

Potential Trap for Tobacco Surcharge

We often are asked about ways for employers to assist in addressing certain non-healthy employee behaviors by providing incentives to have an employee attempt to alter their lifestyle and address their particular unhealthy behavior.

One in particular is providing premium incentives if employees use tobacco products. I came across an interesting case that if this practice is followed, employers should be aware of the associated requirements under HIPAA, the ADA, GINA or state law. From a non-legal perspective, I understand that a tobacco incentive is permitted but it seems to me that the rules have become quite complex.

One of the basic requirements is that in order for a tobacco surcharge to be permissible, an employer must offer a reasonable alternative to obtaining the reduced premium, such as a cessation program. If an employee completes the program, the lower premium must be given to that employee even if the employee keeps using the tobacco product. Yes, it sounds counter-intuitive.

A large clothing manufacturer and distributor recently settled a lawsuit with the Department of Labor (DOL) for failure to provide a reasonable alternative to its employees where it was utilizing a tobacco incentive within their health plans. The company incentivized its employees by reducing their health plans contribution by \$15 per pay period for those who submitted a certification that they were tobacco free, but did not offer a reasonable alternative or waiver. The cost of settlement (without regard to any legal fees) were payments of \$145,000 to employees and \$15,000 in fines.

<https://www.dol.gov/newsroom/releases/ebsa/ebsa20181130>).

This is the third case of its kind that has been settled with the DOL in the past few months and the DOL is also currently litigating cases against others alleging similar violations. If you are administering a tobacco incentive program or are considering putting one in place, you should review these requirements and the various state law rules to avoid a similar issue.

[Please share your thoughts!](#)

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