



Up in Smoke

Are wellness programs causing federal ERISA protections to slowly fade away?

by Bonnie Brewer Cavanaugh

Cigarette smokers in New York state who light up outside of work hours have no fear of losing their job due to their nicotine habit—there's a state law protecting employees from being fired for lighting up off duty.

There's no such protection in Massachusetts, however, where an axed employee is suing his former employer for both the right to smoke off the job and to be reinstated to his job.

More than half the states have

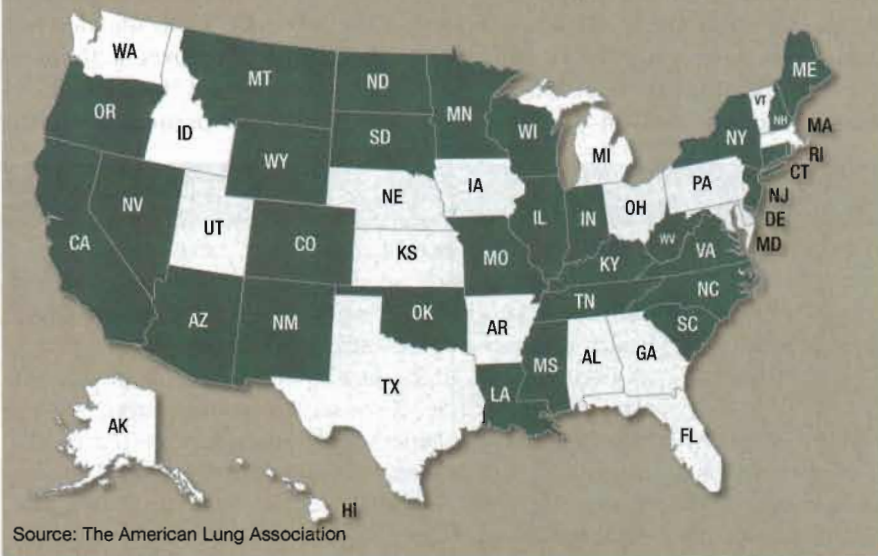
► **The Issue:** Employers must tread a fine line when complying with ERISA requirements.

► **The News:** Companies, cities and employees have all challenged some of ERISA's guidelines in court.

► **The Nex! Step:** Coming judicial decisions could redefine the relationship between ERISA, employers and workers.

Banning the Smoking Ban

In 30 states plus the District of Columbia, state law prevents employers from firing employees who smoke, or imposing a smoking ban on employees outside of work.



corporation's health benefits plans for the purpose of interfering with their receipt of medical benefits."

Additionally, "this case challenges the right of an employer to control employees' personal lives and activities by prohibiting legal private conduct the employer finds to be dangerous, distasteful or disagreeable," according to the suit.

In December 2005 Scotts, a subsidiary of Scotts-Miracle-Gro Co., disclosed that it was instituting a policy prohibiting smoking by its employees, whether at work or not. Further, Scotts said it would conduct random urine tests for nicotine, according to court papers, and any employee testing positive would be fired.

The company said its nicotine-free policy was designed to save money on medical insurance costs and to promote healthy lifestyles among its employees.

Rodrigues, working as a Scotts lawn service technician based in Sagamore Beach, Mass., failed a Scotts-administered nicotine test in August 2006, while still a "probationary" employee. He then was terminated based on the results, the lawsuit states.

Among other things, Rodrigues is

demanding a jury trial and seeking a permanent injunction prohibiting Scotts from enforcing its anti-nicotine policy.

That brings insurers, employers and employees to a central point of contention: Where does it end? Just how far can an employer take its wellness practices before it is interfering with federal or state regulations or privacy issues?

There are some "wacky things going on" with ERISA on both U.S. coasts, said Ed Fensholt, director of compliance services for Lockton Benefit Group.

Massachusetts passed a comprehensive health care law in April 2006 that imposes periodic reporting obligations on employers, but doesn't require an employer to provide health insurance to employees, Fensholt said.

However, if the employer doesn't provide health coverage, it could end up paying a surcharge to help the state pay for health insurance for those without it. Normally the ERISA Shield of Pre-emption would protect the employer against such state mandates, he said.

"It's a way that they're [Massachusetts] hoping to get around ERISA," Fensholt said.

