

Health Promotion Program Legal Updates

Webinar Q&A: September 18, 2019

The following questions were submitted during WELCOA's *Health Promotion Program Legal Updates* webinar session that aired on **September 18, 2019**. To help further educate yourself in legal compliance with your wellness program, please review this list of attendee inquiries and the responses provided by presenter and health law attorney, Barbara Zabawa.

****Please note: The responses provided below do NOT constitute legal advice and should not be used as such. Readers should retain legal counsel to obtain definitive answers. The responses below are for educational purposes only.**

1. If the wellness program is within a GHP, but the incentive is paid like a bonus on a paycheck, does that cross the line to become an employer-based program?

Whether a wellness program is a group health plan program depends on the activities offered through the program (i.e., whether they constitute "medical care" as defined under ERISA) or whether it is part of the major medical plan offering, not on the type of incentive that is offered.

2. What is an example of an RAS for tobacco use?

The HIPAA rules do not require certain RAS's to be offered but instead allow flexibility so that the employee and plan can come up with a RAS that works for the employee. Some examples I have seen are coaching or education programs.

3. Cost of the self-only coverage, is that the cost of the employee or the employer? The cost seems unclear to me. We have a benefit credit and the employee only pays a small portion of the cost. How would the cost be calculated?

It is the combined cost for both the employer and employee.

4. Situation I have seen with one of our customers. They hold biometrics screenings once/year during open enrollment, cotinine is one of the screenings. If positive for cotinine, they will pay more on premiums unless they enroll in our tobacco coaching program. An employee screens positive for cotinine but insists they have never used tobacco or nicotine products. Employer says they can challenge it and re-do the test, but employee has to pay for it. The other alternative is to just enroll in coaching program to avoid doing this. Does this break any of the rules by requiring employee to pay for a test that may not have been accurate the first time?

HIPAA rules allow plans to have employee pay for standard cost-sharing through the plan benefits. So, if the cotinine test is done by the employee's physician, I would argue that the plan could have the employee pay for standard cost sharing to get the test done by the physician. However, to give a definitive answer, one would need to consult legal counsel and gather more facts.

5. So, would it be illegal for companies in states like Wisconsin to have tobacco surcharges in general (if they are not tied to a health plan)? Or just if they are enforced by the company? Would a tobacco affidavit even be a feasible option for employers in states like Wisconsin?

Again, it depends on who is imposing the surcharge. I would argue that a health plan would not be subject to the lawful products use law. However, such laws would apply to employers. It would also depend on the type of employer, the employer's tobacco use policy and whether an employee was in violation of a lawful policy.



Q&A responses provided by
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6. If the program is offered to those on the health plan and also those not on the health plan and the incentive is a contribution to the HSA for those on the plan and a bonus for those not on the plan, how is this determined as a group health plan?

The nongroup health plan program may actually be a group health plan program, depending on the benefits offered by the plan. An analysis would need to be done and if it is a group health plan program, that would subject the program to a number other laws like ERISA and COBRA.

7. Can you start testing for cotinine with new hire applicants only, with plans to start the testing of all associates the following year. Or would this be seen as discriminatory?

Doing any sort of medical test must be in compliance with the ADA. The ADA allows for some medical testing, but only if certain criteria are met. For the hiring process, it must occur post-offer. To provide a definitive answer to the question of whether this testing is discriminatory, more facts need to be gathered and a full legal analysis would need to occur.



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