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CORRESPONDENCE MEMORANDUM

DATE: April 26, 2013
TO: Group Insurance Board
FROM: Bill Kox, Deputy Administrator, Division of Insurance Services
Holly Klawitter, Manager, Disease Management and Wellness Programs
SUBJECT: Consideration of Tobacco Use Surcharge Guidelines

Staff requests the Group Insurance Board (Board) approve the following guidelines for tobacco use surcharge policies.

This memo identifies the background and staff recommendations for policies pertaining to the administration of the tobacco use surcharge proposed in Assembly Bill 40, the executive budget bill.

Background

Assembly Bill 40, the executive budget bill, proposes to create Wis. Stats. 40.03 (6) (cm), as follows:

Section 715. 40.03 (6) (cm) of the statutes is created to read:

40.03 (6) (cm) 1. Notwithstanding ss. 111.321, 111.322, and 111.35, beginning in 2014, the Group Insurance Board shall impose a premium surcharge for health care coverage under ss. 40.51 (6) and 40.515 for eligible employees who use tobacco products and may terminate the health care coverage of any eligible employee who falsely claims that he or she does not use tobacco products.

2. The premium surcharges paid by annuitants who use tobacco products shall be used to reduce future health care coverage premiums for annuitants and to reimburse the department for costs incurred by the department in providing health care coverage to annuitants. Annually, the secretary of administration shall determine the surcharge amounts that are to be used to reimburse the department for costs incurred by the department in providing health care coverage to annuitants and shall transfer that amount to the appropriation account under s. 20.515 (1) (w).

Reviewed and approved by Lisa Ellinger, Administrator, Division of Insurance Services.

Electronically Signed 5/9/13

Board	Mtg Date	Item #
GIB	5.21.13	4J

Key features of the proposed statute include:

- Non-statutory provisions set the surcharge at \$50 per month for 2014-15.
- Surcharge amounts paid by annuitants are to be used to reduce future health care coverage premiums and Department of Employee Trust Funds' (ETF) costs incurred in providing health care.
- The Department of Administration Secretary annually determines the amount of surcharge transferred to ETF to reimburse these costs.
- The surcharge applies to eligible employees and annuitants. Wis. Stats. 40.51(6) limits it to state employees.
- The Board shall impose the premium surcharge.

Discussion and Considerations

Federal Law. The federal Affordable Care Act, referencing sections 2701 and 2705 (j) of the federal Public Health Service Act (PHS Act), informs the manner in which the proposed surcharge could be administered. These provisions generally are intended to avoid inconsistency across group health coverage and are effective January 1, 2014.

- A tobacco use surcharge must be applied in conjunction with an employee wellness program.
- An alternate means of achieving the incentive (or in this case avoiding the negative incentive) must be provided to employees whose physician determines the member cannot meet the requirement for medical reasons. For example, could a member with anxiety issues have their physician certify that it would be inadvisable for that member to quit using tobacco?
- No definition of tobacco use can have a look back period of more than six months.
- No definition of tobacco use can include a member who uses tobacco three or fewer times per week.
- Any wellness program must provide for the use of tobacco cessation counseling and pharmacological aids if the issuer requires a reasonable alternative standard to meet the surcharge exclusion. Standard cost sharing may apply to the pharmacological aids, but not to the physician visit.
- The \$50/month surcharge is allowable under federal limits.

Tobacco Use Definition. In February 2013, federal guidance defined tobacco use as the use of tobacco products four or more times per week. ETF recommends a two (2) month look back period aligning with the five additional states (Georgia, Kentucky, Texas, South Carolina, and Alabama) that administer a tobacco surcharge to state employees using a two (2) month look back for determining tobacco use. This recommendation is less than the six (6) months maximum look back allowable under federal law but is more than the American Cancer Society's recommendation of 30 days.

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Employer cost reductions. Options for building the \$50 surcharge into the premium include a separate surcharge added to premium or separate premium rates for tobacco users vs. non-users. In either scenario, a mechanism will need to be developed to funnel the surcharge funds back to the employer. If the surcharge is to be an add-on, this will be a flat amount, regardless of the current Tier amount of the employee contribution.

For example, if a Tier 1 contribution for regular employees is \$85 (the 2013 value), a tobacco user would be charged \$135. A state patrol classified employee who pays \$31 for a Tier 1 plan would pay \$81.

In the interest of both administrative ease and fairness to our members, the preferred approach, developed by ETF staff, is to apply the surcharge as an add-on.

Annuitants. Annuitants pay the entire premium, either through their accumulated sick leave credits, via annuity deduction, or direct payment to the insurance carrier. The surcharge must therefore be in addition to the total premium--resulting in two premium rate classes for annuitants.

Since the surcharge is part of the premium, it will be included in the premium payment, and annuitants can use accumulated sick leave credits to pay the surcharge.

The surcharge also applies to surviving dependents who apply for coverage as subscribers, since they are defined to be eligible employees.

Continuants. Individuals on state or federal continuation are not subject to the requirement because they do not meet the definition of eligible employee under Wis. Stats. 40.02 (25).

