

Publications

One Court Permits Tobacco Premium Surcharge Claims to Proceed Beyond the Pleading Stage, While Dispositive Motions Remain Pending in More Than a Dozen Cases

ATTORNEYS & PROFESSIONALS

Kathryn Bjornstad Aminkamin@groom.com

202-861-2604

Michael Pramemprame@groom.com

202-861-6633

Christy Tinnesctinnes@groom.com

202-861-6603

Kara Petteway Wheatleykwheatley@groom.com

202-861-6339

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In fall 2024, plaintiffs filed a wave of putative class action lawsuits against employers challenging wellness programs that impose a health coverage premium surcharge on participants if they do use tobacco or do not complete a tobacco cessation course. The lawsuits allege that the defendants violated HIPAA's non-discrimination provision and the HIPAA wellness program rules because the defendants only offered the tobacco-free premium rate to participants who completed a tobacco cessation course on a *prospective* basis and not for the full plan year. The lawsuits also allege that the notices regarding the availability of the tobacco cessation course as a way to earn the tobacco-free rate failed to comply with the wellness program rules. See our prior alert describing the premium surcharge lawsuits [here](#).

While some defendants have entered into early settlements, many defendants filed motions requesting dismissal of the complaints. On April 15, 2025, the United States District Court for the Western District of Missouri issued the first decision on a motion to dismiss in a premium surcharge case in *Mehlberg v. Compass Group, USA, Inc.* The district court denied the defendant's motion to dismiss, holding that the plaintiffs (1) had standing to challenge the premium surcharges and (2) plausibly alleged that the surcharges violated the ERISA fiduciary rules.

The key takeaways are as follows:

- Employees have filed more than 30 putative class actions against employers challenging tobacco premium surcharges. The complaints assert substantially similar allegations.

- Defendants in four cases have entered into settlements on a class action basis, with the settlements ranging from 35-62% of the value of the tobacco premium surcharges collected by the employers over a multi-year time period.
- Motions to dismiss are pending in more than a dozen cases in federal district courts across the country.
- One district court has allowed the tobacco premium surcharge claims to proceed past a motion to dismiss. The district court's opinion did not address certain provisions in the HIPAA wellness program regulations or sub-regulatory guidance regarding premium surcharges.
- Other courts do not need to follow the *Compass Group* decision and may reach different and contrary conclusions. We anticipate that other federal district courts will rule on motions to dismiss in the coming weeks.
- Plaintiffs' firms are likely to file additional lawsuits, particularly if other courts join the *Compass Group* court in denying defendants' motions to dismiss.

Many Defendants Have Sought Dismissal of the Tobacco Premium Surcharge Complaints

Motions to dismiss tobacco premium surcharge lawsuits are pending in 15 federal district courts, which sit in nine different circuits. This sets up the possibility that district courts, and subsequently circuit courts, will reach conflicting decisions on the same issues.

In the motions to dismiss, defendants generally have argued that:

- The plaintiffs lack standing to challenge the tobacco surcharges because the plaintiffs did not allege that they participated, or sought to participate, in the tobacco cessation courses, and the plaintiffs did not allege they were harmed by the allegedly deficient notices regarding the tobacco cessation courses;
- The wellness programs comply with the HIPAA non-discrimination rule and the HIPAA wellness program regulation because they offer enrollment in the tobacco cessation program once per year, with retroactive premium discounts for participants who enroll in the tobacco cessation program by a specific date;
- The employers acted in a settlor capacity when designing and administering the wellness programs and therefore are not subject to fiduciary liability under ERISA for such conduct;
- The HIPAA wellness program rules are not the best reading of the HIPAA non-discrimination requirement pursuant to the [Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*](#), 144 S. Ct. 2244 (2024); and
- The plaintiffs failed to exhaust administrative remedies prior to filing the lawsuits.

