How the Affordable Care Act Affects Tobacco Use and Control

This fact sheet summarizes the main provisions of the Affordable Care Act (ACA) that impact tobacco use and control, including insurance coverage for tobacco cessation treatment.[1]

Higher Premiums for Tobacco Users

The ACA requires individuals to have health insurance starting January 1, 2014 and prohibits insurers from denying coverage based on factors such as health status. However, tobacco users can be charged up to 50% more for health insurance premiums than non-tobacco users in the individual or small group market (see below for an explanation of different types of insurance).[2]

For purposes of the premium surcharge, "tobacco use" is defined as:

- using any tobacco product other than for religious or ceremonial use;
- on average four or more times per week;
- within no longer than the past six months.[3]

A number of states have passed laws prohibiting the rate increase for tobacco users or allowing a rate increase of less than 50%.[4] Additionally, tobacco users in a small business may be able to avoid the penalty by participating in a tobacco cessation program through their workplace (see below for more information on wellness programs).

Note that the federal rules do not currently include e-cigarettes as a form of tobacco use. Therefore if you are an e-cigarette user and you apply for insurance as an individual or through a small group, then the tobacco premium will not apply to you. However, if you receive insurance from a large employer, check your company's definition of "tobacco use" to see if it includes e-cigarettes, as policies of some companies such as Wal-Mart and UPS have done. Additionally, if the federal government regulates e-cigarettes as a tobacco product in the future, then e-cigarette use could become subject to the tobacco surcharge.

Types of Insurance

Although the ACA requires most individuals to have health insurance, there are a number of different ways to get coverage, such as:

- Through a government program such as Medicare (for people age 65 and older and for people under age 65 with certain disabilities) or Medicaid (for low-income people).
- By purchasing an individual policy for yourself or family directly from a private insurance company or through a health insurance exchange or marketplace, which could be run by your state or by healthcare.gov. In the individual market, participants typically pay 100% of their health insurance coverage, subject to government subsidies based on income.
- At your workplace through a large or small group plan, where the employer purchases the policy and may pay some or all of the monthly insurance premiums. A plan in the small group market generally applies to employers with 50 employees or less and the large group market includes employers with more than 50 employees.

Coverage for Tobacco Cessation

Tobacco cessation must be provided at no cost under most types of health insurance as of January 1, 2014. However, there is no single definition of tobacco cessation so the scope of coverage is likely to vary by state, by type of insurance (e.g., Medicare, Medicaid, private insurance), and by the insurance provider (e.g., Aetna, Blue Cross, etc.)

For example, insurance may provide coverage for only some of the following elements:[5]

- Counseling: in-person (individual or group), via phone, or via the internet
- Prescription cessation medications such as varenicline (Chantix) and buproprion (Zyban)
- Over-the-counter nicotine replacement therapies (NRTs), such as nicotine patches or gum

See the chart on pages 5-6 for more specific information.

Coverage for Substance Use

Most health insurance offered as of January 1, 2014, must provide coverage for the 10 "essential health benefits" listed in the ACA, which include "preventive and wellness services" as well as "mental health and substance use disorder services." Most people will access tobacco cessation coverage as a "preventive service," for which there will be no cost to the patient. However, it is also possible that tobacco dependence could be treated as a substance use disorder.

A federal law – the Mental Health Parity and Addiction Equity Act or MHPAEA – requires that insurance coverage of mental health and substance use disorders be comparable to coverage of other medical conditions.[6] However, neither the ACA nor the MPHAEA require individual insurance companies to include benefits for a particular substance use disorder, such as tobacco addiction. Instead, the MHPAEA only requires that if the insurer provides benefits for a substance use disorder then they must provide them on fair and equal terms as coverage for other types of medical care.

