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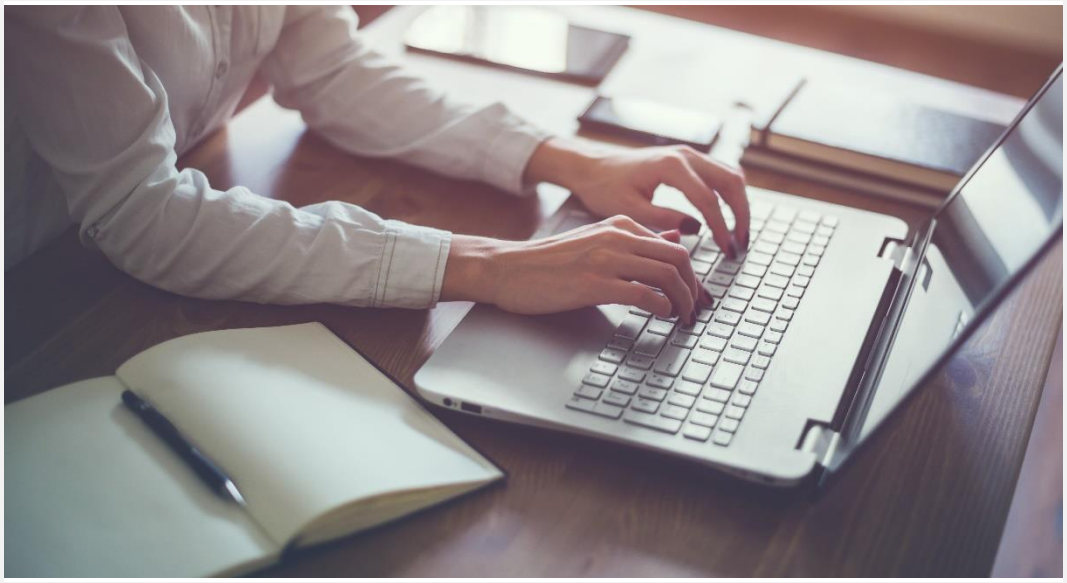


In this Issue:

Court Allows Wellness Program Tobacco Surcharge Lawsuit Against Employer to Continue

A Virginia district court concluded in a recent ruling that allegations brought by class action plaintiffs that their former employer's tobacco surcharge in its wellness program was unlawful was plausible enough to overcome a motion to dismiss. More than 30 similar lawsuits are pending in district courts across the U.S.

Background on Tobacco Surcharges

In recent months, employers have faced a barrage of lawsuits challenging the tobacco surcharges in their wellness programs, which require employees who use tobacco products to pay more for health insurance than non-tobacco users. The Virginia district court is the second court to rule against a plan sponsor's motion to dismiss the claims.

The bases for these lawsuits are rules in HIPAA, the Affordable Care Act, and other statutes that govern employer wellness programs, which are incorporated into ERISA. Under those rules, employers are prohibited from discriminating against individuals with respect to group health plan eligibility, benefits, and premiums based on certain health factors, such as a medical condition. Notwithstanding this rule, insurers can charge up to 50% higher premiums based on an individual's tobacco use. This so-called "tobacco surcharge" must be part of an employer wellness program that meets certain conditions.

Under one type of wellness program, participants are provided with a "reward" if they meet or maintain a specific health outcome, such as not smoking, and the program must meet certain conditions. One of those conditions is that the program must disclose the availability of a reasonable alternative standard, or "RAS" (for example, a tobacco user may still qualify for lower premium rates if they satisfy an alternative, such as attending educational classes or trying a nicotine patch). As noted above, several lawsuits have recently challenged these tobacco surcharges, typically alleging that the program fails to include a RAS or the employer failed to communicate the availability of such an alternative.

Court Allows Lawsuit to Proceed – But More to Come

In May, a Virginia district court ruled in a case called *Bokma v. Performance Food Group* that a class action lawsuit challenging an employer's tobacco surcharge in its wellness program was plausible enough to proceed past the initial stage of litigation. The plaintiffs are former participants in the employer's health plan, which included a wellness program that imposed a $600 annual surcharge on employees who failed to certify that they had not used tobacco products in the last year.

The plaintiffs argued that the program was unlawful because it had a number of deficiencies (mainly, it discriminated against tobacco users because it did not provide retroactive reimbursement for employees who completed a tobacco cessation program part-way through the year); the employer failed to provide sufficient notice of the tobacco cessation program as an acceptable RAS; and the employer breached its fiduciary duties under ERISA by prioritizing its own financial interests when collecting the unlawful surcharges and holding them as plan assets.

At this stage in the litigation, the court only considered whether the plaintiffs' claims were *plausible*, not whether the plaintiffs have proven them to be true.

First, the court first concluded that even though the plaintiffs did not participate in the tobacco cessation program, they could still bring the lawsuit because they had the $600 surcharge deducted from their paychecks. Then, the court found that the plaintiffs plausibly alleged all of their claims, relying on the conclusion that ERISA and its regulations prohibit discrimination.

The court's ruling was only the first step of many in this lawsuit, and it will likely be several more months, if not years, before the case is resolved.

Impact on Employers

Because tobacco surcharges are a common feature of many employers' wellness programs, and tobacco surcharge lawsuits continue to target employers, employers should review the nondiscrimination rules outlined in the HIPAA regulations to ensure that their wellness programs and tobacco surcharges meet all of the conditions, especially the RAS requirement.