Health plans. Under federal law, the tobacco surcharge may be added by the employer. Therefore, only one premium rate will be bid per plan, rather than separate premiums for tobacco users vs. non-tobacco users. Plans would still need to add the surcharge for direct-pay contracts.

Termination of Coverage by Board. The proposed statute allows the Board to terminate health plan coverage for any employee who falsely claims they are a non-tobacco user. However, recent federal law guidance on the Affordable Care Act appears to prohibit the termination of coverage. Staff recommends that members be allowed to re-file their attestations and correct any inaccuracy or misstatement. Regardless of how the Board proceeds, this will require development of guidelines for determining how information on members who file false attestations will be collected and utilized. Note that the Legislature may amend the proposal and rescind the termination language.

False Reporting of Tobacco Use. The Board will also need to consider whether, in cases where an employee is found to be a tobacco user, the surcharge will be collected retroactively for the current calendar year, or forward from the date of the re-filed attestation. If the Board chooses to allow the retroactive collection of the surcharge, they may not look back further than the beginning of the plan year under federal law, section 2712 of the PHS Act. To address a question asked about retroactive collection, none of the five (5) states currently administering a tobacco surcharge retroactively collect the surcharge after the determination of a false attestation claim due to administrative burden. ETF does not recommend retroactive collection of the surcharge at this time due to administrative concerns expressed by Central Payroll regarding the ability of the payroll systems to handle potential tax consequences.

Changes in Tobacco Use Status. Under federal guidance 71 FR 75019, Plans and issuers cannot cease to provide a reasonable alternative standard merely because one was not successful before; “because overcoming an addiction sometimes requires a cycle of failure and renewed effort.” Therefore we must allow a change in status and provide either a reasonable alternative or waive the surcharge.

Surcharge Administration Recommendations

Given the above information, ETF staff make the following recommendations to the Board for the development of tobacco use surcharge policies.

Tobacco Use Definition. Under the federal guidance, tobacco use is defined as the use of tobacco products four or more times per week within the past two months.

Uniform Benefits. No changes to the current Uniform Benefits for smoking cessation are necessary to comply with the federal regulations. If an employee has medical documentation of inability to quit tobacco use attached to their attestation under ADA law, ETF would waive the surcharge. This eliminates the need to provide a reasonable alternative which would require ETF to provide additional cessation education and eliminate all or part of the cost sharing for these programs to meet the standard under federal law.

Appeals. The tobacco surcharge proposal is under Wis. Stats. 40.03. As such, members will have appeal rights to the Board pursuant to ETF 11.01 (3).

Attestation Administration. Attestations will be collected from all employees during the It's Your Choice period, using either a vendor or input directly to the myETF Benefits system, to collect both employee and annuitant tobacco use attestations. The information will be provided to employers using the myETF Benefits system. This system will need to be modified to provide a “tobacco use” field that will identify those subject to the surcharge. ETF is currently evaluating the ability of its IT systems to successfully facilitate this increased utilization. The myETF Benefits system must be modified to accept and distribute changes in employee and annuitant tobacco status

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annually, and as needed. These system modifications will be a cost for ETF, which are expected to be covered through a per contract fee applied as part of ETF's administrative fee or through some other means.

False Reporting of Tobacco Use for Active Employees. If an employer receives a complaint or report of an employee making a false attestation of tobacco use, the employer will be responsible for adjudicating the report, determining if the employee is paying the tobacco surcharge and notifying the employee of their ability to re-file a correct tobacco use attestation with myETF Benefits or through the vendor. If the employee re-files as a tobacco user, the employee will begin paying the surcharge from that month going forward to begin with the next pay period with premium deduction. Surcharges will not be collected retroactively.

False Reporting of Tobacco Use for Annuitants. Reports of false tobacco use attestations for annuitants will be reported to ETF. When ETF receives a complaint or report of an annuitant making a false attestation of tobacco use, ETF will be responsible for determining if the annuitant is paying the tobacco surcharge and notifying the annuitant of their ability to re-file a correct tobacco use attestation with myETF Benefits or through the vendor. If the annuitant re-files as a tobacco user, the annuitant will begin paying the surcharge going forward, beginning with the next eligible pay or billing cycle with a health premium deduction. Surcharges will not be collected retroactively.

Non-response to Attestation. Employees and annuitants who do not file a tobacco use attestation will be subject to the surcharge. If the employee or annuitant is a non-tobacco user they must file an appropriate attestation to stop the surcharge application, any surcharge paid as a result of the initial non-response will not be refunded.

Changes in Tobacco Use Status. Employees and annuitants who change tobacco use status during the contract year will be allowed to change their attestation status once per year outside of the It's Your Choice period through myETF Benefits or through the vendor. The tobacco surcharge may be removed when the employee completes the surcharge removal requirements including completion of a change in status form including documentation of completion of a tobacco cessation program.

Confidentiality. All waivers and attestations will be confidential documents under Wis. Stat. 40.07, to be recorded along with the employees' group health insurance applications and remain part of the employees' myETF Benefits record. Active employees' files will be managed by the employer. Annuitant files will be managed by ETF.

Staff will be at the Board meeting to answer any questions.