For more information on this topic, see the Consortium's fact sheet on *The Mental Health Parity and Addiction Equity Act and the Affordable Care Act: Implications for Coverage of Tobacco Cessation Benefits.*[7]

Employee Wellness Programs

For individuals who receive insurance through their jobs, there are special rules about how employers can financially reward or penalize participants for healthy or unhealthy behaviors – such as tobacco use – or based on their health status, such as blood pressure or cholesterol.[8] Federal rules, which took effect January 1, 2014, specifically allow employers to reward or penalize employees by up to 50% of the cost of health care coverage based on tobacco use. Wellness programs can fall into two main categories:

1) **Participatory wellness programs** – provide a reward that is not based on satisfying a particular standard, such as reimbursement for a gym membership or for a smoking cessation program, even if the employee doesn't quit smoking.
2) **Health-contingent wellness programs** – an individual must meet a standard related to a health factor in order to obtain a reward or penalty, such as a health insurance premium surcharge for tobacco use or a reward for employees who meet a specified medical condition, such as low cholesterol.[9]

Health-contingent wellness programs must offer a "reasonable alternative standard" to obtain the reward. For example, employees could be given more time to complete the program or be offered alternatives based on their doctor's recommendation.[10]

Employers can provide a financial reward or penalty of up to 30% of the cost of coverage for health-contingent wellness programs. For wellness programs designed to prevent or reduce tobacco use, the reward or penalty can be up to 50% of the cost of coverage.[11] For example, if the cost of health insurance is $6,000 per year, of which the employer and the employee each pay $3,0000, the employer could impose a surcharge of up to 50% (up to $3,000) for an employee who uses tobacco and doesn't participate in the plan's tobacco cessation program.

Other ACA Provisions Impacting Tobacco Control

The ACA creates a number of programs to help reduce chronic diseases such as heart attacks and strokes. Some of these programs specifically address tobacco control, including:

- **The Prevention and Public Health Fund**[12] – an investment of up to $2 billion per year in prevention, wellness, and public health activities including community-based tobacco prevention programs and the CDC's *Tips From Former Smokers* campaign.[13]
- **The National Prevention Strategy** – released by the National Prevention Council in 2011, the Strategy includes tobacco-free living as one of the seven main priorities.[14]
- **The Medicaid Incentives for Chronic Disease Prevention Program**[15] – through this grant program, states can apply for funds to incentivize Medicaid recipients to prevent chronic disease. Six states currently receive funding for tobacco cessation programs: California, Connecticut, New Hampshire, New York, Texas, and Wisconsin.[16]

More generally, the ACA encourages community-based prevention through a variety of programs, such as:

- **Community Health Needs Assessment (CHNA)** – nonprofit hospitals are required to conduct a community health needs assessment every three years that incorporates input from the community.[17]

- **Increasing the health care workforce** – the ACA supports fellowship training in public health, provides grants to promote the community health workforce, and provides more than $10 billion in funding for community health centers nationwide.[18]

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Coverage for Tobacco Cessation[19]

