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Does Your Wellness Program Need a Tobacco "Check-Up"?

If your company's group health plan offers a wellness program to participants, it may be time to review its details surrounding surcharges related to tobacco use and any applicable tobacco cessation programs available to participants, as noncompliance with relevant requirements may pose certain risks to employers.

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The Employee Retirement Income Security Act (ERISA) prohibits group health plans from charging otherwise similarly situated participants different premiums based on "health status-related factors." [ERISA § 702(b)(1); 29 USC § 1182(b)(2)] "Health status-related factors" include health status, medical condition, claims experience, receipt of healthcare, and medical history. [ERISA § 702(a)(1); 29 USC § 1182(a)(1)]. However, group health plans may offer certain discounts if a participant adheres to a compliant

"wellness program, including certain tobacco cessation programs." [ERISA § 702(b)(2)(B); 29 USC § 1182(b)(2)(B)]

Plans may apply surcharges to tobacco users if the plan also offers participants who cannot meet the health standard of being tobacco-free a "reasonable alternative" in the form of an ERISA compliant wellness program. Tobacco cessation programs are considered a "reasonable alternative" if:

1. The wellness program's reward does not exceed 50 percent of the cost of employee-only coverage under the plan.
2. The wellness program must be reasonably designed to promote health or prevent disease.
3. The plan must give individuals who are eligible for the wellness program the opportunity to qualify for the program's reward at least once a year.
4. The wellness program's *full* reward must be made available to all similarly situated individuals.
5. A reasonable alternative standard (or possibility of waiver of the otherwise applicable standard) must be disclosed in all plan materials describing the terms of the wellness program.
6. The participant cannot be required to actually stop smoking.

[42 USC § 300gg-4(j)(3); 29 CFR § 2590.702(f); 26 CFR § 54.9802-1(f)]

However, not all tobacco cessation programs comply with these requirements. Numerous class action cases have been filed recently alleging violations of ERISA, with mixed/uncertain results. By our count, as of the date we are writing this, more than 20 cases have been filed (with only a few results) but the allegations in each are quite similar. Because this seems to be a growing trend, now would be a good time to give your wellness program a "check-up."

The majority of the currently pending cases allege the employers' tobacco cessation programs are not compliant because: (1) plaintiffs will not receive the full reward for completing the program (that is, they cannot fully avoid the tobacco surcharge for the plan year, only for the remaining part of the year after completing the program); and (2) participants didn't receive sufficient notice of the program (or other alternatives) in all plan communications. There also are allegations of breach of fiduciary duty/prohibited transactions because the employer administered the tobacco surcharges and retained such amounts in their general accounts—rather than a trust account—thereby reducing their contributions to the plans.

As with many other class action ERISA cases, most of the cases that have been filed to date involve very large companies. Several of these cases have been settled; however, even in these very large plans, the settlement amounts have been modest compared to the large settlements in the 401(k) fee class actions. In this column, we focus on four cases involving motions to dismiss to see what we can glean from those holdings.

Recent Holdings

1. *Mehlberg et al. v. Compass Group USA, Inc.,* No. 2:24-cv-04179 (W.D. Mo.)—Motion to Dismiss Denied

On October 9, 2024, the plaintiffs filed a class action complaint alleging the defendant's tobacco surcharges violated ERISAs anti-discrimination provisions "prohibit[ing] any medical plan from charging an extra premium or fee based on any health status related factor, including tobacco use, unless that fee is part of a *bona fide* 'wellness program'." Plaintiffs allege the wellness program does not meet the "reasonable alternative standard" because participants who complete the tobacco cessation program only avoid the surcharges prospectively (that is, they do not receive the program's "full reward"). Further, plaintiffs allege the tobacco cessation program does not comply with federal law because participants must be given "notice that such an alternative program exists in every communication regarding the surcharge. This notice must also include a statement that recommendations of an individual's personal physician in formulating a reasonable alternative standard will be accommodated."

Defendants moved to dismiss on a number of grounds, including, standing, the Department of Labor's (DOL) regulations governing wellness programs no longer control after the Supreme Court's decision in *Loper Bright v. Raimondo* [144 S. Ct. 2244, 2266 (2024)] (which ended automatic deference to federal regulations where a statute is ambiguous), and failure to state a claim on which relief may be granted.

On April 15, 2025, the District Court denied defendant's motion to dismiss, finding, among other conclusions, that the defendant's reading of *Loper Bright* was too broad, and in any event, the statute itself includes the words "full reward." The Court also allowed a claim that defendants engaged in a breach of fiduciary duty and prohibited transaction because the rebates were held in their own general accounts to go forward.

2. *Bokma v. Performance Food Group, Inc.*, No. 3:24-cv-00686 (E.D. Va.)—Motion to Dismiss Denied

Citing *Mehlberg* as persuasive precedent, a district court in Virginia recently denied a motion to dismiss in a case with substantially similar allegations on nearly identical grounds to *Mehlberg*. As of the time of writing, a Settlement Conference was scheduled in this case for September 10, 2025.

3. *Secretary of Labor v. Macy's, Inc.*, No. 1:17-cv-00541 (S.D. Ohio)—Motion to Reconsider Denial of Motion to Dismiss Is Pending

The case against Macy's is an older case that was brought not by a law firm but by the DOL seeking injunctive relief and is still pending on a motion to reconsider the Court's initial order denying Macy's motion to dismiss in light of *Loper Bright*. Like the plaintiffs in *Mehlberg* and *Bokma*, the DOL alleged that Macy's tobacco cessation program was not an ERISA compliant wellness program because there was inadequate notice of a reasonable alternative standard (or waiver of the otherwise reasonable applicable standard) to avoid the tobacco surcharge for individuals for whom it was unreasonably difficult to stop smoking or it wasn't medically advisable to do so. Further, relief from the surcharge was only available prospectively after a six-month period of no tobacco use.

4. *Buescher v. North American Lighting, Inc.*, No. 2:24-cv-02076 et al. (C.D. Ill.)—Motion to Dismiss Granted in Part, Denied in Part

In a June 30, 2025, order shaped by the *Mehlberg* and *Bokma* decisions, as well as filings in the *Macy's* case, the court partially granted defendants' motion to dismiss. Each year during annual enrollment participants in defendants' health plan were required to declare whether they had used nicotine products in the last 12 months, and if they had, were required to pay an additional monthly premium of at least $65. Plaintiff alleged participants did not have the opportunity to receive the full reward upon completing the tobacco cessation program.

Distinguishing this case from *Mehlberg* and *Bokma*, the court noted the full reward was the only reward ever contemplated by the program because participants would receive the *full reward* for completing the tobacco cessation program in the *next* plan year. Because the program did not involve a partial reward, the court declined to further consider *Loper Bright*'s effect on *Auer* deference. The court denied defendants' motion to dismiss plaintiff's claim that participants did not receive appropriate notice of the tobacco cessation program because the defendants did not assert a specific argument as to why this particular claim should be dismissed.

Conclusion

In light of the success of the plaintiffs in the above cases, and the number of cases being filed, employers who offer tobacco cessation programs that are intended to comply with the "reasonable alternative" standard should review both the timing (that is, can participants who complete a smoking cessation program get a full year's reward?) and the notices about the reasonable alternative(s) to evaluate if the way they are currently structured makes sense. For smaller plans, the savings from the smoking cessation surcharges may not be worth the risk posed by this growing line of cases. ■