

# Health Promotion Program Legal Update: 2019 (November 20, 2019)

Barbara J. Zabawa, JD, MPH

## Health Promotion Program Legal Updates

November 20, 2019



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## Civil Rights and Diversity and Inclusion in Workplace Wellness Program Design

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## Agenda

- Civil Rights Background
- Q&A Session with Michelle Spehr
- Q&A with Attendees



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## CIVIL RIGHTS LAW



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## ADA

- Prohibits employers from discriminating against individuals who have, had **or perceived to have** a disability as to terms, conditions, privileges of employment.
- “Terms, conditions, privileges” can include wellness program participation.



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## ADA

- Disability is a physical or mental impairment that substantially limits one or more major life activities:
  - Caring for oneself      Bending
  - Performing manual tasks      Speaking
  - Seeing      Breathing
  - Hearing      Learning
  - Eating      Reading
  - Sleeping      Concentrating
  - Walking      Thinking
  - Standing      Communicating
  - Lifting      Working



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## ADA

- Disabilities can include:
  - Depression
  - Anxiety
  - PTSD
  - Panic attacks
- Some states have found obesity to be protected by disability discrimination laws.
  - State of Washington case found obesity to be a disability protected under the Washington Law Against Discrimination.



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## ADA

- Reasonable accommodations include:
  - Work environment modifications/adjustments
- Use ADA requirements to proactively design wellness programs that accommodate all abilities



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## Other Civil Rights Laws

- Prohibit discrimination in employment of "protected classes."
- Title VII
  - Gender
  - Race
  - Ethnicity
  - National Origin
  - Religion
- ADEA
  - Age 40+



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## Other Civil Rights Laws

- To help employer avoid liability from civil rights laws, workplace wellness programs should be mindful of disparate impact theory.
- Disparate impact theory: the employer has a policy, practice or rule which on its face appears neutral, but adversely and disproportionately affects members of a protected class of employees or job applicants as opposed to non-class members.



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## Civil Rights Law

- Studies show racial/ethnic minorities, particularly African Americans, have a greater risk of developing chronic conditions involving lifestyle factors, such as heart disease, high blood pressure, and diabetes, compared to non-Hispanic whites.
- Racial/ethnic minorities are less likely to be physically active in later life compared to non-Hispanic whites.
- Studies also suggest that whether someone adopts a healthy diet may also be tied to race.
- These disparities are often the result of environmental and social issues outside an individual's control.



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## Civil Rights Law

- Questions to ponder:
  - If wellness programs reward individuals for healthy measures or behavior, and studies indicate that protected classes are less likely to achieve those measures or behaviors, are workplace wellness programs discriminating against these protected classes on the ground of disparate impact theory?
  - Are these groups indirectly being penalized through workplace wellness programs, and are these penalties (higher premiums, lower pay, fewer benefits) in violation of the civil rights laws?



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## State Law

- 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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## Q&A WITH MICHELLE



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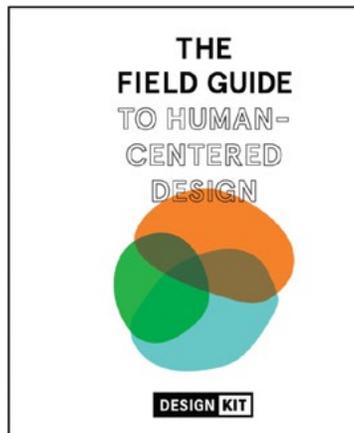
## Q&A with Michelle

- What sparked your interest in this topic?



