

# Health Promotion Program Legal Update: 2019 (September 18, 2019)

Barbara J. Zabawa, JD, MPH

## The Legalities of Tobacco Cessation Wellness Programs

By Barbara J. Zabawa, JD, MPH  
Center for Health and Wellness Law, LLC



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### Agenda

- Current law on tobacco programs
  - HIPAA
  - ADA
- Acosta v. Macy's Case
- Acosta v. Dorel Juvenile Group
- Lawful Products Laws
- Cheating
- Q&A Session



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## CURRENT LAW



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## HIPAA Rules on Tobacco Use

- Participatory tobacco use wellness program:
  - Tobacco cessation program reimbursement
  - Only requirement is that program offered to all similarly situated individuals
- Health Contingent tobacco use wellness program:
  - Incentive tied to not using tobacco
- Applies to Group Health Plan wellness programs only



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**HIPAA**

- **Health Contingent Programs Must Meet Five factors:**
  1. Qualify for the reward at least once/year.
  2. Total reward may not exceed 30% (50% for tobacco prevention programs) of total cost of coverage.
  3. Reasonable design to promote health or prevent disease.

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**HIPAA**

- **Five factors (cont.)**
  4. Full reward must be available to all similarly situated individuals.
    - Must provide reasonable alternative standard (or waiver of standard)
  5. Disclosure of reasonable alternative standard (or waiver) in plan materials describing the wellness program terms.
    - SPD
    - Communications disclosing individual did not meet initial outcomes-based standard

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## HIPAA

- **Why the special treatment for tobacco cessation programs?**
- Several studies that looked at the impact of smoking cessation programs found significantly higher quit rates or less tobacco use. Smoking cessation programs typically offered education and counseling to increase social support.
- Two other studies reported that individuals in the intervention group quit smoking at a rate approximately 10 percentage points higher than those in the control group, and another reported that participants were almost four times as likely as nonparticipants to reduce tobacco use
  - Preamble to HIPAA/ACA rules (June 6, 2013)



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## Test your HIPAA Knowledge

- ABC offers a health plan that costs \$6000/year for self-only coverage. Employees who have used tobacco in the last 12 months and who are not enrolled in the plan's tobacco cessation program are charged a \$1,000 premium surcharge (in addition to their employee contribution towards the coverage). (Those who participate in the plan's tobacco cessation program are not assessed the \$1,000 surcharge.)
  - Permissible under HIPAA?



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## Answer

- Yes. The reward for the wellness program (absence of a \$1,000 surcharge), does not exceed the applicable percentage of 50 percent of the total annual cost of employee-only coverage, \$3,000. ( $\$6,000 \times 50\% = \$3,000$ .)



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## Test Your HIPAA Knowledge

- ABC offers employees a health contingent wellness program with several components, focused on exercise, blood sugar, weight, cholesterol, and blood pressure. The reward for compliance is an annual premium rebate of \$600. In addition to the \$600 reward for compliance with the health contingent wellness program, ABC also imposes an additional \$2,000 tobacco premium surcharge on employees who have used tobacco in the last 12 months and who are not enrolled in the plan's tobacco cessation program. (Those who participate in the plan's tobacco cessation program are not assessed the \$2,000 surcharge.)
  - Permissible under HIPAA?



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## Answer

- Yes. The total of all rewards (including absence of a surcharge for participating in the tobacco program) is \$2,600 ( $\$600 + \$2,000 = \$2,600$ ), which does not exceed the applicable percentage of 50 percent of the total annual cost of employee-only coverage (\$3,000); and, tested separately, the \$600 reward for the wellness program unrelated to tobacco use does not exceed the applicable percentage of 30 percent of the total annual cost of employee-only coverage (\$1800).



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## Test Your HIPAA Knowledge

- ABC is a large, self-insured employer. ABC's plan documents state clearly that any misrepresentation by plan beneficiaries regarding eligibility for benefits shall be subject to recoupment or offset of future benefits. ABC's tobacco cessation program imposes a \$1000/year surcharge on tobacco users unless they enroll in an RAS. Tobacco use is determined by affidavit. Joan lies on her affidavit and states she does not use tobacco. Joan is seen smoking on ABC's premises during work hours. Does ABC have the right to charge her the higher premium?



