

Smoking Discrimination Issues



LORMAN[®]

Published on www.lorman.com - October 2017
Smoking Discrimination Issues, ©2017 Lorman Education Services. All Rights Reserved.

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you **UNLIMITED** access to Lorman's ever-growing library of training resources:

- ✓ Unlimited Live Webinars - 120 live webinars added every month
- ✓ Unlimited OnDemand and MP3 Downloads - Over 1,500 courses available
- ✓ Videos - More than 1300 available
- ✓ Slide Decks - More than 2300 available
- ✓ White Papers
- ✓ Reports
- ✓ Articles
- ✓ ... and much more!

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.



Get Your All-Access Pass Today!

SAVE 20%

Learn more: www.lorman.com/pass/?s=special20

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

It's no secret that healthcare costs have gone through the roof for employers and their laborers. Workers' compensation claims can also cost a small fortune. For those reasons, employers are searching for methods to watch over the well-being and the healthcare expenses of their employees. Businesses have concentrated on the lifestyle choices of their workers to lessen the costs of providing healthcare. Many benefits administrators have honed in on cigarette smoking, cigar smoking and the use of smokeless tobacco products by employees. Some companies have started wellness programs that encourage smokers to give up the habit. In some cases, employers are making employment choices based on whether or not the candidate is a smoker. However, legal questions need to be prudently scrutinized before a company takes action based on a prospective or current employee's status as a smoker or non-smoker. It's possible that problems could develop based on ERISA, Title VII, the ADA, HIPAA and various state and federal laws.

Title VII Considerations

While smokers are not protected under Title VII or other state and federal nondiscrimination laws, a legal problem could crop up if a hiring policy that precludes hiring smokers impacts a protected group of people more than another. An example might be that more men were refused employment than women because more men were smokers. Any hiring decisions based on a smoking/non-

smoking status should be carefully overseen to be sure they do not have a disproportionate effect on a protected group.

Smokers' Rights under the Health Insurance Portability and Accountability Act (HIPAA)

Discriminating against potential participants due to a health factor is forbidden by the Health Insurance Portability and Accountability Act (HIPAA). Individuals cannot be charged higher premiums or be forced to pay an extra fee due to their medical history, their current health or any previous insurance claims they might have made. That rule, however, does permit reductions in premiums for people who engage in wellness programs that encourage disease prevention and better health.

Wellness Plans

Wellness plans that provide a discount for not smoking are permitted. If the premium is determined by a healthy lifestyle choice, it must follow these four requirements.

- The discount cannot be greater than 20 percent of the total cost of healthcare coverage.
- The plan has to encourage health and disease prevention.
- The plan has to be available to all participants in a similar situation.
- An alternative must be offered to those people who find it unreasonably difficult to comply or for whom it would be medically unacceptable to qualify.

Any such plans must advise participants of the existence of the alternative standard. For example, if an employer adds an extra fee to smokers who join the healthcare program, that would be considered a reward that is given to all employees who are non-smokers. It entices workers to quit smoking to lower the cost of their insurance.

However, individuals with a condition, such as nicotine addiction, that makes it unreasonably difficult to comply can escape the fee by joining and pursuing a smoking-cessation program or by attempting to quit by using a nicotine patch even if they do not actually stop smoking. The details of the alternative standard must be spelled out in the terms of the program.

There are situations whereby wellness plans that don't reward a participant based on the ability to achieve a health standard can be acceptable even though the four requirements mentioned above are not met. Here are some examples that qualify regardless of the outcome.

- Reimbursement of health club memberships.
- Reimbursement for programs to quit smoking even if the individual cannot stop smoking.
- Reimbursement for weight-loss programs, regardless of the outcome.
- Waivers for a deductible or co-payment for taking part in a baby wellness program.
- Rewards for taking part in a health fair.
- Rewards for undergoing medical testing, regardless of the outcome.

Currently, numerous businesses have begun

wellness initiatives aimed at smoking cessation, encouraging regular physical examinations and undergoing health screenings. If these programs succeed in their goal of healthier employees and reduced healthcare costs, it is certain that more companies will initiate similar programs.