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## Limitations of Detect and Correct Approach



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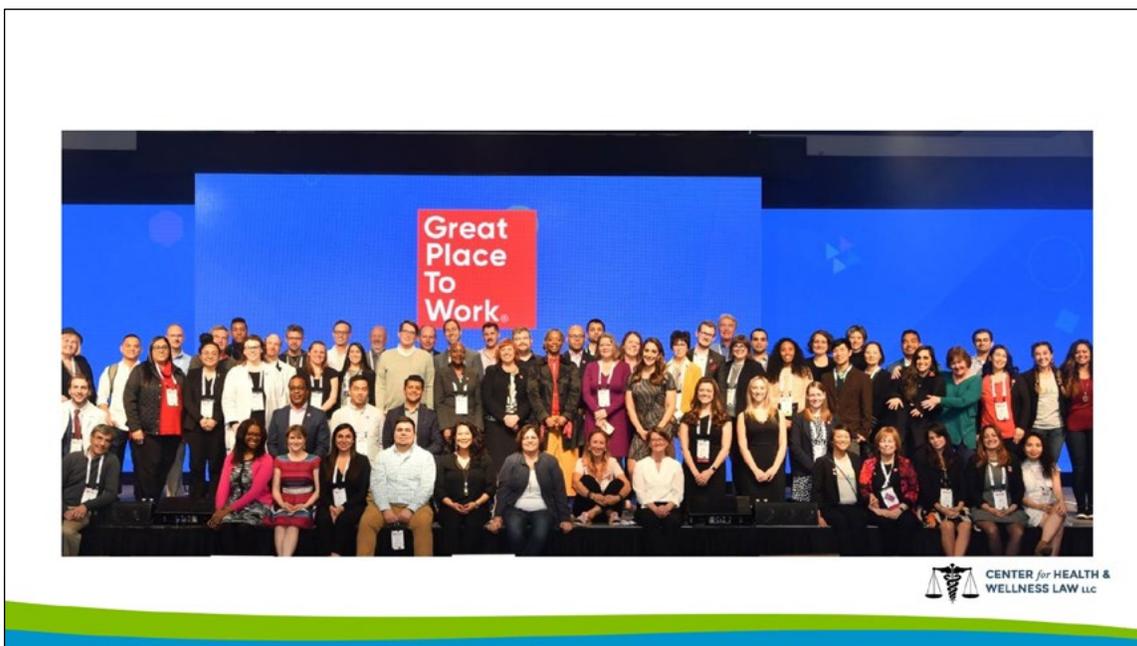
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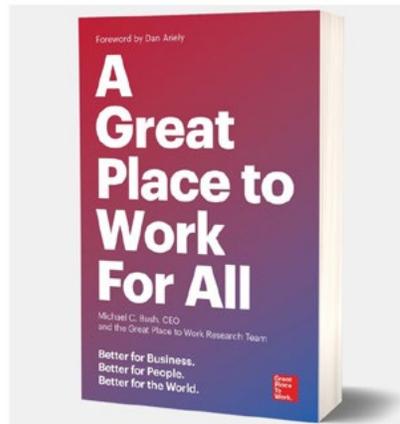
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Three years ago Great Place to Work added “FOR ALL” to our mission, our methodology, and our Summit name because we needed a way to emphasize that we aren’t in business to make work great for some – we mean everybody.

– Michael C. Bush, CEO



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## Q&A with Michelle

- What are some examples of things workplace wellness professionals do that may be well-intentioned, but inadvertently excludes, is unwelcoming, or even harmful to employees?