The *Compass Group* Decision

On April 15, 2025, the United States District Court for the Western District of Missouri denied the defendants' motion to dismiss in *Mehlberg v. Compass Group, USA, Inc.*

- *Standing*: The district court held the plaintiffs' allegation that their employer unlawfully deducted money from their wages was sufficient to allege the elements of standing (under Article III) to challenge the surcharge, *i.e.*, an injury-in-fact that was traceable to the defendants' conduct and could be redressed by a favorable court order. The district court further held that the plaintiffs had standing to challenge the purportedly deficient notices regarding the premium surcharge based on the allegedly deficient notice, coupled with the plaintiffs' alleged monetary loss.
- *Retroactive Reimbursement of Tobacco Surcharges*: The district court concluded that the plaintiffs plausibly alleged that the tobacco premium surcharges violated the HIPAA non-discrimination rules because the plan did not offer a *retroactive* reimbursement of the annual surcharge amount upon completion of the tobacco cessation course. The district court reasoned that the statutory and regulatory requirement that a participant must be eligible for the wellness program's "full reward" means that the reward must apply retroactively. In reaching this conclusion, the district court relied on the preamble to the 2013 HIPAA wellness program regulations, which states that the "full reward" requires a plan or issuer to retroactively reimburse a participant who completes the reasonable alternative standard (here, a tobacco cessation course). Notably, the district court rejected the defendants'

Loper Bright argument that the wellness program rules are not the best reading of the HIPAA non-discrimination requirement. The district court also questioned whether a plan could impose a tobacco surcharge and held that the plain language of the HIPAA statute permits “premium discounts or rebates” in return for participation in a wellness program and that a surcharge is not a discount or rebate.

GROOM INSIGHT: The HIPAA wellness rules require that a plan provide the same full reward regardless of whether the participant meets the no-tobacco status up front or completes a reasonable alternative standard (in this case, a tobacco cessation program). The opinion did not address guidance that the Departments of Labor, Treasury, and Health and Human Services issued in 2014. That guidance stated that, if a plan provides a participant a reasonable opportunity to enroll in a tobacco cessation program at the beginning of the plan year (e.g., at annual enrollment) and qualify for the “full reward” (i.e., avoiding the tobacco surcharge), the plan is not required (but is permitted) to provide another opportunity to enroll in a tobacco cessation program until the next plan year. However, if the plan decides to allow mid-year enrollment in the tobacco cessation program, the plan can pro-rate the reward for that plan year.

The opinion also did not address that the HIPAA wellness regulations themselves include examples of a permissible wellness program involving a tobacco surcharge.

- *Notice Deficiencies:* The district court ruled that plaintiffs sufficiently alleged that the plan’s notice materials describing the tobacco cessation program were deficient because they did not contain disclosures regarding accommodations for a physician’s recommendations. The district court specifically described that, *at the motion to dismiss stage*, these allegations regarding the undisclosed accommodation were sufficient to state a claim for relief.

GROOM INSIGHT: The opinion does not acknowledge that the HIPAA non-discrimination statute and wellness regulations provide that, while the plan must disclose the availability of the reasonable alternative in materials that *describe the terms of* the wellness program, this level of disclosure is not required where plan materials simply disclose that a program is available, without describing its terms.

- *Fiduciary Status:* The district court held that, *for purposes of a motion to dismiss*, the plaintiffs alleged that the defendant employer acted as an ERISA fiduciary and engaged in prohibited transactions when it assessed and collected the premium surcharges and used the premium surcharges to offset the amount the employer contributed to the plan. The district court further held that the plaintiffs sufficiently alleged losses to the plan for purposes of alleging an ERISA section 502(a)(2) claim because the complaint asserted that the employer should have deposited the surcharges into the plan.

GROOM INSIGHT: The court applied a plaintiff-friendly pleading standard when addressing the sufficiency of the plaintiffs’ allegations *to survive a motion to dismiss*. The plaintiffs may face challenges in attempting to prove their allegations at the summary judgment stage.

Some Tobacco Premium Surcharge Cases Have Settled on a Class Action Basis

While most defendants have sought dismissal of the complaints, a handful of defendants opted to enter into early settlements. To date, class action settlements were reached in four cases. The settlements range from approximately 35% to 62% of the value of the tobacco surcharges, with the per capita amount ranging from approximately \$330 to \$580 per class member.

What’s Next for Tobacco Premium Surcharge Litigation?

In the coming weeks, we anticipate that other federal district courts will rule on the motions to dismiss pending in the other cases. While the *Compass Group* decision is a win for plaintiffs, the trajectory of tobacco premium surcharge litigation remains an open question because the other courts are not required to follow the decision. We are optimistic that other courts may undertake a more rigorous analysis and dismiss the complaints. To the extent the complaints survive motions to dismiss, plaintiffs still will need to take discovery to prove their claims at the summary judgment stage.

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The plaintiffs' bar is certain to file additional lawsuits against employers until these issues are resolved by the appellate courts. Indeed, plaintiffs filed another premium surcharge lawsuit the day after the district court issued the *Compass Group* decision.