

Refusing to Quit: Class Actions on Tobacco Surcharges in Health Plans Continue

Labor & Employment Law Update

By Rebecca Bush on March 18, 2025

Over the past year, numerous class actions have been filed against large employers claiming their health plan surcharge for tobacco use is not in compliance with HIPAA nondiscrimination rules. With yet another lawsuit filed on March 3, 2025 against LHC Group (a large home health care company), these cases show no signs of slowing down.

Several recognizable employers have faced similar class actions, including 7-Eleven, Inc. Walmart Inc., Target Corp., PepsiCo Inc., Tractor Supply Co., Whole Foods Market Inc., and Bass Pro Group LLC, which settled its case for a reported \$4.95 million.

It is not uncommon for a niche issue such as this one to gain momentum with a small number of plaintiff's firms once proven relatively successful. However, there are proactive steps employers can take to minimize the risk of becoming targets in this litigation trend.

Proactive Compliance Steps

Employers should review any tobacco-related wellness plans or surcharges they currently have in place. When conducting this review, it is important to keep the following in mind:

- HIPAA prohibits group health plans and health insurers from discrimination in eligibility, benefits, premiums, or contributions based on an enrollees' medical condition or other health factor. Tobacco use (i.e., nicotine addiction) is a health factor.
- An incentive or surcharge must be reasonably designed to promote health or prevent disease, not as a cover for discriminating based on a health factor.
- Incentives related to tobacco use generally cannot exceed 50 percent of the total cost of coverage.
- Participants must have an opportunity to qualify for any incentives (such as through participation in a smoking cessation program) at least once per plan

year.

- Whether structured as a surcharge or an incentive program, a “reasonable alternative standard” must be available for obtaining the full reward or relief from the surcharge.
- The “reasonable alternative standard” must be disclosed in all plan materials describing the wellness program or surcharge, along with contact information for obtaining more details.

Required Disclosure Language

The regulations provide the following sample language to illustrate the disclosure requirements:

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.

It’s important to keep in mind, when designed in compliance with the HIPAA non-discrimination rules, a tobacco-using employee who completes a “reasonable alternative standard” should pay no more in premiums for the year than non-tobacco using employees.

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