The Social Burden of Obesity: Legal Implications of Employer and Government Sponsored Wellness Programs

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From the shouting matches at town hall meetings to the bipartisan accusations in Congress, Americans have blamed everyone but themselves for the huge disparities in access to healthcare and the rising costs of adequate medical treatment. The unhealthy American lifestyle is a leading factor in the high cost of medicine. If the United States has any chance for closing the gap in access to healthcare, it needs to begin holding its citizens accountable for their increasing unhealthy lifestyles, or risk drowning in crippling medical costs. This article reviews the public health and privacy ramifications of the current court decisions finding that holding individuals accountable for their lifestyle choices through wellness programs is constitutional.

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I. OBESITY IS AN EPIDEMIC WITH HIGH HEALTH AND ECONOMIC COSTS

Obesity is an epidemic, with two-thirds of the American population either obese or overweight.\(^1\) Obesity is a known risk factor for over thirty medical conditions.\(^2\) As a result, obesity leads to higher medical costs due to its direct correlation with diabetes, heart disease, hypertension, depression, high blood pressure, and certain types of cancer.\(^3\) At this rate, by 2030 over 366 million people will have diabetes\(^4\) and as a result, will triple the healthcare costs of their counterparts.\(^5\) Studies show that obesity-related diseases, all of which are to a large degree preventable, are the costliest conditions in terms of employee absenteeism, disability, and decreased productivity.\(^6\) Additionally, obese people have been found to spend 36% more on health services over their lifetime than normal weight individuals.\(^7\) These studies are evidence that obesity is not only physically unhealthy, but is crippling the financial health of our already troubled economy. Obesity costs the healthcare system $70 billion annually or 7% of the total healthcare costs in the United States.\(^8\) The government finances roughly half the total annual medical costs attributable to obesity, with the average tax payer spending $175 per year to cover obesity-related medical expenses of Medicare

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\(^3\) Id.

\(^4\) *Id.* at 17.


\(^6\) *Id.* at 222.

\(^7\) Alford & Lampkin, *supra* note 1, at 477.

\(^8\) *Id.* at 479.
and Medicaid recipients. Employers are off-setting $12 billion of those costs each year through group insurance plans for their employees, with an increasing number of employers creating wellness programs or turning to self-insurance to avoid the substantial premiums for high-risk employees. Employers may leave their workers uninsured by deciding to stop providing insurance plans altogether, as studies show that obese workers are less productive, miss more days of work, and have the highest disability filings, thus costing the company more money to employ than normal-weight workers.

II. TARGETING UNHEALTHY LIFESTYLES THROUGH WELLNESS PROGRAMS.

A. Government-Sponsored Programs

With healthcare expenses expected to rise from 16% to 21% of the country’s Gross Domestic Product (GDP) by 2015, both the public and private sectors are implementing wellness programs to lower their excessive costs. In a reaction to the debilitating costs of covering obesity-related illnesses, which make up 80% of the portion of GDP spent on healthcare, several state governments

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10 Erin E. Patrick, *Lose Weight or Lose Out: The Legality of State Medicaid Programs that Make Overweight Beneficiaries’ Receipt of Funds Contingent Upon Healthy Lifestyle Choices*, 58 EMORY L. J. 249, 251 (2008).
12 Alford & Lampkin, supra note 1, at 477.
13 Jesson, supra note 5, at 221.
14 Id. at 224.
15 Id. at 222.
are introducing wellness programs that lower costs by targeting unhealthy behavior.\textsuperscript{16} South Carolina’s program makes the patient responsible for any cost exceeding those allotted to the individual.\textsuperscript{17} West Virginia started the only penalty-based wellness program in the United States for Medicaid and Medicare beneficiaries.\textsuperscript{18} To qualify for coverage, Medicare participants must sign an agreement requiring them to adhere to health improvement programs as directed by their doctor.\textsuperscript{19} Failure to comply will not eliminate coverage, but reduce it to the basic benefit package, which has greatly restricted benefits as compared to the enhanced package received upon compliance.\textsuperscript{20}

