

Wellness Programs in the Workplace: An Unfolding Legal Quandary for Employers

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Abstract

This article is a legal and ethical examination of “wellness” policies in the American workplace. The authors will examine how employers are implementing policies that provide incentives to employees who lead a “healthy” lifestyle. The authors also address how these policies could adversely affect “non-healthy” employees. There are a wide variety of laws – federal and state – statutory and common law – that impact wellness policies and practices in the workplace. The authors review these laws in the context of wellness policies to ascertain when these policies could result in legal violations of employees’ rights. The authors, moreover, provide an ethical analysis of wellness policies, based on major ethical theories, to determine the morality of wellness policies in the workplace. Based on the aforementioned legal and ethical analysis, the authors make practical recommendations for employers and managers.

Keywords: Wellness policies, healthy employees, discrimination, ethics, law, management.

1 Introduction

Many employers today are very concerned about the increase in healthcare costs, exacerbated by the requirements of the Affordable Care Act. Accordingly, many employers are looking for measures to lower healthcare costs. Employers also want healthy employees in order to avoid absences, enhance productivity, and improve morale. So employers are looking for ways to reduce healthcare costs and to manage the health of

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their employees. One beneficial measure is in the form of “wellness” programs in the workplace, which encourage or at times attempt to “force” employees to lose weight, stop smoking, reduce health risks, and overall improve their health. However, employers have to be very careful in creating and implementing wellness programs since there are a variety of laws – statutory, regulatory, and common law – that can apply to wellness programs.

This article examines the legal and ethical ramifications of employers adopting such wellness programs and provides appropriate recommendations. The authors first provide substantive background information and an overview of wellness programs and the healthcare context that they are established in. Voluntary “carrot” wellness programs will be differentiated from more coercive “stick” programs. The authors then examine the many laws – federal and state – statutory, regulatory, and common law – that can impact wellness programs. Important statutory laws that will be examined are the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement and Income Security Act, the Health Insurance Portability and Accountability Act, the Genetic Information Nondiscrimination Act, and state “lifestyle discrimination” statutes. Important common law doctrines that will be covered are the intentional torts of invasion of privacy and intentional infliction of emotional distress. Next after the legal analysis, the authors will examine the moral issues involved in the implementation of wellness issues and discuss how these moral issues should be resolved ethically. Next, the authors, based on the legal and ethical analysis provided herein, make appropriate recommendations to managers on how to set up and implement legal, moral, and practically efficacious wellness programs in the workplace. The authors conclude their article by supplying a brief summary as well as some concluding comments and thoughts.

1.1 Background and Overview

A wellness program can consist of a health or health-risk assessment offered by the employer, which is usually an annual, or semi-annual, medical exam that ascertains the employee’s weight, height, blood pressure, and cholesterol and sugar levels. The employee also may be asked questions about his or her lifestyle, especially in regards to smoking and alcohol consumption. Some assessments even go further and seek to delve into the employee’s mental and emotional state. Of course, some employees may be hesitant about taking part in these “free” health assessments for a variety of reasons. They may be concerned with how the results of these medical exams will be handled and used and what will happen if they are not successful in improving their health and achieving a healthier lifestyle. They naturally will be concerned if there will be any perceived “penalty” for remaining unhealthy.

Initially, it must be noted how “very common” wellness programs have become: Mattke, Schnyer, and Von Busum [1] report that 92% of employers with 200 or more employees offered wellness programs in 2009. Moreover, the most frequently targeted behaviors are exercise (addressed by 63% of employers with programs), smoking (60%), and weight loss (53%). Mattke, Schnyer, and Von Busum also report on a 2010 Kaiser/HRET survey that 74% of all employers who offered health benefits also offered at least one wellness program; and among larger employers (defined as having 200 or more employees) program prevalence was 92%. Program costs, which typically are expressed as cost per program-eligible employee (as opposed to per actual participant, range between \$50 and

\$150 a year for typical programs. Mattke, Schnyer, and Von Busum also report that employers have begun to use incentives to increase employee participation in wellness programs; and that estimates indicate that the average annual value of incentives per employee typically ranges from between \$100 to \$500. However, there are a variety of laws that impose limits on the use of financial incentives by employers as part of the wellness program.

Mattke, Schnyer, and Von Busum vividly illustrate how people in the U.S. “are in the midst of a ‘lifestyle disease’ epidemic,” to wit:

- The Centers for Disease Control and Prevention (CDC) has identified four behaviors that are the primary causes of chronic disease in the United States – inactivity, poor nutrition, tobacco use, and frequent alcohol consumption; and these activities are causing an “increasing prevalence” of diabetes, heart disease, and chronic pulmonary conditions.
- Chronic diseases have become a “major burden” in the U.S. leading to “decreased quality of life,” accounting for severe disability in 25 million people in the U.S., as well as being the leading cause of death, claiming 1.7 million lives per year.
- Treating chronic disease is estimated to account for over 75% of national health expenditures.
- The number of working-age adults with a chronic condition has grown by 25% in ten years, nearly equaling 58 million people.
- A 2008 PricewaterhouseCoopers survey found that the “indirect” costs (for example, missed days at work) were approximately four times higher for people with chronic diseases compared to healthy people.
- A report by the Milken Institute indicated that in 2003 the cumulative indirect illness-related losses associated with chronic disease totaled \$1 trillion compared with \$277 billion in direct healthcare expenditures.

Four excellent articles, one in the *Miami Herald*, two in the *Wall Street Journal*, and one in the *New York Times* provide some “solid,” company-specific, background information to wellness programs at work. The *Miami Herald* [2] cited the “carrots” example of Baptist Health South Florida, which the paper stated was a leader in encouraging its 13,000 employees to lead more healthy lifestyles. For example, the hospital offers benefits such as free 24/7 gyms at work and discounted low-fat meals in its cafeteria. Baptist Health has chosen the “carrot,” related the *Miami Herald*, as opposed to the “stick,” in order to promote employee wellness and to decrease rapidly increasing healthcare costs. Another “carrot” approach used by employers is to reward employees who are effectively dealing with chronic problems. For example, employers can reduce premiums for overweight employees who regularly exercise in a gym or who meet certain weight loss goals.

However, the *Miami Herald* related that Baptist and other “carrot” approach employers may now believe that the “carrot” is not enough since healthcare costs have continued to rise. Consequently, some companies are now taking a “stick” or penalty approach to motivate employees to be more healthy people. One typical “stick” approach is to require that employees with “unhealthy” lifestyles and habits to pay more for insurance. The *Miami Herald* reported on a survey of 600 major companies by a national consulting firm that found that 33% were planning in 2012, or later, to reward or penalize employees based on targets for such issues as weight or cholesterol levels.

The *Miami Herald* also noted that employers are concerned about a rising obesity level for employees and the growing number of diabetic employees, and thus about rapidly increasing healthcare costs. To illustrate, the Center for Disease Control and Prevention estimates that chronic diseases, such as heart disease, diabetes, and cancer afflict a majority of the people in the U.S., yet these diseases are among the most preventable by means of healthy living – eating and drinking healthful foods and beverages, watching one’s weight and being physically active, and avoiding tobacco use [3]. The *Miami Herald* [2] reported on another survey in Florida by a consulting group of 100 Florida employers which disclosed that their healthcare costs had risen 5.7% in 2011. Another survey reported in the paper revealed that the major healthcare challenge for employers in obtaining affordable healthcare is the poor health habits of their employees. The *Miami Herald* reported on another survey from the Center of Disease Control and Prevention that estimated that the average smoking employee costs to an employer equals \$1600 in additional medical expenditures and \$1760 in lost productivity each year. As such, Wal-Mart has begun to charge employees who smoke up to \$2000 a year in what they estimate to be the increased healthcare costs. Yet, Safeway, as reported in the *Miami Herald* has more of a “carrot” approach. The company will reduce yearly healthcare insurance premiums for about \$1000 for an employee and the employee’s spouse or partner for an additional \$1000 if the employee does not smoke and meets certain standards for weight, blood pressure, blood sugar, and cholesterol. Ryder Company has commenced a new wellness initiative, where the company offers diabetic counseling, nutrition advice, and exercise and weight loss classes, and rewards employees up to \$300 for participating in the program. A prime health target is to cut down on smoking by employees. So Baptist Health gives its non-smokers a “carrot,” that is, a \$30 reduction in premium payments per each bi-weekly pay period. Florida Power and Light offers a \$5 bi-weekly reduction for non-smokers. However, the University of Miami uses a “stick,” that is, the university adds a \$50 monthly fee onto health premiums for smokers. All these employers rely on employees to voluntarily and honestly answer all healthcare questions. All these employers also provide free smoking cessation programs [2].

The *New York Times* [1] first noted that about one-third of employers with 500 or more employees are trying to encourage employee into wellness programs by offering them financial incentives, for example, discounts on insurance. Moreover, the *New York Times* pointed to a survey that indicated that wellness policies that impose financial penalties on employees have doubled to 19% of the 248 major companies in the survey. Wal-Mart was given as a prime example since it imposed a \$2000 surcharge for some smokers.

The reason for the “more stick, less carrot” approach is that employers are very concerned about rising healthcare costs and thus are demanding that employees who smoke or who are overweight or have high cholesterol carry a greater share of their healthcare costs. In the case of Wal-Mart, the *New York Times* [1] noted that its decision to impose the high amount on smokers was “unusual” since it was much higher than the customary charges of a few hundred dollars a year that most other employers impose on their smoking employees. The only way for the smoking employees of Wal-Mart to avoid the surcharge was to attest that their doctor said it would be medically inadvisable or impossible for the employee to stop smoking. The *New York Times* reported that Wal-Mart’s main rationale for the smoking surcharge is that tobacco users typically consume approximately 25% more healthcare services than non-tobacco users. In order to qualify for the lower premiums an employee must have stopped smoking; but Wal-Mart does offer an anti-smoking program. Home Depot charges smoking employees \$20 a month and PepsiCo

requires employees who smoke to pay \$600 a year more than non-smokers unless the employees complete a smoke-cessation program. The *New York Times* also reported on another employer, Indiana University Health, a large health system, where employees who meet weight targets can receive \$720 a year of the cost of their insurance. However, employees who cannot meet weight goals can still be eligible for lower premiums if a doctor states that the employee has a medical condition that makes the weight targets unreasonable to achieve.

Employers have always encouraged their employees to be healthy, since a healthy employee is a productive employee, and also in order to reduce healthcare and insurance costs. Yet employers “merely” encouraging their employees to be healthy may not produce the desired objective. So, as reported in the *Wall Street Journal* [4], some companies are “forcing” their employees to be and to stay healthy. The *Wall Street Journal* provided one example of a company, called Amerigas Propane, Inc., a nationwide propane distributor based in Valley Forge, Pennsylvania, that gave their employees an ultimatum: get regular medical checkups or lose your health insurance. The *Wall Street Journal* related that the company’s primary reason for this ultimatum was that the company had undergone several years of steep increases in the cost of health insurance coverage for its approximately 6000 employees. The company’s workforce was not only aging; but also many of the employees had unhealthy habits. The average age of the employees was 46 years and about 44% were smokers, related the *Wall Street Journal*. Moreover, many of the employees were not getting tests or preventive care that could help them avoid cancer, diabetes, and heart attacks. The company had tried several “wellness” programs to encourage healthy habits by employees, but these programs were optional, and were unsuccessful. So, the company then mandated that all employees would have to get physical exams, blood-pressure checks, cholesterol tests, and blood-sugar tests. Women over 40 years of age, in addition, were required to get Pap smears and mammograms. The employees and their covered spouses would have one year to complete the tests, which are 100% covered by their insurance. All the tests and checkups were not only free, but the company’s plan also did not charge for generic drugs for diabetes, blood pressure, asthma, and cholesterol. Co-payments were also reduced for brand name medications for the aforementioned conditions. However, if the employees did not get the check-ups and tests, they would lose their insurance. Furthermore, the employees would need to keep on getting the checkups at least every two years in order to retain their health benefits. The *Wall Street Journal* reported that one employee, age 41, was originally skeptical of the program; but he did get a checkup and realized he had high “bad” cholesterol, which he deemed to be a “very good wake-up call,” resulting in him dieting and exercising and losing 36 pounds. Another employee stated that he had always avoided doctors, and at first he was “shocked” by the program, and considered it an invasion of his privacy, but nonetheless he got the required check-up and found out that he was healthy; and now he says the mandate was a good idea because otherwise he never would have gotten the check-up. Another employee, a 63 year old woman, took the mandatory mammogram and discovered that she had breast cancer; yet if the test was not mandatory, she stated that she would have put it off for several months; thus delaying the diagnosis and enabling the cancer to grow. She stated the program made a real difference to her [4].

