

Health Promotion Program Legal Updates

Webinar Q&A: September 15, 2021

The following questions were submitted during WELCOA's *Health Promotion Program Legal Updates* webinar session that aired on **September 15, 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. **What dollar amount was used as incentive/disincentive? We have a lot of people who think our reward isn't worth the effort?**

Heather: The dollar amount varies for our clients based on the total cost of coverage and what helps the employee feel valued. We've found that with the right communication, the amount of the reward isn't as important as the form or the way it is provided.

2. **In Case #4: How can you focus on changing the culture through recruitment without being discriminatory? Are they not hiring people who are overweight? How are you guiding them in recruiting to change the culture?**

Heather: We have been mostly involved with this client from a benefits strategy perspective and have had limited ability to impact their overall culture. I have provided feedback regarding recruitment efforts and the importance that an inclusive culture plays in attracting and keeping talent on staff. I am not privy to their hiring practices but would strongly discourage any practices that discriminate against a person based on perceived health risks.

3. **What is the formula to determine if the reward is out of compliance?**

Barbara: It depends on what the reward is tied to. If tied to answering disability-related questions (HRA) or undergoing a medical exam (biometric screen), the reward must meet the ADA "voluntary requirement." If not tied to an HRA or biometric screen, and the wellness program is a group health plan wellness program, then the reward can be no more than 30% of the total cost of coverage (or up to 50% for tobacco related programs).

4. **Does the reasonable alternative need to be available throughout the whole year?**

Barbara: Yes, for those employees who have not yet attempted to earn it.

5. **Similar to a tobacco surcharge, if employers are offering a non-vaccinated surcharge, if the employee completes the RAS (for example, being tested once/week or wearing masks), do they avoid the surcharge? If they comply one week and not the next, can an employer adjust a surcharge on a regular basis?**

Barbara: Under HIPAA, the full reward must be available to all similarly situated employees at least once per year. If you adjust the surcharge for one, you would likely need to adjust for all. Hopefully the DOL will issue more clear guidance with regard to the COVID19 vaccine mandate.

6. **It's my understanding that you can set a reasonable alternative completion date (i.e., 90 days to complete a tobacco cessation program) in order to qualify for the reward, including rebated higher rate. Is this correct?**

Barbara: As long as the RAS is reasonable, it should comply with HIPAA wellness incentive rules.



Q&A responses provided by
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7. You said that the RAS needs to be available all year long yet then you said you can put a deadline in for completion. Can you clarify?

Barbara: See response to #3.

8. So, to clarify the non-vaccine question, if they complete the RAS, they avoid the surcharge, correct?

Barbara: Yes.

9. Would being tested weekly have to be paid for by the employer?

Barbara: Not sure. Hopefully OSHA will answer that.

10. In the face of the OSHA mandate, can an employer suspend any reward/surcharge associated with vaccine compliance?

Barbara: This is probably best answered by your legal counsel, as there may be other risks involved with suspending the surcharge. Contact www.wellnesslaw.com. if you need help.

11. Do they need to complete the RAS (e.g., mask wearing) every work day all year long to avoid the surcharge?

Barbara: More context is needed for this question. What is the surcharge for? Is that the written policy by the employer.



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