

DESIGNING LEGALLY COMPLIANT

Wellness Programs



AN EXPERT INTERVIEW WITH BARBARA J. ZABAWA

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DESIGNING LEGALLY COMPLIANT WELLNESS PROGRAMS

with

BARBARA J. ZABAWA

ABOUT **BARBARA J. ZABAWA, JD, MPH**



Barbara J. Zabawa, JD, MPH, owns the Center for Health & Wellness Law, LLC, a law firm dedicated to helping individuals and organizations interested in advancing wellness and population health. Before graduating with honors from the University of Wisconsin Law School, she obtained a Master in Public Health Degree from the University of Michigan. Immediately prior to starting her own firm, she was Associate General Counsel and HIPAA Privacy Officer for a large health insurer where she advised on Affordable Care Act matters. She was also a shareholder and Health Team Leader at a large law firm. Barbara was named 2011 Wisconsin Up and Coming Lawyer and has been at the helm of health care reform in Wisconsin. Barbara is a frequent writer and speaker on health and wellness law topics. Her law practice has successfully represented the interests of health and wellness providers at the state and national level. She is licensed to practice law in both Wisconsin and New York.

ABOUT **RYAN PICARELLA, MS, SPHR**



As President of WELCOA, Ryan works with communities and organizations around the country to ignite social movements that will improve the lives of all working people in America and around the world. With a deep interest in culture and sociology, Ryan approaches initiatives from a holistic perspective that recognizes the many paths to well-being that must be in alignment for long-term healthy lifestyle behavior change. Ryan brings immense knowledge and insight to WELCOA from his background in psychology and a career that spans human resources, organizational development and wellness program and product design. Prior to joining WELCOA, Ryan managed the award winning BlueCross BlueShield of Tennessee (BCBST) Well@Work employee wellness program, a 2012 C. Everett Koop honorable mention awardee. Since relocating to Nebraska, Ryan has enjoyed an active role in the community, currently serving on the Board for the Gretchen Swanson Center for Nutrition in Omaha. Ryan has a Master of Science in Industrial and Organizational Psychology from the University of Tennessee at Chattanooga and a Bachelor of Science in Psychology from Northern Arizona University.

Barbara Zabawa, JD, MPH, who specializes in wellness law, sits down with Ryan Picarella to discuss the reasons why the majority of wellness programs are not legally compliant. Keep reading to learn how you can avoid the number one legal pitfall that has gotten other programs in trouble.

★ **RYAN PICARELLA** Tell me a little about your career and how you ended up specializing in healthcare law—specifically focusing on employee wellness.

BARBARA ZABAWA After undergrad I was fortunate to win a one-year international fellowship to focus on an area of interest of my choice. I chose to explore workplace health promotion in England, Sweden and The Netherlands. I was able to visit some incredible companies and researchers that were involved in employee health promotion and organizational development. What struck me even back then was the disparity in health promotion offerings between groups of employees. After returning to the U.S., I attended the University of Michigan School of Public Health and earned an MPH. One of my advisors encouraged me to go to law school, which I did at the University of Wisconsin Law School. Because of my MPH, I gravitated toward practicing health law, which typically addresses regulatory compliance issues for health care providers such as hospitals and physicians. I became shareholder and led my firm's health law team, but I felt a void in my purpose. After a brief stint as Associate General Counsel for a major health insurer in Wisconsin, I found wellness law and opened my own firm, the Center for Health & Wellness Law, LLC. My career has come full circle and I am now back to helping advance employee health promotion and overall population health, but this time as an experienced lawyer.

★ **RP** With the introduction of the ACA, wellness programs gained a lot of attention. How has the legal landscape of wellness programs evolved over the last several years?

BZ With the growing popularity of financial incentives, I think the legal landscape has become a bit more complex and unsettling for groups implementing workplace wellness programs. There are numerous federal and state laws that impact workplace wellness programs and not all of them have clear guidance from the agencies that enforce those laws. It is becoming increasingly important for organizations to include legal compliance as part of their workplace wellness program design to not only prevent any lawsuits, but to instill confidence in the program for all participants.

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★ **RP** What do you think the future holds for the ACA?

BZ Though it is still criticized on many fronts, I view it as a vehicle for change that needs to occur. Even if the vehicle is broken down, the message it is carrying will still be there. That message includes a need to curb health care spending and start paying for value instead of volume; to improve health outcomes and to eliminate waste in the system. Those are nonpartisan issues that I think will stick no matter what happens to the ACA in the end.

