



Legal Considerations in Implementing a Tobacco Cessation Program in the Workplace

This fact sheet answers a few questions that employers often have about setting up a tobacco cessation program in the workplace. It is designed as a supplement to the Consortium's publications that discuss the need for smoke-free workplaces,¹ as well as the legal risks for employers that allow workplace smoking.² It can also be used in conjunction with tobacco cessation resources prepared by [WorkSHIFTS](#), the [Public Health Law Center's](#) collaborative labor outreach program.³

Please note that employers considering setting up a tobacco cessation program in their workplace should consult with an attorney familiar with employment law in their state. A local attorney might also flag other legal considerations that might arise regarding work-related tobacco cessation services in a particular work site or jurisdiction.

Q: Our company would like to set up a tobacco cessation program for employees. What are some of the benefits of such a program?

A: According to the [Institute of Medicine](#), "research shows that the best way for people to quit smoking is through evidence-based smoking cessation technologies and programs." Employers are in an excellent position to make these cessation services available and can reap the benefits of a healthier work force, lower absenteeism and decreased health care costs.

Q: What tobacco cessation options for the workplace are available?

A: Types of cessation programs range from clinical counseling to pharmaceutical treatment to classes and telephone quitlines. Employers may wish to use cessation programs as a voluntary benefit for employees who want to stop using tobacco or as part of a penalty for employees who don't quit using tobacco. Whether they choose the "carrot" or the "stick" approach, employers should be aware of the legal issues that affect cessation programs, including nondiscrimination regulations under the [Health Insurance Portability and Accountability Act of 1996](#) (HIPAA), Public Law 104-191, and ["smokers' rights" laws](#).

Q: What are some legal issues under HIPAA that might affect a tobacco cessation program?

A: Employers who choose to penalize tobacco users by charging them higher health insurance rates need to be careful not to run afoul of HIPAA nondiscrimination regulations. These regulations prohibit a health plan from denying an individual eligibility for health care benefits or charging more for coverage because of a health factor. For purposes of these regulations, the federal Department of Labor has declared nicotine addiction to be a health factor. Thus, employers may not simply charge tobacco users higher premiums or impose other financial penalties on smokers.

Nevertheless, the HIPAA nondiscrimination regulations also include special requirements for worksite wellness programs that provide employers with some flexibility. Programs that offer a reward to employees who meet a health goal or impose a penalty on those who fail to meet the goal must meet the following requirements:

1. The value of the reward must not exceed 20 percent of the cost of coverage.⁴
2. The program must promote health or prevent disease.
3. Individuals must be allowed to qualify for the reward at least once a year.
4. The program must provide a “reasonable alternative” for those unable to satisfy the standard for medical reasons.
5. Plan materials must state that alternatives are available.

The key provision for employers that are considering charging tobacco users higher premiums is the requirement to provide a reasonable alternative for those unable to stop using tobacco. In most cases, this means providing an opportunity to participate in a cessation program. As long as an employee participates in the cessation program, the employer may not penalize the employee for using tobacco. Only if the employee fails to participate in the cessation program is the employer allowed to increase the employee’s health care premiums or impose another financial penalty. The employer may not set a deadline by which the employee must give up tobacco use.

Q: What are “smoker protection” laws”?

A: Twenty-nine states and the District of Columbia have [laws](#) that make it illegal for employers to impose restrictions on their employees’ tobacco use when they are off duty, except in limited circumstances. Under these laws, commonly called [“smokers’ rights”](#) or [“smoker protection” laws](#), employers may face a legal issue under state law if they attempt to require employees to give up tobacco or participate in a cessation program as a condition of employment.

[Smokers’ rights laws](#) may allow employers to adjust the type or cost of health insurance coverage for tobacco users, but the difference may be limited to the employer’s actual difference in cost. In any event, an employer must satisfy the HIPAA nondiscrimination requirements before imposing a higher price for coverage on tobacco users. Employers

should consult their own state laws to determine the specific requirements in their jurisdictions.⁵

Q: Can we refuse to hire employees who use tobacco or fire those who don't quit?

A: It depends on whether your state has a smoker protection law that prohibits discrimination against smokers. State [smoker protection laws](#) prohibit an employer from refusing to hire or discharging an employee because the employee uses lawful products. There are, however, exceptions to this prohibition. An employer may refuse to hire or discharge an employee for using lawful products if the decision relates to a bona fide occupational requirement and is reasonably related to the employment activities or if the restriction relates to the fundamental objectives of the organization. Some examples of positions that might meet these exceptions are firefighters, health care workers, fitness instructors and representatives of smoke-free advocacy organizations.

In [Minnesota](#), for example, an employer may not refuse to hire, discipline or discharge employees based on their use of lawful consumable products as long as these products are consumed during nonworking hours and off the employer's premises.⁶ However, the [Minnesota statute](#) and a number of [other state laws](#) include the following exceptions that allow employers to refuse to hire or terminate tobacco users: (1) if a prohibition against tobacco use is reasonably related to the employee's work responsibilities, and (2) if the prohibition would avoid a conflict of interest or the appearance of a conflict of interest with the employee's job responsibilities. If one of those exceptions exists, the employer could likely refuse to hire a tobacco-using applicant, and could terminate or require a tobacco-using employee to participate in a cessation program to avoid termination.

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Notes

¹ See, e.g., Micah Berman & Caris Post, Tobacco Control Legal Consortium, *Secondhand Smoke and Casinos* (2007), available at http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-syn-casinos-2007_0.pdf.

² See Leslie Zellers & Samantha K. Graff, Tobacco Control Legal Consortium, *Workplace Smoking: Options for Employees and Legal Risks for Employers* (2008), available at http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-syn-workplace-2008_0.pdf.

³ WorkSHIFTS publications and resources are available on the Public Health Law Center's website at <http://www.publichealthlawcenter.org/programs/workshifts>. The Public Health Law Center is home to the Tobacco Control Legal Consortium.

⁴ This amount will increase to 30 percent in 2014 and may increase as high as 50 percent under the federal health care reform act. Patient Protection and Affordable Care Act, Pub. L. No. 111-

148, 124 Stat. 119, § 2705 (to be codified at 42 U.S.C. § 300 gg-4) (2010), available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf>.

⁵ For information on how federal laws affect insurance coverage for tobacco cessation benefits, see the Tobacco Control Legal Consortium's fact sheet, *The Mental Health Parity and Addiction Equity Act and the Affordable Care Act: Implications for Coverage of Tobacco Cessation Benefits*, available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-MHPAEAto cessationbenefits-2011.pdf>.

⁶ MINN. STAT. §181.938 (2010).