Dorel contracted with Anthem to serve as its network provider & claims administrator but used Anthem’s SBCs & benefit booklets as their governing plan documents.
Dorel, continued

• Dorel also instituted a tobacco surcharge on enrolled participants as well as free smoking cessation programs
• It failed to allow for a “a reasonable alternative standard (or waiver of an otherwise applicable standard) for obtaining relief from the from the surcharge or to adequately explain the terms of the program in plan materials
• Above allegedly violated Dorel’s fiduciary responsibilities under ERISA §§ 4-4, 406 & 702
Dorel continued

Diagnosis (the parties settled):
• Consent order: on November 26, 2018 Dorel agreed to pay participants $145,635 in surcharges that they paid between 2013-2017. It was also assessed a penalty under ERISA §502(l) that was reduced by half by the Secretary to $14,563.50.
• Doral was permanently enjoined from violating Title I of ERISA
Acosta v. ChemStation International

Symptoms (violations) alleged:
• Discrimination based on a health status-related factor. Failure to provide an alternative standard by which participants could obtain discounted premiums offered to similarly situated participants who participated in the awards program (discounted premiums) in violation of ERISA §702(b).
• Failure to follow duties described in plan documents, ERISA §404(a)(1).
• Requiring participants to pay higher premiums on the basis of a health status-related factor, ERISA §702(B)
Tests (facts) revealed:
• Through its self-insured group plan, employer implemented varied premiums to be deducted from employees’ pay depending on whether they successfully participated in a wellness program.
• Those who participated in the program paid lower premiums if they attained or maintained a specified health outcomes (BMI, blood pressure, LDL & glucose levels & used/nonuse of tobacco).
• Employees who didn’t participate or who failed to maintain specific health outcomes paid higher premiums than those who did participate or who attained specified health outcomes.
• None of the plan materials disclosed the program availability or any reasonable alternative standards for obtaining premium reductions.
ChemStation continued

**Diagnosis (the parties settled):**

- On October 17, 2018, two days after the complaint was filed, ChemStation agreed to pay $59,189 to participants who were charged the smoking surcharge for not enrolling in its cessation program or failing to meet the requirements of the program.