Hiring Decisions under ERISA

Employers are prohibited from punishing or firing any employee for health reasons by Section 510 of the Employee Retirement Income Security Act of 1974 (ERISA). That means they cannot interfere with the "attainment of any right to which such participant may become entitled" under an ERISA plan. Based on this rule, it's evident that an ERISA plan participant may not be terminated by an employer because the employee's health insurance program costs more than other employees' programs. Whether this same rule protects job applicants who smoke or participate in other unhealthy activities is unclear.



Therefore, an employer may not fire an employee due to the extra fee for health care coverage due to smoking, but it may refuse to hire a prospective employee based on the likelihood of higher healthcare costs. Recent case law is scarce, but there have been rulings that propose that ERISA Section 510 does not extend to protect job applicants. That means companies must be cautious before denying benefits to employees or denying employment to otherwise qualified applicants based on lifestyle choices that are health-related, like smoking. Organizations that have a vested interest in whether or not their employees smoke can choose not to hire a smoker outright. An example of such an organization would be the American Lung Association.

ADA Discrimination

An employer is prohibited from discriminating in benefits and hiring practices by the Americans with Disabilities Act (ADA) and other state laws. Even though smoking does not qualify as a disability under ADA rules, there are certain health-related problems that are attributable to smoking that do meet the criteria for a disability. Those would include asthma, heart disease or lung cancer. Usually, if a company complies with the HIPAA nondiscrimination requirements for an alternative standard, it is protected from ADA disability claims. On the other hand, companies must be careful that their screening of smokers is not a way for them to screen for people with disabilities.

Companies are also prohibited by the ADA from conducting medical inquiries of employees and applicants about the existence, complexion or degree of a disability unless it is job-related and necessary for business. Courts have ruled that all employees qualify for this type of protection, not just those suffering from disabilities. An employer may ask for medical data as part of a “voluntary” health plan, but offering a large monetary incentive, a major discount on healthcare coverage or employment to non-smokers could be construed as converting the supposed voluntary program into a mandatory plan. The ADA requires that any data collected in this manner be held in confidence and stored in separate medical files. This prevents employers from asking questions about conditions that might be smoking-related, including cancer, asthma, heart disease or high blood pressure.

Off-Duty Conduct

Legal off-duty conduct by employees or applicants is protected in 30 states by anti-discrimination laws. Once again, HIPAA compliance will generally protect applicants and employees who smoke. In those states, however, employers may not make hiring or firing decisions based solely on smoking or non-smoking status. ERISA preemption might apply to those state laws, but the courts have not clearly defined that.

Privacy Issues

Medical data is protected by many state laws as well as federal HIPAA Privacy and Security Rules. Employers must keep any medical information dealing with smoking or non-smoking status separate from personnel records. This includes details about smoking cessation or weight-reduction programs.

Bargaining Rights

The National Labor Relations Board mandates bargaining on pay, hours and other conditions and terms of employment. Non-smoking policies and programs are probably subjects of this bargaining. Therefore, unionized employers need to contemplate their bargaining options before beginning anti-smoking policies.



Conclusion

The issue of discriminating against smokers has many shades of gray. Employees and prospective employees are given protection from state and federal laws like HIPAA, ERISA, the ADA and Title VII. However, employers may offer incentives to employees to cease smoking, thereby lowering the company's healthcare coverage expenses. In some cases, it is ill-advised to refuse to hire a person solely on their status as a smoker or non-smoker. Some companies may choose to only hire non-smokers if their business would be adversely affected by the presence of a smoker.

Many companies have chosen to work within the regulations regarding the rights of employees who smoke when they are not on the job. These businesses find that wellness programs are an efficient and cost-effective method for managing their employees' health and lowering the price of their healthcare coverage. After paying attention to any legal liabilities, the implementation of a carefully crafted non-smoking wellness plan will result in compelling, long-range benefits for the company and its employees who receive coverage and contribute to the lower cost of their healthcare plan. Laws regarding the issue of smoker's rights are continuously evolving, and employers should monitor recent trends and legal decisions.

The material appearing in this website is for informational purposes only and is not legal advice. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. The information provided herein is intended only as general information which may or may not reflect the most current developments. Although these materials may be prepared by professionals, they should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.

The opinions or viewpoints expressed herein do not necessarily reflect those of Lorman Education Services. All materials and content were prepared by persons and/or entities other than Lorman Education Services, and said other persons and/or entities are solely responsible for their content.

Any links to other websites are not intended to be referrals or endorsements of these sites. The links provided are maintained by the respective organizations, and they are solely responsible for the content of their own sites.