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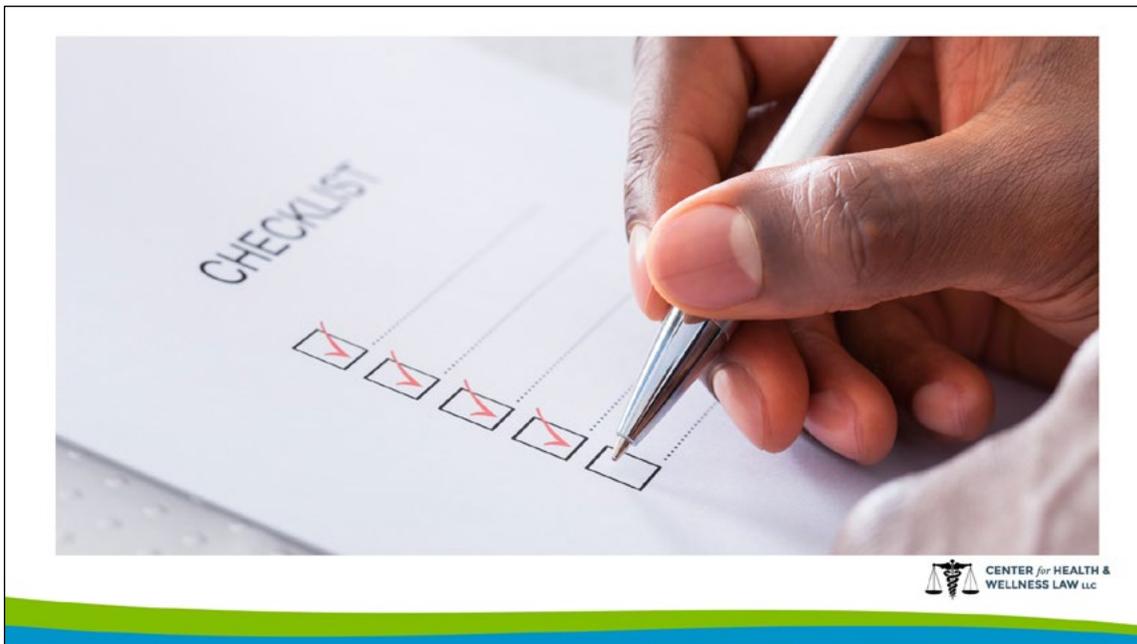


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## Q&A with Michelle

- How might wellness practitioners improve the inclusiveness of their wellness initiatives?



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## Get Comfortable with Being Uncomfortable



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## Assess Your Biases. Take the Implicit Association Test

**PROJECT IMPLICIT SOCIAL ATTITUDES**  
Log in or register to find out your implicit associations about race, gender, sexual orientation, and other topics!

E-mail Address  **LOGIN** **REGISTER**

Or, continue as a guest by selecting from our available language/nation demonstration sites.

United States (English)  **GO!**

**PROJECT IMPLICIT HEALTH**  
Find out your implicit associations about exercise, anxiety, alcohol, eating, marijuana, and other topics! **GO!**

**PROJECT IMPLICIT FEATURED TASK**  
Click here to be directed to a random topic from our task library. **GO!**

<https://implicit.harvard.edu/implicit/>



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## Key Considerations

- Who cannot **access** this space or program?
- Who does not see themselves **represented** positively in this space or program?
- Who might not feel **welcome** in this space or program?



Source: Adapted from Ragen Chastain, [www.SizedForSuccess.com](http://www.SizedForSuccess.com)



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## Design Forms for Gender Diversity and Inclusion

- |   |  |
|---|--|
| <ul style="list-style-type: none"><li>• What is your sex?<ul style="list-style-type: none"><li>• Male</li><li>• Female</li><li>• Not listed</li><li>• Prefer not to say</li></ul></li></ul> | <ul style="list-style-type: none"><li>• What is your gender?<ul style="list-style-type: none"><li>• Woman</li><li>• Man</li><li>• Non-binary/ third gender</li><li>• Prefer to self-describe</li><li>• Prefer not to say</li></ul></li></ul> |
|---|--|

Source: Special thanks Lauren Franklin from Limeade for permission to share examples above.



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## Seek Out Diverse Immersion Experiences to Expand Your Worldview

- Partner with diversity and inclusion programs
- Participate in community volunteering Events
- Learn about foods from different cultures
- Practice communicating across language barriers
- Try to experience the challenges of having a disability
- Talk to people of different dimensions of diversity to learn more about their life experiences

Source: *Making sure the WE in Wellness Includes Everyone*, Shary Tran, Froedtert Health, WCWI Annual Conference Breakout Session, September 12, 2019



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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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## Q&A SESSION



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## Questions?



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