Center for Health and Wellness Law, LLC

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Center for Health & Wellness Law, LLC

It's Tax Season! Is Your Wellness Program Meeting Reporting Obligations?"

Few people enjoy reading or talking about tax issues, but they do arise in workplace wellness programs, particularly when those programs offer incentives. If your wellness program offers cash or cash equivalent incentives (such as gift cards), premium reimbursements or other incentives, this blog post is for you.

Generally speaking, expenses for "medical care" are not subject to income tax or federal withholding. IRC s. 213. There is a long history as to why that is, but for purposes of this blog, let's just say that Congress made the decision a long time ago. What constitutes "medical care" are expenses for the diagnosis, prevention or treatment of a specific defect. That means that most wellness expenses are not medical care expenses because those expenses generally relate to the general improvement of one's health (unless you can show that the wellness expenses were to treat a specific disease, which might happen with some disease management programs).

As a result, employer incentives for wellness expenses are most often subject to income tax. That means gym membership reimbursements, weight loss program reimbursements, cash or gift cards are likely subject to tax. So are premium reimbursements in many cases. That is, if an employer "rewards" an employee for meeting a wellness goal by reimbursing part of that employee's health insurance premium, that reimbursement must be reported as income and is subject to tax. This was made clear by the IRS in a memorandum it released in April 2016. Thus, even though the original premium paid by the employee may have been excluded from income tax (i.e., paid with pre-tax dollars in a cafeteria plan), an employer's reimbursement of those premium payments is subject to income tax withholding.

There is a relevant exception to taxable wellness incentives: de minimis incentives. See IRC s. 132(a)(4). These incentives include awards such as t-shirts, certain event tickets, healthy snacks, water bottles and the like. Because these awards are so small, employers do not need to account for it at tax time. The IRS has determined previously that items with a value exceeding $100 could not be considered de minimis, even under unusual circumstances.

Another relevant exception is wellness rewards consisting of employer contributions to health Flexible Spending Accounts (FSAs), Health Reimbursement Accounts (HRAs) or Health Savings Accounts (HSAs). To qualify for this tax exemption, the employer must meet certain

requirements, such as nondiscrimination and cafeteria plan rules, which can be quite complex and beyond the scope of this blog.

Who is Responsible for Reporting the Wellness Benefit on a W-2 and Withholding Tax?

Even if an employer uses a third-party wellness vendor to administer the wellness program, it is typically the employer's responsibility to report the wellness incentive as income on the employee's W-2 and withhold all appropriate income tax. However, there may be instances when a third party (such as a health insurer for an insured group health plan) administers a wellness program that provides a taxable incentive (e.g., cash or a gift card), and the third party is actually deemed the "statutory employer" for purposes of complying with related income and employment tax withholding and Form W-2 reporting responsibilities (in contrast to the general rule that imposes these obligations upon the common law, or "true," employer). IRC § 3401(d).

Whether an insurer or other third party constitutes the statutory employer for this purpose is very fact-specific, and generally turns on which entity has "control of the payment" of the taxable reward or incentive (i.e., which party determines when an employee is eligible for the incentive, provides funding for the incentives, etc.). If the third party's role with regard to the incentive is more ministerial and the real decision-maker with regard to who qualifies for the incentive as well as who funds the incentive lies with the employer, then the third party generally would not have any related withholding or reporting obligations. In those cases, the common law employer would have the obligation to comply with the relevant requirements.

So, if you are a wellness vendor charged with decision making authority on who qualifies for an incentive and you distribute that incentive, then you may have the obligation to report the incentive as income on an employee's W-2 and to withhold appropriate income tax. It may be a good idea to consult with a tax lawyer or accountant to confirm your reporting and withholding obligations.

Don't Forget – Small Employers May Now Subsidize Individual Health Insurance for Employees!