On the West Coast, a city law in San Francisco that took effect New Year's Day requires employers with 20 or more workers to spend a certain amount on health coverage or put money into a "Healthy San Francisco" city fund.

"It imposes extensive record-keeping upon employers—who's working there, how much they're working, how much am I spending on them, what shortfalls, if any, do I have that I have to report on a quarterly basis," Fensholt said.

In *Golden Gate Restaurant Assn. v. City and County of San Francisco*, the local restaurant association sued, claiming that ERISA preempted the city ordinance. In late December 2007, a federal district court agreed with the restaurateurs.

But on appeal from the city, a three-judge panel of the Ninth U.S. Circuit Court of Appeals issued a preliminary order to stay the lower court's decision, pending a hearing on the merits before the full court. In effect, San Francisco was given the go-ahead to implement its "pay or play" health benefit law.

By contrast, Suffolk County, N.Y., passed a similar law a year or so ago that has since been struck down by a federal court, based on the ERISA Shield of Pre-emption, Fensholt said.

"This is exactly what ERISA was designed to prevent," he said. "San Francisco appealed this ruling right up to the Ninth Circuit Court of Appeals, where a liberal representative said, 'no, we think this is probably OK and we're going to think about it some more. Until that time, the city should be able to enforce this law,'" Fensholt said.

"There are employers scrambling to comply with this record-keeping and expense requirement."

Slippery Slopes

All of this has fueled ongoing buzz that ERISA employer protections are essentially going up in a cloud of smoke.

"It sure looks like it's being kind of chipped away beneath the chisel of

laws that protect American workers from being fired for smoking off the job, but for states that don't—like Massachusetts—employers and the developers of their employee benefits plans are grappling with ways to ensure regulatory compliance while still making everybody happy.

Figuring it all out seems about

as easy as quitting smoking cold turkey.

In the Massachusetts case, *Rodrigues v. The Scotts Company LLC*, plaintiff Scott Rodrigues alleges he was fired for smoking cigarettes during non-work hours, in violation of what he claims is an illegal company ban on employees'

smoking, according to an amended complaint filed Jan. 24, 2007, with the U.S. District Court for the District of Massachusetts.

The plaintiff's suit further alleges that the Scotts Co.'s anti-smoking policy violates the Employee Retirement Income Security Act "because it discriminates against participants in the

A Different Spin

When employee benefits provider Unum Group took a hard look at its own wellness program, the company realized that its long-term strategy of managing health care expenses wasn't cost-effective, said Linda Levesque, vice president of human resources, benefits.

Up to then, Unum had been shifting costs to employees through plan design changes or increased premiums. So the company decided to refocus how it structured its health care strategy and how it was going to spend its health care dollars.

"We decided we needed to get at the underlying risks associated with our employees' health and come up with programs to help manage and identify those potential and existing health conditions," Levesque said. So Unum consolidated, going to one carrier for all its benefits needs.

Unum's change in direction came out of "a sense of frustration—of year after year having to drastically change our benefits plan design—or pass on very significant cost increases on our premiums for medical and saying 'there's just got to be a better way to do this', because we just couldn't afford to go the route we were going," Levesque said.

What the company discovered was it didn't have a lot of catastrophic situations, just health or lifestyle risks, she said.

"We know that we all have lifestyle risks. It could be diabetes, high blood pressure, high cholesterol, weight issues. It could be smoking or depression," Levesque said. "And all of these factor into longer-term health care costs."

The Unum plan is proactive rather than reactive; employees are not penalized for off-duty behaviors, but rather rewarded for avoiding self-destructive behaviors. Unum lures employees into taking better care of themselves by pre-discounting health care premiums. Employees who opt out of the wellness program receive a premium increase of \$5 per paycheck.

"We have very good participation," Levesque said.

The plan focuses on coverage for preventative and early intervention, she said. Unum established three health resource centers: near its Portland, Maine, branch; its Chattanooga, Tenn., headquarters; and its Worcester, Mass., branch office. All are staffed by outsourced nurses. Plan highlights include weight management, nutritional counseling and access to a company-subsidized fitness center. The health resource centers have become a personal health coach for Unum employees.

"We move our employees down that health risk spectrum and help prevent them from moving up the health risk spectrum," Levesque said.

