Tuesday, October 20
9:00 am–10:30 am

705 Corporate Wellness Plans

Christopher L. Brigham
Partner
Meritas- Updike, Kelly and Spellacy

Colleen Reilly
President
Total Well-Being

Anthony Vittone
Vice President and General Counsel
Swimways Corporation

Faculty Biographies

Christopher L. Brigham

Christopher L. Brigham is a principal with the firm of Updike, Kelly and Spellacy, P.C. in New Haven, Connecticut. He is chairman of the firm's employment practices group and represents companies in both federal and state court and before administrative agencies on a wide variety of employment claims. Mr. Brigham also counsels his clients on all forms of workplace issues such as hiring, disciplinary measures, terminations, and wage and hour. Mr. Brigham conducts human resource audits to ensure that employment policies and procedures are in compliance with the most recent state and federal laws. He also conducts employment seminars and sexual harassment training seminars and has published numerous articles regarding employment issues.

In addition to other community and business activities, Mr. Brigham is on the board of directors of the Coordinating Council for Children in Crisis and is the co-chair of the Legislative Committee of the Healthcare Council for the Greater New Haven Chamber of Commerce. Mr. Brigham is a frequent speaker and has written several articles about wellness programs in the workplace.

Mr. Brigham received his BA from Middlebury College in Middlebury, Vermont and his JD from the Vermont Law School.

Colleen Reilly

Colleen Reilly is the president and founder of Total Well-Being, a leading provider of comprehensive and turn-key corporate wellness program solutions for small to mid-size companies with up to 5,000 employees.

Prior to establishing Total Well-Being, Ms. Reilly was the director of wellness and benefits at Nelnet. Her work in improving Nelnet employees' health and well-being earned the company numerous recognitions for excellence in building a strategic wellness program that continues to produce health improvement results for employees as well as cost-savings for the corporation. Ms. Reilly's experience also includes time at the world-renowned Mayo Clinic where she worked with Fortune 500 clients helping them organize and implement successful wellness and benefits programs. Before joining the Mayo Clinic, Ms. Reilly was manager of health and productivity at Coors Brewing Company in Golden, Colorado. Here she led an integrated health and productivity department and implemented a strategic health initiative.

She is a certified health coach through EduCoach Ltd. Ms. Reilly formerly served on the board of the Colorado Governor's Council for Physical Fitness and was an adjunct faculty at the University of Denver teaching the philosophy of wellness.

Ms. Reilly holds a BS from Santa Clara University and both a MBA and Master of Science Management from the University of Denver.

Anthony Vittone

Anthony F. Vittone is the vice president and general counsel of Swimways Corp. in Virginia Beach, VA. Swimways is a manufacturer and distributor of consumer products principally in the areas of water recreation equipment and portable outdoor furniture. Swimways products are sold in the United States through all major and specialty retailer as well as Canada, Europe, Australia and South Africa. Mr. Vittone directly manages the company's business development and legal affairs. In addition, Mr. Vittone is responsible for overseeing the human resources department for Swimways. He recently testified before the House of Representatives Committee on Small Business on the impact of The Consumer Product Safety Improvement Act on small businesses.

Prior to joining Swimways, Mr. Vittone was senior vice president, business development and general counsel for Decipher Inc., located in Norfolk, Virginia, and prior to that was in private practice in Richmond, Virginia. In Richmond, Mr. Vittone practiced with McGuire Woods Battle and Boothe, LLP and then Mezzullo & McCandlish.

He currently serves on the board of directors and executive committee for the Virginia Stage Company, and is active in his local civic association, United Way chapter and alma mater.

Mr. Vittone received his BA and JD from the University of Richmond.

ACC Association of Corporate Counsel

Corporate Wellness Plans

- Overview
- Legal Requirements
- Practical Solutions

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

Corporate Wellness Plans

http://www.youtube.com/watch?v=Tb3CelO_CNM&feature=related

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

Corporate Wellness Plans

- 2/3 of Large US Companies Offer Wellness Plans (Source: Reuters)
- Goal of Presentation – Small Companies can do Wellness Plans too
  - Swimways Plan
  - Total Well-Being Plan

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

Corporate Wellness Plans

- What is a 'Wellness Plan"?
  - Not your father's wellness plan
    - Company's used to have a smoking cessation program or a discount at the gym and call that a wellness plan
  - A plan by the company to combat unhealthy lifestyle choices
  - Usually includes medical screenings, health benchmarks, and financial 'carrots and sticks'

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

WHAT ARE EMPLOYEE WELLNESS PROGRAMS?

Wellness programs take many forms including:

- Educational programs for managing health
- Health Risk Assessments
- Health Screenings
- Onsite fitness facilities
- Subsidized fitness program
- Smoking cessation programs

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

BENEFITS OF EMPLOYEE WELLNESS PROGRAMS

Research shows that a effective employee wellness program can result in a:

- 28% reduction in sick leave absenteeism
- 26% reduction in the use of health care benefits
- 30% reduced workers' compensation claims and reduced "presenteeism"

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

Corporate Wellness Plans

- Lifestyle related problems account for 30% of all medical care costs!
  - Smoking
  - Obesity
  - Excessive drinking
  - Drugs – abuse of prescription and illegal

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

Corporate Wellness Plans

- Smoking
  - Total Medical Costs of Smoking exceeds $180 Billion a year

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

Corporate Wellness Plans

- Obesity
  - Annual Spending is $147 billion a year in health related spending (double what it was 10 years ago) and nearly 10% of all spending
  - Costs $1400 more a year to take care of an obese person than it does of someone of normal weight ($600 of this is in R/X)
  - Higher expense is caused by treating diabetes, heart disease, depression, cholesterol, and other issues
  - 1/3 of adult Americans are obese – obesity rate rose 37% between 1998 and 2006

(Source: *Health Affairs*)

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

Corporate Wellness Plans

- Ethics of Wellness Plans: One View

"You are supposed to be paid on the basis of how you do your job, not how often you go to the gym or how many cheeseburgers you eat…."

Lewis Maltby, president of the National Workrights Institute

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

Corporate Wellness Plans

- Ethics of Wellness Plans: The Other View

"The core ethical justification for penalty programs is that employees should be held responsible for voluntary actions that cause harm to others," they write. But, they add, employees should be exempt from penalties when it is "unreasonably difficult or medically inadvisable" for them to meet a particular goal or standard."

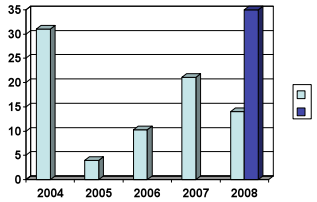
Steven Pearson and Sarah Lieber, National Institutes of Health

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

Corporate Wellness Plans

- Swimways Health Insurance Premiums



Over 107% Increase in Past 5 Years!

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

SWIMWAYS WELLNESS PLAN

2007 Insurance Premiums ….

Currently, Swimways pays 70% of the employee costs for health insurance premiums and 50% on any dependents

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

60-70-80 Plan

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

Corporate Wellness Plans

2008 Insurance Premiums – Swimways will pay:

- On Health Plan / No Wellness Plan – 60% of Employee Cost; 50% for any dependents
- On Health Plan / Wellness Plan* (Fail Screen) – 70% of Employee Cost; 50% for any dependents
- On Health Plan / Wellness Plan (Pass Screen) – 80% of Employee Cost; 50% for any dependents

•**Smokers must also be enrolled in a smoking cessation program**

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

SWIMWAYS WELLNESS PLAN

Health Screen:

	2009	2010
Cholesterol	≤ 200	≤ 200
Blood Glucose	≤ 110	≤ 100
Blood Pressure	≤ 140 / 90	≤ 135 / 85
Body Fat	% of body fat under 35% for a female or under 30% for a male **or** Body Mass Index (BMI) less than 30	% of body fat under 31% for a female or under 24% for a male **or** Body Mass Index (BMI) less than 26

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

SWIMWAYS WELLNESS PLAN

To get 80% preferred rates …

In 2008 – must achieve 4/5
(smoker's must be in a smoking cessation plan)

In 2009 – must be a non-smoker, and achieve 3/4

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

SWIMWAYS WELLNESS PLAN

Verification

- Annually (January) have a nurse administer the health screen for everyone in the Wellness Plan
  - Nurse will only tell us if you passed the screen factors – not your specific results
- If you miss the Nurse visit, or fail and want to retry – have a doctor complete test and send us the results – can qualify for reduced rates at any time during the year

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

WELLNESS PLAN – 2008 HEALTH SCREEN

EMPLOYEE: _____

SMOKING
Does the employee smoke? YES / NO

CHOLESTEROL
Is the combined total cholesterol for the employee under 200? YES / NO

BLOOD PRESSURE
Is the blood pressure for the employee 140 / 90 or better? YES / NO

BLOOD GLUCOSE
Is the blood glucose for the employee under 110? YES / NO

BODY FAT
Is the employee's: YES / NO
percentage of body fat under 35% for a female
or under 30% for a male?

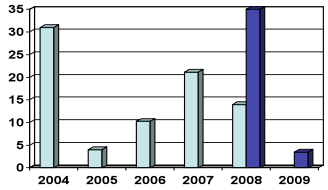
or

Is the employee's Body Mass Index less than 30

###

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

- Swimways Health Insurance Renewal - 2009



3% Increase in 1st Year After Plan

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

Corporate Wellness Plans

- Other Swimways Wellness Plan Success Factors
  - Usage of Swimways Gym
  - Employee Initiated Programs
    - Swimways Biggest Loser
    - RnR Half Marathon -- Swimways Team
    - Healthy Lunch Club
  - Employee Weight Loss
  - Health Screens

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

EMPLOYEE WELLNESS PROGRAMS: BALANCING THE BENEFITS WITH THE LAW

2009 Annual Meeting October 18–21 Boston | Don't just survive. Thrive!

ACC Association of Corporate Counsel

Voluntary Employee Wellness Programs

- Programs in which employee participation is entirely voluntary present the fewest legal challenges:
  - Offering Employees discounted gym membership
  - Offering healthy choices in the cafeteria
  - Establishing employee assistance programs
  - Sponsoring health fairs

2009 Annual Meeting October 18–21 Boston | Don't just survive. Thrive!

ACC Association of Corporate Counsel

Mandatory Employee Wellness Programs

- Some employers are requiring that their employees participate in mandatory wellness plans:
  - Requiring employees to undergo health risk assessment as condition of eligibility for insurance
  - Requiring employees to work with a health coach
  - Requiring employees to participate in some form of exercise
  - Requiring employees to abstain from tobacco products
  - Requiring employees to meet specific health metrics

2009 Annual Meeting October 18–21 Boston | Don't just survive. Thrive!

ACC Association of Corporate Counsel

The Carrot v. The Stick

The Carrot

- Pitney Bowes employees can earn up to $225/year for participating in corporate sponsored workout programs

The Stick

- Scotts Miracle Grow Co., charges $40 more per month in health premiums for employees who do not complete annual risk assessments. The company charges $65 more for workers who do not try to reduce any high risks that show up.

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

EMPLOYEE WELLNESS PROGRAMS AND THE RISK OF LITIGATION

Scott Rodrigues v. The Scotts Company, US District Court, Mass., C.A. 07-10104-GOA

- Rodrigues alleges that the company's policy violated his rights under
  - the Massachusetts privacy statutes (Mass. G.L. c. 214 § 1B);
  - the Massachusetts Civil Rights Act;
  - that firing him amounted to wrongful termination;
  - and that the company's policy violates the Employee Retirement Income Security Act (ERISA) because it discriminates by imposing a penalty on employees who do not quit smoking.

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

EMPLOYEE WELLNESS PROGRAMS AND THE RISK OF LITIGATION CONT.

- On July 23, 2009 the Court concluded that Rodrigues had no cause of action under the Massachusetts privacy statute and that a person such as Rodrigues, who has only a contingent offer of employment, does not have an expectation of benefits under the potential employer's ERISA plan that Section 510 protects.
- The Court does note in its decision that the analysis of Rodrigues' privacy claim may be different if he had claimed that the requirement of a pre-employment urine test in itself was an invasion of his privacy and NOT that Scott's discovery of nicotine in his system was an invasion of privacy.

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

FEDERAL AND STATE LAWS TO CONSIDER WHEN DESIGNING AN EMPLOYEE WELLNESS PROGRAM

- Health Insurance Portability and Accountability Act (HIPAA)
- Americans with Disabilities Act (ADA)
- Age Discrimination in Employment Act (ADEA)
- Employment Retirement Income Security Act (ERISA)
- Title VII
- Collective Bargaining Agreements
- State "Lifestyle Discrimination" Laws

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

HIPAA and ERISA

- The Health Insurance Portability and Accountability (**HIPAA**) nondiscrimination requirements, which are found in ***Section 702*** of the Employee Retirement Income Security Act (**ERISA**) (as amended by HIPAA) generally prohibit ERISA group health plans or group health insurance issuers from denying an individual eligibility for benefits based on a health factor and from charging an individual a higher premium than a similarly situated individual based on a health factor.
- Health factors include such things as:
  - Health status
  - Medical condition
  - Claims experience
  - Receipt of health care
  - Medical history

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

Assessing the Legal Risk of Mandatory Wellness Programs

- When you tie a employee wellness program to a group health plan and the level of incentive/penalty increases there are certain federal regulations that an employer must comply with
- Department of Labor provides a Wellness Program Checklist to assist employers with assessing their legal risk
  1. Is the first day of the current plan year after July 1, 2007?
  2. Does the plan have a wellness program?
  3. Is the wellness program part of a group health plan?
  4. Does the program discriminate based on a health factor?
  5. If the program discriminates based on a health factor, is the program saved by the benign discrimination provision?

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ADDITIONAL HIPAA STANDARDS

1. Rewards (and penalties) based on health factors cannot exceed 20% of the total cost of employee only coverage
2. The program must be reasonably designed to promote health or prevent disease
   - Not overly burdensome
   - Not a strategy for discrimination
3. The program must give individuals eligible for the program the opportunity to qualify for the reward under the program at least once per year
4. The reward under the program must be available to all similarly situated individuals
5. The plan must disclose in all plan materials describing the terms of the program the availability of a reasonable alternative standard.

AMERICANS WITH DISABILITIES ACT (ADA)

The ADA specifically exempts health programs from its requirements if participation in the program is voluntary.

In addition to a program being voluntary the ADA requires that:

- medical records acquired as a part of a wellness program to be kept confidential and separate from personal records
- that the information obtained is not used to limit health insurance coverage eligibility or to take adverse employment action or deny promotional opportunities.

Is it possible to design a mandatory wellness program that complies with the ADA?

Yes - so long as the employer administering the program does not ask its employees any questions likely to elicit information about a disability or require a medical exam.

EEOC AND THE ADA

- The EEOC has delayed issuing formal opinions on several issues concerning worksite programming efforts and their compliance or potential non compliance with ADA regulations.
  - For example the EEOC has issued an informal opinion stating that requiring all employees to take a health risk assessment that includes disability related questions & medical exam that is not job related and consistent with business necessity as a prerequisite for obtaining health insurance coverage violates the ADA.

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

- ADEA prohibits employers from discriminating against any individual with respect to "compensation, terms, conditions, or privileges or employment, because of such individual's age."
- If an employer provides fringe benefits to its employees, it generally must do so without regard to an employee's age. Employers may, however, provide a lower level of benefits to older workers than younger workers in limited circumstances.
- Such an age-based benefit distinction will not violate the ADEA if it can meet the "equal benefit/equal cost" rule set forth in EEOC regulations and expressly incorporated in the ADEA's provisions.
- Under this rule, the ADEA will be satisfied by providing equal benefits to older workers, or by incurring equal costs for their benefits.

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

TITLE VII

- A Title VII violation can arise if an employee wellness program results in disparate treatment or disparate effect on a protected class.
- For example, if a particular medical condition is more common in individuals of a certain race, national origin, gender or religion and that medical condition resulted in higher premiums being paid by that protected class, there may be a violation of Title VII.
- For the wellness program to be permissible, the employer must show it is job-related and consistent with business necessity.

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

COLLECTIVE BARGAINING AGREEMENTS

- If a wellness initiative that is sponsored by an employer changes the structure of employee contributions, co-pays, and deductibles or offers new programs such as smoking cessation or weight loss, the employer will most likely be required to bargain over such changes.
- Health and safety issues such as instituting a non smoking policy or programs that might require that employees submit to physical examinations must also be bargained for with a union.

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

FEDERAL WELLNESS LEGISLATION

- **The Healthy Workforce Act of 2007** proposes to amend the Internal Revenue Code of 1986 by providing a ten-year tax credit of up to $200 per employee for the first 200 employees, and up to $100 per employee thereafter, to employers that provide qualified comprehensive wellness programs.
- **The Workforce Health Improvement Program Act of 2007** focused on providing financial incentives for employee use of fitness facilities or purchase of fitness equipment.
- **The Help America Act** proposes to give an employer credit for wellness programs and exclude employer-paid fitness facility fees from an employee's income.

