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Tobacco Surcharge Updates

Agencies Adopt a Non-enforcement Policy, but Litigation Risk Remains

Over the last few years, we have seen a surge in class action litigation related to tobacco-use surcharge wellness programs. These lawsuits have primarily focused on HIPAA nondiscrimination rules and retroactive refunds of prior surcharges for participants who meet the wellness program standard mid-plan year.

While many of these cases are still pending, the rulings we have seen represent a significant split among federal courts. Though the HIPAA nondiscrimination rules require participants to have the opportunity to earn the “full reward” at least once per plan year, courts have disagreed on whether this requires retroactive reimbursement.

In response to this wave of litigation, the U.S. Departments of Labor (DOL), Health and Human Services (HHS), and the Treasury (the Departments) published [FAQs](#) on August 26, 2026, announcing a non-enforcement policy related to retroactive refunds of tobacco-use surcharges. Though this non-enforcement policy comes as a relief for many employers, it does not eliminate the litigation risk, and other compliance requirements continue to apply.

This alert provides an update on key lawsuits related to tobacco-use surcharge wellness programs, as well as the federal non-enforcement policy. It is relevant for all employers imposing group health plan premium surcharges for tobacco users (or providing discounts to non-tobacco users).

DOL FAQs on tobacco surcharge wellness programs

On August 26, 2026, the Departments published [FAQs](#) addressing the HIPAA wellness program rules for tobacco use surcharges. These FAQs were issued largely in response to a surge of class action litigation challenging employer-sponsored wellness programs that impose premium surcharges on tobacco users. These cases primarily turn on whether an employer must refund all or part of the surcharge once a participant satisfies the RAS (e.g., completion of a tobacco cessation program), though plaintiffs have also alleged that employers failed to properly disclose the availability of a RAS as well as various fiduciary claims under ERISA.

Highlights

Agencies Adopt Non-enforcement Policy

The Departments' August 26, 2026, FAQs provide relief on retroactive refunds, but only as an enforcement policy.

- No enforcement action from federal agencies for pre-RAS surcharges, assuming other HIPAA requirements are met.
- Prospective surcharge removal may be permitted after the participant completes the RAS.
- The FAQs do not create legal immunity or eliminate private litigation risk.

Courts Remain Divided

Federal courts continue to reach different conclusions on whether the wellness rules require retroactive reimbursement. The split means outcomes remain dependent on the facts and jurisdiction.

Compliance Risks Continue

Employers must continue to review program design, participant communications, and fiduciary administration.

- RAS notices must explain how to access the alternative standard and include relevant contact information.
- Plan materials should address accommodation of personal physician recommendations where applicable.
- Separate ERISA fiduciary claims may remain even when a retroactive refund claim fails.

The FAQs indicate that the Departments will not take enforcement action against an employer for failure to retroactively refund premium surcharges collected before a participant completes a RAS, assuming the other HIPAA wellness program requirements are satisfied. However, **the litigation risk remains significant, and some courts have declined to adopt the DOL's interpretation.** In addition, the FAQs do not eliminate the need for compliance with the underlying wellness program rules.

Background

The FAQs address part of the final 2013 HIPAA nondiscrimination rules for workplace wellness programs.¹ Under those rules, a tobacco-use surcharge is classified as an outcome-based health-contingent wellness program subject to the following requirements:

1. The program must give eligible individuals an opportunity to qualify for the reward at least once per year.
2. The total reward for a wellness program designed to prevent or reduce tobacco use must not exceed 50 percent of the total cost of employee-only coverage under the plan (30 percent for non-tobacco-related rewards).
3. The program must be reasonably designed to promote health or prevent disease.
4. The full reward under the program must be available to all similarly situated individuals, and the program must allow a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual who does not meet the initial standard.
5. In all plan materials describing the terms of the program, and in any disclosure that an individual did not satisfy an initial outcome-based standard, the plan must disclose the availability of a reasonable alternative standard (or waiver of the original standard).

The final rules did not clearly address whether the surcharge must be refunded retroactively. The rules provide that the *full* reward under the wellness program must be made available to all similarly situated individuals. However, it did not specify whether the “full reward” refers to the reward that is provided to individuals who meet the initial standard for the plan year, or the reward for the portion of the plan year after the reasonable alternative standard is satisfied. Notably, the preamble to the final rules states that “[w]hile an individual may take some time to request, establish, and satisfy a reasonable alternative standard, the same, full reward must be provided to that individual as is provided to individuals who meet the initial standard for that plan year.”² The preamble also provides an example involving retroactive premium discounts, though this language did not make it into the text of the regulations themselves.

Recent tobacco surcharge litigation

A wave of class action lawsuits were filed under these final rules, primarily challenging whether tobacco surcharges must be retroactively refunded for participants who do not satisfy the initial tobacco standard, but later complete a RAS (such as a tobacco cessation program).

Federal courts have reached differing conclusions regarding whether the HIPAA wellness program rules require retroactive reimbursement of tobacco surcharges when participants complete an RAS during the plan year. Although several earlier decisions allowed participants' claims to proceed, more recent decisions have rejected the retroactive reimbursement theory. However, courts continue to consider independent claims involving RAS disclosures and ERISA fiduciary duties.

¹ 78 FR 33158 (June 3, 2013).

