

Tobacco Surcharges Face Growing Scrutiny in Recent Lawsuits

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There has been a recent uptick in class action litigation filed against large group health plan sponsors alleging that the additional insurance premiums levied against tobacco users (“tobacco surcharges”) through their wellness programs violate HIPAA nondiscrimination rules.

The litigation reminds employers to carefully review their plan designs for compliance with these rules. Below you will find a summary of the arguments being put forth by the plaintiffs as well as some high-level considerations for employers when implementing tobacco related incentives.

■ Background

The HIPAA nondiscrimination rules prohibit group health plans from discriminating against plan participants on the basis of a health status-related factor, including tobacco use. There is an exception that allows for the use of incentives or surcharges (“rewards”) through a wellness program.

A program that imposes premium surcharges on individuals who use tobacco is considered a health-contingent wellness program and must comply with the following five requirements:

1. There must be an opportunity to qualify for the incentive (or avoid the surcharge) at least once a year.
2. The amount of the reward cannot exceed 50% of the cost of the coverage under the plans.
3. The program must be designed to promote health and prevent disease.
4. The reward must be available to all similarly situated individuals and provide for a reasonable alternative.
5. Plan materials describing the wellness program must include a disclosure of the availability of a reasonable alternative.

■ The Litigations

While lawsuits challenging tobacco surcharges are not new, the number of suits being filed (and filed as potential class

actions) is new. The lawsuits primarily target very large, self-insured health plans such as those sponsored by 7-Eleven; Walmart; XPO, Inc.; Target; Nike; Campbell Soup Company; and Tractor Supply Company. So far, no court has ruled on the merits and only one has been voluntarily dismissed—the plaintiff in Walmart filed a voluntary dismissal back on December 13, 2024. The Department of Labor has also focused on the surcharges, filing an action against Macy's in September 2024.

The plaintiffs allege that plan sponsors are violating their fiduciary duties and violating HIPAA because the wellness program at issue discriminates against them on the health status-related factor of tobacco use. Allegations common within each lawsuit include the plan sponsors' failure to:

- provide a reasonable alternative standard to being tobacco-free;
- disclose the reasonable alternative standard to the surcharge in plan materials discussing the wellness program; and/or
- provide the full reward once a reasonable alternative is satisfied.

While it is still early in the litigation process, it appears that most group health plans are fighting back in these cases. However, at least one plan offered by Bass Pro Groups LLC became the first to file a notice of class action settlement related to their tobacco surcharge lawsuit in the United States District Court for the Western District of Missouri.

It is still too soon to tell the expected outcome from the remaining lawsuits, as none of the other defendants have indicated an interest in settling to date.

■ Tobacco Surcharges

These lawsuits do not mean that all tobacco surcharges violate the HIPAA nondiscrimination rules. As described earlier, there are five requirements for health contingent plans that must be met.

As reflected in the allegations contained in the lawsuits, employers may not understand or implement the requirements correctly. The following summarizes some common issues employers fail to address in their tobacco-surcharge programs.

- *Reasonable Alternative.* Employers must offer a reasonable alternative to earn the reward without satisfying the health-related standard. In other words, for those who are not “tobacco free” there must be another way they can earn the reward (or avoid the surcharge). This may be through participation in a tobacco cessation program or through a program recommended by their doctor. Often, employers fail to offer another way to earn the reward (or avoid the surcharge).
- *Full reward must be available.* When an individual earns the reward by completing the reasonable alternative standard (e.g., attend a smoking cessation class) the full reward must be made available. The reward cannot be pro-rated for only those months after the individual met the standard. It also cannot be conditioned on the individual being a “non-smoker.”
- *Disclosure.* Finally, it's important that plan materials describing the wellness program include language that notifies individuals of the availability of a reasonable alternative standard. Model language is provided by the Department of Labor:
 - Your health plan is committed to helping you achieve your best health. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at [insert contact information] and we will work with you (and, if you wish, with your doctor) to find a wellness program with the same reward that is right for you in light of your health status.

■ Employer Action

Employers offering wellness programs with tobacco surcharges should monitor developments as these lawsuits progress. They should also review their program to ensure it meets the requirements under the HIPAA nondiscrimination rules.