****All of the aforementioned bills are currently stalled in Congress.**

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

- Health Care Reform
  - President Obama has said repeatedly that health care reform must focus on prevention and wellness
    - (highlighted the Safeway Plan in the Oval with the CEO of Safeway)
  - Incentives for Corporate Wellness Plans is expected to be a a key feature in Health Care Reform – two key features
    - Tax incentives for Company's the offer the plans
    - Loosen restrictions on company's ability to provide financial rewards and penalties to promote healthy behavior

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

STATE "LIFESTYLE DISCRIMINATION" LAWS

- States have enacted "lifestyle discrimination" laws that protect an employee's right to engage in any lawful activities away from employer's premises during non-work time (For example: California, Colorado, North Dakota)
- Or that protect employees from discrimination in employment due to their use of lawful products away from work (For example: Connecticut, Illinois, Minnesota, Montana, North Carolina, Tennessee, Wisconsin)

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

A Wellness Program for the Small to Mid-sized Company

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

Learning Objectives

- **Importance of an integrated strategy**
- **Techniques for successful implementation**
- **10 best practices**

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

Why Total Well-Being for Small to Mid-Size Employers?

- Most comprehensive and cost-favorable
- Relationship with Mayo Clinic Health Solutions
- Many benefits for your organization

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

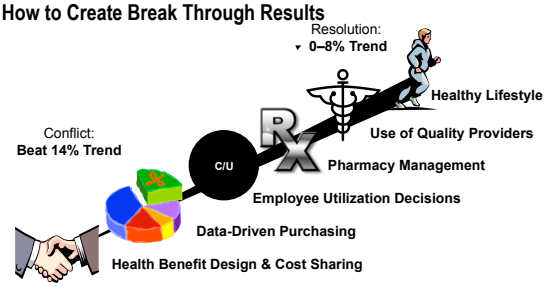
ACC Association of Corporate Counsel

Development of a Comprehensive Wellness Strategy

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

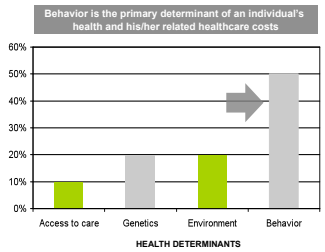
ACC Association of Corporate Counsel

How to Create Break Through Results



2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

Why We Focus on Wellness – Use Research



Source: IETF Centers for Disease Control and Prevention

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

The Economic Burden of Lifestyle Risks

- Total costs of **obesity** exceeding $147 billion
- Total costs of **tobacco** use exceeding $180 billion
- Research connects **inactivity** with:
  - ✓ Depression
  - ✓ Cancer
  - ✓ Heart disease
  - ✓ Stroke
  - ✓ Osteoporosis

More than 50% of disease is preventable through lifestyle change

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

How Many Americans Lead Healthy Lifestyles?

Non smokers:	76%	
Healthy weight (BMI of 18.5-25.0):		40%
Consume 5+ fruits/vegetable per day:	23%	
Exercise regularly (30 min – 5 days/week):	22%	
All of the above:	**3%**	

Bottom Line:
Practice healthy lifestyles across all four categories

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

EDUCATION & AWARENESS
What's wrong with this picture?

MARKETING	$'s SPENT
5-A-DAY	$1 Million
Fast food/Beverage	$25 Billion

2009 Annual Meeting October 18–21 Boston — Don't just survive. Thrive!

ACC Association of Corporate Counsel

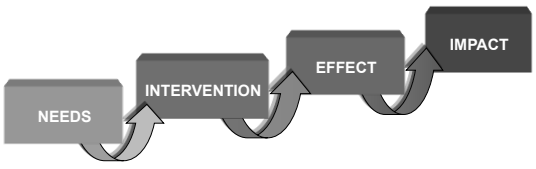
The Strategic Plan

What are the best practices?

2009 Annual Meeting October 18–21 Boston — Don't just survive. Thrive!

ACC Association of Corporate Counsel

Wellness Framework



IDENTIFY ISSUES… BUILD PROGRAM…CHANGE BEHAVIORS… MAKE A DIFFERENCE

2009 Annual Meeting October 18–21 Boston — Don't just survive. Thrive!

Wellness & Benefits Framework – More Detailed

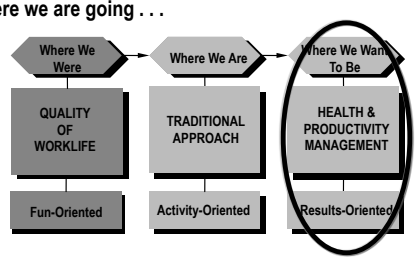
2009 Annual Meeting October 18–21 Boston — Don't just survive. Thrive!

Strategic Approach to Program Design

- ✓ Embed into strategy and culture
- ✓ Set measurable goals
- ✓ Identify components and align with goals
- ✓ Design implementation
- ✓ Education and awareness
- ✓ Incentives
- ✓ Communication
- ✓ Integrate internal and external programs
- ✓ Redesign

2009 Annual Meeting October 18–21 Boston — Don't just survive. Thrive!

Where we are going . . .



2009 Annual Meeting October 18–21 Boston — Don't just survive. Thrive!

Techniques for Successful Implementation of the Wellness Program

For the small to mid size employer

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

News Flash

Small businesses represent 99.7% of all U.S. employers, and

- Employ half of the private sector employees
- Generated 60 – 80% new jobs annually over the last decade

Major findings for small to mid size employers

- Findings
- Challenges
- Reality

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

Things to be aware of

Wellness Programs: one size does not fit all.

- Too broad for the small business
- Not always effective because of size, priorities, infrastructure and resources
- A complicated model does not equal results and risk reduction

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

How did we do it?

1. Senior management support
2. Communication
3. Incentive design
4. Designate a wellness leader and team
5. Assessments
6. Intervention programs
7. Education and awareness
8. Resources and tools
9. Policies
10. Community efforts

11. SOCIAL NETWORKING

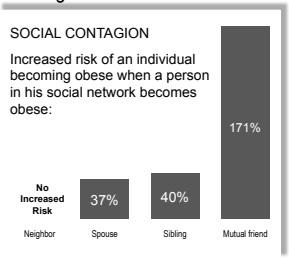
2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

According to Dr. Christakis…

SOCIAL CONTAGION

Increased risk of an individual becoming obese when a person in his social network becomes obese:



"…the relevance of **SOCIAL INFLUENCE** also suggests that it may be possible to harness this same force to ***slow* the spread of obesity**.

NETWORK PHENOMENON might be exploited to *spread positive health behaviors*."

The Spread of Obesity in a Large Social Network over 32 Years, ***Nicholas A. Christakis,*** *M.D., Ph.D., M.P.H., and James H. Fowler, Ph.D.*

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

Design

Health assessment and screening required for benefits eligibility
- ✓ 81% employee participation

Consumer Driven Health Care Plan
- ✓ Increase from **32%** in the first year to **50%** by the third year
- ✓ Unlimited preventive care
- ✓ $500 - $1,000 for wellness participation

PPO participation
- ✓ Decrease from **68%** in the first year to **50%** in the third year
- ✓ Preventive care up to $1,000
- ✓ $100 gift card for wellness participation

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

Nelnet's Health Risks… and Results

Nelnet Metrics	2005	2006	2007	2008	2008 RTC*
Weight	67%	66%	62%	62%	81%
High Cholesterol	36%	34%	27%	21%	n/a
High Blood Pressure	66%	64%	61%	55%	n/a
Lack of Exercise	39%	29%	20%	18%	61%
Tobacco Use	22%	20%	19%	15%	38%

*Readiness to change

- ✓ 42% reduction in Cholesterol
- ✓ 16% reduction in Blood Pressure
- ✓ 7% reduction in Obesity
- ✓ 32% reduction in Smoking

The dramatic risk reductions in the three year time period **exceeded** expectations

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

Nelnet Results: Shape Up the Nation

- ✓ Teamwork
- ✓ Friendly competition
- ✓ Inclusion
- ✓ Healthy lifestyle
- ✓ Education

PARTICIPATION & RETENTION

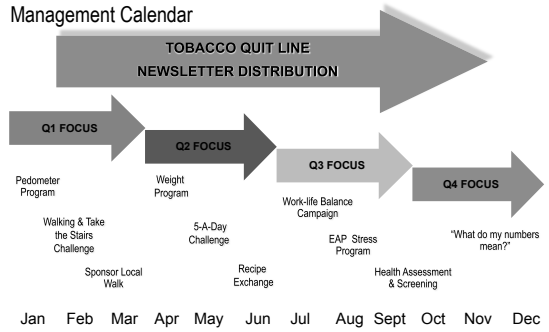
	Actual	National Average
Participants	47% (1235)	35%
Retention	78%	74%

PERFORMANCE DATA

	Cumulative	Individual
Weight loss	3,805 lbs	7.9 lbs
BMI reduction	598 points	1.2 points
Steps taken	328,668 mi	8,008 steps / day
Exercise	49,613 hrs	44 min / day

2009 Annual Meeting October 18–21 Boston

Management Calendar



2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

Corporate Wellness Plans

(1) Work with Insurance company to Develop Plan
(2) Be generous in beginning
(3) Get Executive Team support
(4) Be prepared for the whining
(5) Reinforce the Plan
(6) Outside Counsel review
(7) Keep track of plan's success
(8) Reevaluate the plan each year

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

ACC Association of Corporate Counsel

RESOURCES

- **ACC InfoPAK:** ***Employee Wellness Programs: A Federal and State Analysis of the Legal and Practical Implications***
  http://www.acc.com/legalresources/resource.cfm?show=167801
- U.S. Department of Labor: www.dol.gov/ebsa/pdf/fab2008-2.pdf
- Total Well-Being: ww.employeetotalwellbeing.com
- Tangerine Wellness: http://www.tangerinewellness.com
- WELCOA: http://www.welcoa.com
- Integrated Wellness Solutions: http://www.iwellsolutions.com/
- Well Steps: http://www.wellsteps.com/
- Wellsource: http://www.wellsource.com/
- Safeway: http://www.nowpublic.com/health/safeways-health-care-program-gets-attention

2009 Annual Meeting October 18–21 Boston Don't just survive. Thrive!

Association of Corporate Counsel

InfoPAK℠

Employee Wellness Programs: A Federal and State Analysis of the Practical and Legal Implications

Sponsored by:

MERITAS®
LAW FIRMS WORLDWIDE

Association of Corporate Counsel
1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036 USA
tel +1 202.293.4103, **fax** +1 202.293.4701
www.acc.com

Employee Wellness Programs: A Federal and State Analysis of the Practical and Legal Implications

February 2009

Provided by the Association of Corporate Counsel
1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036
Tel 202.293.4103
Fax 202.293.4701
www.acc.com

This InfoPAK[SM] explores corporate employee wellness programs, highlighting the benefits and challenges employers face when developing such programs. It examines both mandatory and voluntary employee wellness programs, and discusses how to successfully design each type. In addition, this InfoPAK provides an overview of the laws for every U.S. state, as they pertain to an employee wellness program.

The information in this InfoPAK should not be construed as legal advice or legal opinion on specific facts, and should not be considered representative of the views of Meritas, of Meritas contributing firms, or of ACC or any of its lawyers, unless so stated. Further, this InfoPAK is not intended as a definitive statement on the subject and should not be construed as legal advice. Rather, this InfoPAK is intended to serve as a tool for readers, providing practical information to the in-house practitioner.

This material was compiled by **Meritas**, the 2009 Sponsor of the ACC Small Law Department Committee. For a listing of the Meritas firms that assisted in the preparation of this InfoPAK, please see the "About the Author" section of this document. For more information about Meritas, please visit their website at www.meritas.org.

We would also like to thank the following individuals for their assistance:

- Christopher L. Brigham, Principal—Updike, Kelly & Spellacy, P.C. (a Meritas law firm)
- Natalie A. Braswell, Associate—Updike, Kelly & Spellacy, P.C. (a Meritas law firm)
- Anthony Vittone, General Counsel—Swimways Corporation

Contents

I. What are Employee Wellness Programs?

For a decade or more, companies have been developing programs aimed at encouraging their employees to take preventive measures to control illnesses and unhealthy behavior in an attempt to manage the burgeoning cost of health care. Wellness programs take many forms, including educational programs for managing health, health risk assessments, health screenings, onsite fitness facilities, subsidized fitness programs, and smoking cessation programs. As a result of this variety of offerings, companies of virtually any size can benefit from a properly implemented program.

II. Why are Employers Adopting Wellness Programs?

For most companies, the general answer to this question can be found in economic statistics on wellness programs; however, for some companies, the answer is as simple as—wellness programs save lives. Swimways Corporation, whose General Counsel is a member of ACC, is a worldwide manufacturer of leisure and recreational water products, headquartered in Virginia Beach, Virginia. Like many other companies across the nation, Swimways began implementing a wellness program for its employees in response to a 20–30 percent increase in health insurance costs over a three-year period. The goal of its employee wellness plan is to incentivize their employees to make better health choices and provide them with much needed information on their healthcare options.

One Swimways employee, a female factory worker in her fifties, was participating in a health screening when medical personnel determined that her blood pressure was at extremely dangerous levels. She was immediately rushed to the hospital via ambulance. Medical personnel were amazed that she was still able to walk around and function with such elevated levels. The health assessment provided as part of Swimways' newly implemented wellness plan effectively saved a life and, in turn, created a more health conscious employee.[1] Similar success stories abound.

According to the Center for Disease Control, more than 75 percent of employers' healthcare costs and productivity losses are related to employee lifestyle choices. Obesity, smoking, drug abuse, and physical inactivity are factors that contribute to higher use of healthcare services, lowered productivity, increased absenteeism, and higher health and disability insurance premiums. Perhaps

more importantly, studies have revealed that poor health habits take an enormous toll on American business. Workplace use of alcohol, tobacco, and other drugs cost American companies over $100 billion each year, and job stress is estimated to cost American industries $200–$300 billion annually.[2] Obesity-related healthcare costs totaled an estimated $117 billion in 2000 and have climbed steadily since then.[3] Since 1987, diseases associated with obesity account for 27 percent of the increases in medical costs. Medical expenditures for obese workers, depending on severity of obesity and sex, are between 29 percent and 117 percent greater than the expenditures for workers with normal weight.

Ninety-five percent of our nation's health expenditures are committed to diagnosing and treating disease only after it becomes manifest. Since 2000, employment-based health insurance premiums have increased 100 percent, compared to cumulative inflation of 24 percent and cumulative wage growth of 21 percent during the same period.

Cigarette smoking has been identified by the Center for Disease Control as the leading cause of preventable morbidity and premature mortality in the United States. According to the American Lung Association, the economic costs of smoking are astronomical. In 2004, tobacco use was estimated to cost the United States $193 billion, including $97 billion in lost productivity and $96 billion in direct healthcare expenditures. These estimated costs included all diseases related to tobacco use, including those of the lung and heart. One study estimates that a greater decline in the smoking rate would bring significant reductions in the costs of smoking. According to the study, decreasing the smoking rate to 15 percent by 2023—instead of the 19 percent predicted by current trends—would result in $31.4 billion in savings on pulmonary conditions due to smoking and an increase in productivity of $79 billion.

III. Benefits of Employee Wellness Programs

There are literally hundreds of articles that analyze the research and anecdotal evidence of the cost-effectiveness of employee wellness programs. Many of these articles extol the virtues of employee wellness programs and indicate that an effective wellness program can result in a 28 percent reduction in sick leave absenteeism, 26 percent reduction in the use of healthcare benefits, 30 percent reduction in worker compensation claims and reduced "presenteeism" (diminished job performance due to impairment by health issues).[7]

According to a recent study done by Maritz, a Missouri-based sales and marketing services company, wellness programs are connected to overall "well-being"

that goes beyond the employees' physical health. It found that employees at companies offering wellness programs are significantly more satisfied with their jobs, more likely to remain with the company long-term, and more likely to recommend the company as an employer to a friend or family member.[8] In addition to the healthier employees who have better morale and who are more productive, employee wellness programs can yield large dividends resulting in a rate of return from $1.49 to $4.91 for every dollar an employer spends.[9]

IV. Mandatory Versus Voluntary Employee Wellness Programs

For more than a decade, companies have been implementing a variety of wellness programs to promote and improve their employees' wellness and ultimately, to reduce the company's health-care costs. As these companies reduce healthcare expenditures and employees become healthier, there would seem to be no downside to implementing an employee wellness program. However, some wellness programs have come under fire for being too intrusive and going too far in seeking to monitor and change employee behavior in order to save money. A national survey of 450 major employers, released in April 2007 by Hewitt Associates, a human resources consulting company, found that two-thirds of the employers were moving towards more aggressive wellness and disease management programs for employees. Of the group surveyed, almost half were offering incentives to their employees to participate in health initiatives, compared with just 38 percent in the prior year. Although a majority of the companies surveyed were focusing on positive incentives, many employers are moving toward mandatory programs.[10]

A. The Carrot

Wellness programs take many forms, including educational programs for managing health, health risk assessments, health screenings, onsite fitness facilities, subsidized fitness programs, and smoking cessation programs. These reward-based programs, usually voluntary for employees, often focus on encouraging employees to kick unhealthy habits, as well as to develop a sustainable plan to maintain their health and wellness.

For example, Dell, Pitney Bowes, IBM, Kelloggs, and Time Warner, among others, have implemented wellness programs that reward employees for becoming healthy. Pitney Bowes employees can earn up to $225 a year for participating in corporate-sponsored workout programs. "We believe, from a lot of testing over the past 15 years, that the carrot is far more effective than the stick," Pitney Bowes executive chairman Michael Critelli said in a taped interview aired on the TODAY show on August 10, 2007.[11]

B. The Stick

Companies offering reward programs in the past are finding that employees are not taking advantage of those programs. As a result, more and more employers are seeking legal advice on how to create more aggressive wellness programs that utilize *penalties* to change employee behavior while avoiding any potential legal risks. Many have tried the carrot approach only to find it does not work.