The *Wall Street Journal* also reported that chronic illnesses, such as diabetes, affect more than 130 million people in the United States, and account for about 3/4s of healthcare spending. The *Wall Street Journal* reported that well over one-half of the companies in

the U.S. already have “wellness” initiatives to improve their employees’ health. However, Amerigas is just one of a few companies that have mandated healthcare testing. Other companies, though, are considering the imposition of penalties for employees who do not “voluntarily” participate in “wellness” programs. In the case of Amerigas, the *Wall Street Journal* noted that the company, which self-insures its health plan, had annual healthcare expense increases of 10% or more; and its workers had high rates of heart disease and diabetes. Moreover, only 6% of the employees enrolled in the company health plan had gotten recommended cholesterol checks for the previous 18 months, and just 20% of employees had their blood sugar tested. Among women, 44% were getting appropriate mammograms and Pap smears. Furthermore, Amerigas employees younger than 60 were dying of natural causes at nearly three times the expected rate for that age group, reported the *Wall Street Journal* (Mathews, 2009). It is important to note that in the Amerigas program, the company did not force the employees to take any medical actions based on their test results; and the employees’ results, due to medical-privacy laws, were not shared with the company. Also, the company decided not to mandate colonoscopies since they felt that this procedure would be too “intrusive” and would engender resistance and resentment. The company’s mandatory requirements only applied to employees who have been with the company for two years or more [4].

The Amerigas program is called Save-A-Life. Last year the program was initiated. Each employee was given a DVD at home to explain the program and the rationales for the program, particularly costs and healthcare statistics. The company reported that more than 90% of its employees have gotten the required exams and tests; and that the program was expected to cost about \$500,000 for 2008. The company also reported that it now has some evidence suggesting that the program has helped to improve the health of its employees, as well as the expectation is that it will reduce healthcare costs in the long-term [4].

Other companies that have wellness programs are Home Depot, Safeway, PepsiCo, Lowe’s, and General Mills [1]. Safeway offers reimbursements to employees for meeting blood pressure, cholesterol, weight, and tobacco cessation goals [5]. Wal-Mart makes its employees who are smokers pay more of their healthcare premium costs. They can avoid the increased costs by enrolling in an approved smoke cessation program. IBM has a healthy-living rebate program that offers financial incentives to employees who do well in certain key health areas, to wit: physical activity, healthy eating, weight management, clinical preventive care, and children’s health [6]. During annual enrollment periods, IBM employees can choose from three wellness rebates: 1) Personal Vitality Rebate; Children’s Health Rebate; and Physical Activity – Nutrition Rebate. Each rebate is worth \$150; and each rebate has specific requirements that must be completed in order to receive the money. The objective of the Personality and Vitality Rebate is to help employees build energy and have a balanced lifestyle in order to achieve optimal health. The first step is for the employee to evaluate his or her energy level, focusing on activities that boost as well as drain energy. The second step is to find activities that will build energy over a three month period. These activities can vary and are based on what the employee thinks is best and achievable for him- or herself. The final step is an evaluation of the effect of these activities over the three month period, including the recognition of the effect of these activities on the employee’s personal health. There are also three steps to the Children’s Health Rebate, the goal of which is to help parents help their children maintain a healthy weight. The first step is the completion of a Family Meal Analysis, which examines a family’s eating patterns, developing a family action plan for healthy

eating, and choosing program resources to be used at home. The second step is an evaluation of the plan half-way through the program to ascertain if any adjustments have to be made. The final step is to evaluate the family's achievements, and then set new goals. The Physical Activity – Nutrition Rebate focuses on physical activity and healthy eating. The same steps described in the Children's Health Rebate and Personal Vitality Rebate will need to be achieved. Realizing personal goals is a major emphasis of this third rebate. The objective of IBM's wellness program "is to create a 'culture of health' that fosters long-term commitment to healthy lifestyles and the reduction of health risks among our employees and their families" [6]. Such a wellness program as IBM's can be posited as a win-win type program since employers have less healthcare costs as well as more productive employees and employees have better health.

Bloomberg Business week also recently reported on companies that reward workers who participate in wellness programs. *Business week* in May of 2013 reported on a survey by Towers Watson and the National Business Group on Health, which indicated that the number of companies who reward workers for participating in wellness programs increased 61% in 2012 from 36% in 2009; and *Business week* also reported that employers now spend \$2 billion a year on wellness programs [7].

Another recent article on wellness programs is from the *Wall Street Journal* in April of 2013 [8]. The essence of the article is that the thrust of wellness programs for the future will be a more punitive "stick" approach. Because of the pressing need to control healthcare costs, together with the salient fact that not a sufficient number of employees are taking part in voluntary wellness programs, employers will start "demanding" that employees change their lifestyles, share healthcare information; otherwise, employees will be penalized by being forced to pay higher healthcare premiums and/or deductibles. The *Wall Street Journal* noted that corporate spending on healthcare costs is expected to increase to over \$12,000 on average per employee in 2013. The *Wall Street Journal* also emphasized the "poor results" from voluntary programs; and reported that now "companies across America are penalizing workers for a range of conditions, including high blood pressure and thick waistlines". An example given was the tire-maker, Michelin North American, Inc., where employees with high-blood pressure and certain size waistlines will have to pay as much as \$1000 per year more in healthcare coverage, commencing in 2014. Furthermore, not participating in the company's wellness programs means that employees will not get financial incentives; whereas employees who do participate and who do meet certain "baseline" health requirements will receive up to \$1000 to reduce their deductibles. Another example provided by the *Wall Street Journal* was the pharmacy chain, CVS, which, according to the paper, created an "outrage" among employees and employee rights advocates by asking its employees to report personal health information, including body fat, blood sugar, blood pressure, and cholesterol levels to the company insurer by May of 2013 or pay a \$600 penalty. The *Wall Street Journal* also reported that four out of 10 employers now reward or penalize employees based on tobacco use; and that a growing number of employers are now refusing to hire smokers (which practice is legal in 21 states), with the number of employers with such bans currently at 4% and expected to rise another 2% by 2014. The *Sun-Sentinel* newspaper [9] reported in April of 2013 that 20% of companies surveyed for a human resources research report now impose negative consequences if their employees do not utilize the health-awareness mechanisms that the companies provide. An example provided was the Honey International Company which imposes a \$1000 penalty on employees who

undergo certain type of joint replacement or back surgeries without first participating in a program that provides information on non-surgical alternatives.

Most employers, one can assume, still would prefer the “carrot” approach because it does not alienate employees and cost them jobs and promotions, especially due to their chronic health conditions. Nevertheless, one legal commentator questioned if even the “carrot” approach was a truly voluntary one. Sizemore [10] contends:

While workplace wellness programs are allegedly voluntary, the financial incentives designed to induce and reward participation call this into question. To increase participation in workplace wellness programs, employers offer financial inducements such as reduction in the employee’s monthly contribution for health coverage, resulting in employee stratification based on income. A considerable reduction in monthly insurance premiums may not be a sufficient incentive for higher paid employees. Yet, even a small reduction in monthly insurance premiums is a substantial incentive to lower-income employees, making them more economically vulnerable to financial inducements (pp. 663-64).

Yet if the “carrot” approach does not work, and employees cannot, or will not, “voluntarily” become or stay healthy, and consequently employers continue to see healthcare costs rise, employers may consider “forcing” employees to be healthy by penalizing unhealthy employees. Furthermore, support for a more punitive approach to changing lifestyles is found, the *Wall Street Journal* [8] reported, in “the findings of behavior economists showing that people respond more effectively to potential losses, such as penalties, than expected gains, such as rewards.” To illustrate, Kwoh pointed to two studies: one, which was a study of 800 mid- to large-size firms, showed that 6 in 10 employers stated that they planned to impose penalties in the next few years on employees who do not take action to better their health; and the other found that the share of employers who plan to impose penalties is likely to double to 36% by 2014. Furthermore, the *Sun-Sentinel* newspaper related that a human resources survey indicated that 60% of the employers stated that they plan to impose penalties in the next three to five years on workers who do not improve their health [9]. Nonetheless, Kwoh also predicted a “murky” future – legally, ethically, and practically – for these increasing, and increasingly punitive, “stick” wellness programs.

There are many critics, however, of a punitive “stick” approach to wellness in the workplace. Sizemore [10] fears that “...the potential for discrimination and harassment at the workplace for failure to participate in the program also exists.” The labor organization, the AFL-CIO, is opposed to mandatory health tests. A spokesperson, as indicated by the *Wall Street Journal* [4], declared that health tests were a personal matter that should not be brought into the workplace and tied to benefits. Workers’ rights advocates, as indicated by the *Wall Street Journal* [8], condemned the penalties as “legal discrimination” and “essentially salary cuts by a different name. There is also a fear that these wellness programs –whether voluntary or mandatory – are giving employers too much control over their employees’ lives. The *Wall Street Journal* reported on another critic of wellness programs, a university chair and professor of health policy, who condemned wellness programs as “unethical” because the employer’s main motivation is not to improve the employees’ health but to get smokers and other employees with “unhealthy” lifestyles “off their health bill and pass on the costs to someone else.” Another critic, as reported in *Bloomberg Business week* [7], a vice-president of the Preventive Health Partnership, expressed concern that wellness programs might become a “tool for

shifting health-care costs” to sick people, especially under the Affordable Care Act, which will allow employers to charge employees who do not meet certain health standards more for insurance premiums (as will be discussed in a forthcoming section to this article), and thus “you might undermine the whole idea of workplace wellness.” And another professor of public health, quoted in the *Sun-Sentinel* newspaper [9], called wellness policies a “slippery slope,” and express concern about what employee actions would be penalized next, such as going out for fast-food, drinking alcohol, and even, the professor said, unsafe sex.

In addition to labor union, employee rights organizations, and academic objections, there are many potential legal problems for employers in adopting and implementing wellness programs. As such, some employers have shied away from any wellness policies due to legal concerns. One potential legal problem for an employer when it comes to weight provisions and height and weight indexes is that some employees may contend that their weight is based on a medical condition or genetics, and in the latter case tied to racial or ethnic background, and thus the employee is protected by federal discrimination law, such as the Americans with Disabilities Act and the Civil Rights Act. To illustrate, some critics of wellness programs state that tobacco penalties or bans on hiring smokers are discriminatory against poorer and less-educated segments of society, who tend to smoke more [8]; and these people may be minorities who are protected by the Civil Rights Act against discrimination in employment. Moreover, all these health issues must be kept very confidential so as not to trigger lawsuits based on the common law tort of invasion of privacy as well as federal and state statutory confidentiality laws. The *Sun-Sentinel* newspaper [9] quoted a statement from a private non-profit Patient Privacy Rights organization based in Texas, which condemned wellness programs as “coercive” and “invasive,” and which expressed deep concern about the privacy of the wellness information collected because “it doesn’t give patients any control over the extremely sensitive health information they are required to submit. Not only can they not be certain that their employer will never see this information, the data can also be collected, sold and used in different circumstances without their knowledge or consent.”

