



**Re-evaluating wellness in Light of New Agency Guidance:
The Good, the Bad, and the Outright Ugly**

October 15, 2016

Q: Does an employee have to "stop" smoking to avoid a tobacco surcharge?

A: Technically an employer can NOT require that an employee stop smoking to be eligible for an incentive/avoid a surcharge. The agencies view smoking as addiction to nicotine – a medical condition. Under the ACA/HIPAA wellness program rules a reasonable alternative must be offered (e.g., attend a cessation course).

Q: If a company wants to set-up a tobacco incentive, do they have to set-up a formal wellness plan or can they just provide employees access to tobacco cessation programs as their wellness program and implement a tobacco surcharge?

A: See answer above. Care must be taken to ensure that all of the requirements for an ACA/HIPAA compliant wellness program are satisfied.

Q: Is charging more for an eligible participant that does not take an HRA or participate in a cessation program not considered retaliation?

A: EEOC regulations allow an HRA provided that the EEO/ADA regulations are followed – i.e., incentive does not exceed 30% of cost of coverage, etc.

Q: If your carrier offers a wellness discount- do you offer those lower rates for COBRA- if the participant has qualified?

A: Check with the carrier as they may have built the discount into the COBRA rate. If the COBRA rate from the carrier does not include the discount an argument might be made that the discount is not part of the cost of coverage – but rather relates to the cost sharing provided to active employees.