The Wachovia Corporation, a national banking and financial services company with 110,000 employees in 49 states, launched its wellness program in 2004. It encouraged completion of its health assessment by running drawings for $50 gift certificates. In 2004, only 10 percent of incentive-eligible employees completed the assessment. In 2005, Wachovia dropped the incentive and likewise, saw its program participation rate drop to just five percent of eligible participants. Then, in 2006, the company began offering a $75 cash incentive for all eligible employees who completed the health assessment, with the incentive delivered through the employee's paycheck. Participation reached an all-time high of 66 percent. Wachovia expanded its incentive program in 2007 to include all benefit-eligible employees, spouses, and domestic partners. Employees received a $75 incentive for completing the assessment and an additional $50 incentive if their covered spouse or domestic partner completed the assessment.[12]

According to a recent Hewitt Associates survey, only four percent of smoking employees participated in their employer's smoking cessation programs in 2007, and just five percent of overweight employees joined workplace weight control programs.[13] Similarly, disease management programs, which insurers promote for people with asthma, diabetes, cardiac problems, and other conditions, attracted only 10 percent of the employees who were eligible. [14]

In contrast to the reward or carrot-based approach, Indianapolis-based Clarian Health announced that beginning in 2009, Clarian employees would be charged up to $30 every two weeks for failing to meet health standards set by the company. That breaks down to $10 for a body mass index that is too high, and $5 each for smoking, high cholesterol, high blood sugar, and high blood pressure. Clarian Health considered resorting to using penalties only after they felt that their voluntary program was not being utilized by their employees.

Scotts Miracle Grow Company, a lawn and garden company based in Marysville, Ohio, charges an extra $40 per month in health premiums for employees who do not complete annual risk assessments. The company charges $65 more for workers who do not try to reduce any high health risks that have been identified. Scotts also stopped hiring tobacco users in states permitting such a practice, and it reserved the right to fire employees who use tobacco.

Using penalties to change employee behavior is not simply a creature of corpo-

rate America. The government of Benton County, Arkansas raised the annual deductible for its employees from $750 in 2004 to $2,750 in 2005 and built an incentive into the plan enabling workers to cut the amount to as low as $500 if they were able to pass yearly fitness tests with the following requirements: cholesterol lower than 160; glucose lower than 126; blood pressure 140 over 90, and no nicotine. Before this went into effect, the county healthcare fund was nearly a half million dollars in the red. A year and half after it went into effect, the county healthcare fund was nearly a million dollars in the black.[15]

Critics of these plans charge that employers are trying to control private behavior while amassing huge amounts of personal health information, effectively regulating private behavior. Yet some employers see a different economic future—one where exploding healthcare costs pose a serious risk to the financial viability of their companies. Clarian Health abandoned its punitive wellness initiative in favor of a less intrusive plan, in response to protests from employees who objected to the increases in health insurance premiums being tied to the employee's failure to meet specific health goals. Clarian reverted to a plan that rewarded, rather than penalized, employees for meeting health standards.

V. Employee Wellness Programs and the Risk of Litigation

Some employers are requiring that their employees participate in mandatory wellness programs, and if an employee does not participate, certain penalties are imposed, such as charging higher insurance premiums for tobacco-using employees and issuing surcharges to employees if their body mass index is in the obese range, or if their cholesterol or blood pressure does not meet the standard set by the company. This practice is controversial, to say the very least, and some employees are taking their grievances to court, arguing that their employer's wellness initiatives violate their rights under existing law.

Firefighters in the city of Taylor, Michigan sued the city after the fire department implemented a wellness program with a health-appraisal component that included a mandatory blood draw used to determine cholesterol level. Firefighters sued, claiming that the blood draws violated their constitutional rights, including their Fourth and Fourteenth Amendment rights to be free from unreasonable searches and seizures. The Union also filed a grievance on behalf of the plaintiff firefighters claiming that the blood draw violated their collective bargaining agreement. The court denied the city's motion for summary judgment, and the fire department abandoned the blood draws as a result of the union's grievance.[16]

In December 2005, The Scotts Company instituted a nicotine-free policy prohibiting the smoking of tobacco products by its employees whether in the workplace or at home. The ban included tobacco-use testing for new employees and random testing on existing employees. Testing positive for the presence of nicotine is grounds for termination. Scotts' stated purpose for this policy was to save money on medical insurance costs and to promote healthy lifestyles among its employees.

Scott Rodrigues, a former employee of The Scotts Company, filed suit in federal court in Massachusetts after being fired for testing positive for nicotine in violation of Scotts' nicotine-free policy.[17] Rodrigues alleged that the company's policy violated his rights under Massachusetts' Privacy Statutes (the Massachusetts Civil Rights Act) in that his firing amounted to wrongful termination and that the company's policy violates the Employee Retirement Income Security Act (ERISA) because it discriminates by imposing a penalty (i.e., termination) on employees who do not quit smoking.

The Scotts Company moved to dismiss the complaint. The Massachusetts' district court issued an order and opinion on January 30, 2008, granting in part and denying in part The Scotts Company's motion to dismiss. The Court dismissed the count for wrongful termination and the count for violation of the state's civil rights act and determined that Rodrigues' claim for invasion of privacy and for violation of the ERISA provisions were sufficient enough to entitle him a chance to prove his allegations at trial.

Massachusetts, like a number of other states, has enacted a statute to protect the privacy of its citizens. Under Massachusetts law, an employer's legitimate business interest in obtaining an employee's private health information must be balanced against the employee's interest in keeping the information private.

Rodrigues also alleged in his complaint that in terminating his employment, Scotts violated ERISA § 510, which was enacted to prevent employers from discharging or harassing their employees in order to keep them from obtaining ERISA-protected benefits. ERISA § 510 provides in part that:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pensions Plan Disclosure Act [29 U.S.C.A. § 301 *et seq*.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

Rodrigues claims that in terminating his employment because he was a smok-

er, Scotts "interfered with the attainment of a right" to which he would have become entitled—participation in Scotts' employee benefits plan—if he had remained employed. As the court noted in its order, according to *Barbour v. Dynamics Research Corp*., "The ultimate inquiry in a section 510 case is whether the employment action was taken with specific intent of interfering with the employee's ERISA benefits."[18]

These cases illustrate how wellness programs can expose an employer to liability if they are not structured to comply with existing state and federal laws. Given that the case law in this area is sparse, if Rodrigues succeeds in his suit, he could set a precedent potentially opening the door to even more lawsuits involving employer wellness initiatives.

VI. Federal Laws to Consider when Designing an Employee Wellness Program

Employers seeking to reap the cost-saving benefits of wellness programs must also contend with a myriad of legal issues and compliance requirements that are applicable to the development of these programs. Some of the laws to consider include: the Health Insurance Portability and Accountability Act (HIPAA), the Americans with Disabilities Act (ADA), the Employment Retirement Income Security Act (ERISA), the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act, state "lifestyle discrimination laws," and even collective bargaining agreements.

A. Health Insurance Portability and Accountability Act (HIPAA)

On December 13, 2006, the Department of Labor, the Treasury and the Health and Human Services Department published joint final regulations on the non-discrimination provisions of the Health Insurance Portability and Accountability Act (HIPAA).[19] The nondiscrimination requirements, which are found in Section 702 of ERISA (as amended by HIPAA) generally prohibit ERISA-group health plans or group health insurance issuers from denying an individual eligibility for benefits based on a health factor and from charging an individual a higher premium than a similarly situated individual based on a health factor. Health factors include such things as health status, medical condition, claims experience, receipt of healthcare, and medical history. Nicotine addiction and body mass index are examples of health factors covered by the HIPAA non-discrimination rules.

The regulations define a wellness program as any program designed to pro-

mote health or prevent disease.[20] A wellness program regulated by the HIPAA non-discrimination regulations is one that offers rewards in connection with an ERISA-group health plan or health insurance. The regulations provide that a wellness program that does not condition obtaining a reward on an individual satisfying a standard that is related to a health factor does not violate the HIPAA nondiscrimination regulations.[21] The wellness program must also be available to all similarly situated individuals. Examples of automatically acceptable wellness programs are provided in the regulations and include such things as reimbursing the cost of a membership in a fitness center; rewarding participation in a diagnostic testing program, without any difference in reward based on outcomes; and reimbursing the costs of smoking cessation programs without regard to whether the individual quits smoking.

If a wellness program is part of a group health plan and makes rewards conditional on an individual satisfying a standard related to a health factor, that wellness program must satisfy the following five additional requirements or risk violating the HIPAA non-discrimination regulations:[22]

1. The total reward that may be given to an individual cannot exceed 20 percent of the total cost of employee-only coverage. This limit applies to the total cost of coverage, not just the employee share. However, if eligibility for the program is limited to employees only (and does not cover spouses and other dependents who may be eligible for coverage), then the 20 percent limit applies only to the cost of employee coverage. Rewards may take several forms – rebates or contributions toward the employee share of the premium, waivers of co-pays or deductibles, and the absence of a surcharge or some other additional benefit that would not otherwise be provided.

2. The program must be reasonably designed to promote health or prevent disease.

3. The program must allow eligible individuals the opportunity to qualify for the reward at least annually.

4. The program must be available to all similarly-situated individuals. Individuals for whom it is medically difficult to meet the standard must be offered an alternative. An example of a program that would comply with this requirement includes a wellness program where an employer requires employees to walk or exercise for 20 minutes a day, three times a week, on paid time. If an employee is unable to walk or exercise, a reasonable alternative is provided by having the employee engage in stress reduction techniques, such as yoga, for 20 minutes a day, three times a day, on paid time.

5. The plan must disclose, in all plan materials describing the terms of the program, the availability of a reasonable alternative standard. For example, if a wellness program waives the annual deductible for the following year for participants who have a body mass index between 19 and 26, all plans and materials describing the program should include the following statement:

"If it is unreasonably difficult due to a medical condition for you to achieve a body mass index (BMI) between 19 and 26 (or if it is medically inadvisable for you to achieve this BMI) this year, your deductible will be waived if you are able to reduce (or if below 19, increase) your BMI by at least a point. If it is unreasonably difficult due to a medical condition or medically inadvisable for you to meet this alternate standard, we will work with you to develop another way to have your deductible waived, such as a walking program or dietary regimen."[23]

In addition to meeting certain requirements for the wellness program to be considered non-discriminatory under HIPAA, a wellness program might also trigger HIPAA regulations regarding the privacy of employee health information collected and retained by employers. HIPAA defines "protected health information" as individually identifiable health information created or received by an entity subject to the privacy regulations that relates to the past, present or future physical or mental health or condition of an individual, including information regarding the provision of a payment for healthcare that is transmitted or maintained.[24]

The information must either identify the individual or provide a reasonable basis to believe that the information can be used to identify the individual. Based on this definition, it is likely that any information used by a health plan to determine whether someone is entitled to a premium discount under a wellness program would be protected health information under HIPAA.[25]

B. Americans with Disabilities Act (ADA)

The Americans with Disabilities Act prohibits covered employers from denying, on the basis of disability, qualified individuals with disabilities an equal opportunity to participate in, or receive benefits under, programs or activities conducted by those employers. The ADA defines disability as "a physical or mental impairment that substantially limits one or more major life activities of an individual."[26]

The ADA specifically exempts health programs from its requirements if participation in the program is voluntary. In addition to a program being voluntary, the ADA requires that medical records acquired as part of a wellness program

are kept confidential and separate from personnel records and that the information obtained is not used to limit health insurance coverage eligibility, to take adverse employment action, or to deny promotional opportunities. While employers can take steps to make sure that health information gathered in conjunction with their wellness programs is maintained in accordance with the ADA confidentiality measures, they may have more difficulty proving that the participation is voluntary.

According to the Equal Employment Opportunity Commission's (EEOC) Enforcement Guidance (available at www.eeoc.gov/policy/docs/accommodation.html), a wellness program is "voluntary" as long as employees are neither required to participate in the program nor penalized for choosing not to participate. The courts have not yet tested whether an employee who chooses not to participate in a wellness program, and consequently must pay a full health insurance premium, is being subjected to a penalty or whether an overly attractive incentive may render a wellness program involuntary.

To ensure ADA compliance when designing a voluntary wellness program, employers must first confirm that their wellness program is structured so that employees are neither required to participate nor penalized for choosing not to participate. It is possible to design a mandatory wellness program that complies with the ADA, as long as the employer administering the program does not ask its employees any questions likely to elicit information about a disability or require a medical exam that is not job related or consistent with business necessity. For example, if an employer were to require an employee who smokes to attend a smoking cessation program and the employer only asks questions about the employee's smoking habits, rather than questions about their health, the employer would be in compliance with the ADA. If the employer required the employee to participate in a blood screening, such screening would have to be job related and consistent with business necessity.

Wellness programs must also comply with the ADA's reasonable accommodation requirements to allow individuals with known disabilities to participate. The ADA states that wellness programs that involve disability-related inquiries and medical examinations must not inquire about an employee's medical condition unless such inquiries are "job related and consistent with business necessity." However, according to the EEOC, the only exception is that employers may conduct voluntary medical examinations and activities, including taking voluntary medical histories that are part of an employee health program, without having to show that they are job related and consistent with business necessity. If a program simply promotes a healthier lifestyle, but does not ask any disability-related questions or require medical examinations, it is not subject to the ADA according to the EEOC. If, on the other hand, a medical examination is required, it must be job related and consistent with business necessity.[27] As a result of this overlap in the regulations, employers should consult with employ-

ment counsel prior to making these inquiries.

C. Employment Retirement Income Security Act (ERISA)

Employee wellness programs offered in connection with employee welfare benefits plans that provide medical, surgical, or hospital benefits are governed by the Employment Retirement Income Security Act (ERISA). Section 702 of ERISA, as amended by HIPAA, prohibits group health plans and health insurance issuers from discriminating against individuals in eligibility and continued eligibility for benefits and in individual premium or contribution rates based on health factors. These health factors include: health status, medical condition (including both physical and mental illnesses), claims experience, receipt of health care, medical history, genetic information, evidence of insurability (including conditions arising out of acts of domestic violence and participation in activities such as motorcycling, snowmobiling, all-terrain vehicle riding, horseback-riding, skiing, and other similar activities), and disability.[28]

An employee who is barred from obtaining a benefit under an employer's wellness program may have a cause of action for interference with benefits under ERISA.[29] Examples of plan provisions that violate ERISA section 702 because they discriminate in eligibility based on a health factor include plan provisions that require "evidence of insurability," such as passing a physical exam, providing a certification of good health, or demonstrating good health through answers to a health care questionnaire in order to enroll. It may be permissible for plans to require individuals to complete physical exams or health care questionnaires for purposes other than determining eligibility to enroll in the plan, such as for determining an appropriate blended, aggregate group rate for providing coverage to the plan as a whole.

D. Age Discrimination in Employment Act (ADEA)

The Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating against any individual with respect to "compensation, terms, conditions, or privileges or employment, because of such individual's age." If an employer provides fringe benefits to its employees, it generally must do so without regard to an employee's age.[30] Employers may, however, provide a lower level of benefits to older workers than younger workers in limited circumstances. Such an age-based benefit distinction will not violate the ADEA if it can meet the "equal benefit/equal cost" rule set forth in EEOC regulations[31] and expressly incorporated in the ADEA's provisions.[32] Under this rule, the ADEA will be satisfied by providing equal benefits to older workers, or by incurring equal costs for their benefits.

E. Title VII

The Civil Rights Act of 1964 (Title VII) prohibits discrimination based on race,

color, national origin, sex, or religion. A Title VII violation can arise if an employee wellness program results in disparate treatment or disparate effect on a protected class. For example, if a particular medical condition is more common in individuals of a certain race, national origin, gender or religion, and that medical condition resulted in higher premiums being paid by that protected class, there may be a violation of Title VII. For the wellness program to be permissible, the employer must show it is job related and consistent with business necessity.

F. Collective Bargaining Agreements

Employers must bargain in good faith over "mandatory subjects of bargaining" such as health insurance plans according to the National Labor Relations Act. If a wellness initiative that is sponsored by an employer changes the structure of employee contributions, co-pays, and deductibles or offers new programs such as smoking cessation or weight loss, the employer will most likely be required to bargain over such changes. Health and safety issues such as instituting a non-smoking policy or programs that might require that employees submit to physical examinations must also be bargained for with a union.

G. Federal Wellness Legislation

There have been several bills to promote wellness initiatives that have been introduced in the U.S. Congress. The Healthy Workforce Act of 2007 proposes to amend the Internal Revenue Code of 1986 by providing a 10-year tax credit of up to $200 per employee for the first 200 employees, and up to $100 per employee thereafter, to employers that provide qualified comprehensive wellness programs.[33] The Workforce Health Improvement Program Act of 2007 focused on providing financial incentives for employee use of fitness facilities or purchase of fitness equipment.[34] The Help America Act proposes to give an employer credit for wellness programs and exclude employer-paid fitness facility fees from an employee's income.[35] Another proposed bill would amend the Public Health Service Act to establish a workplace wellness education campaign and provide evaluations for both private and public Employer Wellness Programs.[36] All of the aforementioned bills are currently stalled in Congress.

VII. State Laws to Consider[37]

Many states protect an employee from being discriminated against for engaging in lawful activities. For example, some states have enacted "lifestyle discrimination" laws that protect an employee's right to engage in any lawful activities away from employer's premises during non-work time or that protect employees from discrimination in employment due to their use of lawful products away from work.

