

Tobacco Surcharge and Incorrect Claims Processing Lead to DOL Lawsuit and Civil Penalties

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PRACTICES Employee Benefits and Executive Compensation

Recently, the Flying Food Group and its employee welfare benefit plan entered into a consent order and judgment with the DOL under which Flying Food Group agreed to reimburse participants for improperly applied deductibles and for impermissible tobacco surcharges, and to also pay a civil penalty for ERISA fiduciary violations relating to such required reimbursements. The DOL's complaint alleged that (i) the plan engaged BCBS Illinois ("**BCBSIL**") to provide administrative services to the plan's self-funded options, (ii) the certificates of coverage produced by BCBSIL (which were incorporated into the plan document by reference) stated that no deductible would apply to outpatient diagnostic services and mammograms, and (iii) the employer "adopted a policy to impose a deductible" with respect to such services (other than routine mammograms). Application of the deductible was thus not in accordance with the terms of the plan, and the employer, as the plan administrator under ERISA, was liable for operating the plan contrary to the terms of the plan documents. The "policy" that led to BCBSIL's administering the plan in a way that was inconsistent with the certificates produced by BCBSIL is not clear from the complaint. Nevertheless, the takeaway here is that employers should ensure that any documentation or directions given to their service providers is consistent with the benefits booklets or certificates of coverage produced by such service providers. As this case demonstrates, the employer, in its capacity as the plan administrator, is ultimately liable for ensuring the plan's claims administration is in accordance with the terms of the plan.

The DOL also alleged that the employer's tobacco surcharge violated HIPAA nondiscrimination requirements because no alternative standards were available to avoid the tobacco surcharge. This allegation highlights the importance of employers understanding all requirements that may apply when varying premiums based on tobacco use or other health-related factors.

Su v. Flying Food Group, LLC, No. 1:23-cv-06583 (N.D. Ill, Aug. 30, 2023)