Journal of Health Care Law and Policy

Volume 12 | Issue 1 Article 7

The Emergence of Mandatory Wellness Programs in the United States: Welcoming, or Worrisome?

Daniel Charles Rubenstein

THE EMERGENCE OF MANDATORY WELLNESS PROGRAMS IN THE UNITED STATES: WELCOMING, OR WORRISOME?

DANIEL CHARLES RUBENSTEIN, B.S.E.*

INTRODUCTION

The health care industry in the United States is facing a crisis, and employers are taking action.[1] The World Health Organization reports that the United States spent 15.2% of its annual gross domestic product on health and health-related services alone in 2005—more than any other nation throughout the globe.[2] Annual health care expenditures are expected to nearly double from $2.4 trillion in 2008 to $4.3 trillion by 2018.[3] Despite the significant expenditure, however, the United States remains among the lowest-ranked of developed countries in terms of access to and quality of health care.[4] Because most employees obtain health insurance through their employers, businesses and industries alike are finding themselves increasingly burdened with the cost of providing health care.[5] Consequently, the

---

* J.D. Candidate, 2010, University of Maryland School of Law (Baltimore, MD); B.S.E., Industrial Engineering, *magna cum laude*, 2006, University of Pittsburgh School of Engineering (Pittsburgh, PA).

1. *See* Russell D. Shurtz, *Reining in Health Care Costs with Wellness Programs: Frequently Overlooked Legal Issues*, 18 BENEFITS L. J. 31 (2005) (noting that spiraling health care costs are causing employers to pursue various options to control the tailspin).

2. WORLD HEALTH ORG., WORLD HEALTH STATISTICS 2008, at 90 (Frank Theakston ed., 2008), *available at* http://www.who.int/whosis/whostat/EN_WHS08_Full.pdf.

3. CTRS. FOR MEDICARE & MEDICAID SERVS., DEP'T OF HEALTH & HUMAN SERVS., NATIONAL HEALTH CARE EXPENDITURE PROJECTIONS 2008–2018, at tbls.1–2 (2009), *available at* http://www.cms.hhs.gov/NationalHealthExpendData/25_NHE_Fact_Sheet.asp#TopOfPage (follow "NHE projections 2008-2018 (PDF, 2.7 MB)" hyperlink).

4. COMMONWEALTH FUND COMM'N ON A HIGH PERFORMANCE HEALTH SYS., WHY NOT THE BEST? RESULTS FROM THE NATIONAL SCORECARD ON U.S. HEALTH SYSTEM PERFORMANCE 18–19 & exhibit 4 (2008), *available at* http://www.commonwealthfund.org/~/media/Files/Publications/Fund%20Report/2008/Jul/Why%20Not%20the%20Best%20%20Results%20from%20the%20National%20Scorecard%20on%20U%20S%20%20Health%20System%20Performance%20%202008/Why_Not_the_Best_national_scorecard_2008%20pdf.pdf.

5. LEN M. NICHOLS & SARAH AXEEN, EMPLOYER HEALTH COSTS IN A GLOBAL ECONOMY: A COMPETITIVE DISADVANTAGE FOR U.S. FIRMS 3 (2008), *available at*

divesting of large quantities of financial resources toward health care costs results in a less competitive American industry position with respect to the global economy.[6] Faced with these escalating challenges, "many employers are considering implementing workplace wellness programs in an effort" to mitigate rapidly increasing health care costs.[7]

Employers should be careful to note, however, that despite the potential benefits of implementing a workplace-based wellness initiative, a multitude of legal questions, considerations, and challenges may await the unsuspecting private business.[8] Legislation on the federal and state levels that is designed to ensure confidentiality, privacy, and equal protection within the scope of the employer-employee relationship directly or indirectly influences the employer's ability to implement wellness programs.[9] While the novel question of the composition of such programs remains largely untested in litigation, employers are nevertheless wise to engage in advance planning with respect to these legal considerations.

I. WHAT ARE WELLNESS PROGRAMS, AND WHO IS IMPLEMENTING THEM?

A. The "Mandatory" Wellness Program

The definition of a "mandatory wellness program" can vary significantly from employer to employer.[10] Generally speaking, a mandatory wellness program is one in which an employee *must* participate within the scope of his or her employment or risk some form of retribution.[11] Oftentimes, such penalty itself can establish the mandatory nature of participation in an employee wellness program, and the

---

http://www.newamerica.net/files/EMPLOYER%20HEALTH%20COSTS%20IN%20A%20GLOBAL%20ECONOMY.pdf.

6. *Id.*

7. Amanda E. Layton & Vjera V. Silbert, *Employers Considering Wellness Programs Are Advised to Look Before Leaping*, METROPOLITAN CORP. COUNS., Nov. 2007, at 30, *available at* http://www.metrocorpcounsel.com/pdf/2007/November/30.pdf.

8. *See infra* Part III.

9. *See, e.g.*, 29 C.F.R. § 2590.702(f)(2)(i)–(v) (2008) (listing requirements for obtaining a reward from a wellness program that is based on individual health standards, and stating that the program shall not be "a subterfuge for discrimination").

10. *See* GARRY G. MATHIASON ET AL., EMPLOYER MANDATED WELLNESS INITIATIVES: RESPECTING WORKPLACE RIGHTS WHILE CONTROLLING HEALTH CARE COSTS 4–7 (2007), *available at* http://www.essisystems.com/research/Littler_Report.pdf (describing various employer-based approaches to improving employee health); Memorandum from Daniel J. Maguire, Dir. of Health Plan Standards & Compliance Assistance, U.S. Dep't of Labor, to Virginia C. Smith, Dir. of Enforcement, U.S. Dep't of Labor 2 (Feb. 14, 2008), *available at* http://www.dol.gov/ebsa/pdf/fab2008-2.pdf ("A wide range of wellness programs exist to promote health and prevent disease.").