**B. Employer-Sponsored Programs**

Employment is the only source of insurance coverage for 62.2\% of the under-sixty-five population, as employers are the purchasers of most private insurance.\textsuperscript{21} Thus, employees who lose their jobs or are dropped from coverage have few other options, especially if they do not have the money to afford insurance on their own, and do not qualify for Medicare or Medicaid.\textsuperscript{22} Employers who provide their employees with insurance are struggling to contain costs resulting from covering obese employees subject to higher premiums.\textsuperscript{23} As a result, many are following the government’s lead and implementing wellness

\begin{footnotesize}
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\item[16] Id. at 223.
\item[17] Id. at 225-26.
\item[18] Patrick, supra note 10, at 249.
\item[19] Id.
\item[20] Id.
\item[22] Id. at 468.
\item[23] Alford & Lampkin, supra note 1, at 479.
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programs.\textsuperscript{24} In 2006, 28\% of employers had some sort of wellness program in place.\textsuperscript{25} A typical wellness program includes worksite fitness, subsidized gym memberships, healthy vending machines, and financial incentives for employees enrolled in diet programs.\textsuperscript{26} These programs are designed to reduce costs by incentivizing healthy lifestyle choices by limiting the benefits of employees who do not conform to company-determined standards.\textsuperscript{27}

### III. Wellness Programs are Both Beneficial and Detrimental

#### A. Economic Benefits

Wellness programs, regardless of their source, have both detrimental and beneficial effects. A study found that healthy weight decisions are made in the absence of government intervention when individuals faced the full costs of their decisions about eating and exercise, increasing social welfare.\textsuperscript{28} Even moderate levels of cost sharing dramatically reduced the social harm of obesity because weight loss resulted in lower insurance premiums, and overall healthcare costs.\textsuperscript{29} These savings are crucial at a time when the government is already struggling to cover medical expenses, and millions of Americans remain uninsured.\textsuperscript{30} Furthermore, weight loss, in general, provides the economic benefit of improving productivity, increasing income, and decreasing the probability of missed work days due to

\textsuperscript{24} Hendrix & Buck, \textit{supra} note 21, at 467.
\textsuperscript{25} Id.
\textsuperscript{26} Patrick, \textit{supra} note 10, at 251.
\textsuperscript{27} Jesson, \textit{supra} note 5, at 233.
\textsuperscript{28} Bhattacharya & Sood, \textit{supra} note 9, at 25-26.
\textsuperscript{29} Id.
\textsuperscript{30} Schacht, \textit{supra} note 11, at 303.
illness. A study showed that normal-weight workers had higher overall salaries due to fewer missed work days and less money subtracted from paychecks to pay the higher insurance premium charges.

B. Detrimental Effects on Access to Healthcare

Despite the benefits, wellness programs can also result in disparities in access to healthcare. Obese people make an average $1.42 per hour less than their normal-weight counterparts, but only $0.25 less per hour if they are insured outside of the company. Additionally, these programs, which take away the cost-sharing mechanism, provide an incentive to profit from discrimination by hiring only thin workers. Some companies have reduced their costs by eliminating their employee group insurance if several employees were obese, or severely restricted the amount paid for certain illnesses, such as high blood pressure and cholesterol, both highly correlated with obesity.

Unfortunately, as the cases below illustrate, obese employees will have little legal recourse if they are eliminated from an employer’s insurance plan. According to Alexander v. Choate, a plan only fails to provide meaningful access if access to a public service is inadequate for a “disabled” individual. Moreover, courts have consistently refused to recognize obesity as a disability under the

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31 Hendrix & Buck, supra note 21, at 477.
33 Alford & Lampkin, supra note 1, at 479.
34 Bhattacharya & Bundorf, supra note 32, at 653.
35 Id. at 649.
36 Schacht, supra note 11, at 303.
37 Patrick, supra note 10, at 263.
Americans with Disabilities Act.\textsuperscript{38} Courts have also recognized the validity of employer insurance policies that refuse to cover any procedures or drugs used in the treatment of obesity or obesity-related diseases, like high blood pressure or degenerative joint disease\textsuperscript{39} because obesity is not an illness as defined under these plans.\textsuperscript{40} The Texas Court of Appeals in \textit{Bobbitt v. Electronic Data Systems} held that because obesity was not an illness, in that it was not impairment of vital functions, the defendant had no duty to reimburse a gastric bypass surgery under their plan.\textsuperscript{41} The \textit{Bobbitt} holding is significant because it permits insurance companies to deny policy holders reimbursement for obesity treatments, and in essence, prohibits an effective, and for some people, the only, way of starting a healthier lifestyle.\textsuperscript{42}

IV. WELLNESS PROGRAMS ARE CONSTITUTIONAL

\textbf{A. The Obese is Not a Suspect Class, Nor is There a Fundamental Right to Healthcare}

