

JULY 2006

## Littler Mendelson's Employee Benefits Practice Group:

Steven Friedman, *Practice Chair*  
212.583.9600

James Boudreau  
267.402.3029

Lisa Chagala  
925.932.2468

Phil Gordon  
303.629.6200

Michael Hoffman  
415.433.1940

G. J. MacDonnell  
415.433.1940

Darren Nadel  
303.629.6200

Nancy Ober  
415.433.1940

Adam Peters  
415.433.1940

Michelle Pretlow  
202.842.3400

Dan Rodriguez  
713.951.9400

Rick Roskelley  
702.862.8800

Kate Rowan  
415.433.1940

Dan Srsic  
614.463.4201

Daniel Thieme  
206.623.3300

J. René Toadvine  
704.972.7000

Kevin Wright  
202.842.3400

## Employee Benefits

A Littler Mendelson Newsletter

### Penalizing Applicants and Employees For Smoking: A Potential Smoking Gun?

By Steven J. Friedman and Lisa C. Chagala

Faced with skyrocketing annual increases in health care and workers' compensation premiums, employers are looking for ways to manage the health and health care costs of the workforce. Employers have increasingly focused on employee lifestyle choices in an attempt to control these costs. One area where employers have focused their inquiry is on smoking and use of other tobacco products by employees. Many employers have implemented wellness programs to encourage non-smoking. Some employers have gone so far to make hiring decisions based on smoking/non-smoking status.

Legal issues must be carefully considered before taking action based on smoking/non-smoking status. Specifically, issues could arise under HIPAA, ERISA, the ADA, Title VII and other federal and state laws.

#### Wellness Programs & HIPAA's Non-Discrimination Rules

The Health Insurance Portability and Accountability Act (HIPAA) prohibits health plans from discriminating among plan participants based on a health factor. Generally, this means that plans cannot charge individuals different premiums or impose different costs based on health status, medical history, or claims experience. However, HIPAA provides an exception to this rule by permitting wellness programs that promote health and disease prevention, provided that certain requirements are met.

A wellness program that provides a "reward" based on a health factor (such as a reduced

health insurance premium for not smoking) must satisfy each of the following four requirements:

1. the reward cannot be more than 10-20% of the total cost of the coverage;
2. the program must be designed to promote health or prevent disease;
3. the program must be available to all similarly-situated participants; and
4. a reasonable alternative must be available for individuals for whom it is unreasonably difficult to meet the standard or for whom it is medically inadvisable to attempt to meet the standard.

Under these rules, all program materials describing the terms of the program must disclose the availability of the alternative standard.

The following is an example of such a smoking cessation wellness program.

The employer imposes a health insurance surcharge on employees that use tobacco products (in effect, the "reward" is provided to all non-smokers and acts as an incentive for those who smoke to quit) but permits individuals for whom quitting smoking is unreasonably difficult due to a medical condition (such as addiction to nicotine) to avoid the surcharge by enrolling and continuing to participate in a smoking-cessation program or trying a nicotine patch, regardless of whether the

individual actually quits smoking. The employer's program materials describe the terms of the plan and the alternative standard.

Wellness programs that do not condition a "reward" upon a participant's ability to meet a health standard are permissible even if the programs do not meet the four requirements described above. Examples of such programs are: incentives to participate in a health fair or testing, regardless of outcome; waiver of copayment/deductible for participation in well-baby doctor visits; reimbursement of health club memberships; and reimbursement for smoking cessation or weight-reduction programs, regardless of outcome.

Recently, many well-known companies have undertaken wellness initiatives to encourage smoking cessation (as well as other healthy behaviors, such as routine medical examinations and health screens). It is likely that we will see more of these programs in the future, especially if it is determined that the programs lead to healthier employees and lower health care costs.

## Taking Health Factors into Consideration in Employment Decisions Under ERISA

Section 510 of the Employee Retirement Income Security Act of 1974 (ERISA) expressly prohibits employers from disciplining or terminating the employment of an ERISA plan participant "for the purpose of interfering with the attainment of any right to which such participant may become entitled" under an ERISA plan. Under this rule, it's clear that an employer may not terminate an ERISA plan participant merely because an employee incurs higher health care costs under the employer's health insurance program than other employees.