EBSA Nominee Outlines Priorities and Goals at Senate Confirmation Hearing

A recent Senate Health, Education, Labor and Pensions (HELP) Committee confirmation hearing featured Daniel Aronowitz, the nominee to lead the Department of Labor's Employee Benefits Security Administration (EBSA). As part of his testimony, Mr. Aronowitz outlined his goals for EBSA.

Three Primary Goals

In general, Mr. Aronowitz indicated that his three primary goals include providing more regulatory clarity to encourage employers to sponsor and maintain employee benefit plans, limit ERISA litigation, and stop "open-ended" EBSA investigations that can continue for years.

He identified several priorities for enhancing regulatory clarity, including:

- modernizing defined contributions plans to include alternative investments, such as private equity and cryptocurrency;
- the consideration of Economic, Social, and Governance (ESG)-factors when investing plan assets;
- mental health parity;
- plan forfeitures;
- pension risk transfers;
- tobacco and vaccine surcharges and wellness programs;
- managing pharmacy benefit managers and health-care costs; and
- cybersecurity to protect participants assets.

As discussed in RPI 2025-11, the Department of Labor has already announced that it is reconsidering the final mental health parity rule that was issued last year. So that process should already by underway when Mr. Aronowitz arrives, assuming his nomination is confirmed by the Senate.

Benefits for Independent Contractors

In response to a question from Sen. John Hickenlooper (D-CO) about how he would promote expanding employee benefits to more workers, Mr. Aronowitz said he would like to unlock the potential of the employee benefits system with innovative solutions such as association health plans, individual coverage HRAs, and pooled employer plans. Mr. Aronowitz also stated that he would like to work with Congress to allow independent contractors to have the "dignity" of retirement savings and health security.

Next Steps

The HELP Committee must vote to advance Mr. Aronowitz's nomination before it can be considered by the full Senate. The HELP Committee is in the process of holding confirmation hearings for other Department of Labor nominees, and will probably vote on all of them once those hearings are complete. If the committee approves Mr. Aronowitz, as expected, the full Senate could vote on his confirmation at any time.

Department of Labor Expands Opinion Letter Program

After a lull in issuing opinion letters during recent years, the Department of Labor ("DOL") announced that it is expanding its opinion letter program to cover five sub-agencies within the department, including the Employee Benefits Security Administration ("EBSA"). Under the program, DOL issues letters that provide compliance assistance to employers by offering the department's interpretation of certain laws as they apply to a set of facts.

Background

DOL, specifically its enforcement sub-agencies, issues opinion letters to provide official written interpretations of the law and explain how those laws apply to specific factual circumstances presented by individuals or organizations. Opinion letters often address areas of existing regulations or guidance that are unclear and are typically requested by employers, although anyone – including workers – can request an opinion letter. In the case of EBSA, opinion letters address issues relating to employer-sponsored retirement and health plans.

The rate of issuance of DOL opinion letters and similar guidance has fluctuated significantly over the course of the last few presidential administrations. For example, during the Obama Administration, DOL completely phased out Wage and Hour Division ("WHD") opinion letters. In contrast, the first Trump Administration reinstated the WHD program and issued 80 letters, while the Biden Administration issued only eight letters. The Biden Administration also rescinded some opinion letters from the first Trump Administration.

Opinion Letter Program Relaunches

On June 2, 2025, DOL announced that it is launching its opinion letter program across five sub-agencies. As noted above, while the opinion letter program is not new, it was largely dormant during the Biden Administration. DOL's new Deputy Secretary of Labor explained that the agency views opinion letters as an important tool to ensuring workers and businesses have access to practical guidance.

The program will cover the following enforcement sub-agencies within DOL: EBSA, the WHD, the Occupational Safety and Health Administration ("OSHA"), the Veterans' Employment and Training Service, and the Mine Safety and Health Administration. The specific type of guidance that DOL will issue under the opinion letter program will vary depending on the sub-agency – for example, EBSA will release both advisory opinions (applying the law to specific facts) and information letters (highlighting well-established principles or DOL interpretations), while OSHA will provide letters of interpretation (explaining statutory and regulatory standards covering workplace issues).

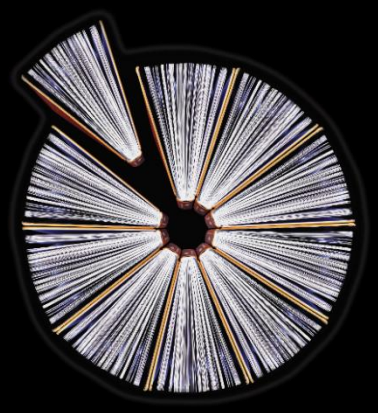
It is expected that the second Trump Administration will ramp up the issuance of opinion letters and similar compliance assistance. Employers interested in learning more about requesting an opinion letter can visit DOL's new webpage, available here, which explains how to request an opinion letter and incudes tips for writing a request.

Visit the Archive

All previous issues of the Rewards Policy Insider are archived on Deloitte.com and can be accessed here.

Don't forget to bookmark the page for quick and easy reference!

Upcoming editions will continue to be sent via email and will be added to the site on a regular basis.



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