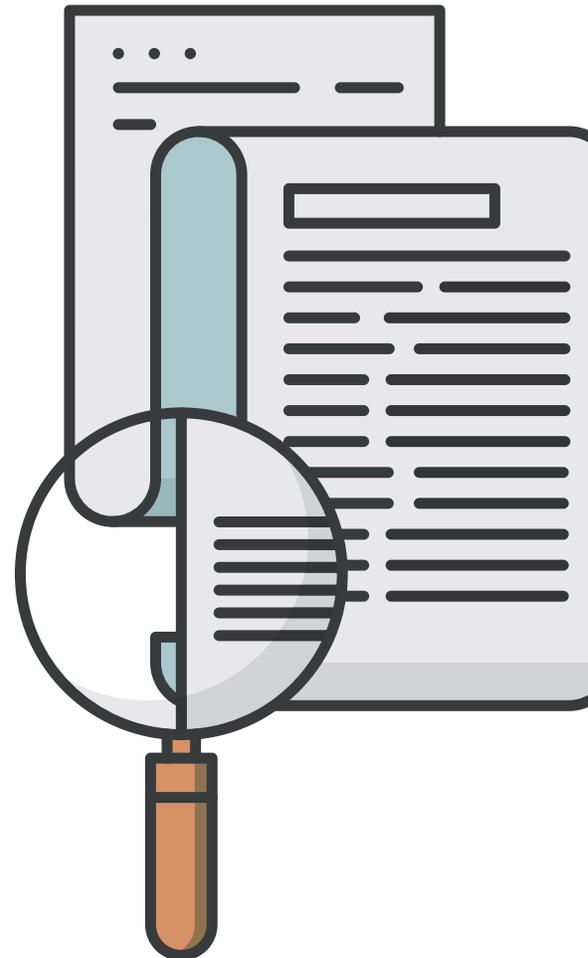
★ **RP** How would you begin to develop a wellness program given your experience in the space?

BZ I would start with appointing a diverse team of individuals throughout the company to review the company’s values statement. The values statement is the foundation for any sincere and effective compliance strategy. If there isn’t a company values statement, the team should create one. If one already exists, you should review it and determine if/how corporate compliance and employee wellness fits within the values statement. If the values statement supports overall corporate compliance and employee wellness, then I would use that values statement as the foundation for creating the wellness program, which should include complying with the various laws, as well as employing WELCOA’s Seven Benchmarks™. If the company does not have a values statement at all or does not have one that supports corporate compliance or employee wellness, I would encourage the team to discuss values such as corporate integrity, employee investment, community responsibility, efficiency, cooperation, customer satisfaction, long-term value on investment, creativity, and ingenuity. These values align with designing effective wellness programs as well as creating a compliant environment. Without a solid foundation of a values statement that has leadership support, it will be more challenging to achieve a culture of wellness and compliance.

★ **RP** In your experience consulting with organizations, do you think that the majority of corporate health promotion programs are legally compliant?

BZ Given the number and complex interrelationship of the various laws that impact workplace wellness program design, no, I do not think the majority of corporate health promotion programs are legally compliant. In my experience, very few corporate health promotion programs incorporate legal compliance as part of their design strategy. It is my mission to change that and to help make workplace wellness law more accessible and friendly.

“The values statement is the foundation for any sincere and effective compliance strategy.”



★ **R P** Why do you think there is so much confusion about how to create legally compliant health promotion programs?

B Z Because of the lack of clear guidance from the EEOC and because there is a shortage of legal resources available to the workplace wellness industry. To date, there is no organized effort from the legal industry to stay on top of the multiplying needs of the workplace wellness industry. It is incumbent upon the legal industry to fill this void and I fully intend to do my part through education, advocacy and publishing accessible materials. As for the EEOC, it has promised to provide further guidance in 2019 since vacating the wellness incentive rules under the Americans with Disabilities Act (ADA) and the Genetic Information and Nondiscrimination Act (GINA).

★ **R P** What do you think are the biggest obstacles or hurdles for wellness practitioners to overcome when designing their wellness programs?

B Z Creating a supportive culture for a results-oriented wellness program. As noted above, a company values statement that supports not only employee wellness but corporate compliance is the foundation for successful programs. Without that solid foundation, wellness programs can often only scratch at the surface of success. It is striking how similar effective workplace wellness program design is to effective corporate compliance programs. Both programs need leadership buy-in, creation from a diverse group of individuals within the company, a written plan and a supportive environment in order to thrive.

★ **R P** What do you think is the most misunderstood legal guideline that wellness practitioners are trying to navigate?

