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Tobacco Surcharge Litigation Flares Up

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Although the Department of the Treasury, Department of Labor, and Department of Health and Human Services believe that wellness programs are delivering on their promise of improving health and reducing costs, one type has recently become the ire of the plaintiffs' bar: the tobacco surcharge. To date, plaintiffs have filed nearly 30 suits against plan sponsors alleging that their health plans violate ERISA Section 702 (29 U.S.C. § 1182), which prohibits discrimination based on health status. Notably, the DOL instituted two of these cases. Because most of these cases have been filed in a spree since August 30, 2024, plan sponsors can likely expect to see the wave of suits continue to swell.

At the heart of the suits is the interplay between Section 702's prohibition on discrimination and a plan's right to offer premium discounts, rebates, and other incentives in exchange for adherence to health promotion and disease prevention programs. The operative DOL regulation states that a wellness program is reasonably designed if it allows a participant who does not meet the initial outcome-based standard—cessation of tobacco use—another opportunity to avoid the surcharge. For example, under the DOL regulations, a plan provides a reasonable alternative standard if participants can avoid the surcharge by completing a tobacco cessation program, regardless of whether they stop using tobacco.

Plaintiffs have argued that prospective avoidance of a surcharge, alone, is inadequate. They say the DOL's regulation requires retroactive reimbursement of surcharges—*e.g.*, if a participant quits smoking or satisfies the alternative standard in November, plaintiffs assert not only should the December surcharge be lifted, but the participant should also receive reimbursement for the surcharges paid since January.

Plaintiffs have also alleged that plan sponsors breached their fiduciary duties by collecting the surcharges to reduce their costs in operating the plan at the expense of the plan's participants.

Despite the surge of cases, the theory underlying them remains untested on the merits. Further muddying the viability of the theory is the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (June 28, 2024), which eliminated *Chevron* deference. With that deference no longer available, a court may find that the DOL's regulatory interpretation of Section 702 is not the "best reading" of the statute. Until courts begin to weigh in, plan sponsors operating

tobacco surcharge wellness programs should monitor the cases, review their plan documents to ensure they provide reasonable alternative standards, and evaluate the sufficiency of their notification of such reasonable alternative standards to their plan participants.

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