

IF YOU'RE GOING TO LIGHT UP, PAY UP

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Is charging smokers more for healthcare really legal?

Employees who smoke cost U.S. companies \$6,000 more per year than their tobacco-free counterparts, according to a study released this summer by Micah Berman of Ohio State University. Smokers are associated with higher rates of absenteeism, lower productivity, and higher healthcare costs. Given these statistics, it's no wonder that employers and insurance companies are looking for ways to encourage employees to quit using tobacco.

Education and wellness programs have become commonplace. And, it *is* legally possible to charge smokers more for their healthcare premiums than non-smokers. Indeed, the Patient Protection and Affordable Care Act (the ACA) encourages such policies by allowing employers and insurers to give larger incentives to participants who are non-smokers (or who quit smoking) than incentives based on other health factors such as obesity or high blood pressure.

But employers that implement such policies need to be careful. Policies should be reviewed in light of requirements under the ACA, HIPAA, the ADA, ERISA, and state law. And, as a starting point, employers who charge smokers more for healthcare premiums should be sure that:

- the program gives employees the opportunity to qualify for the reward at least one time each year by either certifying they do not use tobacco or agreeing to participate in a tobacco cessation program
- the reward, together with the reward for other health-contingent wellness programs, cannot exceed 50% of the total cost of employee-only coverage under

the plan (this is higher for programs that discourage tobacco use than other health factors like obesity)

- the program is reasonably designed to promote health or prevent disease
- the full reward under the program is available to all similarly-situated employees
- the program provides reasonable alternative standards for employees who smoke to enable them to attain the reward (such as a free, easily accessible, tobacco-cessation program)
- the program, having already given an alternative, provides an additional alternative for an employee who can't complete the first reasonable alternative. This could be a physician-supervised cessation program or a doctor's note for an employee whose current health status prevents him from entering the cessation program.

Moreover, you should draft such plans carefully. The plan must disclose, in all plan materials describing the terms of the program, the availability of the reasonable alternative standards to qualify for the reward (and, if applicable, the possibility of waiver of the otherwise applicable standard). Your employees must be told who to contact for information and there should be a statement that recommendations of an individual's personal physician will be accommodated.

In addition, speak with your legal counsel when considering which tobacco products to target, and how "tobacco use" is defined. For example, is some tobacco use permissible? What about a celebratory cigar?

Some employers are choosing to include e-cigarettes in the list of prohibited products while others decide it's a healthier alternative to traditional cigarettes. And you'll need to decide which disciplinary measures to include in the policy for employees who misrepresent their tobacco use to attain the reward.

Finally, train your human resources and management-level staff to ensure that the new policy is administered fairly to all employees and that requests for reasonable alternatives are handled appropriately.

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