Lifestyle discrimination claims against employers can be based on a variety of lawful activities such as tobacco use, alcohol, and food consumption. Employers who refuse to hire or who fire individuals who smoke, drink, or have high cholesterol could be discriminating against individuals who engage in lawful off-duty behavior. In the context of wellness initiatives, employers cannot simply fire individuals because their lawful lifestyle choices result in the employer incurring higher healthcare costs.

Some states that have enacted laws protecting employees or prospective employees from discrimination based on the use of lawful products include Illinois, Minnesota, Nevada, New York, Tennessee, and Wisconsin.[38] Other states, such as California, Colorado, and North Dakota, have statutes that make it impermissible for an employer to terminate an employee for engaging in any lawful activity off the employer's premises during non-working hours.[39]

VIII. How to Design a Successful Wellness Program

There is no "one size fits all" wellness program. Companies must begin by first assessing the specific health issues that their employees are facing. Employees have to be educated about the benefits of participating in a wellness initiative. Companies must generate buzz and stimulate participation. Incentives for participation include such things as providing employees with trinkets, t-shirts, merchandise, or cash for participating in a corporate employee wellness program. The best incentive for employees is a premium reduction of their overall healthcare costs.

There are various models of employee wellness programs. There is the prepackaged incentive campaign that provides employers with easy to implement and cost-effective incentive programs to increase participation in the company's wellness program. These packages usually include an overview and provide specific steps on how to achieve wellness goals, as well as handouts that provide instruction and guidance to employees. Employers can also utilize a nationally recognized provider to develop and implement an employee wellness program. For the most part, this model provides more comprehensive and sophisticated wellness programming with online interactivity.

Finally, employers may want to formally link their wellness program to their companies' benefits plan. Using this approach, companies will offer a reduction in health insurance premiums when employees participate in wellness programs.

IX. ACC Examples of Employee Wellness Program Initiatives

A. Nelnet[40]

Nelnet, Inc. is one of the leading education planning and education finance companies in the United States and provides a comprehensive suite of products and services to education-seeking families and operational products/services to the institutions that serve them. Simply put, the company helps families prepare, plan, and pay for education. They have over 2,200 employees in 17 different locations.

Nelnet's comprehensive wellness program is implemented by Total Well-Being, a corporate wellness consulting company, and is the recipient of the Gold Well Workplace Award and Platinum American Heart Association Start! Award.

Nelnet strives to offer wellness and benefit programs that are designed to meet the company's business needs while addressing its market-competitive goals to attract and retain top talent and improve the well-being of associates and their families. These programs seek to engage members in decisions and shared ownership, while balancing concerns about change to create active participants. Above all else, the company strives to provide choice, innovative wellness and benefit solutions, and efficient delivery for superior customer service to its employees.

Nelnet president and CEO, Mike Dunlap, said of the program:

> "In less than three years, Nelnet has implemented a consumer-driven health plan and a robust wellness program that have seen remarkable results.
>
> The wellness program includes an annual health screening and health assessment along with lifestyle coaching, self-care initiatives, gym membership reimbursement, a tobacco quit line, pedometer walking program, and nutrition education, among other initiatives. These efforts have resulted in a three percent decrease in medical costs, nine percent reduction in high cholesterol, six percent reduction in obesity, five percent reduction in blood pressure, and a three percent reduction in tobacco use.
>
> These extraordinary results, in such a short time frame, are directly attributable to the proactive and engaging program Colleen and team put in place. The outcome is impressive, but more importantly, this

program has brought about culture change in our 2,400 associates nationwide. Nelnet now has a sustainable culture focused on ongoing wellness. It's part of the organizational fabric."

B. Nabholz Construction Wellness Program[41]

Nabholz Construction provides construction services throughout the United States. As part of their employee wellness program, Nabholz covers 100 percent of the employee only portion of the monthly insurance premium. If the employee chooses not to have his/her wellness screening, he/she is responsible for 50 percent of the monthly premium (about $150/month). The employee is still responsible for the spouse and/or family coverage.

To avoid paying $150 a month, Nabholz employees must meet the following requirements:

- Complete an HRA (Health Risk Assessment);
- Complete *Biometrics (cholesterol, glucose, blood pressure, etc.); and
- Sign the consent form.

* Biometrics may be done in one of three ways:
- with Wellness Director at a company screening
- a yearly physical at a doctor's office
- at a "Medi-quick" type facility.

The results are sent to the Wellness Director. They are treated as confidential and HIPPA compliant. If an employee is greatly concerned with results being kept in-house, he/she may provide documentation from their doctor stating that his/her biometrics were completed but no results are needed.

C. Swimways Wellness Program[42]

Swimways Corporation, a member of ACC, is a worldwide manufacturer of leisure and recreational water products headquartered in Virginia Beach, Virginia. Swimways began implementing the Swimways Wellness Program for its employees in 2008. The goal of the Wellness Program is threefold:

- provide Swimways employees with basic information on their health and wellness,
- incentify Swimways employees to make health lifestyle choices, and
- reduce healthcare costs for Swimways and the employees.

Participation in the wellness program is voluntary. However, the portion of an employee's individual insurance premium that Swimways will pay is tied to participation in the wellness program. If an employee chooses not to participate in the program, Swimways will pay 60 percent of the employee's individual healthcare premium. If the employee participates in the program, Swimways

will pay 70 percent of the employee's individual healthcare premium. As part of the Wellness Program, if the employee successfully passes the health screen, Swimways will pay 80 percent of the employee's individual healthcare premium. In order to successfully pass the health screen, the employee must meet four of the following five factors:

- Be a non-smoker for the past six months or participate in a smoking cessation program.
- Have a total cholesterol lower than 200.
- Have a blood pressure that is less than or equal to 140/90.
- Have a blood glucose less than 110.
- Have either (a) body fat make up no more than 35 percent for females or 30 percent for males of the person's total body composition; or (b) have a body mass index of less than 30.

If it is unreasonably difficult due to a medical condition for a Swimways employee to achieve the standards for a reward under this program, or if it is medically inadvisable for an employee to attempt to achieve the standards for a reward under this program, Swimways will work with that employee to develop another way to qualify for this reward.

Swimways has contracted with NowCare Health & Safety to administer the health screen. The medical specialists from NowCare privately evaluate each employee in the wellness program. NowCare does not provide the specific test results to Swimways, but they complete a form so that Swimways can deduct the appropriate insurance premium from the employee's paycheck.

Starting in 2009, non-smoking will be a prerequisite for admission into the wellness program. Swimways will give all employees one year to stop smoking. If an employee is still smoking after one year, Swimways will pay only 60 percent of the employee's individual healthcare premium.

D. Healthwise Wellness Program[43]

Healthwise is a nonprofit organization in Boise, Idaho, which creates consumer health information and tools for other organizations. This company was chosen by *The Wall Street Journal* as one of 15 Top Small Workplaces. The organization's exceptional work culture is bolstered by its employee wellness program which incorporates such things as weekly fitness classes, bike loans, wellness buckets, as well as weekly healthy snacks and organic fruit/vegetable share programs, and onsite massages. Healthwise's wellness initiatives are spearheaded by their Wellness Team. Below is a description of the organization's wellness program.

Goal: The Wellness Team's (WT) mission is to support and encour-

age individual and organizational wellness at Healthwise, and extend wellness into the community. The Wellness Team incorporates the philosophy of body, mind, and spirit wellness as it promotes wellness at Healthwise.

- Encourage individual wellness through activities sponsored by WT and opportunities in the community.
- Improve the overall working environment at Healthwise, focusing on the way we work together as employees and teams.
- Serve as advisors, as needed, in the communication of human resource policies at Healthwise.

Work Plan: WT promotes, plans, coordinates, and encourages participation in a variety of wellness activities and opportunities for Healthwise employees. They strive to reach as many employees as possible—an increasingly challenging prospect given the growing population and diversity of Healthwise employees.

Members: The Wellness Coordinator is a half-time paid position. The coordinator prepares the strategic plan and budget, coordinates/facilitates WT committees for events/offerings, partners with HR and the health plans on wellness issues, and participates in a community wellness networking group.

The Wellness Team members are volunteers from the various working teams at Healthwise. Each member usually serves two years, and then rotates with another member of their working team.

General Wellness: WT maintains the intranet wellness site on the Healthwise network. This allows employees to access the latest wellness news and information at any time. WT is a member of the National Wellness Association and utilizes these resources throughout the year to assist its mission. WT regularly solicits employee feedback on the wellness program.

X. Conclusion

The statistics on the impact of workplace health on a business' bottom line are staggering, especially in a struggling economy. More and more companies are turning to employee wellness programs to save costs and to improve employee health and morale. In fact, the empirical data seems to overwhelmingly support the benefits of these programs. Still, as more companies expend resources to develop wellness initiatives aimed at encouraging their employees to take preventative measures to control illnesses and unhealthy behavior, they must be

mindful of their legal risks and compliance obligations.

Employers should seek the advice of legal counsel as soon as they begin to consider implementing an employee wellness program. This will minimize the likelihood of legal challenges by taking steps to avoid risk such as: retaining an independent third party to administer and collect/analyze all medical information in order to avoid ADA obstacles and comply with privacy regulations; providing accommodations for individuals with disabilities to enable them to participate in wellness programs; framing incentives as rewards, not penalties; complying with applicable state lifestyle or disability discrimination laws; and bargaining with the union to extend the program to represented employees. A well thought-out and constructed program may be just what the doctor ordered for your company's collective waistline.

XI. Additional Resources

A. Total Well-Being—www.employeetotal-wellbeing.com

Total Well-Being is one of the leaders in the corporate wellness consulting field for small to mid size companies. Total Well-Being has a preferred relationship with the Mayo Clinic Health Solutions to provide small to mid size employers (50-4,999 employees) access to the industry's most comprehensive menu of health management products and services available to address the full spectrum of needs along the health continuum. Total Well-Being makes it possible for small and mid size companies to experience the Mayo Clinic Health Solutions' platform of services.[44]

B. Tangerine Wellness— www.tangerinewellness.com

Founded in 2004, Tangerine offers a corporate-sponsored, fully-outsourced weight loss and management solution that offers incentives for employees and their spouses who achieve individual and team goals.

C. WELCOA— www.welcoa.com

The Wellness Council of America (WELCOA) was established as a national not-for-profit organization in the mid 1980s through the efforts of a number of forward-thinking business and health leaders. Today, WELCOA has become one of the most respected resources for workplace wellness in America.

D. Integrated Wellness Solutions—www.iwellsolutions.com

Integrated Wellness Solutions aspires to be the leading provider of integrated health promotion solutions, helping to catalyze and encourage individuals to develop healthier behaviors – and as a result live a better and more enjoyable life.

E. Well Steps—www.wellsteps.com

WellSteps™ is a turnkey wellness program focused on one thing – helping employees adopt and maintain healthy behaviors. Created by Dr. Steven Aldana and Dr. Troy Adams, WellSteps™ uses the latest in behavior change research and Web engineering to provide employees with a continuous stream of effective, engaging, behavior change programs. All programs are also available to employees who may not have Web access.

F. Wellsource—www.wellsource.com

Wellsource, Inc. has been developing health risk assessments (HRAs) and health promotion solutions for nearly 25 years. Building upon their most popular flagship HRA, Wellsource offers a suite of wellness tools that use optimal health benchmarks and rely on the foremost scientifically-based research. Depth of experience, product innovation, and longstanding business success support their position as a leader in the health and wellness industry.

G. U.S. Department of Labor—www.dol.gov/ebsa/pdf/fab2008-2.pdf

The Department of Labor offers a Wellness Program Analysis and Checklist to help employers determine whether their wellness program offers a program of health promotion or disease prevention that complies with the Department's wellness program regulations.

Appendix A: State Laws

Alabama

Alabama has enacted a program called the "Wellness Premium Discount Program" which was approved by the Alabama State Employee Insurance Board (ASEIB) in August 2008. The program encourages state employees to undergo screening for four health factors that are linked to the development of serious, high-cost conditions.

Beginning in January 2019, employees will start paying monthly premiums of $50. Those who don't smoke will have $25 discounted and those who agree to undergo screenings will have another $25 deducted. Therefore, those who comply with the program will pay no premiums.

In 2010, Alabama will join other states such as Delaware, Kentucky, and Oklahoma by launching a health promotion program for its state employees. If Alabama state employees bring litigation challenging the Wellness Program, it will most likely be after its implementation in January 2010.

Alaska

There is no Alaska statute that protects employees from discrimination in employment due to their use of lawful consumable products on the employer's premises during non-work time or their use of lawful consumable products away from work.

Arizona

Arizona has no statutes protecting employees from discrimination due to their use of lawful consumable products away from work or on the employer's premises during non-work time. Similarly, there is no statutory or case law involving the validity of denying employment based on the potential health costs of particular conduct, such as smoking or alcohol consumption, subject, of course, to the requirements of the ADA and its Arizona counterpart, the Arizona Civil Rights Act. 42 U.S.C. §§ 12101 *et seq.* and A.R.S. §§ 41-1461 *et seq*., respectively.

Employers are nevertheless counseled to exercise caution because of the potential for a claim of invasion of privacy. Arizona recognizes "the four-part classification of the tort of invasion of privacy laid out in the Restatement (Second) of Torts §§ 625A *et seq*." *See Hart v. Seven Resorts, Inc.,* 190 Ariz. 272, 279, 947 P.2d 846, 853 (App. 1997). The tort of intrusion on seclusion is of particular concern in this context, as it potentially imposes liability on "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, … if the intrusion would be highly offensive to the reasonable person. Restatement (Second) of Torts §§ 625B, comment b.

As a general matter, wellness programs have been regarded approvingly by the Arizona legislature. Self-insured school districts may include wellness programs in the uses for which insurance trust funds may be utilized. A.R.S. § 15-382C. Nearly 20 years ago, the Arizona Department of Administration, responsible for state government support services, was directed by the legislature to establish a wellness program for state employees. Laws 1990, Ch. 355, effective June 26, 1990.

Finally, under the statutes governing private insurance companies offering health benefit plans, the section prohibiting discrimination in certain situations provides that the section "does not prohibit any health benefits plan from providing or offering to provide rewards or incentives under a wellness program that satisfies the requirements for an exception from the general prohibition against discrimination based on a health factor under the health insurance portability and accountability act of 1996 … including any federal regulations adopted pursuant to that act." A.R.S. § 20-2310N.

Arkansas

There is no Arkansas statute that protects employees from discrimination in employment due to their use of lawful consumable products on the employer's premises during non-work time or their use of lawful consumable products away from work.

California

California Labor Code § 6404.5 provides a statewide ban on smoking in the workplace. Employers with five or less employees may permit smoking as long as all employees who enter the smoking area consent, the smoking area is well ventilated, and minors do not have access to the smoking area.

A recent ruling by the California Supreme Court in *Ross v. RagingWire Telecommunications, Inc.* 42 Cal. 4th 920 (2008), held that California's Compassionate Use Act of 1996, a passed voter initiative which provides a person using marijuana for medicinal purposes with a defense to certain state criminal charges, does not prohibit an employer from firing an employee for marijuana use. The Court held that neither the California medicinal marijuana laws nor the Fair Employment and Housing Act (FEHA) create an obligation for employers to accommodate the use of illicit substances. While California's Compassionate Use Act eliminates *state* criminal liability for medicinal marijuana use, marijuana is still an illegal substance under *federal* law; as such, the Court viewed marijuana as an illegal substance for the purposes of its analysis.

The California Labor Code §§ 96(k) and 98.6 protect employees from demotion, suspension, or discharge from employment for lawful conduct occurring during non-working hours away from the employer's premises. Smoking, for example, remains a legal vice. State and local governments have passed laws

and ordinances prohibiting smoking in the workplace, bars, and even in public areas. However, individuals still may smoke cigarettes in their homes, automobiles, and in other private areas. Therefore, smoking away from the workplace would appear to be a lawful, off-premises activity protected by the California Labor Code.

California Labor Code § 1025 states that every private employer with 25 or more employees "shall" reasonably accommodate any employee who wishes to enter and participate in alcohol or drug rehabilitation programs. However, an employer is still not prohibited from refusing to hire, or firing, an employee due to drug or alcohol use that prevents the performance of his duties.

In 1993, the California Supreme Court held in *Cassita v. Community Foods, Inc.*, 5 Cal. 4th 1050 (1993), that the California Fair Employment and Housing Act (FEHA) does not prohibit discrimination based on weight if the obesity is unrelated to a physiological disorder. Therefore, an individual who alleges employment discrimination on the basis of weight may have a claim under FEHA, but only if the weight problem arises from a physiological condition.

On a local level, cities such as San Francisco have adopted Compliance Guidelines to Prohibit Weight and Height Discrimination to ensure programs, facilities, and services are accessible to people of all weights and heights. Businesses must make reasonable accommodations, such as theaters providing seats without arm rests and with extra leg room; swimming pools providing extra handrails and steps to enter the pool; or medical offices providing dressing gowns of various fits, rather than one-size-fits-all.

To the best of our knowledge, no lawsuits have been filed in a California court alleging that an employer's Employee Wellness Program violated federal or state law.

Colorado

Colorado has no reported appellate decisions or any statutes dealing directly with wellness issues for employers. However, Colorado does have a statute (Colo. Rev. Stat. § 24-34-402.5 (2008)) that defines discriminatory or unfair employment practices to include the termination of employment due to the employee engaging in any lawful activity off the premises of the employer during non-working hours. The obvious implication for wellness programs is that an employer who implements such a program could not, as part of the program, prohibit employees from (and thus punish employees for) engaging in certain activities outside of work such as smoking, drinking, eating fast-food, and so forth.