However, it is much less clear whether ERISA protects job applicants who engage unhealthy behaviors such as smoking. Thus, although an employer could not terminate an employee based on anticipated higher health care costs, it may be permissible under ERISA for an employer to refuse to hire an applicant based on anticipated higher health care costs. This is on account of some case recent laws which suggest that ERISA section 510 does not go so

far as to protect job applicants. However, the case law in this area is sparse, and accordingly, employers may be prudent to act with caution before taking action to deny employment (and consequently benefits) based upon health-related lifestyle choices, such as smoking.

## Discrimination in Employment Under the ADA

The Americans with Disabilities Act (ADA) and similar state laws prohibits an employer from discriminating in employment and benefits against a qualified individual with a disability. Although smoking itself is not likely a disability under ADA, smoking may have attendant health issues that do qualify as disabilities. For example, an employee with heart disease, asthma, or cancer may qualify as disabled under the law. For many types of wellness programs, compliance with the HIPAA nondiscrimination requirements (particularly, the requirement for availability of an alternative standard) will generally protect employers from ADA discrimination claims. However, in the context of hiring and termination decisions, employers must be careful that disability is not a factor and that screening out smokers is not a subterfuge for screening out people with disabilities.

The ADA also prohibits medical inquiries or examinations of applicants and employees regarding the existence, nature or severity of a disability unless job-related and consistent with business necessity. Courts have concluded that all employees, and not just individuals with qualifying disabilities, are entitled to this ADA protection. An employer may request medical information as part of a "voluntary" health program. However, a significant incentive or penalty (including a large cash award, significant premium discount, or employment for non-smokers) could arguably convert a "voluntary" program into a "mandatory" program. Importantly, the ADA requires that information collected as part of a "voluntary" program be maintained in separate medical files and treated as confidential medical information. This limitation on medical examinations and inquiries arguably prevents employers from asking "mandatory" questions about smoking-related medical conditions, such as questions about blood pressure, heart disease, cancer, asthma, etc.

## Disparate Impact Considerations

Smokers obviously are not a protected group under Title VII. However, under Title VII and other federal and state nondiscrimination laws, a legal issue could arise if a non-smoking hiring policy impacted one protected group more harshly than another (e.g., screened out more men than women, etc.) Employment decisions based on smoking status should be monitored to ensure that disproportionate impact on protected groups does not occur.

## State Laws Protecting Off-Duty Conduct

Numerous states have anti-discrimination laws that protect applicants and employees who engage in legal off-duty conduct such as smoking. Compliance with the HIPAA nondiscrimination requirements may protect employers from claims under such state laws. However, making hiring and termination decisions based on smoking/non-smoking status is generally impermissible in those states. Although not clearly defined by the courts, to the extent "related to" an ERISA plan, ERISA preemption might apply to such state laws.

## Privacy Considerations

Many states also have laws that protect the privacy of medical information. Some health information is protected by the federal HIPAA Privacy and Security Rules. Thus, employers are advised to keep information relating to smoking/non-smoking status and participation in non-smoking programs (such as participation in smoking cessation programs) separate from personnel files and confidential.

## Bargaining Considerations

The NLRA requires bargaining regarding wages, hours, and other terms and conditions of employment. Non-smoking programs and policies are likely mandatory subjects of bargaining. Thus, unionized employers must consider their bargaining obligations before implementing smoking policies.

## Conclusion

Even with the legal issues identified above, many employers have found wellness programs to be an efficient and effective means

to manage employee health and health care costs. With due consideration of legal risks, implementing a well-designed non-smoking wellness initiative could result in significant, long term benefits for employers as well as the employees who are covered by and generally contribute financially to the costs of health care benefits. Other initiatives relating to smoker/non-smoker status may be more difficult to implement, however, this is an evolving area and employers would be wise to review current trends and legal outcomes.

---

*Steven J. Friedman is Chair of Littler Mendelson's Benefits Practice Group and a Shareholder in the New York office. Lisa C. Chagala is an Associate in Littler's Walnut Creek office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Friedman at sfriedman@littler.com, or Ms. Chagala at lchagala@littler.com.*

---