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Bally's Class Action Launches Circuit Reviews of Smoking Penalties

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Summary by Bloomberg AI

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- A federal appeals court hearing over Bally's Management Group LLC's health insurance penalties for workers who smoke will set the stage for dozens of similar class actions around the country.
- The US Court of Appeals for the First Circuit is the first federal appeals court to address the surge of litigation against companies that charge higher healthcare premiums to employees who smoke.
- Courts have been particularly divided over how to handle US Labor Department regulations on employee wellness programs now that the US Supreme Court has ended the longstanding practice of deference to agency interpretations of unclear laws.

By Lauren Clason and Jacklyn Wille

(Bloomberg Law) --

A federal appeals court hearing Wednesday over Bally's Management Group LLC's health insurance penalties for workers who smoke will set the stage for dozens of similar class actions around the country.

The oral arguments make the US Court of Appeals for the First Circuit the first federal appeals court to address the surge of litigation against companies that charge higher healthcare premiums to employees who smoke. In more than 80 recent lawsuits, employers are accused of charging these penalties without satisfying the statutory and regulatory rules governing employee wellness programs.

"If one goes poorly, it provides a framework – even if there's a split among courts – it provides a framework that would allow plaintiffs to continue these lawsuits," said Thomas Dowling, who represents health plans as partner at Stinson LLP.

Federal district courts have failed to come to a consensus on these cases, with judges greenlighting lawsuits against Marriott, Cracker Barrel, Whole Foods, and others while dismissing similar allegations against companies including Target, Progressive, and Meijer. Appeals are also pending in the Second, Sixth, Seventh, and Eighth circuits.

Courts have been particularly divided over how to handle US Labor Department regulations on employee wellness programs now that the US Supreme Court has ended the longstanding practice of deference to agency interpretations of unclear laws through its 2024 decision overturning *Chevron* doctrine in *Loper Bright Enterprises v. Raimondo*. Decisions in many courts so far signal the new paradigm may not be as different from *Chevron* after all.

If circuit courts determine that the existing regulations are insufficient to support these types of lawsuits, "well then I think you're going to start seeing a lot less of these cases," said Andrew Oringer, partner at The Wagner Law Group.

Plaintiffs in the Bally's case accuse the gambling and entertainment company of wrongly charging tobacco-using workers an extra $780 per year for healthcare coverage without retroactively reimbursing the penalties paid by employees who later complete a quit-smoking program. Bally's, which secured dismissal of the lawsuit in district court, says retroactive reimbursement isn't required by statute or regulation, and that any suggestion to the contrary from federal regulators isn't entitled to judicial deference.

The preamble to a 2013 rule on wellness programs said employers should refund workers past penalties, but that directive wasn't included in the regulatory text.

DOL released guidance through the Employee Benefits Security Administration in August saying companies are not required to refund past penalties after an employee completes a required wellness activity, such as completing a smoking cessation class. That could change the courts' calculations.

"While a court could theoretically go in a different direction, I think it's instructive and most courts would lean on that type of guidance," Dowling said.

But the guidance also reflects political differences between Democratic and Republican administrations, Oringer said.

"The only way it would tip the scales is if the court, in looking at the rules, really doesn't know where to come out," he said.

Settlements

About a dozen employers have agreed to class-wide settlements over their tobacco penalties. A handful of deals have approached or exceeded $5 million, but half a dozen companies have negotiated settlements of less than $1 million, with Glens Falls Hospital in New York and International Motors LLC both settling for less than $200,000.

Others could theoretically feel emboldened if the plaintiffs succeed at the First Circuit, Dowling said. That won't change the dollars at stake in the settlement amounts, but might discourage other companies from litigating. Fewer employers are offering wellness programs, Dowling added, estimating that less than half of his clients offer tobacco cessation incentives.

"The cost of taking this through litigation becomes something that you just have to balance," he said, "and I think that's why you're seeing this kind of chilling effect with these types of programs."

The Bally's case and the next couple to follow will help determine whether the legal trend targeting wellness programs will peter out or become a longer-term threat for employers, Oringer said. The plaintiffs' bar is always throwing creative spaghetti at the wall, he added.

"When they stick," he said, "there's a lot of judicial activity."

The case is *Williams v. Bally's Management Group, LLC 25-02159*, 1st Cir., No. 25-02159, oral arguments scheduled 9/16/26.

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