Type of Insurance	Is tobacco cessation covered?	What is covered?	What is the cost to the patient?
Medicare (a federal health insurance program for people age 65 and older and for those under age 65 with certain disabilities)	Yes, as of 1/1/11[20]	▪ Two counseling attempts per year (up to four sessions for each attempt or a total of eight sessions every 12 months). ▪ Prescription drugs for tobacco cessation are covered but not over-the-counter treatments such as nicotine patches or gum (since over-the-counter treatments are not covered by Medicare in general).[21] ▪ The ACA establishes a new Annual Wellness Visit for Medicare recipients, which should include questions and personalized health advice about behavioral risks, such as tobacco use.[22]	▪ No cost if provided as a preventive service. ▪ For Medicare beneficiaries with diagnosis of a disease or condition caused by tobacco use, a co-pay and deductible apply.[23]
Traditional Medicaid (a health insurance program for people with low income, jointly funded by the federal and state governments and managed by the states)	Not necessarily. For pregnant women in Medicaid, comprehensive cessation coverage was required under the ACA as of 10/1/10.[24]	▪ As of January 1, 2014, tobacco cessation drugs, including over-the-counter medications, can no longer be excluded under Medicaid.[25] ▪ For pregnant women, comprehensive cessation coverage should include counseling and can include tobacco cessation medication, if doctor-approved.[26] ▪ Tobacco cessation coverage is required for children and adolescents (up to age 21) when medically necessary. ▪ Other (non-pregnant, adult) Medicaid beneficiaries could be eligible for other cessation services, such as counseling, depending on the benefits offered through the state Medicaid plan.[27] ▪ State tobacco quit-lines that meet certain standards are encouraged because they are eligible for a 50% administrative matching rate by the federal government.[28]	▪ Out-of-pocket costs, such as a co-pay, could apply depending on your particular state plan. ▪ No cost for pregnant women.
Medicaid Expansion (for low-income adults up to 138% of the poverty level in states that choose to expand Medicaid)[29]	Yes, as of 1/1/14.[30]	▪ Tobacco cessation must be provided at no cost as an "essential health benefit," which includes "preventive and wellness services" as well as "mental health and substance use disorder services." ▪ Coverage is likely to vary by state.	▪ No cost if provided as a preventive service.
Individual health insurance purchased through a state-run Exchange or Marketplace	Yes, as of 1/1/14.[31]	▪ Tobacco cessation must be provided at no cost as an "essential health benefit," which includes "preventive and wellness services" as well as "mental health and substance use disorder services."[32] ▪ Because the U.S. Department of Health and Human Services has not officially defined tobacco cessation benefits, the level of coverage will vary by the state and the individual health insurance provider.[33]	▪ No cost to the patient if provided as a preventive service.

Type of Insurance	Is tobacco cessation covered?	What is covered?	What is the cost to the patient?
Individual health insurance purchased on the private market (e.g., directly from an insurance company)	Yes, as of 1/1/14 unless the individual has an insurance plan that is "grandfathered" under the law.[34]	▪ Tobacco cessation must be provided at no cost as an "essential health benefit," which includes "preventive and wellness services" as well as "mental health and substance use disorder services."[35] ▪ Coverage is likely to vary among providers.	▪ No cost if preventive services are included in the plan at no cost.
Health insurance from an employer in the small or large group market	Yes, as of September 23, 2010.[36]	▪ Tobacco cessation must be covered as a preventive service. However, coverage will vary among providers.	▪ No cost for access to the cessation services. ▪ Small group plans may only charge a tobacco premium if allowed in that state and if the employee has an opportunity to avoid paying the full amount by participating in an approved wellness program.[37]

Notes

[1] The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) was amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010). Together, the two laws are known as the Affordable Care Act (ACA).

[2] 42 U.S.C. § 300gg(a)(1).

[3] 45 C.F.R. § 147.102(a)(1)(iv); Final Rule: Patient Protection and Affordable Care Act; Health Insurance Market Rules; Rate Review, 78 Fed. Reg. 13405 (Feb. 27, 2013), *available at* https://www.federalregister.gov/articles/2013/02/27/2013-04335/patient-protection-and-affordable-care-act-health-insurance-market-rules-rate-review.

[4] For a list of states that have prohibited or limited the tobacco rate increase, see CENTER FOR MEDICARE AND MEDICAID SERVICES, *Market Rating Reforms: State Specific Rating Variations* (Aug. 9, 2013), *available at* http://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/state-rating.html.

[5] For example, a Georgetown University study reviewed 39 different insurance plans and found significant variation in how private health insurance coverage works for tobacco cessation treatment. Georgetown University Health Policy Institute, I*mplementation of Tobacco Cessation Coverage under the Affordable Care Act: Understanding How Private Health Insurance Policies Cover Tobacco Cessation Treatments* (2012), *available at* http://www.tobaccofreekids.org/pressoffice/2012/georgetown/coveragereport.pdf.

[6] 5 C.F.R. § 156.115; Pub. L. No. 110-343, 122 Stat. 3765 (2008); Final Rules Under the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, 78 Fed. Reg. 68239 (Nov. 13, 2013), *available at* https://www.federalregister.gov/articles/2013/11/13/2013-27086/final-rules-under-the-paul-wellstone-and-pete-domenici-mental-health-parity-and-addiction-equity-act.