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## Answer

- Possibly. It depends on ABC's court jurisdiction (some courts have allowed recoupment of overpayments made because of beneficiary representation, and others have not under ERISA s. 502(a)(3)). ABC's plan documents place beneficiaries on notice that recoupment or offset may be possible, which can help bolster ABC's effort to recoup the \$1000 savings from Joan, but ABC will need to consult with legal counsel to determine its chances of success in such recoupment effort.



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## ADA



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## ADA Requirements

- Prohibits discrimination by employers on basis of disability in regard to terms, conditions and privileges of employment.
  - Discrimination includes:
    - Requiring medical examinations; and
    - Making inquiries as to whether employee has disability unless such exam or inquiry is:
      - Job-related and consistent with business necessity
- Must provide equal opportunity for disabled employees to participate in programs and offer reasonable accommodations.



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## ADA Requirements

- Medical exams include:
  - Procedures
  - Tests
- That seek information on an employee's health
- Prohibition applies regardless of whether employee is disabled.



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## ADA Requirements

- Carves out exception for “voluntary” medical exams part of employee wellness program.
  - Pre-EEOC ADA rules, EEOC Enforcement Guidance said wellness program is voluntary as long as employer neither:
    - Requires participation; nor
    - Penalizes employees who do not participate.



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## ADA

- Merely asking about tobacco use falls outside ADA, so HIPAA 50% max reward could apply
  - Asking whether you use tobacco or stopped using tobacco upon completion of a program does not constitute a disability-related inquiry or medical exam.
- Bioscreen for presence of nicotine is a medical exam, so ADA incentive rules apply.



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## Test Your ADA Knowledge

- ABC Company has a tobacco cessation program that requires employees who use tobacco to pay \$1,000 more per year for their health insurance premium (nonsmokers have \$0 premium cost). The total cost of self-only coverage is \$2000/year. To determine whether an employee uses tobacco, ABC asks all employees to fill out a form that asks whether the employee uses tobacco. If the employee states “yes” on the form, the additional premium is charged.
  - Permissible under the ADA?



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## Answer

- Yes. The mere asking of a question about tobacco use does not constitute a disability-related inquiry or medical exam, so the ADA does not apply. However, the HIPAA rules still apply. Because the incentive is 50% of the total cost of coverage, the incentive complies with the HIPAA rules (assuming the other five factors, including RAS, are met).



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## Test your ADA Knowledge

- ABC Company has a tobacco cessation program that requires employees who use tobacco to pay \$1,000 more per year for their health insurance premium (nonsmokers have \$0 premium cost). The total cost of self-only coverage is \$2000/year. To determine whether an employee uses tobacco, ABC asks all employees to get tested for the presence of cotinine. If cotinine is detected, the employee must pay an additional \$1,000 for health coverage.
  - Permissible under the ADA?



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## Answer

- Likely no. The testing for cotinine is considered a medical exam, which is subject to the ADA's voluntary requirement for wellness programs. Paying \$1,000 more on a policy that costs \$2,000 could seem coercive to many employees and thus they may feel like they must undergo the cotinine screening.



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## ACOSTA V. MACY'S



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### Acosta v. Macy's, Inc.

- R. Alexander Acosta is Secretary for U.S. Department of Labor
- Sued Macy's, Inc. and third party administrators of Macy's self-insured health plan for:
  - Not following provider reimbursement rates as provided in plan documents
  - Violating HIPAA/ACA incentive rules for its tobacco cessation program



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## Acosta v. Macy's, Inc.

- Macy's Wellness Program:
- Since 2011, imposed \$35-\$45/month surcharge on:
  - Employees enrolled in health plan who used tobacco products within last consecutive six months; or
  - Employees who have participating dependents who have used tobacco products within last consecutive six months.



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## Acosta v. Macy's, Inc.

- DOL alleged Macy's tobacco cessation program violated HIPAA incentive rules
- 2011 and 2012 plan years:
  - Failed to offer employees RAS and Notice of RAS
  - Only way to avoid surcharge was for employee to declare that all covered members in family remained tobacco free for 6 months



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## Acosta v. Macy's, Inc.

- 2013 plan year, included notice within Tobacco Affidavit
  - Alerted employee to availability of RAS
  - Affidavit said "I understand that the tobacco surcharge will not be changed retroactively and no refunds or credits will be issued."
  - Refusal to refund or credit participants for tobacco surcharge even if met RAS violated HIPAA.
    - Full reward must be available to all similarly situated individuals of wellness program.



