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ATTORNEY GENERAL

November 12, 2009

The Honorable John M. "Jake" Knotts, Jr.  
Member, South Carolina Senate  
Post Office Box 142  
Columbia, South Carolina 29202

Dear Senator Knotts:

We understand you desire an opinion of this Office concerning the South Carolina Budget and Control Board's "decision to implement a surcharge for tobacco users insured by the State's Employee Insurance Program." You informed us that you received phone calls and letters from your constituents on this issue and they would "like to know how the Budget and Control Board can impose a penalty on those who smoke but not impose a penalty for other vices, such as alcohol or drug use or for those who are obese." Thus, you request an opinion of this Office as to "whether or not it is constitutional for the South Carolina Budget and Control Board to charge a surcharge for smokers but not charge other groups whose health may also be at risk."

#### **Law/Analysis**

By section 1-11-170 of the South Carolina Code (2005), the Legislature requires the Budget and Control Board to make group health insurance available to all active and retired state employees and public school district employees. Subsection (A)(2) of this provision gives the Budget and Control Board the authority to approve a plan of benefits, determine participant eligibility, and set employee contributions for each year. S.C. Code Ann. § 1-11-710(A)(2). In addition, subsection (A)(3) states that the Budget and Control Board can "adjust the plan, benefits, or contributions, at any time to insure the fiscal stability of the system." *Id.* § 1-11-710(A)(3). Pursuant to this authority, in August of 2008, the Budget and Control Board voted to require that tobacco users pay an extra \$25 per month. According to the State of South Carolina's official web site the Budget and Control Board instituted the surcharge because tobacco products increase the risk for illness and disease and such illnesses are estimated to cost the state health plan \$75 million a year. The Official Web Site of the State of South Carolina, <http://sc.gov/NewsCenter/BCB/State+Health+Plan+Launches+Rollout+of+Tobacco+Surcharge.htm> (last visited October 30, 2009).

By your letter, we understand your constituents are concerned that the Budget and Control Board only targeted tobacco users, while other behaviors also pose a risk for illness and disease, but do not trigger a surcharge. By pointing out that those who use tobacco are treated differently than

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other individuals covered under the State's Employee Insurance Program, we assume that you are concerned as to whether the actions by the Budget and Control Board in implementing a tobacco surcharge violate the Equal Protection Clause.

Under the Equal Protection Clause of the Fourteenth Amendment, a state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; see S.C. Const. art. I, § 3 ("The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."). This clause requires that "the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application must be justified by the law's purpose." Sylvia Dev. Corp., 48 F.3d at 818. It does not prohibit different treatment of people in different circumstances under the law. Town of Iva ex rel. Zoning Administrator v. Holley, 374 S.C. 537, 541, 649 S.E.2d 108, 110 (Ct. App. 2007). Instead, "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Id.

Harbit v. City of Charleston, 382 S.C. 383, 396, 675 S.E.2d 776,783 (S.C. App. 2009). "Courts generally analyze equal protection challenges under one of three standards: (1) rational basis; (2) intermediate scrutiny; or, (3) strict scrutiny. 16B Am.Jur.2d Constitutional Law § 812 (1998). If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used." Denene, Inc. v. City of Charleston, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004).

Tobacco users do not constitute a suspect class and tobacco use is not a fundamental right. See Grusendorf v. City of Oklahoma City, 816 F.2d 539 (10<sup>th</sup> Cir. 1987) (finding cigarette smoking is not a fundamental right); Giordano v. Connecticut Valley Hosp., 588 F.Supp.2d 306 (D. Conn. 2008) (indicating smoking is not a fundamental right and smokers are not suspect class); Burnette v. Bredezen, 566 F.Supp.2d 738 (E.D.Tenn. 2008) (stating a rational basis analysis should be used in examining the constitutionality of a ban on smoking in public places because smokers are not a suspect class and do not allege a fundamental right). Thus, we believe a court would employ a rational basis analysis to determine the constitutionality of the tobacco surcharge.

Our Supreme Court recently explained the rational basis analysis in Theisen v. Theisen, 382 S.C. 213, 223, 676 S.E.2d 133, 139 (2009).

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The requirements of equal protection are met if: (1) a classification bears a reasonable relationship to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances; and (3) the classification rests on a reasonable basis. The constitutional guaranty of equal protection of the law requires all members of a class to be treated alike under similar circumstances and conditions, and that any classification not be arbitrary but bear a reasonable relation to the legislative purpose sought to be effected. Sloan v. S.C. Bd. Of Physical Therapy Exam'rs, supra, citing Broome v. Truluck, 270 S.C. 227, 230, 241 S.E.2d 739 (1978).

Id. at 223, 676 S.E.2d at 139.

The determination of whether the levy of a surcharge only on users of tobacco is reasonably related to the purposes or goals the Budget and Control Board sought to affect with the surcharge's enactment would require us to investigate and determine numerous factual issues. Such an investigation and determination are beyond the scope of an opinion of this Office. Op. S.C. Atty. Gen., 27, 2009 ("This Office, unlike a court, does not have the jurisdiction to investigate and determine factual issues."). Therefore, we must defer to a court to ultimately resolve your question. However, given the information we have, we will attempt to provide some guidance as to what a court may conclude.