Regardless of legal compliance and laudatory objectives, other critics assert that wellness programs, even incentive-based ones, are unfair because they can disadvantage some people most in need of healthcare and also that they, in effect, penalize employees who legitimately struggle to attain wellness objectives, but who fail or who regress, particularly since it is recognized that major lifestyle changes are difficult to achieve [5]. The *New York Times* [1] related that some health benefit specialists are worried that wellness programs, even if “billed” as incentives, could in fact become punitive for people who have health maladies not completely under their control, such as nicotine addiction or severe obesity, both of which may not be able to be readily overcome. The *New York Times* also pointed out that the American Cancer Society and the American Heart Association have warned government officials about giving companies too much flexibility regarding wellness programs. These groups, the paper reported, are fearful that the latitude afforded employers in implementing wellness programs could provide a “back door” to discrimination against unhealthy workers. There is an unfair “social gradient,” say Schmidt, Voigt, and Wikler [5], in that “a law school graduate from a wealthy family who has a gym membership on the top floor of his condominium block is more likely to succeed in losing weight if he tries than is a teenage mother who grew up and continues to live and work in odd jobs in a poor neighborhood with limited access to healthy food and exercise opportunities.” Furthermore, Schmidt, Voigt, and Wikler, contend that even if a

program is called “voluntary,” “that voluntariness can become dubious for lower-income employees, if the only way to obtain affordable insurance is to meet the target. To them, programs that are offered as carrots may feel more like sticks.” Nevertheless, Mattke, Schnyer, and Von Busum [1] indicate that “overall, employers seem convinced that workplace wellness programs are delivering on the promise to improve health and reduce costs.” They point to a 2010 Kaiser/HRET survey which indicated that 59% of respondents that offered wellness programs stated that the programs improved employee health; and 44% believed that they reduced costs; and regarding larger firms (with 200 or more employees), 81% of respondents believed that wellness programs improved employee health and 69% stated that they reduced costs. So, wellness programs are surely here to stay, and very likely to expand, and also likely to expand in the more punitive “stick” sense. Yet, as the *Wall Street Journal* [8] emphasized, employers now are trying to balance the “carrot” with the “stick” approach; yet “plenty of companies will be watching to see if inflicting a little financial pain leads to changes in the long run” – and at what cost?

2 Legal Considerations

One initial problem with any examination of wellness programs in the workplace is that there is no statutory or regulatory or uniform definition of the term “wellness program.” Furthermore, there is no single definition of a “wellness program.” One court stated that “wellness plans are incentive programs offered by companies to their employees to reduce insurance premiums, and often include biometric testing such as recording the medical history of participating employees, taking their body weight and blood pressure information, and testing the glucose and cholesterol levels of their blood. Those blood tests, in turn, typically involved a trained examiner drawing a drop of an employee's blood with a prick of the finger and placing the blood onto a ‘cassette,’ which was then placed in a machine that measured blood glucose and cholesterol” [11]. One general definition would mean programs that are sponsored by an employer that seek to improve the physical and/or mental health of employee [12]. Another definition is a program designed “to encourage individuals to take preventative measures, through education, risk assessment and/or screening, or disability management to avert the onset or worsening of an illness or disease” [3]. Yet another definition of a workplace wellness program is “an employment-based activity or employer-sponsored benefit aimed at promoting health-related behaviors (primary prevention or health promotion) and disease management (secondary prevention). It may include a combination of data collection on employee health risks and population-based strategies paired with individually focused interventions to reduce those risks” [1]. Nevertheless, “a formal and universally accepted definition of a workplace wellness program has yet to emerge, and employers define and manage their programs differently” [1].

Employers, of course, have the discretion in formulating wellness programs. Some programs focus on employees with specific health problems, such as heart disease or diabetes. Others take the form of incentives to the employees to undergo physical examinations or to take health assessments as well as incentives to lose weight and stop smoking [13]. All these programs have an educational component that seeks to inculcate to the employees the benefits of a healthy lifestyle and thus to increase awareness of how lifestyle choices can impact one's physical and mental health [3]. Common features of

wellness programs can encompass the following: providing healthcare and medical information by means of health fairs, seminars, classes, lectures, and newsletters; online health and wellness resources; nutrition counseling; lifestyle and risk factor analysis; health and exercise coaching; gym and health-club memberships or membership discounts; health risk assessments; stress management programs; disease management and control programs (concerning heart disease, diabetes, blood pressure, for example); biometric testing and screening, maintenance, and control for heart disease, blood pressure, hypertension, cholesterol, and weight loss); smoking cessation programs; and immunization programs; and onsite clinics [12, 3, 1].

This section to the article is an analysis of the laws impacting wellness policies and practices in the workplace, with an emphasis on the private sector. The authors then commence the private sector analysis by briefly discussing the basic, traditional, and initial principle of employment law in the U.S. – the common law employment at-will doctrine. The authors next examine federal statutory law, especially civil rights law and labor law. State lifestyle discrimination statutes are also discussed. In addition to statutory law, the authors examine the law of tort to determine its applicability to the subject matter herein. In particular, the intentional torts of invasion of privacy and intentional infliction of emotional distress and the doctrine of negligence are scrutinized. Finally, the authors make some pertinent legal conclusions.

A. Employment At-Will Doctrine

The employment at-will doctrine is a fundamental and critical principle of employment law in the United States for private sector employees. The doctrine holds that if an employee is an employee at-will, that is, one who does not have any contractual provisions limiting the circumstances under which the employee can be discharged, then the employee can be terminated for any reason – good, bad, or morally wrong, or no reason at all – and without any warning, notice, or explanation [14]. The employment at-will doctrine can engender a legal but immoral discharge, but not an illegal discharge; that is, the discharge of the employee at-will in violation of some other legal provision, the prime example being the Civil Rights Act of 1964. Accordingly, if an employee is an employee at-will, and the employee is discharged for his or her weight or smoking, the employee may not have any recourse under the traditional employment at-will doctrine. The employee may have a valid wrongful discharge case only if he or she can directly link the “lifestyle” discharge to another statutory or common law legal doctrine.

B. Statutory Laws

In addition to the common law, it is incumbent on employers to be cognizant of the legal ramifications and risks pursuant to statutory law – federal and state - of making good “wellness” employment decisions. The use of wellness policies in the employment context is not without legal risk for employers due to the prevalence of statutory laws that can impact the workplace, especially “forcing” employees to be healthy. Consequently, employers who want to implement wellness policies and practices in the workplace must be aware of the risks of liability pursuant to statutory laws, in particular federal anti-discrimination laws, the Employee Retirement Income Security Act, the Health Insurance Portability and Accountability Act, and the Genetic Information Nondiscrimination Act, as well as state “lifestyle” statutes. Employers also must be keenly aware of statutory developments, especially regarding the Affordable Care Act.

C. Civil Rights Laws

Civil rights laws in the United States make it illegal for an employer to discriminate against an employee or job applicant because of a person’s race, color, religion, sex,

national origin, age (40 or older), and disability [15]. Civil rights laws are enforced in the United States primarily by the federal government regulatory agency – the Equal Employment Opportunity Commission (EEOC). Congress has delegated to the EEOC the power to interpret, administer, and enforce Title VII of the Civil Rights Act of 1964. The EEOC is permitted to bring a lawsuit on behalf of an aggrieved employee, or the aggrieved employee may bring a suit himself or herself for legal or equitable relief. The Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA), it must be stressed, are federal, that is, national laws. Since the U.S. is a federal system, it accordingly must be noted that almost all states in the U.S. have some type of anti-discrimination law – law which may provide more protection to an aggrieved employee than the federal law does.

a. Title VII of the Civil Rights Act of 1964

The Civil Rights Act of 1964 is of prime importance to all employers, managers, employees, job applicants, and legal professionals in the United States. This statute prohibits discrimination by employers, labor organizations, and employment agencies on the basis of race, color, sex, religion, and national origin [16]. Regarding employment, found in Title VII of the statute, the scope of the statutory legal provision is very broad, encompassing hiring, apprenticeships, promotion, training, transfer, compensation, and discharge, as well as any other “terms or conditions” and “privileges” of employment. The Act applies to both the private and public sectors, including state and local governments and their subdivisions, agencies, and departments. An employer subject to this act is one who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year (42 U.S.C. Section 2000e(b)). One of the principal purposes of the Act is to eliminate job discrimination in employment. This Act was amended in 1991 to allow for punitive damage awards against private employers as a possible remedy (*Civil Rights Act of 1991, Public Law 102-166, as enacted on November 21, 1991*). This amendment gives employers even more incentive to conform their workplace employment policies to the law and thus to avoid potential costly liability in this area of employment law. Liability pursuant to the Civil Rights Act can be premised on two important legal theories – disparate treatment and disparate impact.

b. Disparate Treatment v. Disparate Impact

There are two important types of employment discrimination claims against employers involving the hiring, promotion, or discharge of employees – disparate treatment and disparate (or adverse) impact – that must be addressed since they can arise in a “wellness” lawsuit. “Disparate treatment” involves an employer who intentionally treats applicants or employees less favorably than others based on one of the protected classes of color, race, sex, religion, national origin, age, or disability [17]. The discrimination against the employee is willful, intentional, and purposeful; and thus the employee needs to produce evidence of the employer’s specific intent to discriminate.

The other legal avenue claimants may travel to prove their employment discrimination claims is called “disparate impact,” or at times “adverse impact. Pursuant to this theory, it is illegal for an employer to promulgate and apply a neutral employment policy that has a disparate, or disproportionate, negative impact on employees and applicants of a particular race, color, religion, sex, or national origin, unless the policy is job related and necessary to the operation of the business, or, in the case of age, the policy is based on a reasonable factor other than age. This disparate impact legal doctrine does not require proof of an employer’s intent to discriminate. Rather, “a superficially neutral employment

policy, practice or standard may violate the Civil Rights Act if it has a disproportionate discriminatory impact on a protected class of employees” [14]. Accordingly, such a practice will be deemed illegal if it has a disproportionate discriminatory impact on a protected class and the employer cannot justify the practice out of legitimate business necessity. To illustrate disparate impact in the context of a wellness program, the employer must be aware that poorer and less-educated people tend to smoke more [8], and these people may be minorities protected by the Civil Rights Act; and thus the employer must be cognizant of the fact that if it has a smoking ban on hiring or penalizes current employees for tobacco use, such a policy, though neutral on its face as it applies to all applicants and employees, can have an impermissible disparate or adverse impact on minority job applicants and employees, thereby triggering the Civil Rights Act.

c. Age Discrimination in Employment Act (ADEA) of 1967

Wellness policies and practices by the employer also can be challenged pursuant to the Age Discrimination in Employment Act (1967), but only if the employer’s policy and practices were based on, implicates, or functions to discriminate based on age (and the employee is over 40 years of age). It has been long established that concerns over increased insurance costs cannot exempt an employer from compliance with the ADEA, as explained in the case of *Tullis v. Lear School* [18]. In that case, a sixty-six year old school bus driver successfully overcame the school’s (employer’s) articulated excuses for firing him based on an alleged *bona fide* occupational qualification that all school bus drivers must be under the age of 60 due to public safety concerns. The court noted that an ADEA violation could be found because when the employee was dismissed, the school’s principal told him both orally and in writing that the school was compelled to fire him because of increased insurance costs. Thus, employers should be mindful that any wellness program should not be purposefully used as a “weapon” to weed out older employees due to increased insurance costs.