11. GARRY G. MATHIASON ET AL., *supra* note 10, at 6.

embodiment of this penalty may raise the most difficult questions of judicial interpretation with respect to the legality of such programs.[12]

Mandatory wellness programs may vary widely in terms of their application.[13] For example, one program may require that employees undergo a "health risk assessment," including screening for risk factors such as high cholesterol and high blood pressure.[14] Another program may require that employees collaborate with advisors who create and monitor fitness plans on the employee's behalf.[15] Because of the varying nature of employee health statuses, the degree of employer financial expenditures and obligations, and the societal value placed on employee health within the workplace, the organization typically tailors its program to match the goals of the organization's workforce as a whole.[16]

Employers have resorted to measures such as increasing employee health-related contributions, garnishing wages, and even restricting employee access to the workplace itself in order to ensure compliance.[17] The implementation of such measures are most prevalent in the Midwest;[18] however, regionally-based companies, such as Maryland's newspaper publisher, *The Baltimore Sun,* have also taken action by proposing increases in insurance premiums in excess of $100 per month if any covered family member smokes cigarettes.[19] They are not alone—"[m]ore and more [employers] are considering [implementation]" of a mandatory wellness program.[20] The economic benefit to the employer is clear; employee participation in mandatory wellness programs have demonstrated a return on investment (ROI) of almost two-to-one in some cases.[21]

B. The "Voluntary" Wellness Program

Unlike its mandatory counterpart, a voluntary wellness program "does not require participation[,] nor [does it] penalize . . . employees who" choose not to

12. *Id.* at 7–12 (explaining how penalties may make a voluntary program effectively mandatory and create legal problems).

13. *See id.* at 13–15 (presenting two mandatory wellness programs from opposite ends of the spectrum of possible program designs).

14. *Id.* at 6–7.

15. *Id.* at 5–6.

16. *See id.* (describing various company programs and the wide array of approaches to influence their employees' health and well-being).

17. Beth Baker, *Now, the Stick: Workers Pay for Poor Health Habits*, WASH. POST, Nov. 13, 2007, at HE01 (noting that the imposition of penalties can be a significant motivating factor in obtaining employee participation).

18. *Id.*

19. *Id.*

20. *Id.*

21. *See, e.g.*, *Study: Wellness Works: Comprehensive Program Brings Modest ROI*, DISEASE MGMT. ADVISOR, Apr. 2008, at 1, *available at* http://www.connected-health.org/media/162262/april08dma-mdm.pdf.

participate.[22] Voluntary wellness programs offer employers greater flexibility in implementation than their mandatory counterparts. Obtaining health information from employees through voluntary surveys and wellness clinics does not compel action on the part of the employee or employer that may violate various federal regulatory provisions.[23]

A wellness program is only truly voluntary, however, if there are no penalties for nonparticipation.[24] An employee who opts-out of participation, but is penalized for doing so, has effectively become subject to a mandatory wellness program.[25] Additionally, if an employer offers a monetary incentive for participation that is so great that a reasonable employee would feel compelled to participate, a court might nonetheless view the wellness plan as mandatory in purpose and character despite its voluntary label.[26]

Nevertheless, the voluntary wellness plan avoids many of the legal pitfalls that its mandatory counterpart may encounter, while at the same time providing significant financial advantages to the employer and health benefits to the employee.[27] As is oftentimes the case with a mandatory program, the results of a voluntary program may not be immediate.[28] However, even if only a fraction of a company's employees participate in a voluntary wellness plan, the benefits could nonetheless be significant.[29]

---

22. J.P.Morgan, Impact of ADA and ADEA on Wellness Program Design (Oct. 7, 2005), http://www.jpmorganchase.com/cm/cs?pagename=JPM_redesign/JPM_Content_C/Generic_Detail_Page_Template&cid=1159308468905&c=JPM_Content_C (last visited Sept. 19, 2009); *see* GARRY G. MATHIASON ET AL., *supra* note 10, at 4–6 (commenting that "most employers use a voluntary wellness plan that rewards the employee in some way" and describing various examples of voluntary programs).

23. J.P.Morgan, *supra* note 22 (discussing how voluntary programs do not infringe upon regulatory schemes such as the Americans with Disabilities Act and the Age Discrimination in Employment Act).

24. Shurtz, *supra* note 1, at 47.

25. *See id.* (characterizing the imposition of a penalty, such as withholding participation or reduced costs, as creating an involuntary program).

26. Michelle M. Mello & Meredith B. Rosenthal, *Wellness Programs and Lifestyle Discrimination—The Legal Limits*, 359 NEW ENG. J. MED. 195 (2008) ("The larger the financial incentive . . . the more likely it is that a court will view the wellness program as not truly voluntary, particularly if the incentive looks more like a penalty than a reward.").

27. *See* GARRY G. MATHIASON ET AL., *supra* note 10, at 4 (cautioning employers against the use of mandatory wellness programs because such approaches "raise[] significant legal issues").

28. *See* Jennifer Reardon, *The History and Impact of Worksite Wellness*, 16 NURSING ECON. 117, 120 (1998) (summarizing various studies of the benefits of wellness programs and concluding that, while promising, the results of the short-term studies have been mixed); Kenneth E. Warner, *Wellness at the Worksite*, HEALTH AFF., Summer 1990, at 63, 68 (noting a one to five year span before a company may realize a "reduction[] in employee health care costs and absenteeism of as much as 25 to 50 percent" from an implemented wellness program).

29. *See* Reardon, *supra* note 28, at 118 (describing the potential impact of wellness programs based on an NIH survey that showed that in 1995 "45% to 60% [of employees] ha[d] high and borderline-high cholesterol"); Warner, *supra* note 28, at 69–70 (concluding that the mere existence of a wellness program may garner benefits from the generation of goodwill and the attraction of healthy, productive employees).

C. Comprehensive v. Targeted Approaches—The War on Smoking

While the programs noted above are comprehensive in nature, targeted approaches to the implementation of wellness programs, particularly with respect to smoking cessation, have proven to be quite successful as well.[30] While this Comment does not discuss in detail the various laws and regulations in place regarding the validity or success of such programs, it recognizes smoking cessation programs as part of a broader wellness initiative designed to reduce health care costs and promote employee longevity as a whole.

A number of employers in the Baltimore-Washington, D.C. metropolitan area have recently implemented smoking bans aimed at improving working conditions and employee health and safety, particularly in the hospital setting. For example, Fort Washington Medical Center in central Maryland went completely smoke-free in November 2008.[31] The Center joined over 40 other Maryland hospitals that were, or were in the process of becoming, smoke-free.[32] Fort Washington Medical Center's program coincided with the American Cancer Society's *Great American Health Challenge*, a program designed to encourage smokers across the country to quit.[33] Hospitals throughout the country have followed similar approaches.[34]

D. Congressional Reaction

Since the mid-1980's, members of Congress have placed an increasingly large emphasis on maintaining and improving the health of employees in the workplace.[35] The proposed *Healthy Workforce Act of 2007* would provide tax credits to businesses that institute comprehensive employee wellness programs, and would provide similar tax credits to each employee for up to 10 years.[36] Measures including formal recognition of employee wellness beyond financial incentives

---

30. Milt Freudenheim, *Seeking Savings, Employers Help Smokers Quit*, N.Y. TIMES, Oct. 26, 2007, at A1.

31. Joshua Garner, *Fort Washington Hospital Goes Smoke Free*, GAZETTE.NET, Nov. 27, 2008, http://www.gazette.net/stories/11272008/bowinew144111_32476.shtml.

