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**Employee Wellness Programs: Improving Access to  
Healthcare or Legal Landmine?**

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The Patient Protection and Affordable Care Act (PPACA), signed into law on March 23, 2010, provides significant funding and rewards to improve the health status of the nation.<sup>1</sup> The Act is intended to combat America's downward spiraling health outlook by improving access to health care through efforts such as employee wellness initiatives.<sup>2</sup> While there are many advantages to these initiatives, employers must be cautious not to infringe upon discrimination laws and privacy rights when offering these programs.<sup>3</sup> Litigation based on this type of infringement will likely rise, as more employers implement these programs and federal and state employment laws become more complex.<sup>4</sup> Failing to take necessary precautions could cause such programs to do more harm than good.

**I. WELLNESS PROGRAMS – AN EMPLOYER'S MECHANISM TO PROMOTE HEALTH**

With movie seats expanding to accommodate increasingly larger patrons and airlines incurring rising fuel costs to transport heavier passengers, America needs help providing

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1. *Impact of the Health Care Reform Laws on Wellness Programs*, WELLSOURCE (last visited Feb. 28, 2011), <http://www.wellsorce.com/articles-wellnessrx/Impact-of-the-Health-Care-Reform-Laws-on-Wellness-Programs.html> [hereinafter *Impact*].

2. *See id.*

3. Anne C. Bancroft, *Corporate Wellness: Is It Healthy For Employers?*, 55 PRAC. LAW. 39, 44-50 (2009).

4. Jennifer D. Thomas, *Mandatory Wellness Programs: A Plan To Reduce Health Care Costs Or A Subterfuge To Discriminate Against Overweight Employees?*, 53 How. L.J. 513, 554 (2010).

people with access to health care.<sup>5</sup> Even more troubling is the explosion of Americans who lack health insurance.<sup>6</sup> In 2010, estimates revealed that about fifty million Americans between the ages of eighteen and sixty-four did not have health insurance at some point in the twelve-month period preceding the study.<sup>7</sup> Additionally, about thirty-two percent of middle-income adults in this age bracket report being uninsured at some point in the same time period.<sup>8</sup> To further complicate things, health care expenditures are expected to nearly double from \$2.4 trillion in 2008 to \$4.3 trillion by 2018.<sup>9</sup> Of these expenditures, an estimated seventy-five percent of all healthcare costs stem from preventable chronic health conditions.<sup>10</sup>

To best counter this health crisis and its growing expenditures, many employers are turning to workplace wellness programs.<sup>11</sup> By definition, wellness programs are considered “any program designed to promote health or prevent disease.”<sup>12</sup> These programs vary and often include: diagnostic testing for health problems, educational classes, or rewards for meeting certain weight, cholesterol, restraint from nicotine use or blood pressure targets.<sup>13</sup> While employees participate in these programs, employers also gain many benefits from having a healthy workforce such as lower absenteeism, greater productivity, better morale, and lower health insurance expenses.<sup>14</sup>

The early-established wellness initiatives often consisted of voluntary programs such as gym discounts, smoking cessation programs, and other preventative measures.<sup>15</sup> However, in light of the explosion of health care costs, employers are aggressively changing their wellness initiatives by charging higher health insurance premiums or deductibles to those employees who do not participate in wellness programs or choose to

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5. Bancroft, *supra* note 3, at 39.

6. *Access to Health Care*, CENTER FOR DISEASE CONTROL AND PREVENTION – VITAL SIGNS 1 (Nov. 9, 2010), available at <http://www.cdc.gov/VitalSigns/pdf/2010-11-vitalsigns.pdf>.

7. *Id.*

8. *Id.*

9. Daniel C. Rubenstein, *The Emergence Of Mandatory Wellness Programs In The United States: Welcoming, Or Worrisome?*, 12 J. HEALTH CARE L. & POL’Y 99, 99 (2009).

10. Elizabeth C. Ghandakly, *Employee Wellness Programs: A Cure For Employer Health Plans?*, 3 ENTREPRENEURIAL BUS. L.J. 37, 38 (2008).

11. Rubenstein, *supra* note 9, at 100.

12. Ann Hendrix & Josh Buck, *Employer-Sponsored Wellness Programs: Should Your Employer Be The Boss Of More Than Your Work?*, 38 Sw. L. Rev. 465, 468 (2009).

13. Sonja C. Rajki, *Workplace Wellness Programs: What’s Legal, What’s Not (and Why Your Company Should Have One)* (Aug., 2009), available at <http://www.ssr.com/library.html>.

