

# Health Promotion Program Legal Updates

Webinar Q&A: January 15, 2020

The following questions were submitted during WELCOA's *Health Promotion Program Legal Updates* webinar session that aired on **January 15, 2020**. 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.**

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- 1. In terms of the 5 factors. We offer a reimbursement for employees who participate in a weight loss program, such as Weight Watchers. We do have a requirement that they are have a BMI over a certain amount so that someone who is at a healthy weight does not become unhealthy. The employees must also reach a reasonable goal within a time limit. Would this program be in compliance?**

This is a health contingent program that needs to meet the 5-factor test, assuming HIPAA applies. Legal counsel should review your program for compliance.

- 2. Can an employer target and reach out specifically to employees who self-report as tobacco users about the reasonable alternatives?**

Under the HIPAA rules, the availability of a reasonable alternative standard should be communicated in all plan materials that inform employees of their ineligibility for a reward. This communication should be in writing as part of the notice required by HIPAA. I strongly suggest working with legal counsel to ensure that your notice is in compliance, or if it needs to comply with HIPAA at all.

- 3. Is not qualifying for a premium discount the same as a surcharge?**

Yes. Reward means both a positive or negative benefit.

- 4. Regarding the Reasonable Alternative Standard for the Nicotine Surcharge does the physician option need to be a part of the RAS or can just the Nicotine Cessation Program information be adequate. Do both options need to be provided?**

For health contingent programs, there should always be an option for the employee to use the advice of his/her physician as a second alternative.

- 5. In the tobacco example, would it be permissible to have one reward tied to the tobacco use status of the entire household? For example, if anyone in the employee's household uses tobacco, the surcharge is applied?**

It would depend on the amount of the reward and whether the household could obtain the reward through a RAS. It is probably a good idea to work with legal counsel to make sure this initiative is compliant.

- 6. Is there a template for tobacco cessation that is compliant?**

Please check the preamble to the June 2013 rules under HIPAA for a sample notice.  
<https://www.govinfo.gov/content/pkg/FR-2013-06-03/pdf/2013-12916.pdf>



Q&A responses provided by  
**Barbara J. Zabawa, JD, MPH**  
Attorney/President  
The Center for Health Law Equity, LLC