We are not fully apprised as to all of the reasons the Budget and Control Board may have had for instituting the tobacco surcharge. However, as we noted above, according to the State's web site, the surcharge is aimed at preventing disease and illness and to supplement the cost of illnesses and diseases related to tobacco use. We are of the opinion that a court would likely find the surcharge is reasonably related to the Budget and Control Board's desired result. As such, a court would also likely find that a rational basis exists for treating tobacco users differently than other state employees under the State's Employee Insurance Program.

Although we were unable to locate any court decisions addressing similar surcharges imposed by other states on their employees, we discovered that both the Kansas Attorney General and the Delaware Attorney General determined that similar surcharges do not violate the Equal Protection Clause. In a 1987 opinion, the Kansas Attorney General considered the constitutionality of a \$10 per month surcharge on that state's employees who consume tobacco. Op. Kan. Atty. Gen., December 1, 1987. According to the opinion, the basis for the distinction between smokers and non-smokers "is the perceived correlation between smoking and increased health care cost." Id. In addition, the opinion cited that the surcharge sought to implement two goals, one to encourage smokers to stop smoking and "to generate revenues to support preventative health measures." Id. Based on this understanding of the Kansas State Employees Health Care Commission's rationale in implementing the surcharge, the Kansas Attorney General concluded "[t]he means chosen to

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accomplish this seem reasonably related to the desired result. Thus, we find not legally proscribed discrimination with this provision . . . .” Id.

The Delaware Attorney General, in 1989, considered the constitutionality of a hypothetical group health insurance plan for state employees that would offer premium reductions for insured who did not smoke, maintained weight within medically acceptable limits, maintain blood pressure within medically accepted parameters, and used seatbelts. Op. Del. Atty. Gen., September 19, 1989. The Delaware Attorney General analyzed the apparent disparate treatment of these individuals verses others who would be required to pay higher premiums under the Equal Protection Clause. The Delaware Attorney General stated as follows:

[S]uch discrimination as may be present in the healthy lifestyles plan does not merit “strict scrutiny” since it does not affect a “suspect group,” based upon race, color, creed, gender or ethnic or national origin. Nor does it appear to affect a “fundamental right” such as free speech, the right to vote, or religious worship.

We must, therefore, apply the “rational basis” test. In order to withstand an Equal Protection challenge, it must be shown that there is some “rational basis” upon which the State may distinguish among its employees. Shelly v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); Sadler v. New Castle County, Del. Super., 524 A.2d 18 (1987); Cheswold Volunteer Fire Company v. Lambertson Construction Company, Del. Supr., 489 A.2d 413 (1984). Here, as noted above, employees who conform to the healthy lifestyles plan but maintain only basic coverage receive no economic benefit for engaging in healthy lifestyle behaviors, while the same conduct results in a premium credit for those employees electing extended benefits. The motivation for the discrimination is the promotion of the health and general welfare of State employees. Their being a rational basis for disparate treatment, it does not constitute a violation of the Equal Protection Clause.

Id.

The rationales stated for the tobacco surcharge and discount contemplated in the above opinions appear similar to what we understand to be the rationale of the Budget and Control Board in implementing the \$25 per month tobacco surcharge. Both of these opinions conclude that distinguishing tobacco users from other state employees for this purposes is reasonable. Thus, these opinions further support our belief that a court would likely uphold the surcharge implemented by the Budget and Control Board as constitutional.

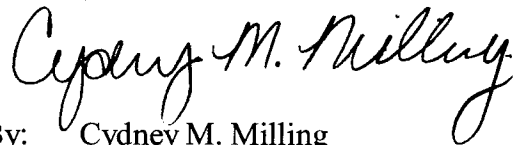
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### Conclusion

Tobacco users are not a suspect class and tobacco use is not a fundamental right. Therefore, we believe a rational basis analysis should be employed to determine whether by singling out tobacco users to pay higher premiums under the State Employee Insurance Program, the Budget and Control Board violates the Equal Protection Clause. We cannot opine with certainty as to whether singling out tobacco users for the surcharge bears a reasonable relationship to Budget and Control Board's purposes. However, based on our understanding of the Budget and Control Board's purposes for imposing the surcharge, we believe a court would likely find it is rationally related to its efforts to prevent illness and disease and to supplement the cost of illness and diseases related to tobacco use. Accordingly, we do not believe a court would find the tobacco surcharge to be unlawfully discriminatory under the Equal Protection Clause.

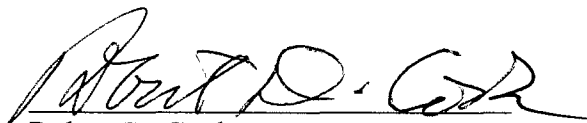
Very truly yours,

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