[7] Tobacco Control Legal Consortium, *The Mental Health Parity and Addiction Equity Act and the Affordable Care Act: Implications for Coverage of Tobacco Cessation Benefits* (2014), *available at* www.publichealthlawcenter.org.

[8] 42 U.S.C. § 300gg–4(j)-(k); Final Rule: Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 78 Fed. Reg. 33157 (June 3, 2013), *available at* https://www.federalregister.gov/articles/2013/06/03/2013-12916/incentives-for-nondiscriminatory-wellness-programs-in-group-health-plans.

[9] 26 C.F.R. 54.9802-1(f)(1); 29 C.F.R. 2590.702(f)(1); 45 C.F.R. 146.121(f)(1). Health-contingent wellness programs fall into two sub-categories: activity-only wellness programs and outcome-based wellness programs.

[10] 26 C.F.R 54.9802-1(f)(3)(iv) and 54.9802-1(f)(4)(iv); 29 C.F.R. 2590.702(f)(3)(iv) and 2590.702(f)(4)(iv); 45 C.F.R. 146.121(f)(3)(iv) and 146.12(f)(4)(iv).

[11] 26 C.F.R 54.9802-1(f)(5); 29 C.F.R. 2590.702(f)(5); 45 C.F.R. 146.121(f)(5).

[12] 42 U.S.C. § 300u-11.

[13] 42 U.S.C. § 300u–13. For more information on activities funded by the Prevention and Public Health Fund, see Trust for America's Health, *Full Reports on the Prevention Fund*, *available at* http://healthyamericans.org/health-issues/category/protecting-the-prevention-and-public-health-fund/fact-sheets-background. *See also* CENTERS FOR DISEASE CONTROL, *Tips from Former Smokers*, *available at* http://www.cdc.gov/tobacco/campaign/tips.

[14] U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE NATIONAL PREVENTION STRATEGY (June 16, 2011), *available at* http://www.surgeongeneral.gov/initiatives/prevention/strategy/report.html. The National Prevention Council also released an Action Plan to implement the Strategy: U.S. DEP'T OF HEALTH AND HUMAN SERVICES, NATIONAL PREVENTION COUNCIL ACTION PLAN: IMPLEMENTING THE NATIONAL

PREVENTION STRATEGY (June 2012), *available at* http://www.surgeongeneral.gov/initiatives/prevention/2012-npc-action-plan.pdf.

[15] Public Law 111-148 § 4108.

[16] For specific information on these programs, see CENTERS FOR MEDICARE AND MEDICAID SERVICES, *MIPCD: The States Awarded*, *available at* http://innovation.cms.gov/initiatives/MIPCD/MIPCD-The-States-Awarded.html.

[17] 26 U.S.C. §§ 501(r)(1)(A), 501(r)(3). For resources on the CHNA process, see CENTERS FOR DISEASE CONTROL, *Resources for Implementing the Community Health Needs Assessment Process*, *available at* http://www.cdc.gov/policy/chna/.

[18] 42 U.S.C. § 280g-12; 42 U.S.C. § 295f–3; 42 U.S.C. §§ 254b(r), 254b-2. For more information, see U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *Creating Jobs by Addressing Primary Care Workforce Needs*, (June 21, 2013), *available at* http://www.hhs.gov/healthcare/facts/factsheets/2013/06/jobs06212012.html. For information on community health centers, see National Association of Community Health Centers, "Health Reform Spotlight," *available at* http://www.nachc.com/healthreform.cfm and U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *HHS Awards Affordable Care Act Funds to Expand Access to Care* (Nov. 7, 2013), *available at* http://www.hhs.gov/news/press/2013pres/11/20131107a.html.

[19] This chart provides information on coverage for tobacco cessation treatment. If a patient needs medical care for a disease caused by tobacco use, such as heart disease or cancer, the cost for this treatment will depend on the coverage levels and deductibles under their particular insurance plan. However, the ACA does remove lifetime limits on coverage and prohibits insurers from denying coverage based on pre-existing health conditions, both of which should make treatment for serious illnesses more accessible and affordable.