Wellness programs, however, have sparked a debate beyond their potential benefits or detriments. There is concern over whether they are constitutional in light of the inherent disparities in access to medically necessary care that result.\textsuperscript{43} Because of the stigma of contempt attached to obesity, it has become one of the

\textsuperscript{38} Alford & Lampkin, \textit{supra} note 1, at 490.
\textsuperscript{40} Alford & Lampkin, \textit{supra} note 1, at 481.
\textsuperscript{42} Alford & Lampkin, \textit{supra} note 1, at 482.
\textsuperscript{43} Patrick, \textit{supra} note 10, at 276.
last socially acceptable forms of discrimination. Obesity can result from any combination of factors, such as excessive eating, lack of exercise, genetic predisposition, socioeconomic status, and cultural norms. Because obesity has been found to be related to poverty and ethnicity, it can be argued that a strict scrutiny standard should be applied to government wellness programs that charge obese individuals higher premiums for failing to meet pre-determined health standards. Courts, however, refuse to recognize obese people as a suspect class or discrete and insular minority, specifically limiting it to race and disability, respectfully. Currently, there is no explicit or implicit constitutional right to healthcare, like voting rights or interstate travel, meaning that the resulting disparities in access are not unconstitutional. Historically, the Supreme Court has been very conservative in defining fundamental rights, limiting them to marriage, procreation, and childbearing. Other federal and state courts also agree that treatments for obesity are cosmetic and not medically necessary, even

\[\text{44}^{\text{Katherine Mayer, An Unjust War: The Case Against the Government’s War on Obesity, 92 GEO. L. J. 999, 1013-14 (2004).}}\]
\[\text{45}^{\text{Jennifer S. Haas et al., The Association of Race, Socioeconomic Status, and health Insurance Status with the prevalence of Overweight Among Children and Adolescents, 93 AM. J. PUB. HEALTH, 2105, 2105, 2109 (2003).}}\]
\[\text{46}^{\text{Mayberry, supra note 2, at 19.}}\]
\[\text{47}^{\text{Haas, supra note 45, at 2109.}}\]
\[\text{48}^{\text{Hendrix & Buck, supra note 21, at 476.}}\]
\[\text{49}^{\text{Patrick, supra note 10, at 277.}}\]
\[\text{50}^{\text{Schacht, supra note 11, at 344.}}\]
\[\text{51}^{\text{Patrick, supra note 10, at 262.}}\]
\[\text{52}^{\text{Hendrix & Buck, supra note 21, at 488.}}\]
with a doctor’s prescription, making it unlikely that access to treatments for obesity violates a Constitutionally-guaranteed right.

B. Wellness Programs do not conflict with the Equal Protection Clause

Wellness programs have been challenged as unconstitutional under the Fourteenth Amendment Equal Protection Clause, which prohibits the states from denying a person equal protection under state law. A state wellness program is constitutional if it does not require that all similarly situated persons be treated differently. If there is a disparate impact on a class of persons, the plaintiff has to show that the insurance law is not rationally related to a legitimate governmental interest. The programs have no disparate impact as long as every participant is denied coverage for obesity-related treatments. Moreover, state-sponsored wellness programs are likely to meet the “legitimate interest” standard because a healthy population is in the public interest, due to the astronomical costs of healthcare and the proven benefits of healthier, and thus more productive, work force. There is a legitimate interest in reducing spending in order to increase the availability of funds available for others and an increase in the quality of care provided. A recent study found that if insurance premiums are not risk rated for obesity, such that everyone pays different amounts based on weight, the

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54 Patrick, supra note 10, at 276-77.
55 Id.
56 Id. at 277.
58 Hendrix & Buck, supra note 21, at 471, 484-85.
59 Id. at 478.
initiative for all plan participants to lead a healthy lifestyle decreases, reducing the overall social welfare.\textsuperscript{60}

\textit{C. Wellness Programs Do Not Violate Privacy Rights}

Although there is no constitutional right of access to healthcare, especially for a condition courts have yet to recognize as an illness, there is a long-standing tradition of privacy protection.\textsuperscript{61} The New York Supreme Court held in \textit{Whalen v. Roe} that there was a right to privacy prohibiting disclosure of personal matters and to make important decisions.\textsuperscript{62} The Court, however, recognized limits to that right if there is a more pressing public concern, such that the disclosure is not unwarranted.\textsuperscript{63} The Court further stated that a request for personal information, like requesting weight and blood pressure information from doctors of obese employees in wellness plans, is sufficiently warranted if it protects the health of many.\textsuperscript{64}

