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ERISA

ERISA lawsuits plague employers' wellness programs over tobacco surcharge disputes



Cigarettes (Getty Images/iStockphoto)

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Where there's smoke, there's lawsuits.

Employers offering wellness programs that include a tobacco surcharge - an extra fee assessed to health insurance of smokers and other tobacco product users — have been inundated with lawsuits by employees who say the surcharges should be rebated when they complete smoking cessation programs.

The result has been dozens of lawsuits claiming ERISA violations — mostly since 2024 — producing a succotash of federal court rulings, dismissals and several settlements with no clear theme.

Employer-defendants, their lawyers and retirement industry trade groups say the lawsuits damage the value of wellness programs and raise the cost to employers. They say some near-term relief could only occur when and if federal appeals courts issue rulings that would guide district court judges.

“Right now, the law is unsettled,” said Kara Petteway Wheatley, a Groom Law Group principal who represents employers and health insurers in ERISA and Affordable Care Act lawsuits. She estimated 90 smoking cessation lawsuits have been filed in recent years. Appeals court rulings won’t take place until next year, she added.

A common theme in the lawsuits is that employees who pay a tobacco surcharge should be paid retroactively when they complete a smoking cessation program or some other approved action such as health coaching or nicotine-replacement therapy.

They contend these programs without the retroactive payment provision in group health plans also violate the health discrimination provision of the Health Insurance Portability and Accountability Act, which includes tobacco use.

Employees who complete a smoking cessation program “must get the full reward” under federal regulations, said the website of Siri & Glimstad, a law firm that has filed multiple challenges to tobacco surcharges. “This means that if an employee finishes the program in May, the company must refund or credit the tobacco surcharges taken from January through April.”

The law firm contends that an employer “cannot just stop charging the surcharge going forward and keep the money it already took.” Even if employers halt surcharges after employees complete a smoking cessation program, failing to rebate the surcharge is “unlawful under federal law,” the website said.

Employers challenge this legal reasoning because it is based on a preamble to 2013 Department of Labor regulations that incorporate information from the Affordable Care Act. They note that the preamble contains examples — not formal regulation or law — on how employers should act. Federal judges dismissing tobacco surcharge lawsuits have agreed.

Big money risks

“The dollars in these cases can be large,” said Douglas Hinson, executive director of the ERIC Legal Center, a unit of the ERISA Industry Committee, which has filed amicus briefs before three federal appeals courts supporting employers. “It’s a big threat.”

Employers must decide if they want to fight or settle, balancing the costs of both, Hinson said. Defending smoking cessation lawsuits means “there’s less money to provide benefits, and that hurts employees’ health,” he said. “Wellness programs help people quit smoking. They incentivize them to quit smoking.”

Hinson and ERISA lawyers said employers should cheer the August 2026 guidance issued by the Departments of Labor, Treasury, and Health and Human Services on how smoking cessation programs are conducted. The key provision: the departments won’t enforce the retroactivity statement in the 2013 preamble.

“The regulatory text of the 2013 final rules does not clearly require retroactive application of the reward,” the guidance document said. “Accordingly, the Departments are exercising such enforcement discretion.”

The guidance document said enforcement wouldn’t take place “until further guidance or regulations are issued,” — none has been proposed yet — prompting ERISA lawyers to say employers could still be at risk depending on different federal courts’ interpretations of ERISA and smoking cessation programs.

“The guidance is a step in the right direction, but you need legislation due to the uncertainty,” said Tina Q. Nguyen, partner and ERISA litigation practice group chair at Baker Botts, which represents employers in ERISA cases. She likened the guidance document to an amicus brief, legal commentary filed by interested parties in lawsuits.

“The impact of the guidance is uncertain,” said Wheatley of Groom Law Group. “It will provide comfort to some employers regarding enforcement, but it may not mitigate litigation risk.”

The guidance document “will help employers” focus on smoking cessation program strategies, said Richard Nowak, partner and co-leader of ERISA litigation at the Mayer Brown law firm, which represents employers in ERISA cases. “But it doesn’t have the force of law. It’s non-binding.”

What can employers do?

Given the legal uncertainties, ERISA lawyers say employers' actions will depend in part on how federal courts have been ruling in their headquarters cities and also in the language of their smoking cessation programs, which vary among employers in terms of cost, timing and requirements.

The guidance document is "a good reminder that employers that offer group health plans with tobacco surcharges should take a fresh look at their wellness programs to ensure that their implementation and administration of the programs complies with the terms of their plan," said a recent analysis by Nowak and colleagues at Mayer Brown.

"They should also evaluate their programs in light of the (guidance document) and recent developments in the ongoing wave of tobacco surcharge lawsuits to identify areas of potential litigation or compliance risk."

Mayer Brown lawyers also counseled employers to "review their plan materials and participant communications to ensure their description of their wellness program satisfies the regulatory disclosure requirements," the document said.

Lawyers noted that some employers may be concerned that if they make changes to their smoking cessation programs then plaintiffs' lawyers will cite these actions as admitting previous ERISA violations, an assertion, they say, that plaintiffs have made in some lawsuits.

Employers can counter that argument due to a section in the Federal Rules of Evidence called subsequent remedial measures.

"When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event," is the legal term. In plain English, a good faith effort to change a policy does not mean the previous policy was illegal or improper.

"Judges understand this," said Nowak. "If you believe you should make a change, you have a duty as a fiduciary to make the changes as long as they are justified."

What comes next?

The first break in the legal logjam is likely to come from the 1st U.S. Circuit Court of Appeals, Boston, which held an oral argument in September in Williams vs. Bally's Management Corp.

Tracy Williams, a Bally's employee, sued the company in April 2025, arguing, among other things, that its tobacco surcharge violated ERISA's non-discrimination provision. A U.S. District Court judge in Providence, R.I. dismissed the complaint in November 2025.

According to court documents, Bally employees who are tobacco users are assessed a surcharge of $65 per month, or approximately $780 per year. Employees may participate in a tobacco cessation program, and the benefits plan covers the cost. Completion of the program results in the removal of the surcharge going forward.

Williams contended the benefits plan should have refund the tobacco surcharge to people who completed a smoking cessation program.

"In sum, the Court finds that, as a matter of law, (ERISA provisions) do not require Bally's Management to provide retroactive reimbursement of the tobacco surcharge," the district court wrote.

The 1st Circuit covers district courts in Massachusetts, Rhode Island, Maine, New Hampshire and Puerto Rico.

The next appeals court showdown should be a Dec. 2 oral argument before the 2nd U.S. Circuit Court of Appeals, New York, in Krista E. Noel vs. PepsiCo Inc.

Noel, an employee of PepsiCo's Frito Lay subsidiary, sued in October 2024, arguing that the tobacco surcharge violated ERISA's "full reward" provision and fiduciary duty rules.

Noel said the "surcharge is unlawful because participants who complete the (smoking cessation) do not receive retroactive reimbursement for surcharges already paid during that year," according to court records.

A U.S. District Court judge in White Plains, N.Y., dismissed the complaint in February 2026, and Noel subsequently appealed. The district court judge said the PepsiCo defendants followed appropriate smoking cessation program guidelines, didn't violate their fiduciary duty and provided adequate notice to employees about the program. The 2nd Circuit covers New York, Connecticut and Vermont.