B Z Whether any incentives can be tied to health information collection activities. As of January 1, 2019, the EEOC vacated the 30% incentive maximum that employers could use to encourage employee participation in health information collection activities such as health risk assessments or biometric screens. Without any solid guidance from the EEOC about the amount of incentives employers can use to encourage health information collection, employers are left with the statutory requirement that any health information collection must be part of a “voluntary” wellness program. What qualifies as voluntary is subjective and can differ among employees. This makes creating a compliant incentive structure more challenging. Nevertheless, when vacating the 30% incentive language from the ADA and GINA rules, the EEOC left other references to “inducements” and “incentives” in those rules. This suggests that the EEOC may permit some incentive amount to be tied to health information collection activities, but that incentive amount should be less than 30% of the total cost of self-only coverage. The court in the AARP v. EEOC case found that a 30% incentive amount may feel coercive to many employees, especially those with lower incomes.

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★ **RP** What advice would you have for a health promotion practitioner who wants to ensure legal compliance with their wellness program?

BZ To not be afraid of the law but instead use it as a tool to help you develop your wellness program. One of my primary goals is to shift the paradigm of legal compliance from an afterthought to a tool to be used as part of the design process. The law can be very helpful in helping health promotion practitioners remember different segments of employees. Remembering the special circumstances of diverse employee populations, such as those with different belief systems, those with disabilities, those who are older, those who may struggle financially or personally with life events, can help health promotion practitioners develop programs that are more accessible to all employees and more sensitive to their unique situations. If you use the law in this way, compliance will come more naturally.

★ **RP** Tell me about an organization you have worked with to achieve legal compliance. What did you do? What happened as a result?

BZ Over the years, I have helped numerous clients achieve legal compliance with various initiatives. One instance that stands out for me is the work I did for a large company that had a very passive approach to compliance that spread throughout the organization. A big part of the problem was lack of leadership and ownership for the compliance issue. Just as leadership buy-in is key for workplace wellness program development, it is also key for compliance. So, one of the first actions I took was to meet with leadership about the issue and to stress the importance of compliance on this issue. I tied compliance to the potential for financial penalties as well as an issue that could undermine the organization's desire to be perceived as a leader in the community. The leaders agreed that the compliance issue was important and helped organize middle management meetings to help spread the message. We organized a committee of individuals from across the company to take ownership of the issue and to monitor progress. The leadership buy-in and creation of a body to own the issue persuaded others within the organization to take compliance more seriously as well. In essence, though I didn't know it at the time, I was incorporating a number of the WELCOA Seven Benchmarks in my approach to achieve compliance.

★ **RP** Do you have any concerns about the future of wellness programs in this country?

BZ Not at all. Researchers have been discussing the growing prevalence of workplace wellness programs since the 1980s. Workplace wellness programs have evolved since then, but they are not going away. For most companies, employees

“Until we receive some clear guidance from a court, the EEOC or Congress, there will continue to be questions on how to structure legally compliant health assessments and biometric screens.”



continue to be the most valuable asset. As a result, creating an environment that bolsters employee productivity, recruitment and retention will continue to be a priority for most companies. Workplace wellness programs are part of creating such an environment. It is up to the health promotion community to convince companies to rank workplace wellness programs high among employee benefits.

★ **RP** What can a health promotion professional do right now to begin improving wellness program compliance with their own or client organizations?

BZ Learn about the law and get proactive about the law. To learn about the law, attend WELCOA's monthly webinar series on workplace wellness program compliance. Subscribe to my firm's monthly newsletter, which can be done through my firm's website at cfhle.com/wellnesslaw.com (scroll to the bottom and enter your information to get on the email list). Invite me to speak to your organization or review your program for compliance. Be open to viewing the law as a tool for designing or redesigning your wellness program. My book, *Rule the Rules on Workplace Wellness Programs* is another resource. Finally, I encourage WELCOA members to follow me on social media, as I post quite a few items that may be of interest to members. My Twitter handle is @wellnessatty. My LinkedIn profile is linkedin.com/in/barbarazabawa/. And my Instagram handle is @wellnessattorney. My firm is also on Facebook at facebook.com/CenterforHealthandWellnessLaw/.

★ **RP** What advice would you give to someone with limited legal knowledge in the throws of developing or evolving their wellness program?

BZ To remember that most laws impacting workplace wellness programs have two goals in mind: 1) to prevent discrimination against people with disabilities (real or perceived), medical conditions, religious beliefs, genetic predispositions, and age considerations; and 2) to provide equal opportunities for those folks to enjoy and benefit from the workplace wellness programs regardless if any incentives are offered. If you remember those two things and try to develop your wellness program to accommodate those two goals, you are well on your way to designing a legally compliant wellness program. 🏆

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