The ADEA may be violated, for example, if the employer’s mandatory wellness program requires that employees achieve certain health standards without adjusting the requirements based on the age of the employee [19]. Moreover, the employer must exercise caution to be sure that its wellness program does not have a disproportionate or adverse impact on older employees. That is, even if a wellness program is neutral on-its-face and thus does not intentionally discriminate against older workers its implementation could have an adverse or disproportionate impact on older workers [20]. Then the employer would have to defend itself by asserting the “reasonable factor other than age” (RFOA) test and demonstrating that its wellness policy was predicated on an RFOA, such as controlling healthcare costs [3]. Yet, “there is absolutely no case law providing any employer with guidance as to whether or not, as a matter of law, a court would conclude that the reduction of healthcare premiums was a reasonable factor and there is always the attendant risk of making that argument to a jury” [3].

d. Americans with Disabilities Act (ADA) of 1990

Similar to redress on Title VII and the ADEA, if the employer’s wellness policies and practices can be linked to a disability, then an applicant or employee may be able to utilize the Americans with Disabilities Act (ADA) to secure redress from discrimination. Wellness policies and practices, therefore, can be challenged pursuant to the Americans with Disabilities Act, but only if the employer’s policy was based on, implicates, or functions to discriminate based on disability. Disability discrimination results when an employer treats an employee or job applicant unfavorably because he or she has a disability. The ADA forbids disability discrimination regarding any aspect of

employment, including for the purposes herein pay and benefits as well as “any other term or condition of employment” [21]. Moreover, the ADA requires that an employer provide a reasonable accommodation to an employee or job applicant with a disability, unless to do so would significant difficulty or expense to the employer [21].

Regarding medical exams the EEOC states that an employer may not ask a job applicant to answer medical questions or take a medical exam before making a job offer. Moreover, after a job is offered to an applicant, an employer is permitted to condition the job offer on the applicant answering certain medical questions or successfully passing a medical exam, but only if all new employees in the same type of job must answer the questions or take the exam. Once a person becomes an employee and has commenced work, the employer generally can only ask medical questions or require a medical exam if the employer needs medical documentation to substantiate an employee’s request for an accommodation or if the employer feels that the employee is not able to perform the job successfully or safely due to a medical condition. Finally, the employer must keep all medical records and information confidential and in separate medical files [21].

Regarding wellness programs, the ADA permits employers to conduct voluntary medical examinations and activities, including securing information from voluntary medical histories as part of an employer’s wellness program so long as any medical information received is kept confidential and separate from personnel records [22]. Moreover, there is no need for the employer to show that these medical activities are job-related or consistent with business necessity [23]. Furthermore, the EEOC considers a wellness program to be “voluntary” of the employer neither requires participation nor penalizes employees who do not participate [22, 23]. The EEOC provides examples of voluntary medical activities, to wit: blood pressure screening, cholesterol testing, glaucoma testing, and cancer detection screening. The employees may be asked disability-related questions and may be given medical examinations pursuant to such voluntary wellness programs and activities [23, 24]. Finally, the ADA requires that the reasonable accommodation duty applied to wellness programs so that an employee with disabilities can fully participate in the employer’s wellness program [25]. The ADA, therefore, does not prohibit wellness programs so long as they are voluntary, there is no penalty for non-participation, and any medical information derived from the wellness program is kept confidential.

However, in the class action lawsuit in *Seff v. Broward County, Florida* [26], county employees sued Broward County, Florida alleging that the employer’s wellness program violated the ADA by requiring employees to undergo medical examination and requiring employees to respond to medical questions. The court explained the program and framed the class action claim as follows:

The employee wellness program consisted of two components: a biometric screening, which entailed a “finger stick for glucose and cholesterol,” and an “online Health Risk Assessment questionnaire.” Coventry Healthcare [Broward County’s Insurance Provider] used information gathered from the screening and questionnaire to identify Broward employees who had one of five disease states: asthma, hypertension, diabetes, congestive heart failure, or kidney disease. Employees suffering from any of the five disease states received the opportunity to participate in a disease management coaching program, after which they became eligible to receive co-pay waivers for certain medications.

Participation in the employee wellness program was not a condition for enrollment in Broward's group health plan. To increase participation in the employee wellness program, however, Broward imposed a \$20 charge beginning in April 2010 on each biweekly paycheck issued to employees who enrolled in the group health insurance plan but refused

to participate in the employee wellness program. Broward suspended the charges on January 1, 2011. Seff, a former Broward employee who incurred the \$20 charges on his paychecks from June 2010 until January 1, 2011, filed this class action, alleging that the employee wellness program's biometric screening and online Health Risk Assessment questionnaire violated the ADA's prohibition on non-voluntary medical examinations and disability-related inquiries.

The appellate court granted summary judgment in favor of Broward County. In doing so, the court explained that the wellness program was a "term" of a group health plan provided by Coventry Healthcare, the health care insurance provider for Broward County. Therefore, the wellness program fell within the ADA's safe-harbor provision since it was sponsored by the employer's group health plan provider as well as the fact that the program was only available to group plan enrollees. The court explained this "safe-harbor" provision as follows:

...that exempts certain insurance plans from the ADA's general prohibitions, including the prohibition on "required" medical examinations and disability-related inquiries. 42 U.S.C. § 12201(c)(2). The safe harbor provision states that the ADA "shall not be construed" as prohibiting a covered entity "from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law" [26].

The Oregon Department of Corrections and Oregon State Police have also recently found themselves defending against a similar claim in *Van Patten v. State of Oregon et. al.* (2012). The state workers have alleged that the state's wellness program's pre-enrollment questionnaire is a violation of the ADA and an invasion of privacy. This claim has yet to be adjudicated by the federal district court, but presumably will rely heavily on *Seff's* ruling if the wellness plan at issue is part of the group health plan rather than exclusively an employer operated plan.

The EEOC has authored an advisory opinion to one employer's query as to if its "wellness program" would be considered legal under the ADA and GINA. As to the ADA advice given by the EEOC [22], the letter advised:

Title I of the ADA allows employers to conduct voluntary medical examinations and activities, including obtaining information from voluntary medical histories, as part of an employee wellness program as long as any medical information acquired as part of the program is kept confidential and separate from personnel records. EEOC guidance states that a wellness program is "voluntary" as long as the employer neither requires participation nor penalizes employees who do not participate (p. 1).

The letter went on to announce that the area of law was murky and that employers should be cautious as it concluded on this issue with the following statement:

As you know, the Commission has not taken a position on whether, and to what extent, Title I of the ADA permits an employer to offer financial incentives for employees to participate in wellness programs that include disability-related inquiries (such as questions about current health status asked as part of a health risk assessment) or medical examinations (such as blood pressure and cholesterol screening to determine whether an employee has achieved certain health outcomes). However, we will carefully consider your comments and the

comments of other stakeholders that we have received on this important issue (p.1).

The EEOC also filed an ADA enforcement action against an employer involving United States Steel Corporation's wellness testing program. At issue in that case was if the company's practice of conducting random drug and alcohol testing on probationary employees was job related and consistent with a business necessity. The court ultimately ruled that the test was appropriate given the hazardous working environment and the legitimate business need for employees to be free from the influences of controlled substances. Of interesting notice, however, was the fact that one of the company's defenses was based on the allegation that its drug and alcohol testing of its probationary employees was part of a valid employee wellness program approved and bargained for by the local union. Thus, the company claimed that the wellness program testing procedures and policy fell within one of the ADA exemptions allowing for voluntary medical examinations. This argument was rejected by the court because the participation in this company wellness and health program was mandatory for probationary employees and if they failed to participate in the drug and alcohol testing program, they would be terminated.

The City of Taylor in Michigan challenged the interpretation of its wellness and fitness programs for its firefighters as "mandatory". The court reflected upon a funding grant's qualifications for the program, which stated that preferences for awards establishing wellness and fitness programs would go to programs that required employee participation. The court found unconvincing the city's argument that even though the city represented to its employees that the wellness program was mandatory, the city claimed that it would not take punitive measures against those who failed to participate. The court ultimately applied Black's Law Dictionary definition of "mandatory" as "containing a command; perceptive; imperative; peremptory; obligatory" when interpreting the city's wellness and fitness program. The court also issued separate related opinions finding that the city's mandatory blood draws which were used to obtain a "Lipid Profile test" to find out the worker's cholesterol, triglycerides, HDL cholesterol, VLDL cholesterol, and LDL cholesterol levels could be the basis for a Section 1983 "constitutional tort" civil rights action by the firefighters and a violation of the Fourth Amendment as an unreasonable search and seizure.

An employer's weight-related wellness policies, moreover, could also trigger the ADA. The Equal Employment Opportunity Commission, however, advises that "normal deviations" in weight, which are not the result of any physiological defect or disorder or physical abnormality, are not disabling impairments covered by the Americans with Disabilities Act [15]. Being overweight, therefore, is not as a general rule a disability; however, severe obesity, which is defined as body weight more than 100% over the norm, is deemed to be impairment. For weight to be considered a disability, one must be "morbidly" obese. The purpose of the ADA is to protect the truly disabled, and thus the statute should not be used as a "catch-all" for all types of wellness-induced weight discrimination.

One legal commentator, furthermore, contends that how a person became obese should not affect his or her ADA case. Sizemore [10] explains:

Although the acts leading to obesity are in many instances voluntary, in some situations once a person is obese nothing can counteract it because of certain genes, diseases, conditions, medicines, or environments. While an obese person may have knowingly participated in behavior leading to or perpetuating obesity,

the actual cause of obesity may be not voluntary in some instances due to a genetic environment or environmental component. Consequently, obesity should be a protected disability under the ADA because, similar to the AIDS cases, even though individual choice led to the condition, obesity cannot, in some circumstances, be eliminated by any affirmative act. Moreover, legal protection under the ADA is not linked to how a person became impaired or whether they contributed to the impairment but to the limiting nature of the impairment (p. 657).

Eating and drinking too much, making poor food and beverage choices, as well as not sufficiently exercising, and thereby causing one's obesity, should not preclude a finding of obesity, assuming, of course, a person can meet the EEOC's heightened standard for obesity.

Employee Retirement Income Security Act (ERISA) of 1974. The Employee Retirement Income Security Act (ERISA) of 1974 is a federal law that sets uniform standards for healthcare and pension plans in the private sector. ERISA covers employee benefit plans; and the statute prohibits employers from discharging or disciplining employees to prevent them from attaining benefits they are entitled to under the plan [3]. Moreover, the Department of Labor, which is the federal government agency which enforces ERISA, has indicated that wellness programs that provide healthcare benefits could be subject to ERISA [3].

An employer wellness program that provides health care, medical, or sickness benefits, directly through reimbursement, or indirectly, including genetic counseling, may constitute part of the employer's group healthcare plan and thus be covered as a "welfare plan" by ERISA [25], [12]. However, if the wellness program is based on an employment policy separate and distinct from the employer's group health plan it would not be subject to ERISA health plan rules [27]. For example, an employer paying for a wellness program that is provided by the employer apart from the group health plan, and which program the employer does not directly monitor the enrollment or participation therein may be enough to keep the wellness program from being governed by ERISA [27]. Similarly, a wellness program that provides to the employees only referrals for treatment of drug and alcohol abuse or other health problems would not be governed by ERISA [28]. However, if the wellness program goes beyond "merely" promoting good health, and contains an ongoing program of healthcare assistance to the employees in the form of medical examinations, testing, procedures, and counseling, such as cholesterol screening, flu shots, or nutrition counseling, as well as assistance for drug and alcohol abuse and depression, then the wellness program would be considered part of the health benefit program and thus be subject to ERISA as a "welfare plan" and be subject to ERISA disclosure and reporting requirements [29,28]. And regarding healthcare counseling, Tinnes [29] advises that based on Department of Labor opinions "the more comprehensive and individualized this advice is, the more likely it could be considered an ERISA benefit."