The statute does have an exception that might creatively be used to allow employers to implement certain wellness initiatives that require employees to refrain from certain conduct outside of work. The exception allows restrictions

on certain activities that "[r]elate to a *bona fide* occupational requirement or [that are] reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer."

The employer might fall within the exception if it can comfortably tie any wellness restrictions to a real job requirement or to particular employment activities of a given employee (e.g., a smoking restriction on someone whose job requires a defined degree of cardiovascular achievement). However, Colorado courts have read similar exceptions very narrowly, and the employer must be wary of violation of the statute, as a plaintiff with a successful claim under the statute will be awarded damages, plus court costs and reasonable attorney's fees. The exception would definitely not apply to broad-based company-wide wellness programs with provisions restricting off-duty legal activities. It should be noted that the statute does not apply to employers with 15 or fewer employees.

Connecticut

Connecticut law prohibits employers from discriminating against any individual who smokes outside the workplace with respect to compensation, terms, conditions, or privileges of employment. *See* Conn. Gen. Stat. Ann. § 31-40s (2003). The Connecticut Department of Labor interprets this law as not prohibiting an employer from having smokers contribute more toward health benefits than non-smokers due to preemption by the federal Employee Retirement Income Security Act (ERISA).

Delaware

Delaware has not enacted laws that protect employees from discrimination in employment due to their use of lawful consumable products, or due to lawful conduct during non-working hours away from the premises or on the employer's premises during non-work time. There has been no litigation in the Delaware courts holding that an employer has the right to deny employment because of the likely future health costs associated with a particular condition nor has there been any law suits filed in Delaware alleging that an employer's employee wellness program violated federal or state laws.

The State of Delaware adopted a state comprehensive wellness program for state employees in 2007, which has won awards for innovation. The Delaware state wellness program, DelaWELL, includes online health risk assessments, weight management efforts, cardio health assessments, personalized lifestyle and disease management coaching programs, and online health resources. For DelaWell Program information, *see* http://delawell.delaware.gov/default.shtml. Many Delaware corporations have modeled their wellness programs after the state program. *See* http://delawell.delaware.gov/documents/summary_partners_resources.pdf (2008).

Florida

Florida law does not provide for protection from employment discrimination based upon the use of "lawful consumable products" or "lawful conduct" away from work. The Florida Statutes contain no mention of either of these terms, or any related concepts. Protection under Florida's primary employment discrimination statute, Florida Civil Rights Code § 760.10, is limited only to cases of discrimination involving race, color, religion, sex, national origin, age, handicap, or marital status. *See* Fla. Stat. § 760.10 (2006). Additional statutory protections are provided elsewhere for discrimination based upon infection with HIV or AIDS, Fla. Stat. § 760.50; the results of DNA analysis, Fla. Stat. § 760.40; and the existence of sickle-cell trait, Fla. Stat. § 448.075.

Florida's Constitution does, however, provide for a right of privacy in Article I, Section 23.

Constitution of the State of Florida, *available at* http://www.flsenate.gov/Statutes/index.cfm?Mode=Constitution&Submenu=3&Tab=Statutes. However, the Florida Supreme Court has specifically held that government employers do not violate that right by requiring prospective employees to affirm that they had not used tobacco in the past year, *City of North Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995). With the stated rationale of reducing costs and increasing productivity by not hiring smokers, the City of North Miami instituted this requirement (but placed no restrictions on current employees) intending that it would reduce the number of smokers by means of natural attrition. *Id*. at 1026-27. The Court reasoned that the City had a "legitimate interest in attempting to reduce health insurance costs and to increase productivity" and that the policy did not violate *Kurtz's* expectation of privacy. *Id*. at 1028.

However, the reasoning behind this decision may make it subject to challenge in today's environment. The Court reasoned that there was no invasion of privacy as smokers are constantly required to reveal their habit when being seating at a restaurant, renting a hotel room, or a renting a car, as in all these situations there are separate smoking and non-smoking accommodations. *Id*. In the time that has passed since *Kurtz*, and with the passage of the Florida Clean Indoor Air Act, many of these accommodations for smokers have gone away. *See* Fla. Stat. § 386.

As such, in today's society, smokers may have more of an expectation of privacy as they are forbidden from smoking in many of the public places where they previously had the option to do so. Despite this expanded expectation of privacy, an important limitation remains. As shown in *Resha v. Tucker*, 670 So. 2d 56 (Fla. 1996), the Florida Constitution's right to privacy, even if it were to apply to smoking or other lawful consumable products or conduct, is only applicable to governmental intrusions and not to those by private actors. *Id*. at 58. Thus, while the hiring practices of public employers might run afoul of the Constitutional right of privacy, private employers are not similarly restricted.

Finally, while Employee Wellness Programs appear to be popular throughout the state, as of yet, there have been no reported cases involving a challenge to such a program in Florida.

Georgia

There is no Georgia statute that protects employees from discrimination in employment due to their use of lawful consumable products on the employer's premises during non-work time or their use of lawful consumable products away from work.

Georgia also has not enacted laws that protect employees from discrimination in employment due to their use of lawful consumable products on the employer's premises during non-work time, other than laws unrelated to wellness programs that prohibit employers from taking adverse employment action against employees who have opposed or been involved in the investigation of discriminatory practices, or who are members of a labor union.

There are no recent cases in which a Georgia court has held that an employer has the right to deny employment to an applicant because of the likely future health costs to the employer from a particular condition afflicting the applicant.

Hawaii

Hawaii Revised Statutes Chapter 328J prohibits smoking in all enclosed or partially enclosed areas of places of employment. Haw. Rev. Stat. § 328-J (2007). The law also allows an owner, operator, manager, or other person in control of an establishment, facility, or outdoor area to declare an entire establishment or any part thereof as a place where smoking is prohibited. The law prohibits an employer from discharging, refusing to hire, or in any manner retaliating against an employee, applicant for employment, or customer because that employee, applicant or customer exercises any rights afforded by the law or attempts to prosecute a violation of law.

The following Hawaiian employers have created and implemented various types of voluntary employee wellness programs that provide incentives for employee participation:

Kaneohe Ranch initiated a workplace wellness program that provides nutrition classes and twice a week total body conditioning courses.

City Mill began its first wellness program with free bags of apples. The program now includes an activity challenge where employees track the amount of hours they spend on a physical activity.

The Kahala Hotel offers smoking-cessation programs and organizes small walking groups. Hotel chefs have been asked to prepare healthy meals to serve to employees. The hotel also makes the on-site fitness center available to hotel

managers after 6:00 p.m. every day.

Grand Hyatt Hotel in Kauai provides safety training programs, family health fairs, hotel meals, and a "life balance program." A Lifeclinic LC500 machine, which measures blood pressure, weight, body fat, body mass index, and blood oxygen, is available for employees' use in their cafeteria. For their participation in its wellness program, the hotel offers its employees discounted and/or free stays at other Hyatt properties.

HMSA and Weight Watchers Hawaii have partnered to create a program that offers employer group members special deals when their employees attend Weight Watcher meetings. This is a 16-meeting plan that is offered to all HMSA members. HMSA pays for members' registration fee and the first three meetings. Those who continue to attend meetings beyond the first three get a discounted rate.

Altres offers its employees discounts to local health clubs and sponsors fitness-based contests.

Science & Technology International (STI) offers employees who quit smoking for 12 months a $2,000 bonus, encourages ping pong games in the employee lounge, and pays $50 a month to fund the physical activity of the employee's choice. STI also brings in a massage therapist a few times a month.

Waianae Coast Comprehensive Health Center allows employees 1½ hours a week of work time for approved fitness activities and gives employees an annual health credit to spend on medical co-pays.

First Insurance Company employees earn points for every physical activity they complete. Employees can then redeem those points for company merchandise or prizes. Three hours of exercise equals 180 points which can be redeemed for movie tickets, for example.csk@hawaiilawyer.com

www.hawaiilawyer.com

Idaho

The Idaho legislature has not enacted any law that protects employees from discrimination due to use of lawful consumable products on the employer's premises during non-work time, or use of lawful consumable products away from the workplace. Certain Idaho employers may, in fact, have implemented policies prohibiting employees from tobacco use.

The Idaho legislature has not enacted any law that protects employees from discrimination in employment due to lawful conduct during non-working hours away from the employer's premises or on the employer's premises during non-work time.

District court cases, where litigation is initially filed by parties in Idaho, are not reported or published, and it is unknown at this time whether any such discrimination cases have been initiated by an employee of an Idaho company. There are no published appellate court decisions addressing this issue.

Similarly, there are no published opinions by the Idaho Court of Appeals or the Idaho Supreme Court holding that an employer's Employee Wellness Program violates federal or state law. It is unknown at this time whether an employee of an Idaho company has initiated litigation on this issue in the state district court.

In addition, the Idaho legislature has not enacted any laws specifically addressing privacy matters or lifestyle choices, including such matters as they may affect employees or employment. The Idaho legislature has enacted the Idaho Employer Alcohol and Drug-Free Workplace Act, Idaho Code Ann. § 72-1701 *et. seq.* The purpose of the Act is to promote a drug-free workplace in order to enhance safety and productivity, and for participant employers, denies unemployment benefits to employees who test positive for alcohol or drugs because a positive test constitutes "misconduct" for purposes of Idaho's employment security law. Testing procedures and requirements under the Act must comply with 42 U.S.C. § 12101 and may be conducted as a condition to beginning employment or as a condition for continued employment. The Act itself does not define the term "drug" or "alcohol," and does not expressly distinguish between prescription drugs and illegal drugs.

The Idaho Labor code (Idaho Code §§ 44-201 to 44-202) specifically addresses Employee Assistance Programs and confidentiality matters related to an employee's use of or participation in such a program. Idaho labor laws do not address wellness programs.

Finally, the Idaho Human Rights Act (Idaho Code § 67-5901 *et. seq.*), provides a method for the state to execute the policies set forth in the federal Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and Titles I and III of the Americans with Disabilities Act. The Human Rights Act prohibits employers, among other specified parties, from discriminating against individuals based on race, color, national origin, religion, sex, age, or disability in connection with employment. The substantive provisions of the Human Rights Act addressing discriminatory practices do not address discrimination based on participation in employee wellness programs or based on privacy matters or lifestyle choices.

Idaho courts have established, however, that the legal analysis applied to discrimination claims under the Human Rights Act is the same as the legal analysis that applies to discrimination claims under federal anti-discrimination laws, *Bowles v. Keating,* 100 Idaho 808, 812, 606 P.2d 458 (1979). Though no published Idaho decision has addressed the issue, it may be possible that, to the extent an employee is "regarded as" disabled in relation to participating in an employee wellness program or related matter, the Idaho Human Rights Act

may provide a method for asserting a discrimination claim.

Except as discussed above, neither the Idaho legislature nor Idaho courts have addressed employee wellness programs or taken steps to protect certain rights of employees related to wellness programs or lifestyle choices.

Illinois

The Illinois Right to Privacy in the Workplace Act prohibits employers from refusing to hire, terminating, or otherwise disadvantaging employees for their use of lawful products off workplace premises during non-working hours. 820 Ill. Comp. Stat. § 55/5-a. Lawful products include tobacco products, alcoholic beverages, food products, and over-the-counter and prescription drugs. Ill. Admin. Code tit. 56, § 360.110(g). The Act does not protect the use of over-consumption of these products if it impairs an employee's performance at work. This section does not apply to certain non-profit employers. 820 Ill. Comp. Stat. § 55/5-b. An employer may offer or impose a health, disability, or life insurance policy that makes a distinction between employees based on the use of these lawful products to determine the type of price of coverage. 820 Ill. Comp. Stat. § 55/5-c.

Indiana

Indiana law prohibits employers from requiring, as a condition of employment, that an employee or prospective employee refrain from using tobacco products outside the course of the employee's or prospective employee's employment. *See* Ind. Code § 22-5-4-1(a)(1) (dubbed the "Smoker's Rights Law"). Similarly, employers are prohibited from discriminating against an employee with respect to his or her compensation and benefits or the terms and conditions of employment based upon the employee's use of tobacco products outside the course of employment. *See* Ind. Code § 22-5-4-1(a)(2). However, under Indiana law, an employer may implement financial incentives related to employee health benefits provided by the employer and/or offer financial incentives intended to reduce tobacco use. *See* Ind. Code § 22-5-4-1(b). There is no case law testing whether a wellness program would fall into this exclusion.

Indiana's Civil Rights Laws, applicable to most private sector employers with six or more employees, protect employees from being discriminated against because of a "physical or mental condition that constitutes a substantial disability unrelated to the person's ability to engage in a particular occupation." *See* Ind. Code §§ 22-9-1-2; 22-9-1-3(r). Indiana's disability discrimination laws protecting employees and prospective employees mirror federal law.

In 2007, Indiana enacted the *"Small Employer Qualified Wellness Program Tax Credit" laws which provide a potential tax credit for certain "small employers." See Ind. Code § 6-3.1-31.2 et seq. A* wellness program is a plan designed to improve the overall health of employees. In order for a wellness program

to become a certified wellness program eligible for the tax credit, the program must include the following components: employee appropriate weight loss, smoking cessation, and the pursuit of preventive healthcare services. Certified wellness programs must also describe related assessments, educational materials, rewards programs, and measurement tools. *If a small employer establishes a "qualified wellness program," as certified by the Indiana State Department of Health, then it is eligible for a credit against its state tax liability for a taxable year equal to 50 percent of the costs incurred by the taxpayer during the taxable year for providing the qualified wellness program for the employer-taxpayer's employees during the taxable year. See Ind. Code § 6-3.1-31.2- 6.*

To date, there has been no major litigation or court decision addressing wellness programs or an employer's right to impact the terms, conditions, or benefits of employment based upon an employee's future healthcare costs or health conditions.

Iowa

Iowa has not enacted laws that protect employees from discrimination in employment due to their use of lawful consumable products on the employer's premises during non-work time or their use of lawful consumable products away from work.

Iowa has not enacted laws that protect employees from discrimination in employment due to lawful conduct during non-working hours away from the premises or on the employer's premises during non-work time. Similarly, there has not been any court decision in Iowa holding that an employer has the right to deny employment because of the likely future health costs a particular condition would create for the employer.

To date, no lawsuits have been filed in Iowa state court alleging that an employer's employee wellness program violated federal or state law.

Kansas

Kansas employment discrimination laws generally mirror federal requirements in this area. State requirements apply to employers with four or more employees. The Kansas Age Discrimination in Employment Act, Kan. Stat. Ann. §§ 44-1111 to 44-1132 (2007), protects any employee age 18 or over from discrimination based on age, thus providing protection for a broader class of employees than the corresponding federal law. Wellness programs which impose different requirements based on age may be subject to scrutiny under this Act.

Kansas law does not protect smokers from discrimination by employers. Kansas courts recognize the tort of invasion of privacy based on unreasonable intrusion upon seclusion as stated in the Restatement (Second) of Torts. While this has not been applied to an employer's intrusion into the medical records or

out-of-office conduct by an employee, such conduct by an employer will likely be tested under this standard.

Kansas law (Kan. Stat. Ann. § 65-6001 *et seq.*) has specific requirements for testing for and reporting (and non-disclosure of) tests for HIV and AIDS. Wellness programs should be reviewed for compliance with this provision. Mandatory participation in wellness program activities must, as under Federal law, be paid time for non-exempt employees.

www.adamsjones.com

Kentucky

Kentucky Revised Statute Section 344.040 forbids employers from discriminating in the terms and conditions of employment because an employee is a smoker or a nonsmoker, so long as the employee complies with any workplace policy concerning smoking. *See* Ky. Rev. Stat. Ann. § 344.040. Section 344.040 also bars employers from requiring, as a condition of employment, that any employee or applicant for employment abstain from smoking or using tobacco products outside the course of employment, so long as the person complies with any workplace policy concerning smoking.

Kentucky is a relatively dependable at-will employment state, but its courts have been protective of the Kentucky Legislature's specific statutory policy protecting employees from adverse employment actions because of their non-work use (or non-use) of tobacco products.

We have no knowledge of any lawsuits filed in Kentucky court alleging that an employer's Employee Wellness Program violated federal or state law.

www.skofirm.com

Louisiana

Louisiana law protects smokers from being discriminated against based on their status as a smoker. The language prohibits employers from taking any adverse action against any employee with respect to discharge, compensation, promotion, any personnel action or other condition, or privilege of employment. *See* La. Rev. Stat. Ann. § 23:966 (1991). However, there is a provision that makes clear that the statute in no way precludes an employer from formulating and adopting a policy regulating an employee's workplace use of a tobacco product (e.g., smoke-free workplace) or from taking any action consistent with such policy. The statue provides for fines levied against the employer for violations. *See id.*

There is no reported case law; hence, it is unclear whether a court would find that the statute imports a private right of action, or the statute is merely penal in nature, and/or who would receive the proceeds of the fine.

The Louisiana Employment Discrimination Law ("LEDL") generally "mirrors" the comparable federal statutes (age, disability, race, color, religion, sex, national origin, pregnancy, childbirth and related medical conditions). La. Rev. Stat. § 23:301 *et seq.* (1997). There is also a provision prohibiting discrimination in employment based on sickle cell trait. *See* La. Rev. Stat. § 23:301 *et seq.* Any issues that may conflict with federal statutes such as HIPAA, ADA, etc., will likely also conflict with LEDL. Accordingly, any program should be a voluntary, *bona fide* wellness plan. Should bright line goals be employed or imposed, an employer would want to consider an exception in the event that it is impossible or unhealthy for an employee to achieve that goal. Any incentives would also need to meet the requirements for validity under HIPAA.