32. *Id.*

33. Press Release, Am. Cancer Soc'y, American Cancer Society Marks 33rd Great American Smokeout (Nov. 18, 2008), http://www.cancer.org/docroot/subsite/greatamericans/content/Media.asp.

34. *See generally* CHRISTINE SHEFFER, UNIV. OF ARK. FOR MED. SCI., SMOKE FREE HOSPITAL TOOLKIT: A GUIDE FOR IMPLEMENTING SMOKE-FREE POLICIES (n.d.), *available at* http://www.uams.edu/coph/Reports/SmokeFree_Toolkit/Hospital%20Toolkit%20Text.pdf.

35. *See* 134 CONG. REC. 742 (1988) (documenting discussion in the Senate regarding the importance of the Employee Health Promotion and Disease Prevention Act); 132 CONG. REC. 32,249 (1986) (discussing the President's efforts to "establish a council to . . . encourage private sector participation in disease prevention and health promotion activities . . . [and] develop and provide incentive plans to encourage the creation of programs in . . . businesses . . .").

36. Healthy Workforce Act of 2007, H.R. 3717, 110th Cong. (2007); *see also* Healthy Workforce Act of 2009, H.R. 1897, 111th Cong. (2009).

have also been promoted by the House and Senate, respectively.[37] For example, the U.S. House of Representatives passed a concurrent resolution "recognizing the first full week of April as 'National Workplace Wellness Week'" in September 2008.[38] In the same month, the Senate separately approved a resolution "recognizing the importance of workplace wellness as a strategy to help maximize employees' health and well being."[39]

E. Editorial Commentary

Journalists and scholars together have added valuable insight to the debate for and against the implementation of wellness-based programs through extensive commentary and discussion.[40] In addition to the emerging legal debate that surrounds the implementation of wellness programs, economic justifications and public policy arguments successfully support both sides of the issue.[41] For example, a prominent bioethicist, Jonathan Moreno, argues that recent efforts by state lawmakers to justify regulation based on the economic consequences of risky behavior (in this particular instance, seat belt use and alcohol consumption—but easily extendable to exercise and dietary habits addressed by wellness programs), are often deterred by the economic expense of the program itself.[42] For this reason, Moreno asserts that broader benefits to society must also be considered and perhaps cited as a primary motivation beyond economics (as a secondary benefit) to such regulation.[43] According to Moreno, such "moral primacy" is a compelling alternative to the economic justification that pervades our system of government at the federal, state, and local levels.[44]

Employee wellness programs serve an important role in promoting societal goals of reducing health-related illnesses and extending the quality and longevity of the lives of workers across the nation.[45] Indeed, the dedicated employer who promotes a healthy lifestyle should be commended for furthering this important matter of public policy. However, inherent in the implementation of such a program is the risk of abuse, namely by way of a program that serves as a means to

37. *See infra* notes 38–39 and accompanying text.

38. H.R. Con. Res. 405, 110th Cong. (2008).

39. S. Res. 673, 110th Cong. (2008).

40. *See, e.g.*, Jonathan D. Moreno & Ronald Bayer, *The Limits of the Ledger in Public Health Promotion*, HASTINGS CTR. REP., Dec. 1985, at 37–41 (discussing regulatory efforts to reduce smoking and alcohol consumption, among others, for the benefit of the general public health); Reardon, *supra* note 28; Warner, *supra* note 28.

41. Moreno & Bayer, *supra* note 40, at 37.

42. *Id.* at 41.

43. *Id.*

44. *Id.*

45. GARRY G. MATHIASON ET AL., *supra* note 10, at 2.

an economic justification alone, with manifest disregard for the well-being of the employee who is requested (or required) to participate.[46]

II. STUDIES RELATING TO THE EFFECTIVENESS OF WELLNESS PROGRAMS

A. Justification for Participation in a Wellness Program

A number of formal studies conducted by corporations and academia have concluded that wellness programs are economically advantageous—the benefits of employee participation in a wellness program often exceed the expenditure invested in the implementation and administration of such programs.[47] Indeed, "it has become of great importance in the employer's effort to contain health care costs [by] design[ing] effective health plans that optimize the cost-containment opportunities available under current laws."[48]

For example, a Ford Motor Company study analyzed the number of cardiac-based, health-related claims between a control group and participants that were provided access to counseling and blood pressure monitoring.[49] Employees within the control group who received no counseling or monitoring submitted significantly higher numbers of health-related claims in the years following the study than employees who participated in the wellness program.[50]

In a review of the effectiveness of wellness programs, researchers at the University of San Diego confirmed that employee participation in exercise programs yielded significant improvements in a number of measured statistics, including: stress-reduction, improved self-image, diminished levels of health-related absenteeism, increased energy, and improved job performance.[51] In addition to the qualitative impact of employee participation in wellness programs, a recent IBM study demonstrated the dramatic quantitative effects of program participation in general, and cost-savings in particular.[52] It found that the avoidance of a single cancer operation resulting from one employee's successful participation in a wellness program would allow the corporation to enroll a staggering 15,000 additional employees in smoking cessation classes.[53] Further illustrative of this

46. GARRY G. MATHIASON ET AL., *supra* note 10, at 18.

47. Reardon, *supra* note 28, at 120; Warner, *supra* note 28, at 69–70.

48. 1 Emp. Coordinator Benefits (West) § 5:1 (2009).

49. Andrea Foote & John C. Erfurt, *The Benefit to Cost Ratio of Work-Site Blood Pressure Control Programs*, 256 JAMA 1283, 1283–85 (1991); 14 Emp. Coordinator Pers. Manual (West) § 12:74 (2009) [hereinafter Emp. Coordinator Pers. Manual].

