

[*Click to return to Table of Contents*](#)

**EMPLOYEE WELLNESS PROGRAMS AND THE LAW:
PRACTICAL CONSIDERATIONS
FOR WEST VIRGINIA EMPLOYERS**

**By Erin K. Jones, Esq.
Kay Casto & Chaney PLLC**

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

I. Nature of Employee Wellness Programs

Before addressing West Virginia law which may affect employers utilizing employee wellness programs, a brief overview of the nature of and need for these programs is necessary.¹ The increased prevalence of employee wellness programs is not surprising, given the cost of employment-based health insurance. Nationally, in the past decade, health insurance premiums have increased at roughly three to four times the rate of inflation and wage growth, respectively.² Twenty-five percent of the health care these premiums pay for is related to lifestyle choices, such as poor diet, lack of exercise, smoking, drinking and drug use.³

In West Virginia, obesity and smoking have long been the gravest health issues, with rates among the highest in the country.⁴ Thus, employee wellness programs are an increasingly attractive option for employers, not only as a way to lower their costs of providing health

¹ The West Virginia law addressed in this article is entirely statutory. The author's research has revealed a lack of state common law addressing the interplay of the statutes addressed herein with the implementation of employee wellness programs in West Virginia. Thus, the analysis and suggestions provided are both theoretical and anticipatory. Furthermore, this article is intended to be a general overview of the state laws that may potentially affect employee wellness programs, rather than an all-inclusive or exhaustive list.

² National Coalition on Health Care, *Health Insurance Costs: Facts on the Costs of Health Insurance and Health Care* (2009), <http://www.nchc.org/facts/cost.shtml> (citing Henry J. Kaiser Family Foundation, *Employee Health Benefits: 2008 Annual Survey* (2008)).

³ Association of Corporate Counsel, *Employee Wellness Programs: A Federal and State Analysis of the Legal and Practical Implications* (2009).

⁴ Governor Joe Manchin III, *Towards a Healthy West Virginia: A Strategic Vision and Action Plan* (2007), <http://www.wv.gov/uploads/HealthyWV050207.pdf>.

insurance for their employees, but also to decrease absenteeism, increase productivity, and to achieve happier, healthier employees overall.

II. Fostering Efforts at Employee Wellness

A. Healthy West Virginia Program

The first noteworthy statute affecting the development of employee wellness programs addresses one of West Virginia's greatest health problems – obesity. The act, which took effect in July 2005, is titled the *Healthy West Virginia Program*.⁵ In its statement of purpose, the statute declares that the “rise in obesity and related weight problems accompanied by the resulting incidence of chronic disease has created a health care crisis that burdens the health care infrastructure of the state.”⁶ As a result, the legislature decided it “must take action to assist West Virginia citizens in engaging in healthful eating and regular physical activity.”⁷

The statute creates the Office of Healthy Lifestyles, which shall, among other duties, “establish a statewide voluntary private sector partnership and recognition program for *employers, merchants, restaurants and other private sector businesses to encourage the development or further advance current programs that encourage healthy lifestyles.*”⁸ In helping to foster these programs, the Office of Healthy Lifestyles is specifically directed to:

- Encourage the development of incentives for participation in employee wellness programs.
- Incentives may be based upon, but should not be limited to, employees' completion of health questionnaires or participating in healthy lifestyles

⁵ Healthy West Virginia Program, W. VA. CODE § 5-1E-1, *et seq.* (2006).

⁶ *Id.*

⁷ *Id.*

⁸ W. VA. CODE § 5-1E-3(3) (emphasis added).

initiatives, and may use experiences of successful initiatives that have occurred in this state.⁹

Employers may also be encouraged by the fact that “[t]he West Virginia Healthy Lifestyles program will develop a recognition program for private sector enterprises that develop or advance programs that address the problems affecting overweight and obese individuals and that promote a healthy lifestyle.”¹⁰ In addition, programs recognized by the Office of Healthy Lifestyles will be marketed through all state agencies.¹¹

The *Healthy West Virginia Program* illustrates that West Virginia values initiatives to improve the health and wellness of West Virginia employees, and is creating a legal atmosphere that protects and supports such initiatives.

B. Disease Management and Prevention

Another statute promoting employee wellness programs, at least indirectly, is the *West Virginia Osteoporosis Prevention Education Act*.¹² Basically, this law allows for the Bureau of Public Health to establish strategies to promote and maintain an osteoporosis prevention education program in West Virginia. One way the Bureau may raise awareness about the disease and educate people about its prevention and early detection is by distributing information through employer wellness programs, among other institutions.¹³ This provision fosters, albeit in a general sense, the use of wellness programs.

Many more state programs and initiatives are highlighted in *Towards a Healthy West Virginia: A Strategic Vision and Action Plan*, aiming at the management and prevention of chronic diseases such as asthma, diabetes, cancer, and cardiovascular disease and even

⁹ W. VA. CODE § 5-1E-3(10).

¹⁰ W. VA. CODE § 5-1E-4(c).

¹¹ W. VA. CODE § 5-1E-4(e).

¹² West Virginia Osteoporosis Prevention Education Act, W. VA. CODE § 16-5M-1, *et seq.* (2006).