Another legal issue is whether ERISA protects job applicants, specifically those applicants with "unhealthy" lifestyles, such as being smokers or overweight. According to Juergens [3] p. 5), "...it may be permissible under ERISA for an employer to refuse to hire an applicant based on anticipated higher healthcare costs. This is on account of some recent case law which suggests that ERISA...does not go so far as to protect job applicants. But the case law in this area is sparse, and accordingly, employers must be prudent and use caution before taking action to deny employment (and consequently benefits) based on health-related lifestyle choices."

Health Insurance Portability and Accountability Act (HIPAA) of 1996. The Health Insurance Portability and Accountability Act (HIPAA) is a significant federal law designed to improve the provision of health benefits, the delivery of healthcare services, as well as improve the healthcare insurance system in the United States. HIPAA, which amended ERISA, prohibits discrimination in group health plans regarding eligibility, benefits, or premiums based on a health factor; however, there is an exception for wellness programs [8]. HIPAA imposes civil and criminal sanctions, including fines and/or imprisonment, for violations [3].

Some of the most important provisions in HIPAA deal with the security, confidentiality, and privacy of individually identifiable healthcare information. All healthcare providers, health organizations, and government health plans that use, store, maintain, or transmit patient health information are required to comply with HIPAA.

HIPAA states that a group health plan cannot discriminate among people on the basis of health factors by varying their premiums. However, there is an exception, called “benign discrimination,” that allows discrimination in favor of an individual based on a health factor in a plan [3]. HIPAA, accordingly, does not prevent an insurer from offering rewards or reimbursements through means of wellness programs. Legal incentives could be offering a premium discount or other reimbursement for participating in a wellness program, for example, a waiver of a deductible for a diabetic employee to enroll in diabetes education classes, as well as offering attainment incentives for meeting health targets, such as meeting a particular body-mass index or cholesterol level [3,5].

It is important to note that HIPAA divides wellness programs into two types. The first category deals with programs that do not require an employee to meet a health objective to obtain a reward, for example, reimbursement for joining a health club or gym, or medical testing with a reward for participation and not results, or reimbursing employees for the cost of a smoke-cessation program, regardless of outcome. Here, the employee merely decides whether he or she will participate; and the employee is not required to meet any objective standard in order to receive the reward or benefit. This category, called participation-based, is permitted since there are no discrimination issues under HIPAA [12,3, 30].

However, the second type of wellness program, called results-based, is one that requires a health standard or measurement to be met in order to qualify for a reward or incentive, for example, ceasing smoking, losing weight, or exercising a certain amount [12, 30]. This second type of wellness program is regarded as discriminatory under HIPAA; but there is a “wellness: exception, and as such a wellness program will be permitted if: 1) if the total reward in the program is limited to 20% (raised to 30% by the Affordable Care Act) of the total cost of the employee-only coverage under the wellness program; 2) the program is reasonably designed to prevent disease and promote health; and 3) the program must give eligible employees an opportunity to qualify for the reward at least once a year; 4) the reward must be available to similarly situated employees; and 5) reasonable alternatives to the program must be offered and disclosed to employees who would have difficulty in obtaining the reward due to medical conditions [12, 1, 30, 19, 3]. For example, an employer wellness program that gives employees a discount on their health insurance premiums for attending regular health seminars would be permissible since there is no health standard to meet. But a wellness program that gives a premium discount of 20% to participating employees who have attained a certain low cholesterol or weight level could be problematical for the employer unless the aforementioned HIPAA requirements are adhered to [30].

Genetic Information Non-Discrimination Act (GINA) of 2008. The Genetic Information Non-Discrimination Act (GINA) forbids employers from requesting, requiring, or purchasing genetic information. GINA [31] makes it illegal for an employer to discriminate against employees or job applicants because of genetic information. GINA prohibits the use of genetic information by the employer in making employment decisions pertaining to any aspect of employment or term and condition of employment, including, of course, hiring, discharge, and benefits; and the law strictly limits the disclosure of genetic information [32]. Specifically, GINA's provision against "discrimination based on genetic information," found in 42 *United States Code* § 2000ff-1(a), states "it shall be an unlawful employment practice for an employer....(1) to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee; or (2) to limit, segregate, or classify the employees of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee." GINA defines "genetic information" as "information about—(i) such individual's genetic tests, (ii) the genetic tests of family members of such individual, and (iii) the manifestation of a disease or disorder in family members of such individual"(42 *U.S.C.* Section 2000ff(4)(A)).

GINA's protections also cover questions concerning family medical history and testing of relatives because the legislature was concerned that the use of one's family medical history could be misused "as a surrogate for genetic traits" [33]. Thus, the evil sought to be abolished by GINA was a "predictive assessment concerning an individual's propensity to get an inheritable genetic disease or disorder based on the occurrence of an inheritable disease or disorder in [a] family member" [33]. Courts, when evaluating if an employer's wellness policy or program violates GINA, will look towards this law's specific words and the forgoing legislative intent. This approach occurred in the case of *Poore v. Peterbilt of Bristoll, LLC* [34]. In that case, the employer's office manager asked a worker to complete a questionnaire regarding his family's general medical conditions and medications for health insurance purposes. The worker disclosed that his wife was afflicted with multiple sclerosis. Shortly thereafter, the office manager inquired to the worker about his wife's prognosis after reading his answer on the questionnaire. Three days later after that conversation, the employee was terminated without cause and without any sufficient explanation provided by the employer. The worker sued alleging various causes of action, including a violation of GINA's provisions. In dismissing the case for failure to state a cause of action, the court recognized that the worker's wife's disease did not predict the future health of the employee so it could not be a claim under GINA. In so doing, the court explained:

GINA is enforced by the Equal Employment Opportunity Commission (Poore's [employee] Complaint fails to state a violation of GINA because the information Poore contends was obtained by Peterbilt [employer] does not constitute "genetic information with respect to the employee." Poore simply disclosed that his wife had been diagnosed with multiple sclerosis, and Peterbilt's office manager later inquired about the date of her diagnosis and her prognosis. The fact that Poore's wife was diagnosed with multiple sclerosis has no predictive value with respect to Poore's genetic propensity to acquire the disease. Furthermore, there is no allegation that Peterbilt used Poore's wife's diagnosis to forecast the tendency of

any other individual to contract multiple sclerosis—Poore explicitly alleges that he was terminated as a result of “his wife's medical condition and [his] association with her.” (Pl.'s Compl. 3.) While he may have a claim for discrimination on the basis of a manifested condition under the ADA, Poore's termination does not constitute discrimination under GINA (p. 731) [34].

The United States Congress enacted GINA due to a concern that as genetic tests develop and increase job applicants would fear the loss of employment opportunities and employee would fear the loss of employment and/or health coverage because of the results of their genetic testing or participation in genetic research [32]. GINA defines “Genetic Tests” as “...an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes” but excludes an “analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes” (GINA Sec. 201(7) (A) & (B)). Employers must be very careful about violating GINA when as part of a wellness program the employer asks employees for Health Risk Assessments (HRA) because HRAs typically request family medical history in order to ascertain at-risk individuals and then provide them with preventative treatment and counseling as well as disease management [10,19].

However, there are six exceptions in GINA. One pertinent to the subject matter herein is that an employer can obtain genetic information about an employee or his or her family when the employer offers health or genetic services, including wellness programs, on a voluntary basis. The employee receiving the services must give prior, voluntary, knowing, and written authorization [32]. The employer can then use this information to guide the employee or family member into appropriate disease management programs. However, only the employee or family member (if receiving the genetic services) and the licensed healthcare professional or board certified genetic counselor involved in providing the services receives the individually identifiable information regarding the results of any genetic services [32]. Moreover, employers may not offer financial inducements for people to provide genetic information as part of a wellness program [22]. However, it would be permissible under GINA or the employer to educate its employees on the importance of talking to their doctors about medical issues, including any occurrence of heart disease or cancer, in their family and how that family medical history could impact the employees; health [20].

One legal commentator, nevertheless, believes that GINA would be violated when wellness programs are applied to obese *and* non-obese employees. Sizemore [10] reasons:

By singling out and discriminating against the obese in the workplace based on genetic information and forcing them to pay more for insurance premiums because of their obesity, workplace wellness programs...violate GINA...Furthermore, endorsement of workplace wellness programs violates GINA by requiring the involuntarily obese to participate in so-called voluntary wellness programs. Workplace wellness programs discriminate against the obese by requiring the disclosure of specific genetic information in exchange for insurance premium discounts. Employees are required to divulge specific protected genetic information before participating in a workplace wellness program. For example, an employer requesting a family history violated GINA because such history is genetic information, albeit in a less precise form than a genetic test...Thus, offering premiums discounts for participation in workplace wellness programs to the non-obese in exchange for legally protected genetic information, such as a family history, violates GINA (pp. 662-663).

Whether the courts or the EEOC will agree in either case with the aforementioned commentator is another issue indeed.

The Affordable Care Act of 2014. The Affordable Care Act of 2014 prohibits health insurance companies from discriminating against individuals because of pre-existing or chronic conditions; however, insurance companies would be allowed to vary premiums within certain limits but only based on age, tobacco use, family size, and geography [35]. The Act also has provisions that directly impact workplace wellness programs. Pursuant to the Affordable Care Act wellness programs in the workplace must meet additional rules, to wit: 1) they must be reasonably designed to prevent disease and promote health; 2) the program must be reasonably designed to be available to all similarly situated employees; 3) the program must offer a different, reasonable, alternative means to qualify for any incentive or reward for an employee who does not meet the standard based on the measurement, test, or screening; 4) the program must have a reasonable chance of preventing disease and improving health; and 5) the program cannot be overly burdensome for employees [36]. The alternative means would have to be offered to employees whose medical conditions make it unreasonably difficult, or for whom it is medically inadvisable, to meet the specified health measure or standard.

The Affordable Care Act also increases the maximum permissible reward under a health-based wellness program in the workplace from 20% to 30% of the cost of health coverage; and further increased the maximum reward to as much as 50% for wellness programs designed to prevent, reduce, and stop tobacco use [36].

Tax Issues. Wellness programs that provide incentives, either directly from the employer or by means of third party vendors, can also have tax ramifications for the employee and employer. Rewards or incentives provided as part of the employee's health benefit plan, for example, reimbursement for joining a smoking-cessation program, should not be taxable to the employee [20]. However, a cash reward may be taxable to the employee as taxable wages; and the employer may have a withholding obligation too. Gift certificates and gift cards likely are also taxable. Yet premium holidays, lower deductibles, and contributions to Health Reimbursement Account or Health Saving Account likely are not taxable [20, 29, 36].

State Lifestyle Discrimination and Freedom of Association Laws. In addition to federal statutory law in the United States, there are state statutes that can impact wellness policies and practices. A few states, such as California, Colorado, Connecticut, New York, and North Dakota, now have very broad statutes protecting the rights of employees to engage in lawful activities and/or to use lawful products outside of the workplace. These statutes typically forbid employers from prohibiting employees to engage in lawful activities and to have associations unless the activity or association conflicts with the employer's business interest or harms its reputation [38,39]. Although these statutes were not created with employer wellness policies in mind, they may be interpreted to protect an employee's "unhealthy" lifestyle or use of unhealthy but legal products, such as tobacco, which is part of the employee's statutory right to live his or her off-duty life free from unwanted employer intrusion, interference, and reprisal [19, 20].