50. Foote & Erfurt, *supra* note 49, at 1284–85; Emp. Coordinator Pers. Manual, *supra* note 49, § 12:74.

51. Emp. Coordinator Pers. Manual, *supra* note 49, § 12:74.

52. *Id.*

53. *Id.*

point, the avoidance of the necessity for long-term drug treatment for one employee would fund drug prevention classes for up to 9,000 additional employees.[54]

B. The Relationship Between Wellness Programs and Health Care Premiums

Employers have a significant and vested interest in controlling the cost of employee health care, as demonstrated by the fact that employers contribute significantly toward employee health care premiums.[55] For example, a statistical analysis conducted by The Kaiser Family Foundation revealed that "[t]he majority of covered workers are employed by a firm that contributes at least half of [their health care] premium."[56] In many cases, the employer funds the entire premium.[57] The Kaiser study demonstrated that "[t]wenty percent of workers with [individual] coverage and [six percent] of workers with family coverage work for a firm that pays [the entire] premium . . . ."[58] By encouraging participation in wellness programs, employers promote healthier habits among their employees, resulting in fewer dollars spent by health insurance companies on health care. Ultimately, those cost savings may be passed on by the insurance company to the employer-insurer, resulting in lower health care premiums.[59]

C. The Marketing and Publicity Advantage

While the benefit to employee health through participation in a permissive or mandatory wellness program has its obvious advantages, the organization may find that there are ancillary benefits as well. For example, a company that publicizes its wellness program may receive favorable praise from the families of employees for their efforts in promoting a healthy lifestyle. Additionally, companies who use wellness programs as a means to benefit the community (e.g., granting "credit" to employees for participation in events such as walks and races for promoting health causes and prevention) may be rewarded not only with improved employee and community health, but also with a sense of pride and admiration through recognition by regional, state, and even federal authorities.[60] While marketing and

54. *Id.*

55. *See* GARY CLAXTON ET AL., KAISER FAMILY FOUND. ET AL., EMPLOYER HEALTH BENEFITS: 2007 ANNUAL SURVEY 68–69 (2007), *available at* http://www.kff.org/insurance/7672/upload/76723.pdf (reporting the amount of costs covered by employers in the United States in 2007).

56. *Id.* at 68.

57. *Id.*

58. *Id.*

59. *See, e.g.*, Carla Lee, *Wellness Programs Aim for Healthier Employees, Lower Insurance Costs*, DOTHAN EAGLE (Ala.), Oct. 12, 2008, http://www.dothaneagle.com/dea/lifestyles/local/article/wellness_programs_aim_for_healthier_employees_lower_insurance_costs/40535/ (last visited Sept. 19, 2009) (commenting on the shared benefits of the Southeast Alabama Medical Center wellness program).

60. *See generally* Alison Harding, *Company Wellness Programs Improve Health, Cut Costs*, CNN.com, Sept. 1, 2009, *available at*

publicity should by no means be the sole motivator for any corporation to develop a wellness program, it nonetheless demonstrates how such a program may serve as a "win-win" for all participants.

III. LEGAL AUTHORITY AND OBSTACLES TO THE IMPLEMENTATION OF WELLNESS PROGRAMS

Regardless of their motivation, employers who desire to implement voluntary or mandatory wellness programs should thoroughly address all legal considerations and implications with respect to the scope, duration, benefits, and consequences of administration and employee participation of such a program.[61] A number of statutes at the federal level, including the HIPAA Privacy Rule, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA), may directly influence the employer's ability to operate a wellness plan, and state law may also apply, depending upon the jurisdiction.[62] In addition to the multitude of statutes that may potentially conflict with employee wellness plans, some state courts have addressed challenges to the validity of wellness program provisions within the scope of employment from a constitutional standpoint, resulting in a maze of opinions and splits of authority.[63]

A. HIPAA Privacy Rule

The *Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule* was enacted by Congress in 1996.[64] The purpose of the Act is to provide security and privacy with respect to health-related data.[65] The methodology used by employers in order to monitor and distinguish employees within the scope of a wellness program directly influences whether such a program is subject to the HIPAA Privacy Rule.[66]

---

http://www.cnn.com/2009/HEALTH/09/01/hcif.healthy.living/index.html (describing how lawmakers look to existing corporate wellness programs to develop federal wellness program legislation).

61. *See* Layton & Silbert, *supra* note 7, at 30 (presenting the potential legal considerations involved with wellness programs).

62. *See infra* Parts III.A–D.

63. *See infra* Part III.D.

64. *See* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified at 42 U.S.C. § 1320d-2 (2006)); 45 C.F.R. §§ 160–64 (2008) (these sections of the Code of Federal Regulations are also referred to as "HIPAA Privacy Rule" and "HIPAA Nondiscrimination Rule" in various sources, and are used interchangeably or are referred to simply as "HIPAA Rules" in this Comment).

65. *See* OFFICE FOR CIVIL RIGHTS, DEP'T OF HEALTH & HUMAN SERVS., SUMMARY OF THE HIPAA PRIVACY RULE 1 (2003), *available at* http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf [hereinafter SUMMARY OF HIPAA]; CTRS. FOR MEDICARE & MEDICAID SERVS., DEP'T OF HEALTH & HUMAN SERVS., OVERVIEW HIPAA—GENERAL INFORMATION, http://www.cms.hhs.gov/HIPAAGenInfo/ (last visited Oct. 2, 2009).

66. *See* 29 C.F.R. § 2590.702(f) (2008).

1. Participation-Based Incentives

An employer that structures a wellness program around incentives for participation rather than achievement of a particular goal is generally considered nondiscriminatory under HIPAA, because the program requires no compelled disclosure of protected and confidential health information.[67] Examples of acceptable programs include providing free lunches to employees who attend a luncheon seminar on a health related topic,[68] voluntary participation in smoking cessation programs, and attendance at health education seminars.[69] Such provisions are likely extendable to enrolled dependents on the employee's health care plan as well.[70]

2. Concerns over Incentives Based on Confidential Health Information

An employer who offers employees discounts based on outcomes that rely on confidential health information, however slight, may nonetheless come within the scope of the HIPAA Privacy Rule.[71] One purpose of the Privacy Rule is to ensure equal application of privacy and confidentiality standards across-the-board, regardless of an individual (or employee's) health status.[72] The employer's use of restricted employee health information in order to administer the wellness program could jeopardize the employee's privacy, and require that the employee ultimately decide between the value of program discounts and confidentiality.

Examples of such confidential health information factors include the measurement of cholesterol levels, blood pressure levels, measurement of body mass-index (BMI), compilation of family health-related history, and participation in "risk behaviors" such as smoking or alcohol consumption.[73] While programs that utilize confidential health information are not impermissible *per se*, in order to withstand legal scrutiny, they must *reward* employees for participation as opposed

67. *How the Final HIPAA Regs Affect Your Wellness Programs*, HRFOCUS, Nov. 2007, at 7, 7 [hereinafter *How HIPAA Regs Affect Wellness Programs*].