Although many individual and group policies now provide benefits for expenses incurred under a health promotion program through health wellness examinations and counseling, such is not a currently mandated benefit under the Louisiana Insurance Code.

There is one reported decision that involved the issue of a wellness program. In *Weimer v. City of Baton Rouge*, 915 So. 2d 875 (La. Ct. App. 2005), the Court rejected the claim that such a program was a "classification plan" as defined in La. R. S. § 33:2473(6) as "all the classes of positions established for the classified service," with a "class" or "class of position" being further defined in La. R.S. § 33:2473(5) as "a definitely recognized kind of employment in the classified service, designated to embrace positions that are so nearly alike in the essential character of their duties, responsibilities, and consequent qualification requirements, that they can fairly and equitably be treated alike under like conditions for all personnel purposes." The Court held that a wellness program had nothing to do with a person's qualifications for original entrance to employment as firefighter or promotions according to a classification plan, nor did any part of the program provide a basis for disciplinary action. While the case uniquely dealt with classified positions of public employees, it at least indicates that the particular wellness plan at issue did not provide for disciplinary action as a consequence of the plan.

Maine

Maine law prohibits employers from requiring, as a condition of employment, that any employee or prospective employee refrain from using tobacco products outside the course of that employment or otherwise discriminate against any person with respect to the person's compensation, terms, conditions, or privileges of employment for using tobacco products outside the course of employment, as long as the employee complies with any workplace policy concerning the use of tobacco. Me. Rev. Stat. Ann. Tit. 26, § 597.

Maryland

Maryland does not have any laws that would specifically limit an employer's

ability to implement an employee wellness program. However, in Howard County, there is a human rights law that prohibits discrimination on the basis of personal appearance, which includes, but is not limited to, physical characteristics. This law, Subtitle 2, Sections 12:200 – 12:213 of the Howard County Code, carries a private right of action as well as administrative remedies. There are several counties with human rights laws of their own, and a number of them address personal appearance.

Massachusetts [45]

Michigan [46]www.abbottnicholson.com

Minnesota

Minnesota law expressly prohibits an employer from refusing to hire a job applicant or from disciplining or discharging an employee because of the use of lawful consumable products if: (1) the use takes place off premises; and (2) during non-working hours. Minn. Stat. § 181.938 (2007). Tobacco, food, and beverages (both alcoholic and non-alcoholic) are included in the definition of "lawful consumable products."

The statute does allow employers to restrict off-duty use of lawful consumable products if the restriction relates to a *bona fide* occupational requirement and is reasonably related to employment activities or responsibilities of a particular employee or group of employees. The statute also allows an employer to offer health or life insurance that distinguishes between the cost and type of insurance offered to an employee based upon that employee's off-duty use of lawful consumable products, as long as premium rates reflect the actual difference in cost to the employer.

Minnesota has not enacted laws that protect employees from discrimination in employment due to lawful conduct during non-working hours away from the premises or on the employer's premises during non-work time. However, Minnesota law recognizes an invasion of privacy tort based upon "intrusion upon seclusion," *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998). While not an employment case, the Minnesota Supreme Court recognized that two Wal-Mart photo center customers were entitled to proceed with a claim because a Wal-Mart employee had shown the customers' private, nude photos to other people. The Court held:

The right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close.

Id. at 235. This holding suggests that to the extent that an employer conducts surveillance on lawful conduct during non-working hours, the employer may

be liable for intrusion upon seclusion because the employee has a reasonable expectation of privacy in his or her conduct during non-working hours. *See Swarthout v. Mut. Serv. Life Ins. Co.*, 632 N.W.2d 741, 744 (Minn. Ct. App. 2001) (holding that there are three elements to the intrusion-upon-seclusion tort: (1) an intrusion, (2) that is highly offensive, and (3) that is into some matter in which a person has a legitimate expectation of privacy).

Furthermore, under the Minnesota Human Rights Act, employers may not require or request persons to undergo physical examinations unless an exception applies. Minn. Stat. § 363A.08 subd. 4(1). For example, a person may be required to undergo a physical examination to test for essential job-related abilities. Minn. Stat. § 363A.20 subd. 8(a)(1)(ii).

Mississippi

In Mississippi it is unlawful for any public or private employer to require as a condition of employment that any employee or applicant for employment abstain from smoking or using tobacco products during non-working hours, provided that the individual complies with applicable laws or policies regulating smoking on the premises of the employer during working hours, Miss. Code Ann. §71-7-33 (1994).

There has not been any recent litigation or court decision in Mississippi holding that an employer has the right to deny employment because of the likely future health costs of a particular condition nor have any law suits been filed alleging that an employer's Employee Wellness Program violated federal or state law.

Missouri

Missouri law should be in line with most other states on the issue of Employee Wellness Programs, as Missouri has very few statutes that may be applicable to an Employee Wellness Program. Out of an abundance of caution, the following issues bear mentioning. However, there are very few fact scenarios under which these statutes will become applicable in connection with an Employee Wellness Program.

Missouri does have a statute stating it is an "improper" employment practice for an employer to disadvantage an individual due to lawful alcohol or tobacco consumption off employer premises and during non-work time. However, that statute has little "bite" because it specifically provides that the statute is not a basis for a cause of action. Further, the statute contains an exception for providing a lower health insurance premium to individuals who do not smoke, Mo. Rev. Stat. § 290.145. The full text of the statute is as follows:

It shall be an improper employment practice for an employer to refuse to hire, or to discharge, any individual, or to otherwise disadvantage any individual, with respect to compensation, terms or conditions of employment because

the individual uses lawful alcohol or tobacco products off the premises of the employer during hours such individual is not working for the employer, unless such use interferes with the duties and performance of the employee, the employee's coworkers, or the overall operation of the employer's business; except that, nothing in this section shall prohibit an employer from providing or contracting for health insurance benefits at a reduced premium rate or at a reduced deductible level for employees who do not smoke or use tobacco products. Religious organizations and church-operated institutions, and not-for-profit organizations whose principal business is healthcare promotion shall be exempt from the provisions of this section. The provisions of this section shall not be deemed to create a cause of action for injunctive relief, damages, or other relief.

Id. An insurance statute prevents an employer from using genetic information or genetic testing results to distinguish between employees or prospective employees, Mo. Rev. Stat. § 375.1306. The statute states in part:

An employer shall not use any genetic information or genetic test results ... of an employee or prospective employee to distinguish between, discriminate against, or restrict any right or benefit otherwise due or available to such employee or prospective employee. The requirements of this section shall not prohibit:

underwriting in connection with individual or group life, disability income, or long-term care insurance;

any action required or permissible by law or regulation;

action taken with the written permission

of an employee, or

prospective employee or such person's authorized representative; or

the use of genetic information when such information is directly related to a person's ability to perform assigned job responsibilities.

While it is difficult to imagine an employee wellness program that would involve implantation of a device within an employee, if such a situation arose, Missouri did recently enact a statute prohibiting microchip implants as a condition of employment. *See* Missouri implant statute: H.B. 1883

Montana

To date, there has been no litigation in Montana related to either of the following statutes:

Mont. Code Ann. 39-2-313. Discrimination prohibited for use of lawful product during nonworking hours -- exceptions.

(1) For purposes of this section, "lawful product" means a product that is legally consumed, used, or enjoyed and includes food, beverages, and tobacco.

(2) Except as provided in subsections (3) and (4), an employer may not refuse to employ or license and may not discriminate against an individual with respect to compensation, promotion, or the terms, conditions, or privileges of employment because the individual legally uses a lawful product off the employer's premises during non-working hours.

(3) Subsection (2) does not apply to:

(a) use of a lawful product that:

affects in any manner an individual's ability to perform job-related employment responsibilities or the safety of other employees; or

conflicts with a *bona fide* occupational qualification that is reasonably related to the individual's employment;

(b) an individual who, on a personal basis, has a professional service contract with an employer and the unique nature of the services provided authorizes the employer, as part of the service contract, to limit the use of certain products; or

(c) an employer that is a nonprofit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public.

(4) An employer does not violate this section if the employer takes action based on the belief that the employer's actions are permissible under an established substance abuse or alcohol program or policy, professional contract, or collective bargaining agreement.

(5) An employer may offer, impose, or have in effect a health, disability, or life insurance policy that makes distinctions between employees for the type or price of coverage based on the employees' use of a product if:

(a) differential rates assessed against employees reflect actuarially justified differences in providing employee benefits;

(b) the employer provides an employee with written notice delineating the differential rates used by the employer's insurance carriers; and

(c) the distinctions in the type or price of coverage are not used to expand, limit, or curtail the rights or liabilities of a party in a civil cause of action.

Mont. Code Ann. 39-2-314. Civil action limitation.

(1) Except as provided in subsection (2), an individual who is discharged, dis-

criminated against, or denied employment in violation ... may file a civil action against an employer within one year of the alleged violation and the court may require any reasonable measure to correct the discriminatory practice and to rectify the harm, pecuniary or otherwise, to the person discriminated against and may allow reasonable attorney fees to the prevailing party.

(2) Prior to filing a civil action under subsection (1), an employee shall, within 120 days of the alleged violation, initiate any internal grievance procedure available. If a grievance procedure is not exhausted within 120 days, the employee may file a civil action.

****

Montana has passed no laws related to lawful conduct of employees during non-working hours or non-work time. There have been no recent litigation or court decisions in Montana regarding this issue. There have been no lawsuits filed in Montana regarding this issue.

Nevada

Nevada's lawful products statute makes it unlawful for an employer to fail or refuse to hire a prospective employee, or to discharge or discriminate against an employee in compensation, terms, or conditions of employment because he or she engages in the "lawful use in this state of any product outside the premises of the employer during his non-working hours, if that use does not adversely affect his ability to perform his job or the safety of other employees." An employee who is discriminated against by an employer is entitled to lost wages and benefits, an order of reinstatement, and attorney's fees and costs. *See* Nev. Rev. Stat. § 613.333 (2007).

In addition, the state of Nevada has enacted a statute directing the Health Division of the Department of Human Resources to establish the Advisory Council on the State Program for Fitness and Wellness to advise and make recommendations to the Health Division concerning the Program. *See* Nev. Rev. Stat. § 439.514 – 439.521. The statute also directs the Health Division of the Department of Human Resources to establish a State Program for Fitness and Wellness to raise public awareness relating to physical fitness, including programs for physical fitness, nutrition, and the prevention of obesity and other diseases.

Some resources for employers in Nevada who want to develop a corporate wellness program for their employees include:

http://www.healthiernv.org/http://www.healthiernv.org/: Weekly wellness tips, health quizzes, and various other wellness initiatives (site is not updated on a frequent basis).

http://health.nv.gov/index.php?option=com_content&task=view&id=433&Ite

mid=734:o Contains contact information for the State Program for Fitness and Wellness and a link to Nevada Revised Statute 439.514.

New Hampshire

New Hampshire has enacted laws that protect employees from discrimination in employment due to their use of lawful consumable products on the employer's premises during non-work time or their use of lawful consumable products away from work. N.H. Rev. Stat. Ann. § 275:37-a protects smokers from discrimination in the workplace. There are no other New Hampshire laws related to an employee's consumption of lawful products.

Although New Hampshire has not enacted laws that protect employees from discrimination in employment due to lawful conduct during non-working hours away from the premises or on the employer's premises during non-work time, § 275:56 prohibits employers from retaining information obtained from employees through a health and wellness program in personnel files and from using it in any workers' compensation proceeding.

There are no applicable court decisions in New Hampshire holding that an employer has the right to deny employment because of the likely future health costs a particular condition would create for the employer. There is, however, a relevant New Hampshire state statute. Pursuant to § 354-A:7, an applicant who has any of the listed conditions could be considered a member of a protected class (physical or mental disability), and the statute makes it unlawful for an employer to refuse to hire such person unless the refusal is based upon a *bona fide* occupational qualification.

No lawsuits have been filed in any New Hampshire court alleging that an employer's Employee Wellness Program violated federal or state law.

New Jersey

New Jersey law protects smokers from being discriminated against based on their "off-time" habit. The language does not allow employers to take any adverse action against any employee with respect to compensation, terms, conditions, or other privileges of employment. *See* N.J. Stat. Ann. ("N.J.S.A"), § 34:6B-1. However, there is a provision that permits employers to so discriminate if there is a "rational basis for doing so which is reasonably related to the employment, including the responsibilities of the employee." There is no case law testing whether a wellness program would fall into this exclusion.

The New Jersey Law Against Discrimination ("NJLAD") provides liberal coverage for employees against discriminatory actions, including, but not limited to, actions against employees with physical or mental handicaps or perceived handicaps. *See* N.J.S.A. § 10:5-1 *et seq.* Any issues that may conflict with the federal statutes (HIPAA, ADA, etc.) will likely also conflict with NJLAD. To

that end, any program should be a voluntary, *bona fide* wellness plan. Any bright line goals should also have a caveat in the event that it is impossible or unhealthy for an employee to achieve that goal. Any incentives must meet the requirements for validity under HIPAA.

Every individual and group policy medical and health services corporation contract that provides hospital and medical expense benefits shall provide benefits for expenses incurred under a health promotion program through health wellness examinations and counseling. *See* N.J.S.A. 14:48A-7i; N.J.S.A. 14:48E-35.6; N.J.S.A. 17B:26-2.1h; N.J.S.A. 17B:27-46.1h. Payment for the benefits set forth in these sections shall not exceed: $125 a year for each person between the ages of 20 to 39, inclusive; $145 a year for each man age 40 and over; and $235 a year for each woman age 40 and over; except that for persons 45 years of age or older, the cost of a left-sided colon examination shall not be included in the above amount; however, no insurer shall be required to provide payment for benefits for a left-sided colon examination in excess of $150.

New Jersey has at least tacitly approved of wellness programs by creating a Retiree Wellness Program for state employees eligible for the State Health Benefits Program. The state will waive the required 1.5 percent of employees' retirement allowance for employees that: (1) agree to and submit the signed *Pledge for Healthier Living;* (2) complete an annual Health Risk Assessment (HRA); (3) have a medical check-up annually; (4) have age and gender appropriate tests and screenings performed when recommended; and (5) participate in their health plan's disease management program when recommended, if they are diagnosed with a chronic disease.

New Mexico

New Mexico has not enacted laws that address discrimination in employment due to the use of lawful consumable products by employees during non-work time in the general sense. However, New Mexico statutes do address the use of tobacco products by employees in NMSA 2008 § 50-11-3 and that employers cannot discriminate against employees or possible employees based on their use of tobacco products during non-working hours. That statute states:

A. It is unlawful for an employer to:

(1) refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions, or privileges of employment because the individual is a smoker or nonsmoker, provided that the individual complies with applicable laws or policies regulating smoking on the premises of the employer during working hours; or

(2) require as a condition of employment that any employee or applicant for employment abstain from smoking or using tobacco products during non-working hours, provided the individual complies with applicable laws or policies regu-

lating smoking on the premises of the employer during working hours.

B. The provisions of Subsection A of this section shall not be deemed to protect any activity that: (1) materially threatens an employer's legitimate conflict of interest policy reasonably designed to protect the employer's trade secrets, proprietary information, or other proprietary interests; or (2) relates to a *bona fide* occupational requirement and is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer. NMSA 2008 § 50-11-3.

In the New Mexico statutes, discrimination is broadly addressed in NMSA 2008, § 28-1-7 (1978) in the Human Rights chapter. This statute addresses what is considered to be an Unlawful Discriminatory Practice in New Mexico. In regards to an employer, the statute states:

"It is an unlawful discriminatory practice for: ... an employer, unless based on a *bona fide* occupational qualification or other statutory prohibition, to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of race, age, religion, color, national origin, ancestry, sex, physical or mental handicap, or serious medical condition, or, if the employer has 50 or more employees, spousal affiliation; provided, however, that 29 U.S.C. Section 631(c)(1) and (2) shall apply to discrimination based on age; or, if the employer has 15 or more employees, to discriminate against an employee based upon the employee's sexual orientation or gender identity. NMSA 2008, § 28-1-7(A) (1978).

Although New Mexico does address the issue of employees' use of tobacco products, this does not address the more specific question of a law that protects an employee from discrimination due to their use of **all** lawful consumable products on the employer's premises during non-work time or their use of lawful consumable products away from work.

New York

New York law makes it unlawful for an employer to refuse to hire, employ, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions, or privileges of employment because of an individual's legal use of consumable products or legal recreational activities prior to the beginning or after the conclusion of the employee's work hours, and off the employer's premises and without use of the employer's equipment or other property. N.Y. Labor Code § 201-d.

