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Smoke Signals: Tobacco Cessation Program Litigation Update

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Courts Are Deciphering Regulatory Limits After *Loper Bright* While Employers Try to Contain Tobacco Cessation Program Litigation

There are now more than 75 tobacco surcharge class actions pending in federal courts across the nation. Since our last article in January 2026, tobacco cessation litigation continues to heat up as cases have now spread to the First, Second, Sixth, Seventh, and Eight Circuit Courts of Appeal. As older cases work their way through the judicial system, new cases continue to be filed—with Comcast and Waffle House being two of the latest employers to be haled into court. This article will examine recent developments in tobacco cessation cases and what steps employers can take to help ward off similar suits.

What's everyone fuming about?

ERISA and HIPAA forbid group health plans from charging similarly situated participants different premiums based on "health status-related factors." These factors include health status, medical conditions, claims experience, medical history, and the receipt of health care. Group health plans are, however, permitted to charge participants who use tobacco a surcharge if they also offer a tobacco cessation program that qualifies as a compliant wellness program. To qualify as a compliant wellness program, as discussed in our Autumn 2025 Journal of Pension Benefits article, certain requirements must be met. One requirement—that the tobacco cessation program's *full* reward must be made available to all similarly situated individuals—is the most hotly contested in the current cases. Plaintiffs also commonly contend plan materials didn't provide sufficient notice of a reasonable alternative standard to obtain the full reward, which is another requirement of a compliant wellness program.

Are there any reinforcements coming to help employers?

<u>*Loper Bright* is providing a preliminary line of defense with courts deferring to the plain language of the statute</u>

Some employers have thrown money at the issue to put out the flames, with some employers agreeing to multi-million-dollar settlements. But in the last few weeks, motions to dismiss have been granted in the employers' favor in three cases—*Williams v. Target Corp.* (No. 0:24-cv-03748 (D. Minn.)) ("*<u>Target</u>*"), *Spencer v. Campbell Soup Co.* (No. 1:24-cv-09882 (D.N.J.)) ("*<u>Campbell</u>*"), and *Janosky v. United Surgical Partners International, Inc.* (No. 3:25-cv-02934 (N.D. Tex.)) ("*<u>United Surgical</u>*").

In *Target*, participants alleged that they were unable to recoup the *full* $800 tobacco surcharge, and that they did not receive notice that their doctors' recommendations would be accommodated if they were unable to meet the tobacco-free standard necessary to avoid the surcharge. The court found that Target's interpretation of the summary plan description *did*, in fact, provide for the full, retroactive reimbursement of the surcharge. Further, relying on *Loper Bright*, the *Target* court looked to the plain language of the statute and determined it *does not* require that participants be given notice that their doctor's recommendations will be accommodated—this particular language comes from the regulations and cannot be read into the statute.

In *Campbell*, the court similarly grappled with the meaning of the statutes' use of "full reward" and considered whether participants had to be able to avoid tobacco use surcharges for the *entire* plan year. Based on the statutory text, context, and relevant regulatory framework, the *Campbell* court determined it did not. Under *Loper Bright*—even if the preamble were afforded the same weight as the regulations themselves, the court had to adhere to the statute because its language was unambiguous and the regulations merely paraphrased the statute. Similarly, the *United Surgical* court found if Congress had intended for the term "full reward" to include retroactive reimbursement, it would have said so.

<u>Amicus briefs are also being filed to aid employers in their fight</u>

Although the *Target*, *Campbell*, and *United Surgical* cases were dismissed at the district court level, it doesn't mean the fight is over. A lower court's decision to grant a motion to dismiss may just blow the embers to the appellate level and spark a renewed fight.

In Noel v. Pepsico Inc. (Docket No. 26-862 (2d Cir.)) and *Williams v. Bally's Management Group, LLC* (Docket No. 25-02159 (1st Cir.)), employers have received support from amici—The Chamber of Commerce of the United States of America, The ERISA Industry Committee, and the American Benefits Council.[1] These briefs instruct the courts to exercise their independent judgment when interpreting statutes and—as required by *Loper Bright*—defer to the statute's plain, unambiguous language.

How can employers prevent tobacco cessation program lawsuits?

Employers should examine their group health plans to determine whether participants who use tobacco pay a surcharge. If participants do, the next step is for employers to examine their summary plan descriptions and notices provided to participants to assess whether they meet the requirements necessary to be considered a compliant wellness program. Employers should also keep a watchful eye on developments in the tobacco cessation cases to determine whether there are any "flare ups" that will put their program at risk of being deemed noncompliant.

If you have any questions about your company's tobacco cessation program, please contact your Boutwell Fay attorney.

[1] The ERISA Industry Committee has also filed a motion for leave to file an amicus curiae brief in *Mehlberg, et al v. Compass Group USA*, (Docket No. 26-08007 (8th Cir.)).