68. *See generally* Steven P. Noeldner, *Rewards for Healthy Lifestyles*, *in* WELCOA SPECIAL REPORT: MERCER HEALTH & BENEFITS 2 (2006), *available at* http://www.welcoa.org/freeresources/pdf/mercer_special_report.pdf (listing numerous wellness program options available for employers to implement, including healthy eating campaigns and health improvement seminars).

69. *Id.*; *see also How HIPAA Regs Affect Wellness Programs, supra* note 67, at 7.

70. *See, e.g.*, Joann S. Lublin, *Employers Lure Spouses into Wellness Programs to Help Cut Costs*, WALL ST. J., Aug. 31, 2009, at B4, *available at* http://online.wsj.com/article/SB125167156581970743.html (last visited Oct. 2, 2009) (describing expanded company wellness programs for the improvement of the health of employees' spouses and domestic partners).

71. *How HIPAA Regs Affect Wellness Programs, supra* note 67, at 7.

72. SUMMARY OF HIPAA, *supra* note 65, at 4.

73. *See* 29 C.F.R. § 2590.702(a) (2008) (listing the health-related factors that are prohibited from use).

to penalizing employees for failing to meet set objectives.[74] HIPAA statutory language requires that wellness programs meet five requirements to be considered *prima facie* permissible: 1) a cap on the maximum program discount; 2) a minimum frequency of enrollment opportunities throughout the year; 3) a reasonable justification for participation in the program; 4) a reasonable alternative to program participation for those unable to meet established requirements; and 5) notice of such alternatives provided to employees by means of printed publication.[75]

Evaluating each factor in turn reveals that HIPAA acts as a check on the scope and reasonableness of the wellness program. For example, with respect to the first factor, *a cap on the maximum program discount,* HIPAA rules require that the sum of all wellness program discounts not exceed 20% of the employee's cost of coverage under the employer's health plan (including the cost of covering eligible dependents).[76] This requirement serves to ensure that an incentive for participation is not so great that a reasonable employee would feel compelled to participate.[77] The second factor ensures that qualified employees or dependents are eligible to enroll in the program and obtain all applicable discounts at least once per year.[78] The third and arguably most significant requirement in demonstrating program validity requires providing a proper justification for its existence.[79] Indeed, many of the reasons discussed in the sections above provide the necessary foundation for establishing employer-based wellness programs. At a minimum, employers should make a claim as to the qualitative effects of improving employee health on overall productivity and employee satisfaction. Quantitative justifications such as a reduction in overall cost for health-related expenses would likely meet this requirement. The fourth factor, the availability of a reasonable alternative in participation, is essential to signifying the legitimacy of any wellness program because it demonstrates flexibility and reasonableness on the part of the employer for employees that may experience difficulties meeting program objectives.[80] For example, an employee who is required to obtain a certain reduction of LDL

74. *See How HIPAA Regs Affect Wellness Programs, supra* note 67 at 7; M.P. McQueen, *Wellness Plans Reach Out to the Healthy—Fit Employees Now Qualify for Financial Incentives to Stop Smoking, Lose Weight*, WALL ST. J., Mar. 28, 2007, at D1.

75. Layton & Silbert, *supra* note 7, at 30; Emp. Benefits Sec. Admin., U.S. Dep't of Labor, FAQs About the HIPAA Nondiscrimination Requirements, http://www.dol.gov/ebsa/faqs/faq_hipaa_ND.html (last visited Sept. 19, 2009).

76. *How HIPAA Regs Affect Wellness Programs, supra* note 67, at 7.

77. *See* Nondiscrimination and Wellness Programs in Health Coverage in the Group Market, 71 Fed. Reg. 75,014, 75,018 (Dec. 13, 2006) (codified at 29 C.F.R. § 2590.702(f)(2) (2008)).

78. *See id.*

79. *See id.*

80. *See id.* at 75,019 ("Th[e] alternative standard must be available for individuals for whom . . . it is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard, or for whom . . . it is medically inadvisable to attempt to satisfy the otherwise applicable standard.").

cholesterol, but is unable to do so because it is medically inadvisable, or otherwise unreasonably challenging, may nonetheless be able to obtain the benefits designed by the wellness program in exchange for an alternate effort, such as eating foods rich in Omega-3 in lieu of less healthy dietary choices.[81] Finally, the fifth requirement ensures that the employer is providing proper and reasonable notice to all employees that an alternative program exists.[82] The most effective method of achieving this requirement is to provide notice of an alternative program in all literature that discusses the wellness program itself.[83]

B. HIPAA Protected Health Information

Even when an organization successfully complies with the five statutory requirements of the HIPAA Privacy Rule, it faces yet another HIPAA-related hurdle with respect to the privacy of the information required or provided through the course of administering a wellness program, commonly referred to as protected health information (PHI).[84] PHI is broadly defined, and encompasses at least eighteen distinct categories of information, including: patient names, addresses, phone and fax numbers, social security numbers, medical record numbers, account numbers, biometric identifiers (e.g., fingerprints and retina scan information), or any other unique identifying mark.[85] Additionally, PHI may consist of any information not specifically defined in the regulations should it become part of a medical or payment record or history.[86]

Because of the broad definition of PHI, an employer-based wellness program will likely encounter greater judicial criticism when the administration of the wellness program requires specific, identifying information. In other words, the greater the magnitude of confidential health information the program seeks to obtain in determining eligibility for the benefit, the higher the likelihood that such a program will infringe upon the HIPAA Privacy Rule. However, while privacy

---

81. *See* MayoClinic.com, Cholesterol: The Top 5 Foods to Lower Your Numbers, http://www.mayoclinic.com/health/cholesterol/CL00002 (last visited Sept. 19, 2009) (discussing the beneficial impact Omega-3 fatty acids have on lowering levels of cholesterol in the body, among other health benefits).

82. Nondiscrimination and Wellness Programs in Health Coverage in the Group Market, 71 Fed. Reg. at 75,019.

83. *See id.* ("[A]ny plan materials that describe the general standard would also have to disclose the availability of a reasonable alternative standard. However, if the program is merely mentioned (and does not describe the general standard), disclosure of the availability of a reasonable alternative standard is not required.").

84. *See generally* Health Insurance Portability and Accountability Act, 45 C.F.R. §§ 160–164 (2008) (discussing the procedures for dealing with PHI).

85. *See id.* § 164.514.