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## Acosta v. Macy's, Inc.

- Plan year 2014 participants filled out following "Associate and Dependent Tobacco Designation":
  - \_\_\_ I and/or one or more of my enrolled dependents is/are a Tobacco User.
  - \_\_\_ I and all my enrolled dependents are Tobacco Free.
  - \_\_\_ I and all my enrolled dependents who are not Tobacco Free have completed a reasonable alternative standard during the current plan year to avoid the tobacco surcharge for the current plan year. *I further certify that:* (emphasis added)
  - \_\_\_ I and/or one or more of my enrolled dependents is/are still a Tobacco User, or
  - \_\_\_ I and all of my enrolled dependents are either Tobacco Free and/or no longer using Tobacco products and working towards Tobacco Free status. (emphasis added)
  - \_\_\_ I mistakenly designated Tobacco User status during enrollment and I and all of my enrolled dependents were not a Tobacco User when I enrolled.



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## Acosta v. Macy's, Inc.

- To avoid tobacco surcharge in 2014, participants had to certify that they were either tobacco free or working towards being tobacco free.
- Wellness program did not allow participants to avoid surcharge if they completed RAS.



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## Acosta v. Macy's, Inc.

- Although third parties (Aetna and Cigna) helped administer tobacco cessation program for Macy's, Macy's had ultimate control of wellness program, including:
  - Determining which participants were charged the tobacco surcharge
  - Determining which participants are reimbursed the tobacco surcharge
  - Withholding the tobacco surcharge from a participant's paycheck and placing it in the health plan trust account; and
  - Directing the third parties regarding how completions of the tobacco cessation programs are reported.



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## Acosta v. Macy's, Inc.

- Because of these alleged violations, DOL asking court for following relief (with regard to wellness program violations):
  - to have Macy's stop its violations of HIPAA
  - to reimburse all participants who paid the tobacco surcharge from July 1, 2011 to the present (plus interest)
  - to revise its wellness program to comply with HIPAA wellness incentive rules, to prevent Macy's from collecting tobacco surcharges until it revises its wellness program to comply with the HIPAA rules
  - to disgorge all profits received as a result of its fiduciary breaches, and
  - to pay the costs the government incurred to bring the lawsuit against Macy's.



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## Acosta v. Macy's

- Case update:
  - Macy's moved to dismiss the case in late 2018.
  - DOL has opposed the motion.



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## Acosta v. Macy's, Inc.

- What should workplace wellness programs do in light of Macy's case?
  - Know that Trump Administration willing to enforce workplace wellness rules
  - Realize compliance affects companies of all sizes
  - Offer RAS
  - Issue notices
  - Make sure anyone who completes RAS qualifies for the entire reward for that plan year
  - Review wellness programs for compliance



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## ACOSTA V. DOREL JUVENILE GROUP



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## Acosta v. Dorel Juvenile Group

- DOL sued Dorel Juvenile Group, an employee benefit plan, in September 2018. The lawsuit alleges that Dorel imposed a \$10-\$15/biweekly tobacco surcharge on nonunion employees, and \$2.50/biweekly surcharge on union employees
  - without offering a reasonable alternative standard (RAS)
  - no notice of the availability of the RAS.
- To avoid surcharge, employee must declare that he or she was not a tobacco user.
- Dorel provided free access to the American Lung Association's tobacco cessation program called "Freedom from Smoking."



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## Acosta v. Dorel Juvenile Group

- On 11/28/18, DOL and Dorel Juvenile Group entered into consent order in which Dorel agreed to pay plan participants \$145,635 to replace the monies withheld for the plan's tobacco surcharge wellness program from January 1, 2013 through December 31, 2017.
- DOL assessed Dorel a penalty of \$14,563.50.
- Dorel amended all of its wellness programs to comply with ERISA's requirements for wellness programs, such as offering an RAS and ensuring that those who complete the RAS earn the same reward as nontobacco users.
- Each party agreed to bear their own attorneys' fees, costs and other expenses relating to the lawsuit.



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## LAWFUL PRODUCTS



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### Lawful Products

- Tobacco
- Alcohol
- Prescription Drugs (with proper prescription)
- Hemp-based products (CBD oil)?
- Marijuana?