The gist of these statutes is that an employer should not have a say in the employee's personal life and lifestyle outside of the workplace. Thus, in the "wellness" context, one would expect legal outcomes to be based on factual circumstances which may differ from case to case. In some cases, the activity in question may be deemed to be in direct conflict with the business interests of the employer; but in others it may not. Accordingly in a state that has one of the aforementioned freedoms of lawful activity, association, or

lifestyle discrimination statutes, the employer must be prepared to demonstrate how the employee's "unhealthy" lifestyle conflicts with its business interests or harm its reputation. There are two major conclusions that can be drawn from the foregoing statutory analysis: first, there are many laws that apply and could apply to workplace wellness programs; and second, to date, there is not a great deal of guidance from the legislatures, courts, and regulatory agencies on how all these legal principles will be applied. Thus, an employer has to be very careful in creating and implementing a wellness program and as such must consult with legal counsel.

D. Tort Law

In addition to statutory law, common law in the form of tort law may have relevance to "wellness" workplace disputes. A tort is a civil wrong against a person or his property for which money damages are the main remedy. Tort law is divided into two major branches – intentional torts, based on purposefully acting in a wrongful manner, and negligence, based on acting in a careless manner and causing harm [14]. There are three intentional torts that could pertain to "wellness" workplace disputes: invasion of privacy and intentional infliction of emotional distress. The tort of negligence also might apply. It is the function of the courts today in very modern and advanced healthcare screening settings to apply these traditional legal principles to determine when tort violations occur in the context of employment wellness policies. General liability insurance may not cover an employer's employment related practices, including operations of their "wellness program," as one company realized in the case of *For Women Only Fitness*, [11]. In that case a company was sued relative to their "wellness plan" by a former employee. The court ruled that the company's insurance carrier had no duty to defend as the policy exclusion was clearly worded, conspicuous, and stated "FITNESS AND WELLNESS PROGRAM" in capital letters as an exclusion to coverage.

1. Invasion of Privacy

The intentional tort of invasion of privacy protects the right to maintain one's private life free from unwanted intrusion and unwanted publicity. Invasion of privacy is a broad legal doctrine which consists of four distinct invasions of a person's privacy and personality. These four privacy torts are: 1) appropriation of a person's name or likeness for commercial purposes; 2) intrusion into a person's private life, private affairs, or seclusion; 3) "false light," that is, the publication of facts which places the aggrieved party in a "false light"; 4) the public disclosure of private facts about the aggrieved party (even if the facts are true). Regarding the intrusion tort, it must be emphasized that the aggrieved party is held to a reasonableness standard; that is, only a reasonable expectation of privacy is protected by the tort [14].

Nevertheless, the common law intentional tort of invasion of privacy, particularly in the form of an unreasonable "intrusion" into a person's private life, can have applicability in the context of employer-employee relations, especially pertaining to health and wellness. Employees pursuant to tort privacy law have the right to be left alone. A person's body is one's own "personal" property. Employers must be careful not to intrude on the employees' private "space" or private life when implementing wellness programs. And if an employer is too strict or too invasive or intrusive in implementing a wellness policy and thereby infringes on the employee's private life and private person, the employer may be liable for the intentional tort of invasion of privacy.

One worker's smoking habits on personal time and his termination for tobacco use was not considered an "intrusion" or a violation of a worker's privacy rights under Massachusetts' law [40]. In that case, the court held that since the employee openly

smoked cigarettes, openly carried them around at work, his claim for violation of privacy for being fired for smoking did not constitute a violation of privacy after he tested positive for nicotine in a job screening process. It should be noted, though, that 29 states and the District of Columbia ban employment discrimination based on “lifestyle,” which often includes firing employees who smoke [22]. Thus an employer should be cautious that its wellness program” does not violate these individual state statutes protecting workers who test positive for nicotine from workplace retaliation or discrimination.

Note also that medical records or medical screening results relating to wellness programs should be kept confidential and often separate from general employee files not only because such procedures are required under the regulations implementing the ADA (29 CFR Part 1630), but also because mishandling of the information or publishing it to outside parties could be a basis for a tort violation of privacy claim.

2. *Intentional Infliction of Emotional Distress*

The tort of intentional infliction of emotional distress arises when a person purposefully acts in an extreme, outrageous, or atrocious manner, and thereby causes the aggrieved party to suffer severe emotional distress. The wrongful conduct must be conduct that goes beyond all bounds of decency tolerated by a civilized society. Mere indignities and annoyances are insufficient [14]. Business examples of this tort are not too frequent, but they do occur, usually in a situation where the employee is discharged in an abusive, threatening, humiliating, mocking, and disrespectful manner in full view of his or her co-workers [14]. Regarding wellness policies, if the employer implements a wellness policy in a demeaning and disrespectful way, and consequently causes mental suffering, emotional distress, humiliation, or shame to the employee, the employer may be liable for the tort of intentional infliction of emotional distress. One court has summarized an employee’s burden in proving this high standard of offensiveness relative to his employer’s actions in the case of *Bradley v. Pfizer, Inc.* [15]. In that case, the employer allegedly distorted the training testing scores of an employee, which formed the basis of the employee’s ADEA action for wrongful discharge and discrimination. The court felt that the alleged misconduct, even if proven, did not meet the high bar of “outrageous” to sustain a ruling in favor of the employee on his intentional infliction of emotional distress tort claim. The court explained that the employer’s actions must be extreme and outrageous conduct in character; and so extreme in degree so to go beyond all possible bounds of decency; and such atrocious conduct would be utterly intolerable in a civilized community and no reasonable person could be expected to endure it.

3. *Negligence*

Torts are divided into intentional torts and the tort of negligence. Negligence is an old common law tort based on a person acting not intentionally to cause harm but rather in a careless manner which causes harm to a person. The essence of negligence is the “reasonable person” test; that is, a person can be deemed liable for negligence if a person has a duty to act and that person acts in an unreasonable manner, thereby breaching that duty of care (and assuming causation and damages are present) [14]. Consequently, if an employer is negligent in the implementation or operation of its wellness program, for example, by carelessly disclosing an employee’s or an employee’s family’s healthcare information then the employer could also be liable for the tort of negligence.

The employer’s negligence liability can also arise if the wellness program is improperly operated by the company. In the case of *Huffman v. Smith Kline Beecham et al* [43], the employee participated in a company sponsored wellness program. In that case, the employer, Wirlpool, conducted a “wellness program,” staffed with nurses working for

Wirlpool. As part of this program, Wirlpool employees and their spouses were offered a free, annual, mini-physical examination. The mini-physical included, among other things, an analysis of a sample of the participant's blood. The worker participated in the program and received a "Personal Wellness Report," which identified a blood issue, but failed to properly direct the worker to seek immediate medical attention. Ultimately, after some time passed between reading the report and contacting a treating physician, the complaint alleged that the employer and laboratory were negligent in interpreting, evaluating, and providing blood test results to plaintiff's deceased husband. As a result of defendants' alleged negligence, the complaint alleged that the deceased worker's chances of surviving colon cancer were diminished. The court ruled that the complaint properly stated a cause of action against Whirlpool for negligence and could proceed forward.

4. Conclusion

The intersection of tort law with employer wellness policies presents new legal risks for the employer, particularly regarding the common law torts of invasion of privacy and intentional infliction of emotional distress. The predominant legal conclusion is that the law regarding wellness policies and practices in employment is plainly an evolving legal area. The role of the courts, legislative bodies, and regulatory agencies will be to create and further delineate the boundaries of the law in response to the advancement of healthcare monitoring and screening. However, there appears to be a degree of latitude when it comes to an employer adopting a wellness program; yet that discretion must be exercised very carefully due to the existence of all the statutory, regulatory, and common law that applies and could apply to wellness programs. Yet, even if a practice is legal, it is not necessarily moral, which brings the analysis in this article into the realm of ethics, which is a branch of philosophy. However, difficult as it may be to make legal determinations and predictions, ascertaining the morality of wellness policies in employment, especially employer efforts to force employees to be healthy, emerges as an even more arduous task. The consideration of the morality of wellness policies in employment thus will be addressed ethically in the next major section of this article.

3 Ethical Considerations

The subject of wellness-based employer decision-making raises very controversial and important moral issues. One ethical issue involves the morality of employers accessing health information of employees and investigating the health (or lack thereof) of employees and job applicants. Another related ethical issue involves the morality of the employer using health information obtained in employment decision-making. Thus, even if legally obtained, is it moral to make decisions in employment and to not hire applicants or to sanction employees based on their health? Is it moral based on ethics for employers to adopt wellness programs? What about the morality of a wellness program with a perhaps coercive "play-or-pay" mindset? Now, at first instance, many people may decry employers seeking health-based job information, or making determinations, or "forcing" employees to be healthy as "morally wrong."

Nonetheless, determining whether an action, rule, or law is moral or immoral, right or wrong, or just or unjust perforce brings one into the realm of ethics, which is a branch of philosophy, and then logically to ethical theories, ethical principles, applied ethics, and ethical reasoning to moral conclusions. In this ethics part of the article, the authors will apply four major ethical theories – Ethical Egoism, Ethical Relativism, Utilitarianism, and

Kantian ethics – to the subject of wellness-based employer decision-making to determine if such discrimination in employment is moral. These ethical theories were chosen because they represent the essence of ethics as a branch of philosophy in Western Civilization, which obviously is not the only civilization, but it is one that the authors are the most familiar with, including, of course, the ethics component to Western knowledge and thought, as opposed to Confucian ethical principles and the application thereof, which, although most interesting and intriguing to learn and to apply, practically would be beyond the scope of the authors' objectives for this article. These four Western theories also were selected because they are reason-based ethical theories; as such, the authors assume that the readers of this article possess intellect, reason, and logic, and thus will be quite "comfortable" in following the authors' ethical "train of thought," though, of course, perhaps not agreeing with their ultimate moral conclusions. Furthermore, religion-based ethical theories were not chosen because not all the readers will be of the same religion and, for that matter, some may have no religion at all; and, moreover, bringing in a religious-based ethical component to the article would be to expand the article beyond the authors' aims. So, the focus is on Western ethics and the first ethical theory to examine in the context of wellness policies in the workplace is Ethical Egoism.

A. Ethical Egoism

The ethical theory of Ethical Egoism also harkens back to ancient Greece and the Sophists and their teachings of relativism and promotion of self-interest. This ethical theory maintains that a person ought to promote his or her self-interest and the greatest balance of good for himself or herself. Since this theory is an ethical theory, one thus has a moral obligation to promote one's self-interest; and so "selfishly" acting is also morally acting; and concomitantly an action against one's self-interest is an immoral action; and an action that advances one's self-interest is a moral action. An ethically egoistic person, therefore, will shrewdly discern the "pros" and "cons" of an action, and then perform the action that performs the most personal good, which also is the moral course of action. However, the Ethical Egoists counsel that one should be an "enlightened" ethical egoist; that is, one should think of what will inure to one's benefit in the long-run, and accordingly be ready to sacrifice some short-term pain or expense to attain a greater long-term good – for oneself, of course. Also, the prudent ethical egoist would say that as a general rule it is better, even if one has a lot of power as well as a big ego, to treat people well, to make them part of "your team," and to "co-op" them. Why should one treat people well? One reason is certainly not because one is beneficent, but rather because one is "selfish." That is, one is treating people well because typically it will advance one's own self-interest in the long-term to do so. One problem with ethical egoism is that one's own "good" must be defined. What exactly is one maximizing? Is it one's knowledge, power, money, pleasure, comfort, prestige, success, or happiness? Ethical egoists agree that people ought to pursue and advance their own good; but they disagree as to the type of good people should be seeking [44].