86. *Id.* § 164.514(2)(i)(R).

concerns are of the utmost importance in the implementation of a wellness program, they are not necessarily dispositive.[87]

Despite the challenges that exist in handling PHI, employers may consider alternate means of administration to ensure that such information cannot be directly linked to the individual. For example, the employer may implement an anonymous system of data entry in which workforce statistics are compiled and analyzed as a whole, but employee names are replaced with random numbers not attributable to any particular individual. This would meet the compliance requirements of HIPAA in that while the employer may analyze and interpret useful data derived from confidential health information, such information could not be attributed to any one particular individual. Alternatively, the employer may obtain the same benefit by choosing to utilize a third-party administrator in order to protect confidentiality.[88] The employer may also request that employees complete authorization forms with respect to their privacy rights under HIPAA.[89] However, the ability to secure waivers varies largely from state to state and may be affected by additional statutory or common law provisions.[90]

C. ADA and ADEA Considerations

Various federal statutes in addition to the HIPAA Privacy Rule complicate the ability of employers to administer wellness programs. Protections afforded under statutory authority such as the Americans with Disabilities Act (ADA),[91] as well as the Age Discrimination in Employment Act (ADEA),[92] reflect societal judgments that such legislation is necessary to protect the interests of Americans living with disabilities, and to attempt to ensure a policy of nondiscrimination with respect to

87. *See, e.g.*, 42 U.S.C. § 12112(d)(4)(B) (2006) (allowing employers to "conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site" under the Americans with Disabilities Act).

88. *See* 45 C.F.R. § 160.103 (defining "business associate" as any person who "on behalf of . . . [a] covered entity . . . performs, or assists in the performance of . . . [a] function or activity involving the use or disclosure of individually identifiable health information . . ."); American Health Information Community Confidentiality, Privacy, and Security Workgroup Meeting, 72 Fed. Reg. 57,945, 57,945 (Oct. 11, 2007) (recommending that a business associate that electronically exchanges personal health information be subject to the HIPAA Privacy Rule).

89. *See* 45 C.F.R. § 164.508 (describing what types of disclosure need "authorization forms" to waive HIPAA privacy rights).

90. *See, e.g.*, MD. CODE ANN., HEALTH-GEN. § 4-303 (LexisNexis 2008); MONT. CODE ANN., § 27-12-302 (2007).

91. 42 U.S.C. §§ 12101–12213 (2006).

92. 29 U.S.C. §§ 621–634 (2006).

an employee's age.[93] The employer must therefore take care to tailor a wellness plan that does not infringe on these various sources of federal authority.[94]

1. Americans with Disabilities Act (ADA)

The Americans with Disabilities Act, first codified on July 26, 1990, established broad protections against discrimination based on disability.[95] Disability is defined by the Act as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual . . . ."[96] The law states that as a general rule,

> [n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[97]

It is therefore the language "and other terms, conditions and privileges of employment" that may influence the policies of an employer-based wellness program.[98] For this reason, any wellness program that infringes upon the ADA requires strong justification for its validity.[99] Indeed, the ADA specifically states that employers may not "utiliz[e] standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability . . . ."[100] The obvious implication of the ADA with respect to employee wellness programs is that any metric used to determine success, participation, or

---

93. *Id.* § 621; 42 U.S.C. § 12101; *see also* Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified as amended at 42 U.S.C.S. §§ 2000ff to ff-11 (LexisNexis 2009), and referenced in this Comment as "GINA").

94. *See* GARRY G. MATHIASON ET AL., *supra* note 10, at 7–12 ("Any wellness program that is not carefully drafted and implemented is likely to be found in violation of at least one of the many applicable federal and state laws."); Layton & Silbert, *supra* note 7, at 30 ("[T]here are many moving legal parts to consider . . . . Advanced planning . . . is key to mastering these legal considerations."). A complete discussion of the effect of ADA, ADEA, and GINA with respect to wellness programs is beyond the scope of this Comment, but employers should be diligent in addressing the various regulatory and policy questions presented by each piece of legislation.

95. Americans with Disabilities Act of 1990, 101 P.L. 336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213).

96. 42 U.S.C. § 12102(2)(A).

97. *Id.* § 12112(a).

98. *See id.* § 12112(d) (prohibiting discrimination based on medical examinations and inquiries); GARRY G. MATHIASON ET AL., *supra* note 10, at 9 ("Under the ADA, an employer may not discriminate against a qualified individual with a disability with regard to, among other things, employee compensation and benefits available by virtue of employment. ADA issues will arise in a mandatory wellness program for [several] reasons.").

99. *See* GARRY G. MATHIASON ET AL., *supra* note 10, at 9–10 (discussing various defenses to claims of discrimination in wellness programs under the ADA).

100. 42 U.S.C. § 12112(b)(3).

conformance with program policies must at the same time avoid categorical groupings based on factors that could be construed to pertain to a disability.

2. Age Discrimination in Employment Act (ADEA)

The Age Discrimination in Employment Act, first codified on December 15, 1967, established broad protections against discrimination in the workplace based on age.[101] Specifically, the ADEA protects workers age 40 and over, providing for reinstatement and back pay when wrongful termination based on age discrimination occurs.[102] While employers may institute and enforce waivers of ADEA provisions or discharge employees for "good cause" regardless of age considerations, employers wishing to institute a wellness program must ensure that penalties for noncompliance, if any, do not discriminate on the basis of age.[103] Discrimination may occur directly or indirectly; in the case of wellness programs, employers who set unrealistic goals for individuals who may be physically unable to meet them as a result of their age could be subject to liability under the ADEA.[104]

D. State Law Considerations

State laws regarding the regulation of PHI in light of wellness programs vary widely across jurisdictions, and protections may be tailored broadly or narrowly depending upon the goals of the local legislature.[105] At least thirty states currently protect employees from hiring and firing decisions based upon otherwise legal behavior engaged in outside of the workplace.[106] However, some states continue to permit mandatory program enrollment and enforcement of noncompliance for engaging in such behavior through penalties such as wage garnishment.[107] For example, in 2005, the State of Michigan permitted Meritian Health, a self-funded

---

101. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2006)).

102. 29 U.S.C. § 631(a).

103. *See, e.g.*, Blakeney v. Lomas Info. Sys., Inc., 65 F.3d 482, 484–85 (5th Cir. 1995) (interpreting § 626(f)(1) of the ADEA as "provid[ing] that an individual may not waive rights under the statute unless the waiver is 'knowing and voluntary'" under "specific statutory requirements").

104. *See* GARRY G. MATHIASON ET AL., *supra* note 10, at 10 ("If a mandatory program requires an employee to achieve a certain health standard, that standard should take into account, and if necessary, be adjusted for, the age of the employee.").

