

## Class-Action Trend

# Lawsuits Target Health Plan Tobacco Surcharges

**A** NEW WAVE of class-action lawsuits is targeting employers that apply health insurance premium surcharges to employees who use tobacco, accusing them of discrimination and violating the Employee Retirement Income Security Act (ERISA), according to two new blogs by prominent law firms.

The lawsuits, according to Chicago-based Thompson Coburn LLP, assert that the surcharges are violations of fiduciary duty rules under ERISA, as well as discrimination regulations under the Health Insurance Portability and Accountability Act (HIPAA).

The law firm says these cases are being filed across the country on an almost daily basis and to date no courts have ruled to have the cases dismissed.

The fast-developing lawsuit trend is notable, considering that tobacco surcharges are widely used, and if any of the new lawsuits are successful, they could set a precedent that could expose thousands of employers to legal action. Most of the lawsuits are against self-insured plans, but even employers who purchase health insurance and also impose surcharges for tobacco use could be targeted as they are considered “fiduciaries” under ERISA.

The lawsuits hinge, in part, on a HIPAA prohibition on group health plans and wellness plans discriminating on the basis of health status. For example, health plans are barred by the law from charging higher premiums to group health plan participants with pre-existing conditions.

However, HIPAA has one exception to the rule: It allows plans to charge different premiums for employees who enroll in and adhere to “programs of health promotion and disease prevention.” You can find HIPAA’s non-discrimination rules for wellness plans here.

## In the crosshairs

The lawsuits target a common practice: requiring employees who use tobacco to pay higher health plan premiums than their colleagues who certify that they don’t use tobacco products (cigarettes, e-cigarettes, chewing tobacco and similar products).

## Common themes

### Typical lawsuit allegations:

- The plan did not provide an alternative standard for tobacco users to obtain a discount because the premium reductions for participating in the wellness plans are only available on a prospective basis, in violation of ERISA Section 702, and
- The plan failed to provide information on the existence of such alternatives in “all plan materials.”

### The lawsuits typically seek:

- Declaratory and injunctive relief.
- An order instructing the employers to reimburse all persons who paid the surcharges, with interest.
- Disgorgement of any benefits or profits the businesses received as a result of the surcharges.
- Restitution of surcharges.

It should be noted that as of the end of October, no court had ruled on a motion to dismiss a case, according to the blog. At least one case has settled as a class action and the employer and plaintiffs in another class-action case had informed the court that they were working on a settlement agreement and would both ask the court to dismiss the case.

In addition to these private actions, the Department of Labor has sued several employers targeting premium surcharges, including in 2023 when it brought action against a firm whose health plan was charging tobacco users a \$20 per month surcharge, according to a blog by Washington, D.C.-based Groom Law Group.

## The takeaway

Thompson Coburn said in its blog that these types of cases are snowballing: “It is highly possible that any group health plan that applies tobacco surcharges ... faces the possibility of a lawsuit.”

The law firm recommends reviewing your health plans to ensure that they comply with HIPAA’s non-discrimination rules for wellness plans, which allow tobacco surcharges when applied properly, such as charging different premiums for workers who enroll in and adhere to a program that’s focused on promoting health and preventing disease.

This is a newly evolving threat to employers. We will keep you updated on developments. ❖