With the economy of the U.S. only very slowly recovering from the recent recession, and with healthcare costs expected to rise, especially pursuant to the Affordable Care Act, employers naturally are looking for ways to cut costs and save money, particularly regarding healthcare costs of their employees. Wellness programs have emerged as one cost-saving measure. Yet attempting to ascertain the appropriate legal and ethical boundaries for wellness policies certainly also has emerged as a challenging task for employers due to the advancement of technology, the ever-growing rise of healthcare costs, and the unique issues presented at this intersection of employment practice, law,

and ethics, as well as the fact that the law in this management area is extensive and is very complicated. Nonetheless, it is certainly in the egoistic interest of the employer to have healthy employees from the vantage points of having more productive employees as well as reduced healthcare costs. Of course, the employer must assure that no laws or regulations are violated in implementing wellness policies, particularly if the employer establishes a “stick” type wellness program where the smoking and “unfit” employees pay more for health insurance. Yet it certainly is in the long-term, egoistic, self-interest of the employees to achieve and maintain healthy lifestyles, which also inures to the benefit of the employer in having more productive employees as well as lower employee healthcare costs.

B. Utilitarianism

Utilitarianism is a major ethical theory in Western civilization; it was created principally by the English philosophers and social reformers Jeremy Bentham and John Stuart Mill. Their goal was to develop an ethical theory that not only was “scientific” but also would maximize human happiness and pleasure (in the sense of satisfaction). Utilitarianism is regarded as a consequentialist ethical theory, also called a teleological ethical theory; that is, one determines morality by examining the consequences of an action; the form of the action is irrelevant; rather, the consequences produced by the action are paramount in determining its morality. If an action produces more good than bad consequences, it is a moral action; and if an action produces more bad than good consequences it is an immoral action. Of course, ethical egoism is also a consequentialist ethical theory. The critical difference is that the Utilitarians demand that one consider the consequences of an action not just on oneself, but also on other people and groups who are affected directly and indirectly by the action. The scope of analysis, plainly, is much broader, and less “selfish,” pursuant to a Utilitarian ethical analysis. In business ethics texts and classes, the term “stakeholders” is frequently used to indicate the various groups that would be affected by a business decision. Furthermore, the Utilitarians specifically and explicitly stated that society as a whole must be considered in this evaluation of the good and/or bad consequences produced by an action. The idea is to get away from a “me, me, me” mindset and consider other people and groups affected by an action. Utilitarianism is a very egalitarian ethical theory since everyone’s pleasure and/or pain gets registered and counted in this “scientific” effort to determine morality. Yet, there are several problems with the doctrine. First, one has to try to predict the consequences of putting an action into effect, which can be very difficult if one is looking for longer-term effects. However, the Utilitarians would say to use one’s “common storehouse of knowledge,” one’s intelligence, and “let history be your guide” in making these predictions. Do not guess or speculate, but go with the probable or reasonably foreseeable consequences of an action. Also, if one is affected by an action, one naturally gets counted too, but if that same one person is doing the Utilitarian analysis, there is always the all-too-human tendency to “cook the books” to benefit oneself. The Utilitarians would say that one should try to be impartial and objective in any analysis. Next, one now has to measure and weigh the good versus the bad consequences to ascertain what prevails and thus what the ultimate moral conclusion will be. The Utilitarians said that not only was this ethical theory “scientific,” but it was also mathematical (“good old-fashioned English bookkeeping,” they called it). But how does one do the math? How does one measure and weigh the good and the bad consequences? And for that matter how does one measure different types of goods? The Utilitarians, alas, provided very little guidance. Finally, a major criticism of the Utilitarian ethical theory is that it may lead to an unjust result. That is, the “means may justify the

ends.” Since the form of the action is irrelevant in this type of ethical analysis, if the action produces a greater overall good, then the action is moral, regardless of the fact that some bad may be produced in this effort to achieve the overall good. The good, though, outweighs the bad; accordingly, the action is moral; and the sufferers of the bad, who perhaps were exploited or whose rights were trampled, got counted at least. Such is the nature of Utilitarianism [45]. After determining the action to be evaluated, the next step in the Utilitarian analysis is to determine the people and groups, that is, the stakeholders, affected by the action

Stakeholder Analysis

There are a variety of stakeholders, or constituent groups, that are affected by wellness policies in the workplace. The most directly affected stakeholder group is, of course, the employees. Despite the good goals of these wellness programs, there are moral issues which arise and which directly impact employees – both positively and negatively. There certainly will be positive consequences if the wellness program operates as a benefit for employees and especially so if the employer provides material benefits for participation. Employees naturally will benefit from becoming and staying healthy – and not just physically, but emotionally too. Being healthy and fit will supply one with more energy as well as relieve stress and anxiety. They will be able to perform their jobs more efficiently and engage in better interpersonal relations, which is not only beneficial to the employers, but also the employer too. An incentive-based wellness program should improve office morale and instill in the employees a deeper sense of job satisfaction. Another benefit to employees, as well as their families, would be if a wellness program causes an early identification of a medical problem, thereby alerting an employee to seek early medical care. For example, the obesity rate in the U.S. is very high and thus it should be construed as a positive benefit for employers to encourage obese employees to lose weight.

On the negative side, employers using the “stick” approach to wellness programs in the workplace may produce some negative feelings on the part of employees, such as the employer being invasive, intrusive, and paternalistic. Employees who are obese, or smoke, or who are chronically diseased, or engage in unhealthy behaviors may feel penalized, even by an incentive-based program, and thus feel pain. All employees, moreover, would be concerned that their private and personal health information could be made public and misused, resulting in embarrassment or discrimination. Even an initial health assessment could reveal medical information that an employee might wish to keep private. Further negative consequences could arise if the employee is a single mother who is “pressed for time” and thus who cannot go to her employer’s gym and exercise classes in order to lower her premiums. Yet one could argue that even “forcing” the employee to take some responsibility for his or her own health and “make” them work on achieving a healthy lifestyle will be good for the employee in the long-term.

Families of employees certainly want their “loved-ones” as well as “bread-winners” to be healthy and not become sick or die prematurely. They certainly will be pleased by the increase in take-home pay due to an incentive-based program with reduced employee insurance costs. Moreover, the now healthier employee may serve as a role model for his or her family members, who also may be encouraged to participate in wellness programs; and thus the whole family will be healthier and, presumably, happier.

Job applicants who are healthy will certainly be attracted to a company with an incentive-based wellness program since they will have more “take-home” pay. They may feel positive about going to work for an employer who is so health-conscious and concerned. However, some job applicants might be negatively affected if they are fearful of

healthcare testing because they are reticent about disclosing medical issues, or they are struggling with their weight or smoking habits, and thus they may not seek or pursue employment. Yet perhaps the existence of such a program will motivate an “unhealthy” job applicant to get healthy to obtain employment and then participate in the benefits of a company’s wellness program.

Employers, of course, are directly affected by wellness programs. Encouraging and even “forcing” employees to become and stay healthy will have positive consequences for the employer, so long as all applicable laws and regulations are complied with. Employees will work better and be more productive as well as less absent and the employer’s healthcare costs will be reduced. The problems and costs associated with healthcare issues, such as absenteeism, workplace stress, accidents, and increased healthcare costs will be lessened. Effectiveness, loyalty, and productivity would increase, and health insurance costs would decrease, resulting in an overall increase in profitability, thereby benefitting owners and shareholders.

There may be negative consequences for the employer, however. There will be the costs of setting up and implementing a wellness program, as well as a loss of productive work time, at least in the short-run, as employees attend health seminars and undergo medical testing. Legal issue, naturally, would have to be considered; and thus the employer would have to seek out legal counsel to make sure that its wellness plan is in conformity with the law. If there are legal problems, not only will legal costs ensue, but adverse publicity could result too. If a wellness program is not implemented in a careful and prudent manner, the level of trust between employers and employees could be reduced, employee morale could be decreased; and as such perhaps good and valuable employees, who have no interest in participating in the program, and who may actually feel uncomfortable about it, may seek employment elsewhere. The astute employer, therefore, has to avoid or lessen these negative consequences by convincing employees that it will be costly – for them, their families, the employer, and society as a whole for the employees to have an unhealthy lifestyle.

Customers, consumers, and clients could gain some indirect benefits from a workplace wellness program. A comprehensive wellness program could improve the quality of service the employees provide to this stakeholder group. When employees are in a better health condition it is logical to assume that they will perform their duties fully and pleasantly, so that customers, consumers, and clients can expect better products and services. Of course, the increased cost to the employer, at least in the short-term, of wellness programs may be passed on to the customers by means of increased costs.

Doctors, nurses, laboratories, and other healthcare providers and institutions surely would benefit from employment wellness programs as their professional services would be an essential component of such programs.

The legal system certainly would be challenged in the effort to apply all the statutory, regulatory, and common laws to wellness program disputes in the workplace. Yet, that is their “job” – to develop the appropriate legal framework and ultimately to do justice!

Any increase in productivity, profits, and pay will inure to the benefit of the local community where the employer is based, especially if the employer is a socially responsible one who contributes to local charities and who is engaged in civic and community affairs. Company growth helps the local tax base and helps to provide jobs – directly by the employer and indirectly for the healthcare professionals and businesses involved in the wellness programs.

Society in the U.S. today certainly places a premium on expression, speech, privacy, association, and lifestyle. Yet if employer wellness programs are widely implemented, there should be in the long-run less strain on societal medical resources and personnel. It surely is a benefit for society as a whole for employers to promote more healthy employees. Society today seems more attuned to health issues; and concomitantly more and more people are trying to find ways to become healthier. The obesity rate in U.S. society is very high, for example, and employment wellness programs can help to decrease this dangerous and costly medical condition. Offering more ways to become and stay healthy is in accord with the increasing emphasis that society places on good health. Wellness programs thus should benefit society overall. Most people's lives revolve about their work; and many very busy working people may not have the time or inclination to become and remain healthy. Receiving incentives, especially in the form of more money, as well as avoiding penalties of paying more for health insurance, should motivate employees to take advantage of wellness programs, thereby contributing to healthier employees, communities, and society as a whole.

Overall, despite some negative consequences, it appears that there are more positive consequences for the stakeholder groups affected by employer wellness programs. Employers implementing wellness programs, particularly if voluntary and incentive-based, would produce more pleasure than pain. Thus, pursuant to the Utilitarian ethical theory wellness programs in the workplace are moral. Nevertheless, regardless of any Utilitarian moral conclusion based on a perceived "greater good," many academics, practitioners, and civil rights, union, and employee advocacy groups are troubled by a teleological business-oriented approach to wellness policies, standards, and practices in employment. One of these "academics," at least historically, would be the German professor and philosopher, Immanuel Kant.