North Carolina

In North Carolina it is unlawful for an employer to discriminate based on an

employee's lawful use of a lawful product. However, such discrimination is lawful if it relates to a *bona fide* occupational requirement, an organization's objectives, or the employee's lawful use of a lawful product that adversely affects the employee's ability to perform his or her job. *See* N.C. Gen. Stat. § 95-28.2.www.jahlaw.com

North Dakota

Pursuant to the North Dakota Century Code, an employment having no specified term may be terminated at will, upon notice, by either the employer or employee. *See* N.D.C.C. § 34-03-01. It is important to note, however, that North Dakota has enacted statutes, commonly referred to as "lifestyle discrimination" laws, which serve as an exception to the strict at-will employment system. N.D.C.C. § 14-02.4-03 provides, in part, as follows:

"It is a discriminatory practice for an employer to fail or refuse to hire a person; to discharge an employee; or to accord adverse or unequal treatment to a person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment, because of race, color, religion, sex, national origin, age, physical or mental disability, status with respect to marriage or public assistance, or participation in lawful activity off the employer's premises during non-working hours which is not in direct conflict with the essential business-related interests of the employer." *See Hougum v. Valley Memorial Homes*, 574 N.W.2d 812 (N.D. 1998) (held that material issues of fact remained as to whether residential home terminated chaplain's employment for participating in lawful activity off employer's premises during non-working hours which was not in direct conflict with home's essential business related interests, or whether chaplain's actions were contrary to a *bona fide* occupational qualification that reasonably related to his employment activities and responsibilities, precluded summary judgment for home on chaplain's claim under Human Rights Act, based on home allegedly terminating chaplain's employment as a result of an incident in which he allegedly was observed masturbating in an enclosed stall in the public restroom of a department store).

An exception to the aforementioned statutory exception is codified in N.D.C.C. § 14-02.4-08:

"...nor is it a discriminatory practice for an employer to fail or refuse to hire and employ an individual for a position, or to discharge an individual from a position on the basis of that individual's participation in a lawful activity that is off the employer's premises and that takes place during non-working hours and which is not in direct conflict with the essential business-related interests of the employer, if that participation is contrary to a *bona fide* occupational qualification that reasonably and rationally relates to employment activities and the responsibilities of a particular employee or group of employees, rather than to all employees of that employer." *See Fatland v. Quaker State Corp.*, 62 F.3d 1070

(8th Cir. 1995) (prohibiting employees from operating off-hours businesses that would benefit from confidential information that employees' positions within company would enable them to secure from competitors, thereby resulting in resentment toward, and termination of businesses with, employer is a *bona fide* occupational qualification within meaning of North Dakota statute which is exception to an exception of the at-will employment doctrine and which states that it is not discriminatory practice for employer to discharge employee on basis of his participation in lawful activity off employer's premises if that participation is contrary to a *bona fide* occupational qualification that relates to employment of a particular group of employees).

Notwithstanding the exception to the exception provided in N.D.C.C. § 14-02.4-08 (*see Soentgen v. Quain & Ramstad Clinic, P.C.*, 467 N.W.2d 73 (N.D. 1991)) (finding that assuming alcoholism and drug addiction were handicaps under state law, physician was not victim of discriminatory practice when clinic discharged her, since clinic's actions were based on *bona fide* occupational qualification reasonably necessary for physician), North Dakota has expanded its definition of lifestyle discrimination beyond lawful consumable products (e.g., tobacco, alcohol, etc.) and included within, pursuant to N.D.C.C. § 14-02.4-03, essentially all lawful off-work behavior. North Dakota has not provided similar statutes protecting lawful activity ***on the premises*** during ***non-work time***. *See Jose v. Norwest Bank North Dakota*, 599 N.W.2d 293 (N.D. 1999) (held that employees' participation in internal investigation of other employees' job performances was not a lawful activity off the employer's premises during non-working hours entitled to protection under statute prohibiting discharging employees for participating in such lawful activities).

Although North Dakota has not seen extensive litigation on an employer's right to deny employment because of future health costs associated with a potential employee's lifestyle, similar issues have been raised in age discrimination cases. *See Dammen v. UniMed Medical Center*, 236 F.3d 978 (8th Cir. 2001) (Court explained that employment decisions motivated by characteristics other than age, such as salary and pension benefits, even when such characteristics correlate with age, do not constitute age discrimination).

The North Dakota Supreme Court has recognized that diseases such as obesity constitute a legitimate "disability" entitled to protection from employment discrimination. *See Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793, 796 (N.D. 1987) ("We believe that these commonly understood meanings of disability and handicap may comprehend an obese condition which significantly impairs a person's abilities.").

However, the same burden of proof must be shown with discrimination based on obesity, or other lifestyle-based discriminatory actions, as is required for all disability discrimination cases. *Id.* (Mere assertion that one is overweight or obese is not alone adequate to bring claimant within class of persons afforded relief for discrimination under statute prohibiting an employer from discharg-

ing an employee because of a physical or mental handicap; something more must be shown.)

Like many other states, North Dakota has embraced the ideology behind Employee Wellness Programs. *See* http://www.healthynd.org. Such programs have been codified in N.D.C.C. § 54-52.1-14. However, there has not currently been any suit filed in North Dakota alleging that an Employee Wellness Program violated federal or state law.

Ohio

Ohio law does not prohibit an employer from discriminating in employment based on employees', or potential employees', use of lawful consumable products such as tobacco or based on other lawful conduct. Timothy A. Gudas, *State Lawful Products Statutes* (Chicago: American Bar Association 2005). Ohio is a strict "at will employment" state and as such, an employer may fire or deny employment to any employee, or potential employee, for any reason not contrary to public policy.

Ohio has not adopted a right-to-smoke law. Smoking is not a legally protected right in Ohio. *See Operation Badlaw, Inc. v. Licking County General Health Dist. Bd. Of Health,* 866 F. Supp 1059, 1067 (June 26, 1992). Actually, under the Smokefree Workplace Act enacted in 2006, Ohio Revised Code § 3794.02, the Ohio legislature has prohibited smoking in most public places and places of employment. Therefore, Ohio's employers seem to be free to base hiring and firing decisions on whether or not an employee or applicant uses lawful consumable products at home. Employees are prohibited under Ohio law from smoking at the workplace.

Ohio-based employer Scotts Miracle Gro has implemented a policy prohibiting smoking of tobacco products by its employees at any time and in any place, whether at work or at home. This policy is currently being challenged in court. *See Rodrigues v. The Scotts Company, LLC and EG Systems*, 2008 U.S. Dist. LEXIS 6682 (D. Ma. Jan. 30, 2008). In January 2008, the Court dismissed Rodrigues' claim under the Massachusetts Civil Rights Act and his wrongful termination claim, leaving only an ERISA claim and a claim under the Massachusetts privacy law which may proceed to trial. Ohio does not have a privacy statute similar to the Massachusetts law at issue in *Rodrigues*. Nevertheless, Ohio employers will need to pay attention to the outcome of this case since if Rodrigues succeeds he may open the door to more lawsuits.

There has been no reported law suit filed in Ohio state court challenging the validity of an employer's Employee Wellness Program. However, Ohio employers should take heed that, "Under the dual-capacity doctrine, 'an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of

those imposed on him as employer.'" *Huffman v. SmithKline Beecham Clinical Lab., Inc.*, 111 F. Supp. 2d 921, 925 (N.D. Ohio 2000)*Huffman v. SmithKline Beecham Clinical Lab., Inc.*, 111 F. Supp. 2d 921, 925 (N.D. Ohio 2000)(quoting 2 Larson's Workmen's Compensation, Section 72.80 (Desk Ed. 1982)). In *Huffman v. SmithKline Beecham, supra*, the plaintiff alleged that her husband was injured as a result of his participation in Whirlpool's wellness program. The wellness program was a voluntary program offered by Whirlpool in which Whirlpool provided mini-physicals to its employees and their spouses to evaluate their health and recommend healthy lifestyle changes. Whirlpool did not require its employees to participate. Nor was Whirlpool required by law to provide the mini-physicals.

Mr. Huffman participated in the annual mini-physicals provided by Whirlpool, and he did so in lieu of having a regular physical examination with his personal physician. Further, plaintiff alleged that, as part of the wellness program, Whirlpool failed to adequately inform Mr. Huffman that his abnormally low hemoglobin level could indicate a serious medical problem. As a result, Mr. Huffman's diagnosis with colon cancer was delayed by seven weeks and his chances of surviving were diminished.

The federal district court held that this evidence was sufficient to raise a genuine issue of material fact as to whether the Whirlpool wellness program went beyond providing work-related health care and assumed a second status of personal medical care provider to its employees and their spouses. Clearly, Ohio employers will want to consider this decision in designing a wellness program.

Oklahoma

Oklahoma law makes it unlawful for an employer to discharge an individual, or otherwise disadvantage an individual, with respect to compensation, terms, conditions or privileges of employment because the individual is a nonsmoker or smokes or used tobacco products during nonworking hours; or to require as a condition of employment that any employee or applicant for employment abstain from smoking or using tobacco products during nonworking hours. Okla. Stat. tit. 40, § 500 (1991).

Oregon

Oregon law provides that it is an unlawful employment practice for any employer to require, as a condition of employment, that any employee or prospective employee refrain from using lawful tobacco products during non-working hours, except when the restriction relates to a *bona fide* occupational requirement. Collective bargaining agreements that prohibit off-duty use of tobacco products are exempt from this requirement. Or. Rev. Stat. § 659A.315.

Pennsylvania

There is no Pennsylvania statute that protects employees from discrimination in employment due to their use of lawful consumable products on the employer's premises during non-work time or their use of lawful consumable products away from work.

Rhode Island

Rhode Island has unreservedly embraced the concept of incorporating wellness plans in health insurance coverage as a means to increase affordability, particularly in the small and individual group markets, by providing "appropriate incentives for employers, providers, health plans, and consumers to, among other things: (i) focus on primary care, prevention, and wellness; (ii) actively manage the chronically ill population; (iii) use the least cost, most appropriate setting; and (iv) use evidence based, quality care." R.I. Gen. Laws §§ 27-18.5-8(c)(3); 27-50-10(b)(3). Rhode Island law explicitly permits the creation of wellness plans in connection with health insurance in the small group market. R.I. Gen. Laws § 27-50-10. In fact, the state Insurance Commissioner has crafted its own version of a wellness plan for small employers and individuals, and state insurance laws mandate that insurers actively market and offer at least that wellness plan to all small employers and eligible individuals. R.I. Gen. Laws §§ 27-18.5-8(a), 27-50-7(b)(1), 10(b); OHIC Reg. 11, § 14.

Wellness plan aspects that most often cause concern for consumers and employers are those that require lifestyle changes (weight loss and/or tobacco cessation), how an employer/insurer discovers whether an insured is keeping his or her pledge, and if the insured is not keeping a pledge, what the employer/insured will do about it. Rhode Island wellness plan statutes and regulations do not specifically deal with these issues, but may speak to them indirectly.

Rhode Island has made tobacco cessation a priority. Rhode Island law now requires insurers to offer and cover tobacco cessation services (a key component of any wellness plan) as a mandated benefit in nearly all individual and group health insurance products. R.I. Gen. Laws §§ 27-18-66, 27-19-57; 27-20-53; 27-41-70.

In addition, the state-mandated wellness plan ties lower co-payments for physician visits, lower coinsurance for specific procedures, lower annual deductibles, and lower out-of-pocket maximums (and other benefits) to adherence to wellness plan standards. OHIC Reg. 11 § 14(d)(1)(C). Failure to achieve goals related to: (i) smoking cessation, if applicable; (ii) weight loss or weight management, if applicable; (iii) participation in a disease management program (or programs); and (iv) participation in a case management program (or programs), if applicable; causes an individual to forfeit those benefits. *Id*.

Finally, we are aware of no case law that applies discrimination law to the requirement that employees join a wellness plan or that they pay increased premiums if they fail to join or fail to achieve the goals set in a wellness plan. Howev-

er, it does appear that the employer is limited in the tools that can be used in an attempt to "catch" employees violating their wellness plan. For example, Rhode Island law protects employees' privacy in private spaces, such as the rest room and locker room, and does not permit surveillance to be performed in those spaces or used against the employee in any way. R.I. Gen. Laws §§ 28-6.12-1(a), (b). Therefore, an employer could not use audio or video evidence of an employee smoking in the rest room or locker room to prove violation of a wellness plan pledge. *Id*. Similarly, employers cannot require a physical examination or medical testing of employees, except in limited circumstances—none of which appear to apply to the administration or enforcement of wellness plans. *See, e.g.*, 28-6.5-1 (drug testing); 28-6.2-1 (pre-employment physical); 28-33-34 (work-related injury).

South Carolina

S.C. Code § 1-13-80 addresses unlawful employment practices. Under this section, it is unlawful for an employer to discriminate against an individual with respect to the individual's terms of employment because of the individual's race, religion, color, sex, age, national origin, or disability.

S.C. Code § 1-13-85 addresses medical examinations and inquiries in the context of unlawful employment practices. An employer may not conduct a medical examination or make inquiries of a job applicant as to whether the applicant is an individual with a disability or as to the nature or severity of the disability, S.C. Code § 1-13-85(B). However, the employer may make pre-employment inquiries into the ability of an applicant to perform job-related functions. *Id*. § 1-13-85(E)(1).

An employer may conduct voluntary medical examinations including voluntary medical histories which are part of an employee health program available to employees at that work site. *Id*. § 1-13-85(E)(2). It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screens out or tends to screen out or otherwise denies a job or benefit to an individual with a disability has been shown to be job related and consistent with business necessity, and the performance cannot be accomplished by reasonable accommodation, as required under this title. *Id*. § 1-13-85(F)(1). Therefore, pre-employment inquiries of health-related issues appear to be limited to an applicant's ability to perform job-related functions and not allowed in the context of determining an applicant's likely future health costs for an employer.

South Carolina Legislature Online (*www.scstatehouse.gov*www.scstatehouse.gov) provides no commentary or insight into any potential or proposed legislation concerning employee wellness programs in South Carolina. Additionally, phone calls to the offices of general counsel for both the South Carolina Human Affairs Commission and the South Carolina Department of Insurance revealed that both departments are unaware of any recent regulation or litigation spe-

cific to wellness programs or discrimination in similar employment contexts in South Carolina.

South Dakota

South Dakota has enacted laws that protect employees from discrimination in employment due to their use of lawful consumable products. S.D. Codified Laws ("SDCL") § 60-4-11 states that it's discriminatory for an employer to terminate an employee because of the employee's use of tobacco products off the premises during non-working hours.

However, there are two exceptions:

(1) Relates to a *bona fide* occupational requirement and is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or

(2) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.

South Dakota has not enacted laws that protect employees from discrimination in employment due to lawful conduct during non-working hours away from the premises or on the employer's premises during non-work time. In addition there has been no recent litigation or court decisions in the state holding that an employer has the right to deny employment because of the likely future health costs of a particular condition and no law suits have been filed in state court alleging that an employer's Employee Wellness Program violated federal or state law.

Tennessee

The Tennessee Public Protection Act makes it unlawful for an employer to discharge an employee "solely for participating or engaging in the use of an agricultural product ..." Tennessee Code Annotated § 50-1-304. The law does not apply to agricultural products not regulated by the Alcoholic Beverage Commission that are not otherwise proscribed by law. The employee must only participate or use such agricultural products in a manner that complies with all applicable employer policies regarding use of that agricultural product during times when the employee is working. Section 50-1-304 is commonly understood to protect tobacco smokers.

Texas

Texas has not enacted laws that protect employees from discrimination in employment due to their use of lawful consumable products on the employer's premises during non-work time or their use of lawful consumable products away from work. To the contrary, the Texas Workforce Commission has pro-

mulgated a firm smoking policy under which employers can severely curtail employees' tobacco use at work.

Texas has not enacted laws that protect employees from discrimination in employment due to lawful conduct during non-working hours away from the premises or on the employer's premises during non-work time. There has not been any recent litigation or court decisions in Texas holding that an employer has the right to deny employment because of the likely future health costs a particular condition would create for the employer nor has there been any law suits filed in Texas court alleging that an employer's Employee Wellness Program violated federal or state law.

Utah

There does not appear to be any Utah laws or court decisions that would currently prohibit employers from establishing employee wellness programs. Specifically, Utah has not enacted any laws that protect employees from discrimination in employment due to either (1) their use of lawful consumable products on the employer's premises during non-work time or their use of lawful consumable products away from work; or (2) lawful conduct during non-working hours away from the premises or on the employer's premises during non-work time. Utah courts also have not addressed any challenges to employee wellness programs. Typically, Utah would follow applicable federal laws on these types of issues.parrbrown.com

Vermont

Neither the Vermont legislature nor the Vermont courts have specifically addressed the topic of employee wellness programs. Similarly, there is no Vermont statutory or decisional law protecting employees from discrimination due to lawful use of consumable products or other lawful activity away from work. There are, however, a handful of Vermont statutes that are peripherally relevant to the topic of employee health and wellness:

Vermont law requires employers to adopt a written smoking policy that prohibits smoking throughout the workplace or restricts smoking to designated enclosed smoking areas. *See* 18 V.S.A. § 1421 *et seq*.

Vermont employers may not require employees or prospective employees to submit to testing for enumerated drugs (includes certain prescription drugs and alcohol) as a condition of employment unless:

the applicant has been given a job offer contingent upon a negative test result;

the applicant received written notice of the drug testing procedure, a list of the drugs to be tested, and a notice that therapeutic levels of medically prescribed drugs will not be tested; and

the drug test is administered in accordance with statutory criteria.