Unum's medical trend cost increase was 9.3% at the start of the program, which still was less than the national average, she said. By 2007, the trend line had fallen to 7.2%. "Now we're seeing all the benefit of the actions we have taken, and we're seeing 3.6% for 2008," she said.

And the 3.6% premium increase was achieved despite richer benefit offerings, said Andrew Molloy, assistant vice president for Unum's health management and insurance programs.

"We added a support program for folks doing the smoking cessation program. We're giving away generic diabetes drugs for free. We've beefed up the baby benefit of the maternity program, and we have an oncology program added this year," he said.

The company's smoking cessation program, launched in January, includes an outreach center and a pharmacy benefit in which employees pay 50% for related prescriptions, and get reimbursed if they succeed in quitting, Molloy said.

All the different facets of the wellness program are outsourced to keep Unum's relationship with its employees' medical needs confidential, Molloy said.

"It's important that we have an arm's-length relationship," he said. "Having a third party keeps us out of that loop on that individual level."

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public policy consideration," Fensholt said.

At Withum Smith+Brown Global Assurance, a Princeton, N.J., accounting firm and consultancy specializing in Sarbanes-Oxley compliance issues, *Rodrigues v. Scotts* is a test case, said CPA Lew Bivona, a principal with the group.

Employers are trying incentives to get their workers to do the right thing for their health—or at least be responsible to some extent financially, Bivona said.

"There is a difference between somebody being an overeater versus somebody with glandular dysfunction," he said. "Those things are very slippery slopes."



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—Ed Fensholt,
Lockton Benefit Group

one in Denver, one in St. Louis and one in Dallas."

Notable in the plaintiff's complaint in *Rodrigues v. Scotts* is that the employer does not prohibit other potentially unhealthy or risky off-duty behaviors, such as "obesity, consumption of alcohol, failure to exercise, skydiving, excessive television viewing, eating processed sugars, owning

to stay competitive, and state and local governments wrestling with uninsured citizens. There's no easy solution to that.

"Dealing with the hassle of state and local regulatory institutions takes three perspectives: what the insurance companies have to grapple with; what do the employers have to grapple with; then what people like Lockton and consultants like us have to grapple with," Fensholt said.

From the employer's perspective, in the context of insurance benefits, ERISA was designed to prevent that kind of struggle that insurance companies have to deal with, Fensholt said.

"Brokers and consultants, we're kind of caught in the middle. We leverage technology a lot to stay apprised of what's going on in the state legislatures and state insurance departments to keep our clients informed about what's happening at the state and local level," Fensholt said. "We have to allow our clients to make informed decisions about whether it makes sense to insure their benefits."

"Maybe they throw off the yoke of a group insurance contract and they go for self-insurance and dodge all those state things." **BR**



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Withum Smith+Brown Global Assurance

And while employers are looking hard at driving behavioral change among their employees to help hold down health insurance costs, there are limitations, Fensholt said.

"And that drives employers crazy," he said. "The CEO or COO looking at the health insurance costs, they want just intuitively to charge the couch-sitting, drink-guzzling, chain-smoking employee more for health insurance than the employee that's taking care of himself or herself."

In fact, the most prevalent issue today in the employers' work site is wellness, Fensholt said. Wellness programs have become one of the fastest growing areas of employee benefits.

"We spend more of our time now consulting on that wellness issue, talking to employers about designing effective and compliant wellness programs," Fensholt said. "Three years ago we didn't have a single wellness coordinator on our staff. Our Kansas City office alone now has three of them. We have

dangerous pets, flying private aircraft, mountain climbing, downhill ski racing, single-handed sailing, or spreading toxic chemicals on lawns," the latter of which is a snarky reference to the company's core business of lawn care.

"The interesting thing about it is a lot of people don't realize the insecticides they're using now have a nicotine component in it," Bivona said. "So if this guy is whipping up a batch of insecticide to spray on a lawn, you could actually have absorption issues through your skin. So whether or not he's even smoking, these tests could give you false positives."

That takes things back to the poppyseed bagel, "where you could test positive for opiates," he said.

"It's becoming difficult for domestic employers to compete on a local scale when state and local regulations are requiring them to provide benefits that make up a fair part of their labor costs," Fensholt said. "We've got employers working

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