



# Can You Link Insurance Premiums To Smoking?

Insights

7.01.14

Rocked by soaring costs, including skyrocketing increases in health insurance premiums, employers are desperate to manage, and hopefully limit, whatever costs they can. Many employers have begun to look to the lifestyle choices of their employees and how those choices might influence their cost of doing business. One lifestyle choice with hugely adverse effects, not just upon the cost of health insurance but also upon the business itself, is smoking and the use of other tobacco products.

Numerous studies have focused on smoking and its deleterious effects, not just upon the smokers' own health, but upon their productivity as employees. The results are shocking. A study of 20,000 employees revealed that smokers had more hospital visits per 1,000 (124 vs. 76), had a longer average length of stay in the hospital (6.5 vs. 5 days) and made six more visits to healthcare facilities per year than non-smokers.

Another recent study found that smokers missed an average of 6.16 days of work per year as opposed to the 3.86 days missed by non-smokers, and that a smoker taking four 10-minute smoke breaks actually worked one month less over the course of a year than a non-smoking employee. The Centers for Disease Control (CDC) estimate that each smoking employee costs a company an additional \$3,391 per year – including \$1,760 in lost productivity and \$1,623 in excess medical expenses. So, smoking employees seem to be an excellent target to help an employer manage its costs, and not just the cost of providing healthcare.

That notion has found increasing acceptance among both private and public employers. Now, numerous state governments and private companies, such as Macy's and PepsiCo, charge higher insurance premiums to employees who smoke, and some companies even refuse to hire smokers. In this same vein, the Affordable Care Act (ACA) actually recognizes the increased healthcare costs associated with smoking employees by allowing insurers to raise smokers' premiums up to 50% over those paid by nonsmokers.

## HIPAA Concerns

Smoking is clearly the kind of lifestyle choice that impacts healthcare costs and may legitimately affect premium rates, but are there pitfalls and dangers in imposing additional costs on smokers? Not surprisingly, implementing increased premiums does involve some degree of added risk and

the decision to do so should involve due concern for those risks.

For one, the Health Insurance Portability and Accountability Act (HIPAA) prevents employees in a group health insurance plan from being charged more for coverage because of a “health factor,” a term which includes an employee’s health status, medical condition and claims experience. Although lifestyle choices such as smoking are not specifically named as a health factor, medical opinion certainly exists identifying nicotine addiction as a medical condition. So, when implementing any changes affecting smokers, it is only prudent to take HIPAA into account.

Fortunately, HIPAA does allow employers some leeway to maintain a premium differential so long as they establish a nonsmoking program as part of a wellness program, and then provide a “reward” for participating in the program in the form of a reduced premium for not smoking. The wellness/nonsmoking program must, however, satisfy the following four requirements:

- the “reward” is no more than 20% of the total premium;
- the program is reasonably designed to promote health and prevent disease;
- eligible employees must be given an opportunity to qualify for the reward at least once a year;
- a reasonable alternative must be given to employees for whom it is unreasonably difficult to stop smoking, such as attending educational classes; and
- all program materials must disclose the availability of the alternative.

## **The ADA Argument**

Another potential legal problem arises from the Americans with Disabilities Act’s (ADA) prohibition against discrimination in offering benefits with respect to qualified individuals with disabilities. Although the courts have yet to identify smoking itself as a disability, there is no denying that it often involves a host of attendant health issues that are disabilities.

Moreover, because the ADA prohibits discrimination not just upon the basis of an accepted disability but also against employees who are “regarded as” being disabled, it is not a huge stretch to imagine a court allowing a lawsuit to proceed based upon an argument that charging a higher premium to a smoker was sufficient grounds to state a “regarded as” claim. Still, it’s likely that having an acceptable wellness program would provide some insulation from such outcomes.

Proponents for smokers have also argued that, as the less affluent, less educated are much more likely to smoke and to fail to participate in wellness and smoke-cessation programs, imposing a premium cost for those choices has a disproportionate adverse impact on such people, which may amount to racial or national origin discrimination – the idea being that minorities and certain ethnicities are much more likely to be smokers. A related argument is that smoking is often not so much a matter of choice, but an addiction that began earlier in life. While these kind of arguments have yet to gain much legal traction, in the right context and upon appealing facts, they probably will

have yet to gain much legal traction, in the right context and upon appealing facts, they probably will continue to be advanced.

## **States Weigh In**

Some potential state-law concerns could also arise when an employer imposes a premium differential. Namely, there are a few jurisdictions which explicitly prohibit discrimination against smokers. The District of Columbia prohibits an employer from discriminating against a smoker in hiring, wages and benefits, or the terms of employment. In addition, some states have laws protecting employees who engage in legal off-duty conduct, such as smoking.

New York law adds an interesting wrinkle – although it prohibits discrimination against a smoker with respect to compensation and benefits, it goes on to provide that it is not discrimination to offer insurance with a different rate or coverage if based upon cost to the employer. So, state and local law has to be reviewed carefully.

## **The Reasons To Move Forward**

While there are legal concerns with doing so, there are compelling reasons to implement a premium differential for smokers as opposed to non-smokers. But, what should an employer consider and do before putting such a program in place?

First, determine if the state in which you wish to implement a differential has any law which would make it illegal to do so. Even if such a law exists, all may not be lost as some state laws may be preempted by federal law.

Second, upper management must be fully advised of the potential pitfalls as well as the benefits of adopting tiered premiums. This would include the costs associated with a wellness program.

Third, if you have a union, a premium differential for smokers would probably be a mandatory subject of bargaining. Unionized employers must then consider their bargaining obligations before implementation.

Fourth, establishing a compliant wellness program, with an attendant smoke-cessation program as well as alternative mechanisms for some smokers, are key components of any decision to impose a premium differential. There are numerous providers for such programs, often insurers, and the advice of an attorney would also be fruitful.

Fifth, once a program has been implemented, you should monitor the impact of the differential to determine if it results in a disparate impact upon employees in protected groups, such as minorities and specific ethnicities.

Sixth, give due consideration to an ongoing assessment of the impact of a premium differential on

Sixth, give due consideration to an ongoing assessment of the impact of a premium differential on employee morale, productivity, and the overall culture of the workplace.

Even with the legal issues involved in charging smokers more for healthcare premiums, with effective wellness programs employers can, and have been, able to manage healthcare costs and enhance employee productivity. Smoking unquestionably has a deleterious effect not just upon overall health but also upon employee productivity; it's good to know that there are programs and mechanisms you can use to enhance both for your employers.

---

For more information contact the author at [KFrye@fisherphillips.com](mailto:KFrye@fisherphillips.com) or 404.231.1400.