105. *See, e.g., id.* at 11–12 (discussing state privacy laws application to employer-based wellness programs); Susannah Carr, *Invisible Actors: Genetic Testing and Genetic Discrimination in the Workplace*, 30 U. ARK. LITTLE ROCK L. REV. 1, 10–11 (2007) (recommending certain exceptions to properly tailor laws that prohibit the use of genetic information by employers); Baker, *supra* note 17, at HE01 (discussing the volume of cases litigated with respect to wellness program initiatives that varies significantly between jurisdictions).

106. Baker, *supra* note 17, at HE01.

107. *See id.* (describing several examples of wellness programs that garnish wages for failure to participate or to meet the standards).

health care plan provider, to garnish $50 per paycheck of any employee whose spouse smoked and failed to enroll in a smoking cessation program.[108]

IV. POLICY RECOMMENDATIONS

Federal and state statutes as well as case law relating to employment-based wellness programs have left many business owners and employees alike confused, both in terms of the scope of implementation and the threat of legal scrutiny. Despite the significant confusion and unsettled area of law, many congressional members and commentators have attempted to weigh in and provide clarity to an otherwise ambiguous subject matter.[109] Ultimately, the permissibility of an employee wellness program may rest on a combination of a weighing of *voluntariness*, the *nature of the method used for obtaining medical information* for data analysis and program administration, and the *benefit* or *burden placed upon the employee* for meeting or failing to meet program objectives.

A. Legal Considerations Relating to Mandatory and Voluntary Programs

The employer should at all times be especially careful to comply with all relevant statutory and common-law authority.[110] Employers should ensure that documentation obtained in the course of administering wellness programs complies with the HIPAA Privacy Rule as well as nondiscrimination provisions.[111] Additionally, the employer should make certain that program administration does not inadvertently infringe upon related federal provisions, such as the ADA and the ADEA.[112]

B. Practical Considerations Relating to Mandatory and Voluntary Programs

The workplace culture of the American industry leaves the employee with little time to reflect on his or her diet and exercise routine, let alone provide for additional time to stay physically fit.[113] The pivotal distinction between a mandatory and permissive program from the employee's perspective, therefore, may reflect heavily on whether the employer provides flexibility in the standard

---

108. *Id.*

109. *See, e.g.*, U.S. Workplace Wellness Alliance, Workplace Wellness Legislation: 111th Congress, http://www.uswwa.org/portal/uswwa/legislation/default (last visited Sept. 20, 2009) (listing bills proposed in Congress during 2009 that directly affected the use of wellness programs in the workplace).

110. *See supra* Part III.

111. *See supra* Parts III.A–C.

112. *See supra* Parts III.C.1–2.

113. *See Current Culture Makes It Hard for People to Exercise, Four Out of Five Americans Say*, HEALTH BUS. WK., June 1, 2007, at 557 (describing survey results that indicate that "exercise is a critical component of preventive health care to most Americans . . . [yet] they are losing the struggle to balance the demands of work and family with personal health and need greater support").

workday schedule in order for employees to complete the requirements of a wellness program.[114]

For example, an employer that mandates participation in a wellness program may find greater success if that employer establishes clear guidelines and expectations as to how much on-the-job time is allotted toward employee wellness, and a description as to which particular activities are considered "wellness activities." Employees may be more inclined to participate in a wellness program where the employer permits the employee to "flex" his or her work schedule, permitting the employee to adjust his or her standard workweek (or month) in order to accommodate physical fitness activities throughout the course of the business day.[115] Further, the promulgation of clear and concise guidelines provides definitive language in which the employer, employee, and if need be, a judicial authority,[116] may rely upon in determining the reasonableness of wellness program provisions.

In contrast, the permissive approach may appeal to employees who do not wish to participate should the employer *require* them to take on additional responsibility unrelated to their employment through physical fitness. However, the permissive program contains legal risks for noncompliance as well—employees who are not required to participate may choose to forego involvement in the program, citing insufficient economic incentive or benefit to their own welfare.[117]

Indeed, an employer considering the permissive program must find a way to motivate even the most disinterested employee by offering a reward structure that benefits the employee as well as the bottom line of the corporation. Those employers who favor mandatory wellness programs should strive to incorporate the time requirement into pre-existing work hours, to avoid disputes related to time-management brought by the employee or considered in judicial proceedings.[118]

C. The Distinction Between Reward and Reprimand

Regardless of whether an employer chooses to pursue a mandatory or permissive wellness model, the method of program administration may have a

---

114. *See, e.g.*, CORNELL UNIV. DIV. OF HUMAN RES., FLEXIBLE WORK ARRANGEMENTS: PARTICIPATION GUIDELINES FOR WELLNESS AND FITNESS PROGRAMS, *available at* http://www.ohr.cornell.edu/workLife/flex/flexGuidelines.pdf (presenting a framework for implementing meaningful wellness programs through use of flex time and release time policies).

115. *Id.*

116. *See, e.g.*, Parent v. City of Bellevue Civil Serv. Comm'n, 763 N.W.2d 739, 746–47 (Neb. App. 2009) (using a plain language review of wellness provisions for employment to determine whether such provisions were mandatory).

117. GARRY G. MATHIASON ET AL., *supra* note 10, at 6 (stating that voluntary programs appeal to those who possess healthy lifestyles already and questioning whether such permissive programs benefit employees with unhealthy habits).

118. *See, e.g.*, Philipp Harper, *Shape Up Your Company with a Wellness Program*, *available at* http://www.microsoft.com/smallbusiness/resources/ArticleReader/website/default.aspx?Print=1&ArticleId=Shapeupyourcompanywithawellnessprogram (last visited Oct. 2, 2009).

significant effect on employee involvement and morale.[119] For example, companies that choose to reward success for employee participation in wellness programs may find employees more motivated to achieve their fitness and dietary objectives than their counterparts who are penalized for failing to meet their goals.[120] Employees who receive a reward for their success may become more likely to continue to strive for newer, more challenging goals than their counterparts who are reprimanded for failing to meet objectives. Reprimand in the context of an employee wellness program carries a legal risk as well—tangible job consequences that accompany reprimand related to a wellness program could constitute adverse employment actions.[121]

Employers need not become overburdened with the economic implications of rewarding employees,[122] as a small amount of recognition (e.g., a small deduction from a monthly health premium, a free month of membership at a local gym or even a monthly award ceremony in which employees receive recognition in front of their peers) may be sufficient to motivate the employee to continue with their efforts. After all, the true benefit of the program is not necessarily financial or economic in nature; rather, it is the healthier lifestyle, increased productivity, and improved satisfaction of the employee both at the office and in the home.