For existing employees, random or company-wide tests are prohibited unless required by federal law; however, the employer may require an individual employee to submit to a drug test if:

it has probable cause to believe that the employee is under the influence of a drug on the job,

the employer offers employees a *bona fide* rehabilitation program for alcohol or drug abuse provided by health insurance or under contract,

the employee will not be terminated if the test is positive and the employee agrees to participate and then successfully completes the employee assistance program, and

the test is administered in accordance with the statutory criteria. *See* 21 V.S.A. § 511 *et seq.*

Vermont employers may not require a current or prospective employee to pay the cost of a medical exam as a condition of employment. *See* 21 V.S.A. § 301 *et seq.*

Thus, in the absence of specific statutory guidance in the area of employee wellness programs, the validity of such programs in Vermont will likely turn upon whether the plan complies with general anti-discrimination law under Title VII, ADEA, the ADA, the FMLA, and their Vermont analogues. (Note: Under Vermont's fair employment practices law, HIV status is a protected class. *See* 21 V.S.A. § 495(a)(6)-(7). In addition, Vermont law prohibits discrimination among employees on the basis of health coverage status, and prohibits an employer from inquiring about the health coverage status of an applicant. *See* 21 V.S.A. § 561.)

Virginia

In 1989 the Virginia General Assembly enacted law which declares that government employers will not adopt a smoking policy that infringes on the employee's lawful consumption or conduct away from the workplace. The American Lung Association has expressed disapproval for the statute, among those of 30 other states, as elevating smokers to a protected class. State Legislative Actions on Tobacco Issues, 'Smoker Protection' Laws, American Lung Association, http://slati.lungusa.org/appendix.asp (last updated September 24, 2008).

Specifically, state employees and state job applicants will not be *required to smoke* or use tobacco products while on the job as a condition of their employment, and will not be *required to abstain* from smoking or using tobacco products outside of employment. Va. Code. Ann. § 2.2-2902 (Administration of Government, Virginia Personnel Act).

A substantially identical provision appears in Va. Code § 15.2-1504, applicable to localities or political subdivisions of the Commonwealth. Similarly, Va. Code § 23-38.118(C) extends the same protection to a "participating Covered Employee, or applicant for employment with, any covered [educational] institution" in Virginia.

'Lifestyle discrimination' by a state employer on the basis of employee status as a smoker, then, is prohibited in the Commonwealth. Additionally, hiring decisions cannot be conditioned on the applicant's status as a non-smoker. The law makes no reference to employee benefits, insurance premiums, or other forms of health-based discrimination related to smoking. No equivalent laws have been enacted to cover private employers in Virginia.

The Virginia Code does not speak to employee alcohol consumption attendant or outside employment in any general sense. However, Va. Code § 2.2-178 addresses the special case of the public school bus driver, who may not be hired by a school board without first furnish[ing] a statement indicating that DMV records do not show a conviction for a charge of driving under the influence of alcohol or drugs or "any alcohol safety action program or driver alcohol rehabilitation program" within the preceding five years. The section further specifies that bus drivers "as a condition of employment, [must] submit to alcohol and controlled substance testing … conducted in compliance with Board of Education regulations." Clearly, the provision condones screening to eliminate candidates who may pose a danger to Virginia school children; it is not a mechanism for discrimination. Of course, "unsafe use" of alcohol and violation of drug use policies can jeopardize the status of those in the licensed professions. E.g., Va. Code §§ 45.1-161.35 (miners), 54.1-2706 (dentistry), 54.1-2806 (funeral directors, embalmers), 54.1-325 (optometrists), 54.1-3807 (veterinarians).

Virginia has demonstrated a long commitment to workplace wellness since establishing in 1986 an employee wellness plan called **CommonHealth** through the Commonwealth's Department of Human Resource Management (DHRM). The program is available to state employees working for participating state agencies and state universities, as part of the state employee benefits package. CommonHealth provides such services as health classes and seminars, cholesterol screening and seasonal flu shots, tobacco cessation tools (Quit for Life), fitness center membership discounts, and assistance in health management. *See* http://commonhealth.virginia.gov/. http://commonhealth.virginia.gov/Employee access to a secure, interactive Revolution Health Web site provides risk assessment software and allows the user to set up a confidential, personalized online health record capable of tracking conditions and allergies, prescriptions and physician visits. *See* https://www.revolutionhealth.com/commonhealthva/.

The University of Virginia Medical Center has created its own occupational health and employee wellness program, UVA-WorkMed. The organization partners with government agencies, non-profits, and corporations to generate programs tailored to meet the needs of the employer and to provide the clini-

cal element of these wellness programs, including physical evaluations, drug screens, and immunizations.

The **Healthy Virginians Initiative,** spearheaded under Governor Warner's leadership and managed by CommonHealth, covers state employees but was also intended "as a best practices demonstration for the private sector," Madeleine Bayard, National Governor's Association Center for Best Practices, *Issue Brief: State Employee Wellness Initiatives* 10-11 (May 18, 2005)http://www.nga.org/Files/pdf/05WELLBRIEF.pdf. *See* http://www.nga.org/Files/pdf/05WELLBRIEF.pdf. A Healthy Virginians toolkit produced in 2004 and distributed to state agency coordinators suggests ways to integrate into the workplace the healthy lifestyle initiative, which aims to combat obesity, to promote daily exercise and healthful eating habits, to inspire health accountability, and to reward modest health achievements. Governor Tim Kaine has vocalized his support for the program and its parent, CommonHealth system, which also sponsors charity walks and runs (Turkey Trot, Virginia on the Move), offers nutrition classes, and expands access to prenatal care (Future Moms).

CommonHealth and the Healthy Virginians Initiative are in part incentive-based, but those incentives are not tied to individual performance measures and therefore do not threaten to violate HIPAA regulations. Instead, group events are coordinated to facilitate fitness and well being, frequent prize drawings are held to motivate registered participants, and gubernatorial challenges afford employers boasting notable employee participation recognition as a "Governor's Healthy Workplace." Moreover, engagement in the programs, including health exams, is completely voluntary and so does not offend the antidiscrimination provisions of the Americans with Disabilities Act.

Virginia has newly made a model of its state health care offerings. State employees participating in the state employee benefit plan, COVA Care, enjoy free routine wellness care. Well office visits (annual check-ups), childhood immunizations, related lab tests, and x-rays for children and adults are covered with no deductible or copayment. Preventive care benefits for adults are likewise free to COVA Care state employees and covered family members. Increased budgeting to provide for this enhanced wellness coverage was earmarked in the 2007 legislative session. (HB 1650).

Washington

Worksite wellness programs are generally favored in Washington. The Washington State Department of Health has prepared a *Worksite Wellness and Chronic Disease Prevention Resource Kit* designed to assist businesses in starting and maintaining wellness programs for their employees. The *Resource Kit* is a step-by-step guide to be used in assessing the worksite, identifying appropriate programs, implementing such programs, and determining their effectiveness. The *Resource Kit* is available at http://www.doh.wa.gov/cfh/NutritionPA/our_work_sites/worksite_data/Worksite_wellness_toolkit.htm.

Separately, the Washington State Health Care Authority manages a wellness program for all state employees, retirees, and family members. A description of that program is available at http://www.washingtonwellness.gov/about.shtml.

Washington employers may seek, and insurers may provide, discounts on health insurance premiums based on workplace "wellness activity," which is defined as an explicit program of an activity consistent with Department of Health guidelines (*available at* https://fortress.wa.gov/doh/here/howto/images/wellnessguidelines.html), such as, smoking cessation, injury and accident prevention, reduction of alcohol abuse, appropriate weight reduction, exercise, automobile and motorcycle safety, blood cholesterol reduction, and nutrition education for the purpose of improving enrollee health status and reducing health service costs.

Participation in any such wellness plan must be voluntary. Generally, it is not permissible to ask questions about any employee's medical condition. An employer can require that an applicant take a physical examination as part of a hiring process only if the exam takes place after a conditional offer of employment. The employer must follow the same procedure and give the same examination to all conditional employees similarly situated. An individual employee's participation in any wellness program, and all individually identifiable information gathered in the process of conducting the program, must be held in strict confidence and must not affect any employee's job security, promotion opportunities, or other employment rights.

Washington Law Against Discrimination.

Participation must also comply with the Washington Law Against Discrimination, RCW 49.60. The Washington State definition of "disability" is broader than the ADA definition, and covers a greater number of impairments and medical, mental, or psychological conditions. Temporary conditions are covered, as well as conditions that are ameliorated or mitigated by medication or other means. Under the WLAD, there is no requirement that a condition have an impact on a major life activity, or that the impact of the condition be substantially limiting. RCW 49.60.040(25)(a) (as amended by Laws of 2007, ch. 317).

This broad definition may come into play, for example, if an employer provides an incentive for the development of healthy habits. Rewarding employees for healthy habits is permissible, provided that the employer does not discriminate against those who have a health condition that makes it unreasonable or medically inadvisable to meet a desired standard.

Drug and Alcohol Addiction under the WLAD.

In addition, drug and alcohol addiction is considered to be a disability under the WLAD. While current users of illegal drugs are not protected, alcoholics

who currently drink alcohol are generally considered to be protected under the law. Individuals who are in a drug or alcohol recovery program, or have been through a drug or alcohol recovery program, are protected. Wellness plans must not discriminate against any such protected employees.

Employers must prohibit the use of alcohol and illegal drugs at the workplace, unless the employer is in the business of producing, distributing, or selling alcohol or narcotics. Employers must also prohibit employees from being under the influence of alcohol or illegal drugs during work hours or while on-call. WAC 296-800-11025.

If an employer suspects an employee of drug or alcohol abuse, confronting the employee may place the employer in the situation of "regarding" the employee as disabled, which may trigger the protection of the WLAD. Before confronting an employee, the employer should have documented, objective, and verifiable proof of the drug or alcohol use. If an employee comes forward about a drug or alcohol issue, the employer should not assume the employee is an addict, and should not refer to the employee as disabled. The employer should gather more facts and ask what the employee is requesting. If the employee requests accommodation, the employer must engage in an interactive process. Usually employers need to provide a leave of absence to get treatment and time off to attend counseling or meetings.

West Virginia

For employers in West Virginia who are considering implementing employee wellness programs, the good news is that recent health education and illness prevention legislation has begun to tackle some of the greatest health issues facing West Virginians. However, the bad news is that numerous statutory provisions, such as those dealing with protected health information and prohibited discriminatory practices, create obstacles for employers developing these programs.

The first noteworthy statute affecting the development of employee wellness programs addresses what is arguably West Virginia's greatest health problem – obesity. The act is titled the *Healthy West Virginia Program*, and took effect in July 2005. W. Va. Code § 5-1E-1 (2008) *et seq*. In its statement of purpose, the statute declares that the "rise in obesity and related weight problems accompanied by the resulting incidence of chronic disease has created a healthcare crisis that burdens the health care infrastructure of the state." W. Va. Code § 5-1E-1. As a result, the Legislature decided it "must take action to assist West Virginia citizens in engaging in healthful eating and regular physical activity." *Id*.

The statute creates the Office of Healthy Lifestyles, which shall, among other duties, "[e]stablish a statewide voluntary private sector partnership and recognition program for *employers*, merchants, restaurants, and other private sector businesses *to encourage the development or further advance current programs*

that encourage healthy lifestyles." W. Va. Code § 5-1E-3(3) (emphasis added).

Another grave health issue facing West Virginians, and costing employers a great deal in healthcare costs, is tobacco use. As such, working toward the reduction or even elimination of tobacco use by employees is likely an important part of many employee wellness programs. However, W. Va. Code § 21-3-19 delivers a striking blow to such efforts. Subsection (a) provides that "[i]t shall be unlawful for any employer, whether public or private, or the agent of such employer to refuse to hire any individual or to discharge any employee *or otherwise to disadvantage or penalize any employee* with respect to *compensation, terms, conditions, or privileges of employment* solely because such individual uses tobacco products off the premises of the employer during non-working hours." W. Va. Code § 21-3-19(a) (2008) (emphasis added). Thus, to the extent that a wellness program has tobacco reduction or elimination provisions, this statute severely limits the punishments and/or consequences that may be imposed for failing to reduce or eliminate tobacco use.

Employers who want to link employee wellness programs to the insurance benefits they offer must be aware of W. Va. Code § 33-16D-13. This statutes provides that "[a]ny employer subscribing to a healthcare benefit plan for or on behalf of its employees pursuant to this chapter shall not discriminate against any eligible employee *on the basis of such employee's status with the employer* by paying for all or part of the healthcare benefit plan premiums in a manner different from that provided any other eligible employee." W. Va. Code § 33-16D-13 (2008) (emphasis added). To the extent that an employee's lack of participation in a wellness program affects his or her "status with the employer," the employer may not use that as the basis for discrimination in payment of insurance premiums. To be safe, employers may want to link participation in employee wellness programs to non-insurance-related incentives altogether.

Employers who need detailed health information on their employees for wellness program purposes may have difficulty accessing this protected information from a health maintenance organization. Based on W. Va. Code § 33-25A-26, "[a]ny data or information pertaining to the diagnosis, treatment, or health of any enrollee or applicant obtained from that person or from any provider by any health maintenance organization shall be held in confidence and shall not be disclosed to any person," except in limited circumstances. W. Va. Code § 33-25A-26 (2008). The statute goes on to state that this information may only be disclosed: (1) to facilitate an assessment of the quality of care delivered; (2) upon the express written consent of the person; (3) pursuant to statute or court order; (4) in the event of a claim between that person and the health maintenance organization wherein the information is pertinent; or (5) to a department or division of the state pursuant to the terms of a group contract for the provision of healthcare services. *Id*. Furthermore, "[a] health maintenance organization is entitled to claim any statutory privileges against the disclosure which the provider who furnished the information to the health maintenance organization is entitled to claim." *Id*.

Employers developing and implementing wellness programs should be encouraged by recent legislation, such as the *Healthy West Virginia Program* and the *West Virginia Osteoporosis Prevention Education Act*, that places a high value on ambitious efforts to improve the health of West Virginians. However, employers should still err on the side of caution when developing the "teeth" of these programs, considering the statutory obstacles highlighted. The safest route is to develop voluntary programs linked to non-insurance-related incentives, and to avoid any differential treatment of employees based on the health information received pursuant to or during their participation in those programs.

Wisconsin

Wisconsin has enacted the Wisconsin Fair Employment Act which prohibits employers from discriminating against an individual for the use or nonuse of lawful products when not on the employer's premises during non-working hours. Wis. Stat. § 111.321 provides in relevant part as follows:

Subject to ss. 111.33 to 111.36, no employer...may engage in any act of employment discrimination as specified in s. 111.322 [e.g., to terminate from employment any individual] against any individual on the basis of...use...of lawful products off the employer's premises during non-working hours.

There are five exceptions denoted in Wis. Stat. § 111.35(2) as follows:

Notwithstanding s. 111.322, it is not employment discrimination because of use...of a lawful product off the employer's premises during non-working hours for an employer...to...terminate an individual from employment...if the individual's use...of a lawful product off the employer's premises during non-working hours does any of the following:

Impairs the individual's ability to undertake adequately the job-related responsibilities of that individual's employment.

Creates a conflict of interest, or the appearance of a conflict of interest, with the job-related responsibilities of that individual's employment.

Conflicts with a *bona fide* occupational qualification that is reasonably related to the job-related responsibilities of that individual's employment.

Constitutes a violation of s. 254.92(2) [against children's purchase of tobacco products].

Conflicts with any federal or state statute, rule or regulation.

Wisconsin statutes establish a statutory right to privacy. Wis. Stat. § 995.50. The statute is not limited to employment, but would provide an employee with a cause of action for invasion of privacy related to conduct in the workplace.

Wisconsin statutes specifically permit employers to offer a policy or plan of life, health, or disability insurance coverage under which the type of coverage or the price of coverage for an individual who uses a lawful product off the employer's premises during non-working hours differs from the type of coverage or the price of coverage provided for an individual who does not use that lawful product. Wis. Stat. § 111.35(3).

Aside from the prohibition on discrimination due to use or non use of legal products discussed above, Wisconsin has not enacted laws that protect employees from discrimination in employment due to lawful conduct during non-working hours. However, Wisconsin has a statutory right to privacy that prohibits the intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private. Wis. Stat. § 895.50. To the extent that an employer's monitoring of its employees' off-duty conduct would constitute such an intrusion, an employer could face liability for invasion of privacy.

The Wisconsin Fair Employment Act (WFEA) provides broad protections for employees against discriminatory actions by employers, including but not limited to actions against employees who have physical or mental disabilities, a record of a disability, or who are perceived as disabled. Wis. Stat. § 111.32(8). Wellness program provisions that would trigger legal issues under the ADA or HIPAA are likely to raise legal concerns under the WFEA. Accordingly, wellness programs should be voluntary, *bona fide*, and comply with HIPAA's standards for wellness programs.

The WFEA also prohibits discrimination by way of contributing a lesser amount to the fringe benefits, including life or disability (including health) coverage, of any employee because of the employee's disability. Wis. Stat. § 111.34(1)(a). This provision could be implicated by a wellness program that ties employer contributions to employee benefits to the employee's participation in disease management or health coaching programs. Employees who, through health risk assessments or otherwise, are identified as suggested participants in such programs, may well have conditions that are disabilities under the WFEA.

No law suits have been filed in Wisconsin court alleging that an employer's Employee Wellness Program violated federal or state law.

ACC Extras

Supplemental resources available on www.acc.com

Employee Wellness Programs: A Federal and State Analysis of the Legal and Practical Implications.
InfoPak. March 2009
http://www.acc.com/legalresources/resource.cfm?show=167801

New HIPAA Nondiscrimination Regulations & Your Wellness Program.
Program Material. December 2007
http://www.acc.com/legalresources/resource.cfm?show=19917

Wellness Programs in the Workplace Made Simple.
ACC Docket. April 2009
http://www.acc.com/legalresources/resource.cfm?show=181253

Please note, these additional resources are provided by the Association of Corporate Counsel and not by the faculty of this session.