Moreover, for a court to recognize a right to privacy violation there must be an unreasonable and serious intrusion of information not already in the public domain.\textsuperscript{65} In \textit{Rodrigues v. Scotts}, the United States District Court of Massachusetts held that testing for off-duty conduct, like smoking, was not an unreasonable intrusion because the employee smoked around others and

\textsuperscript{60}Bhattacharya & Sood, \textit{supra} note 9, at 3, 14.
\textsuperscript{61}Hendrix & Buck, \textit{supra} note 21, at 477.
\textsuperscript{62}Jesson, \textit{supra} note 5, at 278-79.
\textsuperscript{63}\textit{Id.} at 280.
\textsuperscript{64}\textit{Id.}
purchased cigarettes in public. Obesity may face a similar fate because people consume food in public, and those that join gyms exercise in the public eye. Further, obesity is a condition that is recognizable by the naked eye, further decreasing the chances of judicial protection.

Furthermore, employer-mandated wellness programs regulating off-duty conduct are likely to be upheld under the Constitution, provided the conduct could be shown to be job-related. While food consumed or amount of exercise seem unrelated to job performance, according to studies, normal weight workers are less likely to claim disability, are more productive, and on average, take fewer sick days. This operates on the logic that a healthier workforce would reduce healthcare costs, which in turn would benefit the financial health and stability of the company.

State courts have also recognized the lack of a reasonable expectation of privacy in the workplace. In California, to win on an invasion of privacy claim against a private employer, the employee must show that he had a legally protected privacy interest, a reasonable expectation of privacy under the circumstance, and that the conduct was constituted a serious invasion of privacy. An employer, however, need only negate one of the three elements, or alternatively show the request for private information is justified under the

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66 Id.
67 Hendrix & Buck, supra note 21, at 489.
68 Jesson, supra note 5, at 224.
69 Hendrix & Buck, supra note 21, at 489.
70 Id. at 491.
71 Id. at 490.
relatively low threshold of the substantial furtherance of one or more countervailing interests.\textsuperscript{72} While most states only recognize privacy that reaches private conduct in government action and only for serious violations, California is one of the few states to have a constitutional provision regarding privacy that reaches private conduct, with most only recognizing the right in government action, and only for serious violations.\textsuperscript{73} Additionally, even if then state law reaches private actions, states like New York and Colorado provide for exceptions of business necessity in their Constitutions,\textsuperscript{74} or, like in Michigan, have no employment privacy provision for off-duty conduct at all.\textsuperscript{75} Under Minnesota’s state Constitution, an employer can restrict an employee’s use of lawfully consumable products if it’s reasonable related to employment activities or responsibilities.\textsuperscript{76}

V. CONCLUSION

The contract for West Virginia’s wellness program requires the participant sign an agreement stating “I understand that is it my responsibility to do what is necessary to stay healthy.”\textsuperscript{77} Courts seem to be echoing this sentiment as they continue to hold wellness programs constitutional, refusing to define obesity as a disability, or extend constitutional protection of a right to privacy in the

\textsuperscript{72} Id.
\textsuperscript{73} Id. at 489-90.
\textsuperscript{74} Id. at 493-94.
\textsuperscript{75} Id. at 492.
\textsuperscript{76} Id. at 493.
\textsuperscript{77}Patrick, supra note 10, at 283.
employment setting. Furthermore, the despondent state of the economy and an alarming incidence of obesity in the population provide both the government and employers with legitimate issues of public concern that outweigh the right to penalize for unhealthy off-duty conduct. It is likely that this trend will become the standard for litigation on obesity-related insurance coverage. Because almost half of the nation is covered by an employers’ health insurance plan, if employers eliminate their plans to lower costs incurred from covering obese employees, or institute wellness programs that many obese and overweight employees cannot follow, many people will be left uninsured, resulting in disparities in health care coverage. With obesity at epidemic proportions, a new population of uninsured or underinsured is highly likely to develop. While a national devotion to safeguarding individual liberties exists, there is also something inherently democratic about programs that demand personal accountability. As a nation we demand personal accountability from our representatives and our business leaders. With obesity reaching epidemic proportions, it could be time to hold ourselves to the same standards.