D. Method of Measurement—The Use of Confidential Health Information

The numerous legal implications of using confidential health information makes strict measurement of sensitive, confidential or otherwise personal medical information challenging and fraught with the risk of liability.[123] Employers may wish to consider alternative methods of measuring success with regard to employee participation. For instance, instead of measuring and monitoring an employee's BMI, the employer may choose to measure the employee's success by their ability to run a certain distance, or participate in a healthy exercise activity for a specific period of time (e.g., swimming for 20 minutes per day). Such indirect measurement

---

119. Rachel Christensen, *Employment-Based Health Promotion and Wellness Programs*, EMP. BENEFIT RES. INST. NOTES, July 2001, at 1, 1, 3, *available at* http://www.ebri.org/pdf/notespdf/0701notes.pdf; WellnessQuotes.com, Wellness Programs: A Boost to Everyone's Morale, *available at* http://www.wellnessquotes.com/wellness-programs-boost-employees-morale.html (last visited Sept. 20, 2009).

120. ALLISON KOPICKI ET AL., HEALTH AT WORK? UNEQUAL ACCESS TO EMPLOYER WELLNESS PROGRAMS 5 (2009), *available at* http://www.heldrich.rutgers.edu/uploadedFiles/Publications/Heldrich_Center_WT18.pdf.

121. *See, e.g.*, Grube v. Lau Indus., Inc., 257 F.3d 723, 729 (7th Cir. 2001) (stating alternatively that, in the absence of tangible job consequences, "unfair reprimands . . . do not constitute adverse employment actions").

122. *See* Reardon, *supra* note 28, at 118, 120 (documenting the economic gain of wellness programs over a period of time); Warner, *supra* note 28, at 67–70 (discussing the advantages of small incentive wellness programs from non-economic perspectives).

123. *See* GARRY G. MATHIASON ET AL., *supra* note 10, at 7–12; *supra* Part III.A.2.

helps to ensure employee privacy and confidentiality, while at the same time permitting the employer to evaluate the success of their program reliably.

The use of non-protected health information as a basis of measurement may permit the employer to circumvent many of the legal issues raised above.[124] For example, age and disability-sensitive measures of success may permit the employee and employer to work together to determine what a reasonable goal may be depending upon the employee's physical condition. Communication between the employee and employer is critical to ensuring that the employee is comfortable with the requirements of the program, while at the same time guaranteeing that the employer is able to assess the overall status of the program's success at any time.[125]

V. CONCLUSION

There is no such thing as a "model wellness program."[126] Each employer should determine the needs of his or her workforce in order to develop a program that meets the health objectives of its employees, while at the same time traversing any legal considerations that may arise from its implementation.[127] However, the challenges that employers face in today's environment should not serve as a deterrent to making efforts to work with employees and third-party administrators to develop a well-rounded wellness plan that promotes social welfare and provides an economic benefit to both the employee and employer. Employers have a responsibility to review the implications of both permissive and mandatory wellness programs from the perspective of maximizing participation, improving employee morale, and striking an acceptable balance between economic opportunity and expense.[128]

Thus, the current state of the law leaves the design and implementation of employee wellness programs in a state of flux, but also with a great deal of flexibility for future exploration. While variations in *voluntariness, method of reward or reprimand* and the *confidential nature of health information used in data collection* each create a presumption of validity or invalidity in their own right, many combinations of these factors create "gray areas" open for interpretation by the private sector.[129] At a minimum, voluntary programs will likely be met with

---

124. *See supra* Parts IV.A–D.

125. *See* GARRY G. MATHIASON ET AL., *supra* note 10, at 12–13 (suggesting that the development of wellness programs should coincide with the development of an audit strategy and a means of educating employees about the program).

126. *Id.* at 12.

127. *Id.*

128. *Id.* at 2 (stating that, while wellness programs may involve some risk, they are beneficial in areas such as improving morale and driving down health care costs).

129. *See id.* at 15–17 (summarizing legal questions that remain at the state and federal level); *see also* KOPICKI ET AL., *supra* note 120, at 5, 7 (discussing employee worries about the penalization and invasion of privacy).

less skepticism than mandatory programs in almost every instance. Within this distinction, companies that reward their employees for meeting program objectives rather than reprimanding them for failing to accomplish their goals are more likely to withstand legal scrutiny.[130] Finally, employers that implement programs that are *prima facie* valid in their method of participation and administration should carefully consider the multitude of anti-discrimination and privacy statutes promulgated by local and federal governments.[131]

Wellness programs continue to expand exponentially, in terms of the number of participants as well as the scope of employee benefits and opportunities.[132] Employers should recognize that a "wellness program" in its traditional sense might include changes to both dietary habits and levels of physical activity. However, the perceptive employer should also identify education as a key component to any wellness initiative, noting that the opportunity for lifelong learning provides both a sense of understanding as well as an additional method of measuring success for employees across the board.[133]

Regardless of the methodology ultimately adopted in the administration of an employee wellness program, the employer should make all reasonable efforts to engage employees in conceptualizing, discussing, planning, and executing wellness initiatives.[134] Employees engaged in the design and administration of the program are more likely to feel like active stakeholders in the success of the program. For this reason, employees should be encouraged to provide constant feedback, through both formal and informal channels, to ensure continuous improvement and adaptation to the changing needs of the organization and the workforce.[135] Mandatory wellness programs are not *per se* impermissible; however, the heightened legal standard to which these programs may be subjected ensures that abuses are minimized and the employee's confidential medical information is protected to the fullest extent permitted by law. As society continues to recognize the importance of wellness at the workplace as well as within the home, programs that assist the employee in achieving healthy habits should continue to be encouraged.

---

130. *See* GARRY G. MATHIASON ET AL., *supra* note 10, at 7–12.

131. *Id.*

132. *See* Wellness Council of Am., Building a Well Workplace (2008), http://www.welcoa.org/wellworkplace/index.php?cat=1&page=1 (last visited Sept. 20, 2009) (presenting statistics of employer-based wellness programs in the United States).

133. *See* GARRY G. MATHIASON ET AL., *supra* note 10, at 13 (describing employee education as essential to prevent the perception of invasion of privacy).

134. *See id.* (recommending the use of self-assessments and recognizing the importance of obtaining employee "buy-in").

135. *See id.* (describing a wellness program that started out with an employee survey of health status and needs).