



# Benefits Alert

## Legal developments affecting employee benefits

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### Terminating employee for off-premises smoking may violate ERISA §510 and state privacy law

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In a recent decision, *Rodrigues v. The Scotts Co., LLC*, a federal district court in Massachusetts held that the termination of an employee for violating his employer's policy prohibiting smoking entirely, including outside the workplace, may constitute an interference with that employee's right to participate in the company's benefits plan in violation of Section 510 of the Employee Retirement Income Security Act (ERISA). The court also left alive the claim that the broad no-smokers policy was an invasion of privacy under the Massachusetts Privacy Act.

To save money on medical insurance costs and promote a healthy lifestyle among its employees, the employer adopted a policy prohibiting the smoking of tobacco products *at any time and at any place*, including outside of the workplace. Pursuant to this policy, the plaintiff took and failed a urine test for nicotine, and was fired for this reason shortly after being hired.

The plaintiff sued the employer in federal district court. On a motion to dismiss by the employer, the court dismissed the plaintiff's claims for wrongful termination and violation of the Massachusetts Civil Rights Act, but allowed his claims for invasion of privacy under the Massachusetts Privacy Act and interference with attainment of employee benefits under ERISA §510 to proceed. While doing so, the court narrowed the balancing test that employers must conduct under Massachusetts privacy law and potentially expanded the application of ERISA §510 to broad no-smoking policies aimed at interfering with an employee's benefits under ERISA.

#### **No-smoking policies under ERISA §510**

Under ERISA, employers are generally free to adopt, modify, or terminate benefit *plans*, but ERISA §510 makes it unlawful for an employer to terminate a *participant* for the purpose of interfering with the attainment of any right to which he may become entitled under the employer's benefit plans. Most employer violations of §510 occur when an employer terminates an employee just before he or she is expected to make a claim or become eligible for benefits under the employer's pension or retirement plan, thus violating §510 by interfering with the employee's rights under such plans.

However, the plaintiff argued in this case that terminating his employment *because he was a smoker* interfered with his attainment of the right to participate in the employee benefits plan, to which he would have become entitled had he remained employed.

The court rejected the employer's argument that excluding an employee from participation in a benefit plan because of smoking behavior is not the same as excluding an employee from participation in a benefit plan because he was expected to make a claim for benefits, holding that "the ultimate inquiry in a Section 510 case is whether the employment action was taken with the *specific intent* of interfering with the employee's ERISA benefits." The court also reiterated that §510 does not apply to instances where the loss of benefits was a consequence of, but not a motivating factor behind, a termination of employment, and that §510 relates to discriminatory conduct directed against individuals, not to actions involving the plan in general.

In light of this, the ERISA claim ultimately survived the motion to dismiss because the court held that the examination of the employer's intent in terminating the plaintiff was fact-specific and discovery had not yet been conducted.

### **No-smoking policies under Massachusetts invasion of privacy laws**

Under the Massachusetts Privacy Act, individuals are protected from unreasonable, substantial, or serious interference with their privacy. In the employment context, privacy claims typically surface where an employer improperly intrudes into purely private matters of an employee (i.e., through physical searches, drug-testing, or surveillance of conduct). In determining whether an employer has violated an employee's right to privacy, courts usually balance the employer's legitimate business interests against the employee's reasonable expectation of privacy.

The district court in *Scotts* agreed that an employer's legitimate business interest in obtaining an employee's private information must be balanced against the employee's interest in keeping the information private. However, the court suggested a potentially narrower balancing test through which it would ultimately decide the issue: the employer's legitimate interest *in determining the employees' effectiveness in their jobs* should be weighed against the seriousness of the intrusion on the employees' privacy.

Ultimately, the privacy claim survived the motion to dismiss because the court held that additional discovery was needed to apply the balancing test and because it was "plausible" that the employee's stated privacy interest outweighed the employer's "interest in a generally healthy workforce that will have high productivity and low health-care costs." The court's articulation of the balancing test could signal a significant change in Massachusetts workplace privacy law and should cause employers to review closely any policies or practices that may affect employees' privacy interests.

### **Conclusion**

This case is not the final word on this subject. The decision now allows the plaintiff the opportunity to prove his claims through discovery and at trial. In addition, this decision should have no effect on employer policies prohibiting smoking *at work*, where the prohibition is aimed at complying with state or local anti-smoking laws, or improving workplace conditions, rather than managing health care costs.

Employers should, however, understand the potential ramifications under ERISA for implementing policies that are motivated by a desire to deny benefits to employees who smoke. In addition, certain

anti-smoking policies may violate employees' rights to privacy under state law. Also, various states, including California and New York, have laws that prohibit discrimination against employees on the basis of lawful outside-the-workplace conduct, which can include smoking. Employers should carefully consider whether the cost savings associated with implementing such a broad no-smoking policy are worth the risk of future litigation under ERISA and/or state law issues.

For more information on this issue or any other labor or employment law matter, please contact your regular Nixon Peabody attorney or:

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