

Health Promotion Program Legal Updates

Webinar Q&A: April 21, 2021

The following questions were submitted during WELCOA's *Health Promotion Program Legal Updates* webinar session that aired on **April 21, 2021**. 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 a Broker donates a \$50 gift card to their client for the purpose giving it as a prize for a wellness challenge, is the broker is responsible for reporting the tax?**

It depends on the level of involvement. If the broker's involvement is more than "ministerial," then yes, the broker may be responsible for filing tax-related documents.

2. **If the employer is using a vendor to administer the wellness program/incentives but the employer is providing the funding for the rewards, who is responsible for reporting taxes? What if the vendor is providing a portion of the reward funding? What if the reward funding is being funded by a wellness credit from the carrier?**

It all depends on the level of involvement in the administration of the wellness program. If involvement is "ministerial," then the vendor would not be responsible for any tax reporting obligations. If the vendor had greater than ministerial involvement, then they would.

3. **When talking about a third party or insurance company offering a voluntary participatory wellness rewards program, if the third-party notes that this could be taxable through their employer group, does this relieve them of risk?**

No. The obligation stems from the level of their involvement with wellness program administration. Of course, the third party and employer may delegate tax reporting responsibilities via contract, but without a written agreement as to who is responsible for what, it will depend on level of involvement. See answers to previous questions.

4. **In the case of a tobacco surcharge, where an employee completes the RAS mid plan year, are the premium reductions that are reimbursed at the non-tobacco user rate back to the start of the plan year taxable?**

Assuming the premium is paid with before tax dollars, according to the IRS guidance, any employer reimbursement of premium dollars already paid is taxable.

5. **How would InsureYou in your last example, be able to tax the participants of the program.**

The tax obligations is about reporting the incentive amounts as income on the Form W-2 for the employees so that they can in turn report those incentives as taxable income to the IRS.

6. **With the "Tax Withholding Responsibility" slide, is it also true that the "employer" or TPA also has a responsibility to pay the "employers" portion of tax?**

The TPA should treat the incentive amount as they would any other employee income for tax purposes.

7. **Can you offer an incentive to a specific program such as a Diabetes Management program? I would think yes, because it's offered to all similarly situated employees, i.e. all that have Diabetes are eligible.**

Yes, this is considered benign discrimination by the US Department of Labor. See [Exception for benign discrimination](#): The nondiscrimination rules do not prohibit a plan from establishing more favorable rules for eligibility or premium rates for individuals with an adverse health factor, such as a disability. See [29 CFR 2590.702\(g\)](#).



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