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## Lawful Products

- Wisconsin Statute:
- **111.321 Prohibited bases of discrimination.** Subject to ss. [111.33](#) to [111.365](#), no employer, labor organization, employment agency, licensing agency, or other person may engage in any act of employment discrimination as specified in s. [111.322](#) against any individual on the basis of age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record, military service, ***use or nonuse of lawful products off the employer's premises during nonworking hours***, or declining to attend a meeting or to participate in any communication about religious matters or political matters.
- (Emphasis added.)



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## Lawful Products

- 18 jurisdictions have enacted "tobacco only" statutes. These include: Connecticut, District of Columbia, Indiana, Kentucky, Louisiana, Maine, Mississippi, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Virginia, West Virginia, and Wyoming.
- 8 states protect the use of lawful products. These are Illinois, Minnesota, Missouri, Montana, Nevada, North Carolina, Tennessee, and Wisconsin.
- 4 states offer statutory protection for employees who engage in lawful activities. These are California, Colorado, New York, and North Dakota
  - From <http://www.ncsl.org/documents/employ/off-dutyconductdiscrimination.pdf>.



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## Other Federal vs. State Law Issues

- Group Health Plan vs. Employer Wellness Incentives
- Employer action with wellness incentives subject to both federal and state law
- Group health plan (self-funded) action with wellness incentives subject to federal law only (ERISA)
- Insured health plans may be subject to state insurance laws
- GHP ≠ EMPLOYER



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## Other Federal vs. State Law Issues

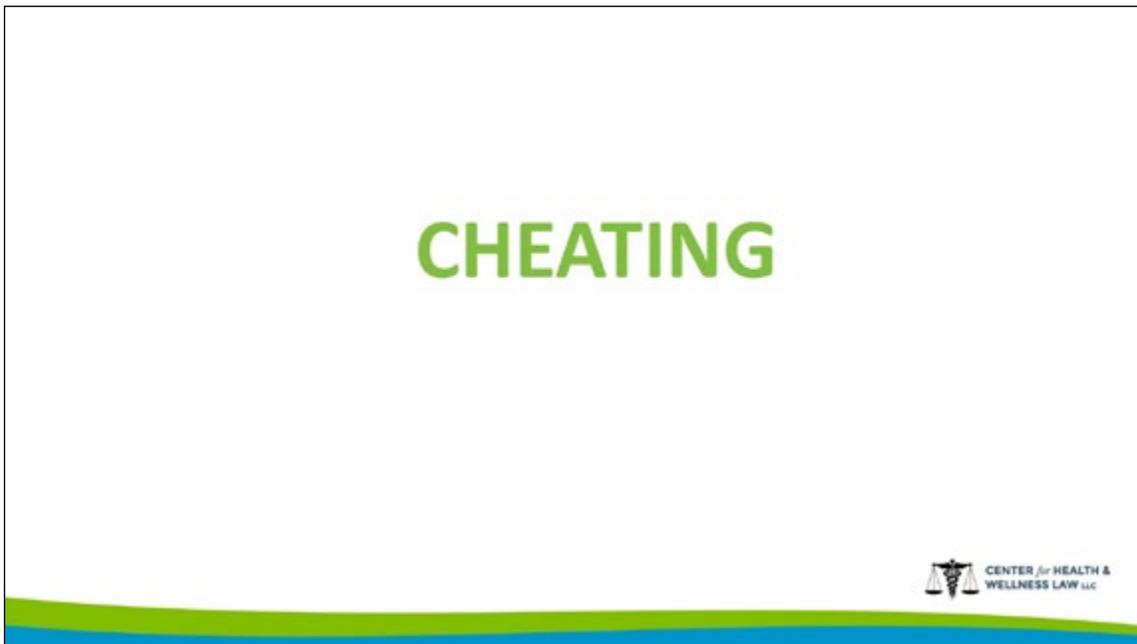
- Premium differentials for tobacco use by group health plan wellness programs should not be subject to state lawful product or lawful activity laws because those laws most often directed to “employer,” not health plans.
- So, whether wellness programs can tie incentives to lawful product use may depend in part whether the program and incentive is part of a group health plan, whether that group health plan is self-funded (and therefore not subject to any state insurance law), or whether the program is an employer-based program.



