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Benefits Alert

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Employer favorable trend emerges from tobacco cessation class actions

By Mark Stember and Kelly Hathorn

Federal courts are increasingly rejecting ERISA class actions over employer tobacco premium surcharges and wellness programs.



What's the impact?

- Employers facing tobacco-surcharge litigation have stronger authority to argue that removing the surcharge prospectively after completion of a cessation program satisfies ERISA's "full reward" requirement without retroactive refunds.
- The decisions also reinforce that reasonable alternative-standard notice claims may fail where the SPD includes the required disclosure and allegations about other deficient "plan materials" are vague or conclusory.
- By treating wellness program adoption as a settlor function rather than a fiduciary act, the courts provide additional grounds to defeat fiduciary-breach claims tied to the design and funding effects of these programs.

In three recent decisions, federal courts across the country dismissed class action lawsuits challenging employer-imposed tobacco premium surcharges, each holding that the plaintiffs failed to state a claim under ERISA.¹ The courts rejected plaintiffs' core contention that ERISA requires employers to retroactively reimburse participants for premium surcharges paid prior to completing a tobacco cessation wellness program. Each court also rejected claims that employers violated ERISA by not adequately disclosing a reasonable alternative standard, and they noted that adoption of a wellness program is a settlor function, not subject to ERISA's fiduciary duties. Taken together, these decisions significantly strengthen the growing body of authority favorable to employers facing the more than 50 substantially similar lawsuits that have been filed in federal courts across the country.

Background on wellness regulations

Under ERISA, group health plans generally may not require participants to pay higher premiums than similarly situated individuals based on health status-related factors. However, ERISA expressly permits plans to establish premium discounts, rebates, surcharges or modified cost-sharing arrangements related to wellness programs. In 2013, the Department of Labor finalized regulations relating to wellness programs, providing illustrative examples of compliant wellness program structures. The preamble to the final regulations stated that "the same, full reward must be provided to [an] individual [who satisfies a reasonable alternative standard] as is provided to individuals who meet the initial standard for that plan year," and provided an example suggesting that retroactive reimbursement of surcharges may be required. This preamble language became a central interpretive battleground in the litigation that followed.

Plaintiffs' claims and court responses

CLAIM #1: THE "FULL REWARD" REQUIRES RETROACTIVE REIMBURSEMENT

The primary argument advanced by plaintiffs across all three cases was that the term "full reward" requires employers to retroactively reimburse participants for all tobacco surcharges paid during a plan year once a participant completes the wellness program's reasonable alternative standard. Plaintiffs argued that if a participant completes a tobacco cessation program mid-year, the employer must refund surcharges paid from the beginning of the plan year through the date of completion, so that the participant receives the same monetary benefit as a non-tobacco user who never paid the surcharge. In support, plaintiffs relied heavily on the 2013 regulatory preamble, which provided an example suggesting that a participant who satisfies

¹ *Greene v. Progressive Corp.* (N.D. Ohio Mar. 20, 2026); *Noel v. PepsiCo, Inc.* (S.D.N.Y. Feb. 27, 2026); and *Plesha v. Ascension Health Alliance* (E.D. Mo. Feb. 3, 2026).

a reasonable alternative standard on April 1 must receive premium discounts for January, February, and March.

All three courts rejected the plaintiffs' interpretation of "full reward" and held that ERISA does not require retroactive reimbursement of tobacco surcharges. The courts reasoned that where the reward is the absence of a surcharge and the surcharge is fully removed once a participant completes the reasonable alternative standard, the employer has provided the "full reward." The courts also noted that Congress provided plan administrators flexibility in structuring rewards, and that if Congress intended all rewards to operate as retroactive rebates, Congress would have simply mandated that the reward must be in the form of a rebate only.

Additionally, the Southern District of New York provided an alternative basis for its holding, noting that even if "full reward" required the full annual amount, the employer's program in that case satisfied this standard because participants had the opportunity to avoid the entire surcharge for the full plan year by completing the tobacco cessation program during a designated period in the prior plan year, and ERISA only requires one opportunity per year for participants to qualify for the reward.

CLAIM # 2. DEFICIENT NOTICE OF THE REASONABLE ALTERNATIVE STANDARD

Plaintiffs in all three cases alleged that the employers' plan materials failed to comply with ERISA's requirement that plans "disclose in all plan materials describing the terms of a wellness program the availability of a reasonable alternative standard." Particularly, in the Southern District of New York case, the plaintiff argued that the plan's notices regarding the reasonable alternative standard were "necessarily deficient" because the underlying program itself did not comply with ERISA. Further, the plaintiff alleged that other plan materials beyond the Summary Plan Description (SPD) did not uniformly contain the required notice.

The courts uniformly dismissed the notice claims. The court in the Southern District of New York held that because the employer's wellness program complied with ERISA, the plaintiff's argument that notices regarding the reasonable alternative standard were "necessarily deficient" failed as a threshold matter. The court further found that the plaintiff's conclusory allegation that other plan materials lacked the proper notice was "too vague to state a claim," particularly where the plaintiff conceded that the SPD contained the required disclosure.

Although not in the three court decisions, it is also important to note that while the final wellness program regulations contain "model language" that employers can use to insert into their plan materials, the model language is not legally required. Further, even if an employer inserted the model language as is (and nothing else regarding the wellness program), the SPD would likely fail the completeness requirement applied to SPDs generally due to the fact that the "model language" only address one facet of the wellness program rules—the reasonable alternative standard.

As part of both types of claims, all three sets of plaintiffs alleged that the employers breached their fiduciary duties under ERISA by implementing and administering allegedly unlawful wellness programs. Plaintiffs contended that the employers acted as fiduciaries—not merely as plan sponsors or settlors—when they collected and retained tobacco surcharges, and that the employers improperly used those funds to offset their own financial contributions to the plan rather than for the exclusive benefit of plan participants.

All three courts held that the employers did not act as ERISA fiduciaries when implementing their wellness programs. Particularly, the Southern District of New York court found that the distinction between creation (a settlor function) and implementation (a fiduciary function) is illusory where a plaintiff alleges only that a discriminatory wellness program was implemented as created. The court also found that the plaintiff failed to allege harm to the plan as required for a fiduciary breach claim, reasoning that the crux of the complaint was that the employer contributed less of its own funds, not that the plan itself was shortchanged.

Key takeaways

In reviewing the three favorable court decisions, two key takeaways have come to light regarding how employers can sponsor compliant wellness programs that reduce litigation risk—

- / Removing the surcharge on a going forward basis once the program requirements are met does not require retroactive reimbursement under the “full reward” requirement.
 - o Even if “full reward” meant a full annual reward, then requiring employees to complete the wellness program prior to the start of the plan year and then removing the surcharge for the entire next plan year, should satisfy this requirement.
- / Notice of the wellness program requirements should be included in any official disclosure document, including an SPD and any Summary of Material Modifications (SMM).
 - o If the program requires certain actions during annual enrollment to be completed before the beginning of the next plan year, these requirements should also be included in the annual enrollment materials.
 - o Use of the “model language” in the final wellness program regulations is not a silver bullet in structuring a compliant wellness program.

With over 50 active tobacco cessation class action cases, this area is still in flux. But, these three well-reasoned cases, are a strong indicator on how employers can defend against these and similar future lawsuits.

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