² 78 FR 33158, 33163 (June 3, 2013).

Retroactive reimbursement: courts reach different conclusions

In *Mehlberg v. Compass Group USA, Inc.* (W.D. Mo. 2025), the court allowed participants' claims to proceed, finding that they plausibly alleged violations of ERISA's wellness program requirements based on the employer's failure to reimburse surcharges paid before completion of the RAS. The court relied in part on the "full reward" language in the preamble to the 2013 final wellness program regulations. On April 9, 2026, the court certified several classes seeking retrospective relief, including claims alleging statutory violations, violations of plan terms, and fiduciary breaches. Compass sought permission to appeal the class-certification ruling but the Eighth Circuit denied that petition on June 30, 2026. The case remains active as a certified class action.

A similar result was reached in *Bokma v. Performance Food Group, Inc.* (E.D. Va. 2025), where the court initially denied the employer's motion to dismiss the principal ERISA claims, allowing participants to pursue allegations concerning retroactive reimbursement, RAS disclosures, and fiduciary duties. Rather than proceeding through further merits litigation, the parties subsequently agreed to a \$4.7 million class action settlement covering approximately 18,500 current and former participants who paid tobacco surcharges. The court granted approval of the settlement on April 22, 2026. Because the case settled, the resolution does not constitute a final judicial determination that Performance Food Group's program violated ERISA, but the settlement illustrates the potential financial exposure associated with these claims.

Several courts have reached the opposite conclusion:

- *Williams v. Bally's Management Group, LLC* (D.R.I. 2025). Court held that the statutory and regulatory language did not require retroactive reimbursement and dismissed the plaintiff's fiduciary claims as well. The plaintiff appealed, and the case is currently pending before the U.S. Court of Appeals for the First Circuit.
- *Plesha v. Ascension Health Alliance* (E.D. Mo. 2026). Court dismissed the plaintiff's complaint with prejudice, concluding that the "full reward" requirement did not mandate reimbursement of surcharges paid before completion of the RAS. The court also rejected the plaintiff's notice and fiduciary theories.
- *Spencer v. The Campbell's Company* (D.N.J. 2026). Court rejected the retroactive reimbursement theory. The court dismissed the action based on the plaintiff's lack of standing but also addressed the merits, concluding that the full reward requirement does not mandate retroactive reimbursement. The court declined to treat the 2013 regulatory preamble as controlling.

Retroactive reimbursement is only one component of compliance

The July 2026 decision in *Mueller and Janosky v. United Surgical Partners International, Inc.* (N.D. Tex. 2026) highlights both the relief available to employers and the remaining litigation risks.

The court rejected the plaintiffs' retroactive reimbursement theory and dismissed that claim with prejudice, concluding that the full reward requirement could be satisfied by eliminating the tobacco surcharge prospectively after completion of the RAS. However, the court permitted aspects of the plaintiffs' separate RAS disclosure claims to proceed, including allegations that plan materials failed to provide required contact information and language addressing the accommodation of an individual's personal physician's recommendations. The court also allowed certain fiduciary claims concerning the treatment of tobacco surcharge proceeds to continue. This decision illustrates why retroactive reimbursement is only one component of the litigation risk; an employer may successfully defend its prospective surcharge removal design while continuing to face potential exposure based on participant communications and fiduciary administration.

Most recently, in *Trout v. Meijer, Inc.* (W.D. Mich.), the court rejected the plaintiff's retroactive reimbursement theory and, on September 1, 2026, dismissed the remaining notice and fiduciary claims. *Trout* adds to a line of recent decisions that are more favorable to employers, while the contrary rulings in *Mehlberg*, *Whole Foods*, and *Baker* show that the issue remains unsettled.

Impact of the FAQs

Against this litigation backdrop, and with the issuance of the recent FAQs, the Departments have taken the position that they will not enforce a retroactive refund requirement for premium surcharges paid before an employee completes the RAS, assuming that all other HIPAA wellness program requirements are met. The Departments expressly acknowledge that the preamble to the 2013 final regulations suggested that a retroactive refund would be due but note that the regulatory text did not clearly impose that requirement. As a result, the Departments are exercising enforcement discretion. In practice, this may allow employers to remove the surcharge on a prospective basis only once the participant satisfies the standard, without refunding amounts collected earlier.

That said, the Departments' non-enforcement position should not be construed as legal immunity. The FAQs do not eliminate the need to comply with the underlying wellness program requirements. The program must still be reasonably designed to promote health and prevent disease and may not operate as a subterfuge for discrimination or an attempt to underwrite health risk. Employers must also continue to provide clear and accurate disclosure of any RAS, including how to access it, relevant contact information, and notice that physician recommendations will be accommodated where applicable.

Most importantly, as demonstrated by the lawsuits reviewed above, the litigation risk remains significant. Courts likely will continue to evaluate these programs based on the facts and circumstances involved, and some have declined to adopt the Departments' interpretation as represented in the FAQs. As a result, employers should carefully review their tobacco surcharge designs, confirm that plan materials accurately describe any RAS, and assess their exposure on a plan-by-plan basis. Employers that wish to begin or continue removing their tobacco-use surcharge on a prospective basis only are strongly encouraged to consult with legal counsel to assess the risk involved.

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