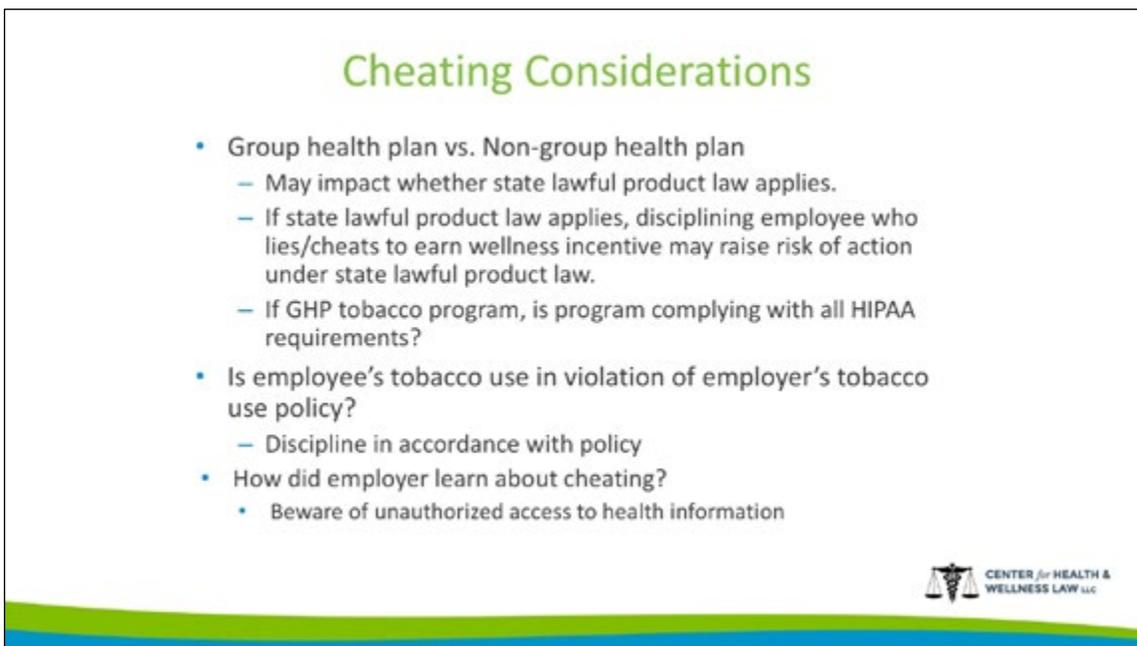
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## Test Your Knowledge on Cheating

- ABC Company offers a tobacco cessation wellness program. Employees who use tobacco must pay an additional \$1,000/yr on their health insurance premium. ABC's wellness vendor, Wellways, administers an HRA and one of the questions is whether the employee uses tobacco. Employees who answer "yes" are assessed the \$1,000 additional premium. An HR employee for ABC suspects that Joan uses tobacco. The HR employee is curious to know whether Joan lied on her HRA about tobacco use. The employee asks WellWays for Joan's HRA answers. Should WellWays give the employee Joan's HRA?



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## Response

- Probably not. Unless ABC administers part of the wellness program and has complied with HIPAA privacy rules regarding plan sponsor obligations to get access to individually identifiable health information, WellWays should not provide the HR employee with the information.



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## Test your Cheating Knowledge

- ABC offers a tobacco cessation program. Employees who use tobacco are ineligible to earn a \$500 bonus. ABC's wellness vendor, Wellways, asks employees to sign an affidavit on whether they use tobacco. Employees who do use tobacco do not get the \$500 bonus. An HR employee for ABC suspects that Joan, an employee, uses tobacco because she smells like smoke. The HR employee believes Joan lied about tobacco use and decides to recoup the \$500 bonus through Joan's paycheck. Joan lives in Wisconsin.
  - What is the legal risk for the HR employee's actions?



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## Answer

- If Joan did not violate any workplace tobacco policy (such as smoking in nondesignated areas during work time), offering nonsmokers more compensation than smokers could be in violation of the state lawful product use law, as that is arguably discriminating against individuals who are using lawful products off premises and during nonworking hours. Also, the HR director should consider whether Joan has any underlying disability or other protected classification that could be protected under the ADA or some other civil rights law, especially if the HR director is singling out Joan and not anyone else.



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## Q&A REMINDER

The following Q&A session does NOT constitute legal advice and should not be used as such. It is for educational purposes only.

WELCOA Members should retain legal counsel to obtain definitive answers.



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## Questions?

- For more information, contact:  
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