[20] 42 U.S.C. § 1395x(ddd).

[21] CENTERS FOR MEDICARE AND MEDICAID SERVICES, *Tobacco-use Cessation Counseling Services* (Feb. 2012), *available at* http://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/downloads/smoking.pdf.

[22] 42 U.S.C. § 1395x(hhh); *see also* CENTERS FOR MEDICARE AND MEDICAID SERVICES, *Providing the Annual Wellness Visi*t (July 2012), *available at* http://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/Downloads/AnnualWellnessVisit-ICN907786.pdf.

[23] CENTERS FOR MEDICARE AND MEDICAID SERVICES, *Tobacco-use Cessation Counseling Services* (Feb. 2012), *available at* http://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/downloads/smoking.pdf.

[24] 42 U.S.C. § 1396d(bb).

[25] 42 U.S.C. § 1396r–8(d)(7).

[26] CENTERS FOR MEDICARE AND MEDICAID SERVICES, Letter to State Medicaid Directors Re: New Medicaid Tobacco Cessation Services (June 24, 2011), *available at* http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SMD11-007.pdf.

[27] For more information on the scope of Medicaid coverage in each state, including nicotine replacement therapies and counseling, see Kaiser Family Foundation, S*tate Medicaid Program Coverage of Tobacco Dependence Treatments by Type of Coverage* (2012), *available at* http://kff.org/medicaid/state-indicator/cessation-treatment-under-medicaid and American Lung Association, *State Tobacco Cessation Coverage*, *available at* http://www.lungusa2.org/cessation2.

[28] CENTERS FOR MEDICARE AND MEDICAID SERVICES, Letter to State Medicaid Directors Re: New Medicaid Tobacco Cessation Services (June 24, 2011), *available at* http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SMD11-007.pdf.

[29] The ACA expanded eligibility for Medicaid to all U.S. citizens and legal residents with income up to 138% of the Federal Poverty Level, including adults without dependent children. However, the U.S. Supreme Court ruled that states do not have to agree to this expansion, and many states have chosen not to expand Medicaid coverage. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *see also* Kaiser Family Foundation, *Status of State Action on the State Medicaid Expansion, 2014* (2014), *available at* http://kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act.

[30] Newly-eligible Medicaid beneficiaries will receive benefits through a state Alternative Benefit Plan (ABP), which may offer different benefits than traditional Medicaid. CENTERS FOR MEDICARE AND MEDICAID SERVICES, Letter to State Medicaid Directors Re: Essential Health Benefits in the Medicaid Program (Nov. 20, 2012), *available at* http://bit.ly/QgBv1l.

[31] 42 U.S.C. §§ 18021(a)(1)(B), 18022(b)(1).

[32] 42 U.S.C. § 18022(b)(1).

[33] States must identify a "benchmark plan" which contains all of the essential health benefits, and insurers will be required to offer plans with benefits "substantially equal" to the state benchmark. Final Rule, Patient Protection and Affordable Care Act; Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation, 78 Fed. Reg. 12833, Feb. 25, 2013, *available at* https://www.federalregister.gov/articles/2013/02/25/2013-04084/patient-protection-and-affordable-care-act-standards-related-to-essential-health-benefits-actuarial; 45 C.F.R. § 156.115.

[34] 42 U.S.C. §§ 18021(a)(1)(B), 18022(b)(1).

[35] 42 U.S.C. § 18022(b)(1).

[36] Health insurers offering coverage to individuals or in the small group market must provide the essential health benefits package. 42 U.S.C. § 300gg-6. Group health plans and health insurance providers offering group or individual health insurance must provide coverage for evidence-based items or services that have a rating of "A" or "B" by the USPSTF. 42 U.S.C. § 300gg-13.

[37] 45 C.F.R. § 147.102(a)(1)(iv). *See* Kaiser Family Foundation, *Small Group Health Insurance Market Rate Restrictions* (2012), *available at* http://kff.org/other/state-indicator/small-group-rate-restrictions/.