14. Bancroft, *supra* note 3, at 40.

15. Hendrix & Buck, *supra* note 12, at 469.

engage in unhealthy behavior.<sup>16</sup>

## II. PPACA - SPREADING WELLNESS THROUGH FINANCIAL INCENTIVES

Beginning in 2011, provision § 10408 in the PPACA offers small businesses the opportunity to qualify for federal grants that help establish a wellness program in the workplace.<sup>17</sup> The provision offers financial incentives to employers with fewer than 100 employees who work twenty-five hours or more per week.<sup>18</sup> Additionally, to qualify for grant money, employers must not have had a workplace wellness program in place as of March 23, 2010.<sup>19</sup> To be eligible for the grant, the wellness program must contain health awareness initiatives, efforts to encourage employee participation such as financial incentives, initiatives to change unhealthy behaviors and lifestyle choices, and supportive environment efforts including workplace policies.<sup>20</sup>

Commencing, January 1, 2014, the PPACA will also allow employers to give reductions of up to thirty percent of the cost of insurance premiums to employees who participate in employee wellness programs.<sup>21</sup> Further rewards may be forthcoming, as discretion will be left to the regulatory agencies to increase this threshold to as much as fifty percent.<sup>22</sup>

Prior to the enactment of the PPACA, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) gave employers the opportunity to lower the cost of health insurance premiums for employees participating in wellness programs.<sup>23</sup> HIPAA carries a strict non-discrimination rule that aims to prevent discrimination in health coverage as a result of a person's health status.<sup>24</sup> However, it offers an exception in the form of rewarding participation in a health wellness program.<sup>25</sup> While the HIPAA

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16. *Id.* at 469-70 (some companies have implemented 'unhealthy behavior' fines for nicotine use).

17. Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, § 10408 (2010).

18. PPACA, § 10408(b)(2)(A) (2010).

19. *Id.* at § 10408(b)(2)(B) (2010).

20. *Id.* at § 10408(c)(2) (2010).

21. HEALTH BENEFIT NEWS, WELLNESS AND PREVENTION PROVISIONS IN THE PATIENT PROTECTION AND AFFORDABLE CARE ACT 2 (last visited Feb. 28, 2011) [http://healthbenefitsnews.com/wp-content/uploads/2010/05/WELLNESS\\_ppaca\\_Issue-Brief-May-2010.pdf](http://healthbenefitsnews.com/wp-content/uploads/2010/05/WELLNESS_ppaca_Issue-Brief-May-2010.pdf) [hereinafter WELLNESS].

22. *Id.*

23. *Id.*

24. BENEFIT ADVISOR, FINAL HIPAA NON-DISCRIMINATION RULES 1, (last visited May 2, 2011) [http://www.mcgrawhrentworth.com/Benefit\\_Advisor/2007/BA\\_Issue\\_1.pdf](http://www.mcgrawhrentworth.com/Benefit_Advisor/2007/BA_Issue_1.pdf).

25. ERIN RIAN, LEAGUE OF MINNESOTA CITIES INSURANCE TRUST, WORKSITE WELLNESS PROGRAMS – THE GOOD, THE BAD & THE HEALTHY 3 (last visited Feb. 28, 2011), [www.lmc.org/media/document/1/worksitewellnessprograms.pdf](http://www.lmc.org/media/document/1/worksitewellnessprograms.pdf).

exception limits rewards to twenty percent of the cost of employee-only coverage under the plan, the PPACA expands the incentive to participate in an employee wellness program.<sup>26</sup>

### III. IMPROVING ACCESS THROUGH INCENTIVES

Section 10408 and Section 2705 of the PPACA align to achieve the same goal of increasing participation in employee wellness plans. This comes as a relief considering many companies desperate to cut costs from their budget eliminated wellness programs during the height of the recent recession.<sup>27</sup> Section 10408 of the Act gives small employers who eliminated these programs prior to March 23, 2010, incentive to reinstate such programs.<sup>28</sup>

Several scholars have criticized the effectiveness of positive incentives, such as those outlined in Section 2705, in successfully increasing participation levels in wellness plans.<sup>29</sup> Suggestions have been made that penalties, such as charging employees higher insurance premiums for not participating in a wellness program, are more likely to increase participation.<sup>30</sup> For example, in 2008 PepsiCo introduced a \$600 surcharge for smokers but also offered a smoking cessation program and nicotine replacement therapy.<sup>31</sup> As a result, PepsiCo saw a tenfold increase in participation in its wellness program coupled with a dramatic decline of employees who smoked.<sup>32</sup> While empirical evidence may suggest that such negative incentives may be more powerful, employers should be cautioned that such actions may trigger lifestyle discrimination claims or even disability claims.<sup>33</sup> Nevertheless, it is too soon to say whether the PPACA will persuade employers to shift towards offering positive incentives, and if so, whether this approach is the most effective means to increasing participation in a wellness program.

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26. WELLNESS, *supra* note 21, at 2.

27. Laura Petrecca, *Cost-Conscious Companies Re-Evaluate Wellness Programs*, USA TODAY (June 19, 2009), available at [http://www.usatoday.com/money/workplace/2009-06-16-wellness-programs-companies\\_N.htm](http://www.usatoday.com/money/workplace/2009-06-16-wellness-programs-companies_N.htm).

28. WELLNESS, *supra* note 21, at 2.

29. Thomas J. Parisi, *The Onus Is On You: Wellness Plans And Other Strategies Being Employed For Patients To Take Ownership Of Their Health*, 13 QUINNIPIAC HEALTH L.J. 243, 262 (2010).

30. *Id.* at 263.

