

Benefits & Executive Compensation News

# Macy's Awaits Judge's Move in Suit Over Surcharges for Smokers

By Lydia Wheeler

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- Languishing case was reassigned to new judge Dec. 11
  - Attorneys closely watching for guidance on tobacco surcharges
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It's been over a year since Macy's Inc. asked a federal court to toss out a lawsuit in which the Labor Department alleges the company is running a wellness plan that discriminates against employees who smoke.

The case was reassigned in December to a new judge, giving court watchers hope that a decision on the future of the case is forthcoming. It's a dispute attorneys who specialize in employee benefits are closely watching given its potential to interpret rules for wellness programs, particularly those that charge tobacco users more for their health insurance.

"I hope the court doesn't turn around and say the regulations have no teeth, but I also think that they need to be enforced in a way that's consistent with what the intent was," said Denise Clark, founder of Clark Law Group, which specializes in employee benefits and employment law.

The rules' intent was never to allow an employer to use a wellness program to weed out individuals from its workforce but "to get individuals to change their behavior in a way that's beneficial to them," she said.

The Department of Labor first sued Macy's Inc. and its health plan administrators—Anthem Blue Cross Life and Health Insurance and Cigna subsidiary Connecticut General Life Insurance Co.—in August 2017, alleging mismanagement of the health plan in violation of the Employee Retirement Income Security Act.

Among the allegations is that between July 1, 2011, and June 30, 2013, Macy's failed to give employees who smoke a reasonable alternative to avoid paying a penalty—now up to \$45 a month—for every employee and dependent enrolled in the company-sponsored health plan who used tobacco products within the previous six months.

The Labor Department said that from 2011 to the present Macy's provided employees with free access to a tobacco cessation program but did not provide notice that this was an alternative to avoid the penalty for any individual for whom it was "unreasonably difficult due to a medical condition or medically inadvisable to attempt to achieve the standards of the program."

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Notices were provided in 2013 and 2014, but not all employees who completed the cessation program avoided the tobacco surcharge or were reimbursed.

Therefore, the Tobacco Surcharge Wellness Program did not meet the regulatory requirement to be a nondiscriminatory wellness program under ERISA from 2011 to the present, the agency said.

### New Judge

The case was reassigned Dec. 11 from Judge Algenon Marbley to the court's newest member, Judge Douglas Cole. Cole was nominated to the lifetime seat on the bench by President Donald Trump and confirmed by the Senate Dec. 4.

But a new judge doesn't mean a decision will be issued in short order, attorneys said.

A newly seated judge may have criminal cases to decide before he turns to the civil docket, Clark said. Because this case is likely one of the older civil cases pending, a decision could come once the criminal cases are dealt with.

"Maybe in the first quarter of the year we'll see a decision," she said.

If the court grants Macy's request and tosses the case, Clark said it could make it virtually impossible for the Labor Department to regulate the use of wellness plans. And some wellness plans, Clark believes, are specifically designed to weed out people with certain conditions.

"For employers, it will incentivize them to buy into more of these programs, and I think for participants, it's going to create a bit of an issue in terms of your ability to have the best health care," she said.

An attorney representing Macy's in the case declined to comment for this story. A Labor Department spokesperson said the agency "cannot comment on pending litigation."

### Reasonable Alternative

Under ERISA and its accompanying regulations, wellness plans must offer employees a reasonable alternative if "it is unreasonably difficult due to a medical condition" to meet a certain requirement or "it is medically inadvisable to attempt to satisfy" the requirement.

But Macy's argued it did nothing wrong because there's no reasonable alternative for tobacco users that a doctor would support other than quitting.

"Applying this regulation to tobacco use, in order to qualify for the reasonable alternative one must either have a medical condition that would make it unreasonably difficult to cease using tobacco, or must have a doctor find and certify that it is medically inadvisable to cease use of tobacco products," attorneys for the retailer said in a motion to dismiss the case.

Therefore, the Labor Department is arguing Macy's failed to provide a reasonable alternative that "practically speaking does not exist and that no doctor would ever support," the retailer's attorneys said.

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Benefits attorneys say employees should always be able to consult with their physician to find an alternative.

“There always has to be another choice for employees in outcome-based programs,” said Barbara Zabawa, founder and president of the Center for Health and Wellness Law LLC, a law firm dedicated to improving legal access and compliance for the health and wellness industries.

The funds from this tobacco surcharge were deposited into Macy’s Inc. Welfare Benefits Trust and used to pay medical claims and plan administrative expenses. The money has been a “windfall” for the retailer, making more money available to pay benefits, the Labor Department said in one brief.

Macy’s argues the only allegation the Labor Department has is that it failed to notify employees of the cessation program, but the company asserts that even then there is “no allegation that this notification failure led to any participant foregoing the opportunity to avoid the surcharge.”

The case is *Acosta v. Macy’s, Inc.*, S.D. Ohio, No. 1:17-cv-00541, order 12/11/19.

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