The 21st Century Cures Act allows small employers (those with fewer than 50 employees) to offer employees a pre-tax Health Reimbursement Account to help employees pay for individual health insurance premiums on the individual insurance market. That is, starting January 1, 2017, small employers can deposit money into an account, pre-tax, that employees can use to pay for individual health insurance. Before the Cures Act, no employer could offer this benefit without also offering comprehensive health benefits that met Affordable Care Act standards. Now, employers who don't offer health insurance can at least offer their employees some financial help in affording individual health insurance.

To learn more, contact the Center for Health & Wellness Law, LLC.

EEOC v. Flambeau Case Update

Just over a year after the US District Court in the Western District of Wisconsin decided in favor of wellness programs that require employees to pay 100% of their health insurance premium if they refuse to participate in an HRA or biometric screen, the US Court of Appeals for the Seventh Circuit in Chicago let that decision stand. Recall that the EEOC appealed the district court's decision to the Seventh Circuit and that during oral argument before the panel of appellate judges, the judges inquired as to whether the employee suffered any injury in the case.

On January 25, 2017, the Seventh Circuit issued its opinion in the case and not surprisingly, based on the judges' comments at oral argument, decided that there was no injury to the employee and therefore the case is moot. The Flambeau employee who brought the original complaint against his employer for requiring him to take the HRA and biometric screen had resigned his position in March 2014, six months after the EEOC filed its lawsuit against Flambeau. The court concluded that, given the circumstances, the employee was not entitled to any monetary damages and the legal and factual landscape has changed since 2012 (when Flambeau's wellness program required employees to take HRAs and biometric screens).

Now, we have the EEOC regulations issued in May 2016 and Flambeau no longer requires HRAs and biometric screens as part of its wellness program. Indeed, the Seventh Circuit noted that Flambeau halted the mandatory HRAs and biometric screens in part because it found that its employees were not using the test results to change their behavior. Opinion, at 12.

Because the Seventh Circuit found the case moot, it did not address the legal question of whether the ADA insurance safe harbor can apply to workplace wellness programs. Applying the insurance safe harbor would allow wellness programs to "require" employees who were part of an employer's health plan to take HRAs and biometric screens or face paying the full health insurance premium.

The Seventh Circuit's decision to not weigh in on that legal question means that the District Court's analysis of the insurance safe harbor within the ADA still stands. Which, as I mentioned in a previous blog post, was the opposite conclusion reached by the Orion Energy court last fall. Which means that using the ADA insurance safe harbor for workplace wellness programs is risky and in violation of the EEOC ADA rules. So until you hear differently, don't rely on the ADA insurance safe harbor for your wellness program.

Barbara Zabawa from Center for Health & Wellness Law to Present at the American Heart Association Workplace Wellness Symposium!

The Symposium will take place in the Chicago area on April 11, 2017.

Register Now for the 2017 WELCOA Summit and Pre-Conference, August 28-30th in Omaha, NE!

Barbara Zabawa, JD, MPH from the Center for Health and Wellness Law, LLC will be conducting a pre-conference session on Wellness Compliance. See the full agenda and information on how to register, here.

Center for Health and Wellness Law, LLC

Are You a WELCOA Member? Sign Up for My Monthly Legal Update Webinars Starting January 2017!

The Center for Health and Wellness Law, LLC has teamed up with WELCOA to offer WELCOA members monthly legal update webinars. Each month the webinars will explore a different wellness compliance issue, leaving plenty of time for questions and answers to wellness compliance questions from attendees. Don't miss this great opportunity to stay on top of wellness compliance issues! You can learn more and register here.

Interested in receiving a full day of workplace wellness compliance training?
UW-Milwaukee's Continuing Education program is offering a full-day of workplace wellness compliance training on Saturday, May 6, 2017. You can learn more here.

Attending the National Wellness Conference 2017 in St. Paul?

Barbara Zabawa will be presenting on Data Privacy and Security in Workplace Wellness. To learn more and register, click here.