C. Kant's Categorical Imperative

Kant condemned Utilitarianism as an immoral ethical theory. How is it logically possible, said Kant, to have an ethical theory that can morally legitimize pain, suffering, exploitation, and injustice? Disregard consequences, declared Kant, and instead focus on the form of an action in determining its morality. Now, of course, since Kantian ethics is also one of the major ethical theories in Western civilization, a huge problem arises since these two major ethical theories are diametrically opposed. Is one a Kantian or is one a Utilitarian? (Or is it all relative as the Sophists and Machiavelli stated?) For Kant, the key to morality is applying a formal test to the action itself. This formal test he called the Categorical Imperative. "Categorical" meaning that this ethical principle is the supreme and absolute and true test to morality; and "imperative" meaning that at times one must command oneself to be moral and do the right thing, even and especially when one's self-interest may be contravened by acting "rightly." The Categorical Imperative has several ways to determine morality. One principal one is called the Kingdom of Ends test. Pursuant to this Kantian precept, if an action, even if it produces a greater good, such as an exploitive but profitable overseas "sweatshop," is nonetheless disrespectful and demeaning and treats people as mere means, things, or as instruments, then the action is not moral. The goal, said Kant, is for everyone to live in this "Kingdom of the Ends" where everyone is treated as a worthwhile human being with dignity and respect. Related to the Kingdom of Ends precept and also part of the Categorical Imperative is the Agent-Receiver test, which asks a person to consider the rightfulness of an action by considering whether the action would be acceptable to the person if he or she did not know whether the person would be the agent, that is, the giver, of the action, or the receiver. If one did

not know one's role, and one would not be willing to have the action done to him or her, then the action is immoral. Do your duty, said Kant, and obey the moral "law," based on his Categorical Imperative [44].

There are many moral issues that arise pursuant to Kantian ethics regarding wellness policies in the workplace. If a company has a voluntary, incentive-based wellness program that the employees are fully informed of in a non-coercive manner then the employee has the freedom to choose whether to participate in the program and obtain the benefits of good health as well as the company incentives. If a company, for example, offered a healthcare cost deduction if an employee would demonstrate that he or she had a healthy lifestyle and did not smoke, one would think that an employee as a rational person would avail himself or herself of such a benefit. Such a scenario, one could well argue, pass Kant's agent-receiver test as well as the Kingdom of Ends test. For the former, a rational person would want the opportunity (as an employer) to promulgate or (as an employee) to participate in the program; and for the latter a person is treated as an "end" and with respect since one has the freedom to choose whether to participate.

Another moral concern for the Kantian is the fact that there are many factors to take into consideration when an employer tries to determine who is, and who is not, a "healthy." Health is an area that is personal and private as well as subjective; and certainly not all people have the same lifestyles. Any "forcing" of an employee to be healthy when the employee already believes he or she is, or does not care, is not justifiable under Kantian ethics since the coercive or manipulative element contravenes Kantian rationality, reason, and choice. Furthermore, attaining the goal of being "healthy" may not be achievable for all people. Moreover, certain people with health conditions that they feel would be embarrassing to disclose, such as their weight, might see wellness programs as degrading or humiliating [5]. Today, life is so fast-paced, and many people are so very busy with work and family responsibilities, that it is much more challenging to become and stay "healthy." Moreover, there seems to be a fast-food restaurant on every corner – with tempting fare (and often large-sized and high caloric fare) as well as economical pricing. Many restaurants also serve large portions. Eating a lot of perhaps not the "right" type of food and drink and "on the go," as well as not exercising (due to lack of time or perhaps lack of inclination) and smoking are not habits conducive to good health, of course. Nonetheless, if a person is performing his or her job satisfactorily even though being an overweight, or for that matter overweight, or a smoker and such a person does not wish to participate in any wellness program, Kant would say that this person should not be discriminated against or sanctioned. To do so would be demeaning. The employee would be used as a mere means to reduce healthcare costs instead of as a worthwhile, though perhaps not optimally healthy, end. A Kantian would declare that no one, even with good intentions, has the moral right to tell a person what to do with his or her own body.

Balancing the legitimate interests of employers and employees and job applicants, as well as drawing the proper ethical boundary between moral and immoral conduct regarding wellness policies in the workplace is a very difficult undertaking indeed. Employers have legitimate business interests to manage their companies; and employees have legitimate interests to have private off-duty activities.

4 Practical Considerations and Recommendations

First and foremost, an employer must be cognizant of the many federal and state statutory and regulatory laws as well as the common law of tort that can apply to wellness programs in the workplace. There is, literally, a patchwork of laws that could apply to workplace wellness programs. The employer has, of course, discretion in adopting a wellness plan, but this discretion must be exercised very carefully, especially since there is not yet a great deal of legal guidance as to the applicability of key laws to wellness programs. The wellness plan must be properly structured to be legal, moral, and efficacious.

Legally, the authors would emphasize the following basic points about wellness programs:

- Avoid and direct or indirect discrimination when creating or implementing the wellness program.
- Make sure health-related rewards or penalties do not exceed 20% of the cost of the employee's health coverage (and, as noted, this percentage will increase to 30% as per the Affordable Care Act).
- Do not reduce an employee's pay for any healthcare issue; rather, connect what the employee pays for healthcare to whether the employee meets or fails to meet certain healthcare standards.
- Provide alternatives or offer exemptions for employees who cannot for underlying medical reasons participate in a wellness program or meet certain healthcare goals.
- Do not request health records before extending an offer of employment.
- Keep employee healthcare information strictly confidential.

Mattke, Schnyer and Von Busum [1] suggest that the "three common themes" and strategies for workplace wellness programs are 1) internal marketing, 2) program evaluation and improvement, and 3) leadership and accountability. Regarding the first – internal marketing – companies should actively engage their workforce in health promotion, including fact-to-face interactions, mass disseminations, explaining the program during the new hire process, and providing multiple communication channels. Regarding the second – program evaluation and improvement – companies should have a "needs assessment," consisting of surveys, HRA data, and using voluntary employee committees; then engage in data collection, storage, organization, and integration; and next conduct performance evaluations based on performance measures to determine the success of the wellness program. Finally, regarding the third component – leadership and accountability – a strong commitment to the wellness program by all levels of the organization is required, especially by senior and middle-management, as well as by external stakeholders, such as unions, is required. For example, concerning senior-management support, Mattke, Schnyer and Von Busum (p.30) point to the example of Johnson & Johnson, where a "champion," who is a senior level manager, is identified for each component of the wellness program; and this wellness "champion" is responsible for taking the lead in developing and promoting his or her wellness component. Mattke, Schnyer and Von Busum (p. 31) also emphasize the "alignment with mission" factor, that is, "a characteristic of many successful programs is an explicit linkage between the goals of these efforts and an overarching organizational mission."

Employees, for example, may rightly contend that their size, weight, and health are based on medical conditions or genetics, thereby triggering federal laws. Health issues are,

obviously, very serious and very personal, and consequently wellness programs have ramifications too. Wellness program information must be kept private and confidential. Employees must be treated in a respectful and dignified manner when participating, or refusing to participate, in a wellness program. Perhaps an employee cannot lose weight because of a medical condition, such as a thyroid problem; and if so the employer risks legal sanctions for disclosing and/or penalizing an employee for his or her weight, as well as moral opprobrium for treating the employee's weight problem in a demeaning fashion. The goal for the employer is to have a "good," that is, legal and moral, as well as mutually beneficial wellness program.

A "carrot" incentive-based approach, therefore, makes more sense for the prudent employer because it encourages and motivates the employee to achieve a healthier lifestyle, perhaps by seeking medical assistance to attain that goal. Pursuant to an incentive-based approach, employees should be more forthcoming about their health issues, particularly if they are assured of confidentiality, so that they can strive to receive the rewards and benefits from changing their "bad" habits to become healthier. A good wellness program should be able to motivate employees to take preventative health measures which are customized to their personal well-being [20]. Confidentiality is a critical component to any wellness program as some evidence that an employee is meeting wellness standards and goals will be required.

Noll (p.2) offers the following practical advice to employers contemplating adopting wellness programs:

- Carefully assess the legal framework before establishing a wellness plan
- Be as clear as possible as to why the employer wants to adopt a wellness program, what it hopes to achieve, and understand the commitment in terms of personnel, time, and money
- Create an employee wellness committee that represents all levels of the organization to help structure the program and to promote the employer's wellness mission
- Implement the program gradually and seek employee "feedback" from participants as well as non-participants as to perceptions of the program
- Use a qualified third party to operate the wellness program that has all pertinent federal and state licenses, maintains adequate liability insurance, and has professional staff to conduct medical screenings and provide counseling to employees
- Keep wellness program employee medical information strictly confidential; do not share such individualized information with the employer or fellow employees; and have a contract with the wellness program provider that includes an agreement covering HIPAA as well as other relevant federal and state laws
- Do not make any rewards, benefits, or premium incentives contingent upon the employee completing a Health Risk Assessment that asks for genetic information, such as family medical history.

A healthy employee will feel better physically as well as mentally and emotionally. He or she will be able to perform work tasks better, more readily achieve goals and be more successful and self-satisfied. Accordingly, the prudent employer must demonstrate to the employees the disadvantages of having an unhealthy lifestyle and the advantages that will accrue from having a lifestyle change and obtaining a healthy lifestyle. The employer thus must show that by participating in the voluntary wellness program their health will

improve. Moreover, the employer must show that the employees' healthcare costs will be reduced and thus their paychecks will be increased. The employees should have the option to participate in the wellness program. As such, the rational and egoistic employee will certainly take heed of the "sales pitch" – Get healthy, feel good, and save money! Such an approach if carried out in a legal and ethical manner should be a "win-win" situation for the employee and employer.

5 Summary

Creating and implementing a wellness program can be very beneficial to the employer as well as the employee. The goal is to have an efficient, effective, legal, and moral wellness program that helps the employee to attain and keep good health as well as help the employer to manage and reduce healthcare costs. Regarding the growth of wellness programs, Mattke, Schnyer, and Von Busum (p. 39) emphasize that "most observers expect that the uptake will continue to increase as programs become more comprehensive and more accessible for smaller worksites. The Affordable Care Act will help to sustain this trend, as it is likely to increase employment-based coverage and, hence, employers' interest in potentially cost-saving measures."

However, as underscored in this article, there are many laws that can apply to wellness programs, and thus before taking any "good" action the employer must very carefully consider all the legal issues and consequences. Furthermore, the employer must be cognizant of the ethical issues involved and consequently must strive to have a moral wellness program and not one perceived as coercive, manipulative, demeaning, or punitive by the employees. The goal, as always, is to be "just," that is, acting legally and ethically.

The employer's ultimate objective, therefore, should be to create a "wellness culture" in the workplace by means of its legal and moral wellness program and other healthy-lifestyle measures. As per the IBM program, the intent is to create a "culture of health." The goal is to have wellness and healthy lifestyles as a core company value along with integrity and respect for others. The employer can provide health-related information to employees, challenge them to become informed, and then become active participants in promoting their own health. The employer will provide the means for the employees to reach their full health potential by means of its wellness program. The employer also can offer healthy-meal options in the company cafeteria and snack bar, filtered free drinking water, and walking options. Setting, meeting, and accomplishing goals – health and otherwise – are good for the individual, his or her family, the employer, and society as a whole. A company's investments in its employees' health and wellness will "pay off" for the company in the long-run and naturally will benefit the employees, their co-workers, families and communities. Encouraging and motivating employees to get involved in work wellness programs will produce positive feelings on the part of the employee as well as positive interaction among employees who, for example, may share wellness "tips," anecdotes, and most importantly, success stories. Employees, moreover, should tend to gravitate toward participating in voluntary wellness programs and actively work toward achieving wellness goals if they get encouragement and support from co-workers as well as tangible benefits from the employer. Such a voluntary cultural-based wellness approach at work will be more efficacious, as well as less perilous legally, rather than having major lifestyle changes, even if in their own good, "forced" on them. A legal and moral wellness program is a socially responsible and mutually beneficial action. The

employees, employer, as well as all the stakeholders affected, will benefit from such a “good” wellness program.

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