31. Petrecca, *supra* note 27.

32. *Id.*

33. Parisi, *supra* note 29, at 263.

## IV. LEGAL CAUTION FOR EMPLOYERS

While the PPACA may create strong incentives to encourage participation in a wellness program, employers should proceed with caution. Such programs implicate many federal laws including HIPAA, the Genetic Information Non-Discrimination Act of 2008 (GINA), Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA).<sup>34</sup> For example, HIPAA requires that wellness programs meet a five-factor test if they are offering a reward based on satisfying a health factor.<sup>35</sup> Other laws such as GINA prohibit employers from collecting genetic information, such as family medical history, through a wellness program.<sup>36</sup> Similarly, the ADA prohibits employers from denying, on the basis of a disability, qualified individuals with a disability an equal opportunity to participate in the wellness programs.<sup>37</sup> As a result, employers must be prepared to offer a reasonable accommodation to an employee with a disability to ensure their participation.<sup>38</sup> Further, the ADA restricts employers from making medical inquiries or requiring medical exams unless they are job-related and a business necessity.<sup>39</sup> Additionally, the ADEA allows workers over the age of 40 to challenge their employer's wellness program on the basis of disparate impact.<sup>40</sup>

Restrictions imposed by these laws coupled with privacy rights of the employees often complicate the employer's desire to monitor employee health behavior.<sup>41</sup> Thus, it is often quite difficult to prove that an individual has achieved success in a wellness program, such as quitting smoking or changing eating habits.<sup>42</sup>

In addition to federal laws, many states also prohibit employers from engaging in "lifestyle discrimination."<sup>43</sup> For example, California has implemented off-duty conduct laws to protect employees from experiencing an adverse employment action for their

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34. *Wellness Programs May Be Bad For Employers' Health*, LAWYERS.COM (last visited Apr. 3, 2011), <http://labor-employment-law.lawyers.com/human-resources-law/Wellness-Programs-May-Be-Bad-For-Employers-Health.html>.

35. Emily Noll, *Good-Intentioned Wellness Programs Need Rules Too*, CORPORATE WELLNESS MAGAZINE (July 8, 2010), available at <http://www.corporatewellnessmagazine.com/article-detail.php?issue=issue-12&article=intentioned-wellness-programs>.

36. *Id.*

37. *Workplace Wellness: Potential Legal Issues Associated With Workplace Wellness Plans* (last visited Apr. 3, 2011), [http://www.hbbenefits.com/Workplace\\_Wellness\\_Potential\\_Legal\\_issues.pdf](http://www.hbbenefits.com/Workplace_Wellness_Potential_Legal_issues.pdf).

38. *Id.*

39. *Id.*

40. Noll, *supra* note 35.

41. Parisi, *supra* note 29, at 263.

42. *Id.* at 263-64.

participation in lawful conduct away from the workplace.<sup>44</sup> Meanwhile, other states protect the employee's use of lawful products but permit employers to discriminate in providing health insurance due to their negative health habits.<sup>45</sup>

Navigating the legal implications of wellness programs may be unsettling for many employers, especially small businesses who lack the resources for legal assistance. Section 4303 of the PCPAA provides some assistance in that it requires that the Center for Disease Control provide an educational campaign and technical assistance to promote the benefits of employee wellness programs, however, it is yet to be seen what net positive value this program will bring.<sup>46</sup>

#### V. CONCLUSION

The PPACA aims to rein in the growing expenditures of medical treatment through health and wellness promotion and prevention initiatives.<sup>47</sup> As recent as 2008, spending levels to treat preventable diseases had risen to approximately \$303 billion to \$493 billion annually.<sup>48</sup> While this cost seems astronomical, the detriment to the economy hurts most in terms of lost productivity and absenteeism in the workplace.<sup>49</sup> Understanding the costs associated with preventable diseases influences employers to take a proactive approach by investing in workplace wellness programs.<sup>50</sup>

Congress created the PPACA with certain mandates and incentives to promote wellness and healthier lifestyles, especially through workplace initiatives.<sup>51</sup> While employers often possess the best intention to utilize these programs to increase healthcare options for their employees, employees are not afraid to look to the judicial system to prevent employers from over-regulating their private lives.<sup>52</sup>

Only time will tell how successful the PPACA is in promoting access to health care. Although, the PPACA pushes employers to participate in wellness programs, it may end

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43. Bancroft, *supra* note 3, at 48.

44. *Id.*

45. *Id.* at 48-49.

46. Howard K. Koh & Kathleen G. Sebelius, *Promoting Prevention Through The Affordable Care Act*, *NEW ENG. J. MED.* (Aug. 25, 2010), available at <http://www.nejm.org/doi/full/10.1056/NEJMp1008560>.

47. WELLNESS, *supra* note 21, at 1.

48. *Id.*

49. *Id.*

50. See Rajki, *supra* note 13.

51. WELLNESS, *supra* note 21, at 1.

52. Ghandakly, *supra* note 10, at 39.

up pushing employers right into the courtroom. Costly litigation in defending the employer from alleged violations of federal and state employment laws could ultimately hurt a company's bottom line and perhaps persuade them that wellness programs, while harmless on their face, are in actuality a legal land mine.