



# Can and Should You Link Health Insurance Rates and Smoking?

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Faced with skyrocketing increases in health insurance premiums, employers are wisely seeking ways to manage and limit those costs. One way to do so is to focus on the lifestyle choices of their employees and how those choices might influence premium costs. Lately, one lifestyle choice receiving particular attention is smoking and the use of other tobacco products.

Numerous studies have focused on smoking and its deleterious effects, not just on health but also on employee productivity. A study of 20,000 employees showed that smokers had more hospital visits per 1,000 employees (124 vs. 76), had a longer average length of stay (6.5 days vs. 5) and made six more visits to health care facilities per year than nonsmokers. Another study recently found that smokers miss an average of about 6.16 days of work per year, compared to 3.86 days missed by nonsmokers, and that smokers taking four 10-minute smoke breaks per day actually work one month less per year than nonsmoking employees. The Centers for Disease Control and Prevention estimates that each employee who smokes costs a company an additional \$3,391 per year—including \$1,760 in lost productivity and \$1,623 in excess medical expenses. So focusing on employees who smoke seems to be an excellent idea for employers trying to manage the cost of providing health care.

This 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 recognizes the health care costs associated with employees who smoke by allowing insurers to raise smokers' premiums up to 50 percent over those paid by nonsmokers.

## Risks of Imposing Additional Costs on Smokers

Smoking is clearly the kind of lifestyle choice that impacts health care costs and may legitimately affect premium rates, but are there pitfalls and dangers involved in imposing additional costs on smokers?

Implementing increased premiums involves some 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," which includes health status, medical condition and claims experience,

among other things. Although lifestyle choices such as smoking are not named as health factors, medical opinion exists identifying nicotine addiction as a medical condition.

HIPAA does, however, allow employers some leeway to maintain a premium differential as long as they establish a wellness program that includes a nonsmoking component and that provides a “reward” for participation in the form of a reduced premium for not smoking. The wellness program must satisfy the following four requirements:

- \*The reward is no more than 20 percent 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, such as attending educational classes, must be given to employees for whom it is unreasonably difficult to stop smoking. All program materials must disclose the availability of the alternative.

Another potential legal problem arises from the Americans with Disabilities Act’s (ADA) prohibition against discriminating in the form of benefits with respect to qualified individuals with disabilities. Although smoking has yet to be identified as a disability itself, it often involves attendant health issues that are disabilities, and there always is a possibility that a court would accept a claim on the theory that a smoker was “regarded as” being disabled. Still, it is also likely that having an acceptable wellness program would provide some insulation from such outcomes.

Proponents for smokers also have argued that because less affluent and less educated individuals are much more likely to smoke and to fail to participate in wellness and smoking-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 is 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 rather an addiction that began earlier in life. While these kinds of arguments have yet to establish much legal traction, they could be advanced in the right context.

Some potential state law concerns also could arise when an employer imposes a premium differential. Namely, there are a few states that explicitly prohibit discrimination against smokers. In addition, some states have laws protecting employees who engage in legal off-duty conduct such as smoking.

### **Steps Employers Should Take**

While there are legal concerns with doing so, there are also compelling reasons to implement a premium differential for employees who smoke. What should an employer consider and do before putting such a program in place?

First, determine whether the state in which the premium differential would be implemented has any law that would make it illegal to do so. Even if such a law exists, all may not be lost as some state laws may be pre-empted 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 the employer has 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 smoking-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 seeking the advice of an attorney would be fruitful.

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

Sixth, due consideration should be given 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 health care premiums, effective wellness programs can be, and have been, used by employers to manage health care costs and enhance employee productivity. Smoking unquestionably has a deleterious effect, not just on overall health but also on employee productivity. But there are programs and mechanisms an employer can use to enhance both for its employees.

[Kytle's article first appeared on the Society for Human Resource Management website.](#)