¹³ W. VA. CODE § 16-5M-2(a)(1)(E).

addressing behavioral health issues like substance abuse.¹⁴ The action plan seeks to include employers in its network of “local and statewide partners.”¹⁵

C. West Virginia Workers’ Compensation Statute

Finally, the West Virginia Workers’ Compensation statute provides additional legal support for efforts at improving employee wellness. Generally, the purpose of the Workers’ Compensation Fund is to compensate employees for covered, on-the-job injuries via privatized insurance maintained by participating employers.¹⁶ Because illness and disease can potentially contribute to the occurrence of such injuries, it is not surprising that the workers’ compensation statute encourages employee wellness. Specifically, West Virginia Code § 23-2-5(a) provides, in pertinent part:

(a) For the purpose of creating a workers' compensation fund, each employer who is required to subscribe to the fund or who elects to subscribe to the fund shall pay premium taxes calculated as a percentage of the employer's gross wages payroll at the rate determined by the workers' compensation division and then in effect. At the time each employer subscribes to the fund, the application required by the division shall be filed and a premium deposit equal to the first quarter's estimated premium tax payment shall be remitted. The minimum quarterly premium to be paid by any employer shall be twenty-five dollars.

...
(5) The division may encourage employer efforts to create and maintain safe workplaces, to encourage loss prevention programs, and to *encourage employer provided wellness programs*, through the normal operation of the experience rating formula, seminars and other public presentations, the development of model safety programs and other initiatives as may be determined by the commissioner and the compensation programs performance council.¹⁷

Enabling the division to promote wellness programs through incentives, presentations and other initiatives, this statutory section provides yet another avenue for partnership in the employee wellness effort.

¹⁴ Manchin, *supra* note 4, at 9-15.

¹⁵ *Id.*

¹⁶ W. VA. CODE § 23-1-1, *et seq.* (2005).

¹⁷ W. VA. CODE § 23-2-5(a) (emphasis added).

III. Statutory Obstacles

A. Discrimination Based on Tobacco Use Prohibited

A serious health issue facing West Virginians, and costing employers a great deal in health care costs, is tobacco use. As such, working toward the reduction or even elimination of tobacco use by employees is an important part of many employee wellness programs. However, West Virginia Code § 21-3-19 delivers a striking blow to such efforts. This statute provides that “it shall be unlawful for any employer, whether public or private, or the agent of such employer to refuse to hire any individual or to discharge any employee *or otherwise to disadvantage or penalize any employee* with respect to *compensation, terms, conditions or privileges of employment* solely because such individual uses tobacco products off the premises of the employer during nonworking hours.”¹⁸ Thus, to the extent that a wellness program aims for the reduction or elimination of tobacco use, this statute severely limits the terms used and the consequences imposed for failing to reduce or eliminate such tobacco use.

However, it should be noted that the section does not apply to nonprofit organizations with the objective of discouraging tobacco use by the general public, and it also does not prohibit an employer from making distinctions in the type or price of coverage, or in the premium rates charged to employees for their coverage, based on tobacco use where the distinction accurately reflects the differential cost to the employer.¹⁹

B. Discrimination Based on Health Status Prohibited

Employers who want to link employee wellness programs to the insurance benefits they offer must be aware of West Virginia Code § 33-16D-13. This statute provides that “any employer subscribing to a health care benefit plan for or on behalf of its employees pursuant to

¹⁸ W. VA. CODE § 21-3-19(a) (2008) (emphasis added).

¹⁹ W. VA. CODE § 21-3-19(b)-(c).

this chapter shall not discriminate against any eligible employee *on the basis of such employee's status with the employer* by paying for all or part of the health care benefit plan premiums in a manner different from that provided any other eligible employee.”²⁰ To the extent that an employee’s lack of participation in a wellness program affects his or her “status with the employer,” the employer may not use that as the basis for discrimination in payment of insurance premiums. To be safe, employers may want to link participation in employee wellness programs to non-insurance-related incentives altogether.

Along those same lines, health maintenance organizations cannot discriminate in enrollment policies or quality of services based on health status, unless differences in rates are based on valid actuarial distinctions.²¹ Again, this provision may be applicable to the extent that “health status,” as defined by a health maintenance organization, is affected by participation in an employee wellness program.

C. Patient-Specific Protected Health Information

Employers who need detailed health information on their employees for wellness program purposes may have difficulty accessing this protected information from a health maintenance organization. Based on West Virginia Code § 33-25A-26, “any data or information pertaining to the diagnosis, treatment or health of any enrollee or applicant obtained from that person or from any provider by any health maintenance organization shall be held in confidence and shall not be disclosed to any person,” except in limited circumstances.²²

Specifically, this information may only be disclosed: (1) to facilitate an assessment of the quality of care delivered; (2) upon the express written consent of the person; (3) pursuant to statute or court order; (4) in the event of a claim between that person and the health maintenance

²⁰ W. VA. CODE § 33-16D-13 (2006) (emphasis added).

²¹ W. VA. CODE § 33-25A-14a(d) (2006).

²² W. VA. CODE § 33-25A-26.

organization wherein the information is pertinent; or (5) to a department or division of the state pursuant to the terms of a group contract for the provision of health care services.²³ Furthermore, “a health maintenance organization is entitled to claim any statutory privileges against the disclosure which the provider who furnished the information to the health maintenance organization is entitled to claim.”²⁴

Additionally, although West Virginia has created an interoperable health information network to facilitate the public and private use of health care information in the state, such information is closely guarded. West Virginia Code § 16-29G-8 provides that patient-specific health care information contained in the West Virginia Health Information Network is to be “disclosed only in accordance with the patient's authorization or best interest to those having a need to know, in compliance with state confidentiality laws and the Health Insurance Portability and Accountability Act of 1996 and any amendments and regulations under the Act.”²⁵

Considering these protective provisions, an employer needing the health information of its employees for wellness program purposes may have no choice but to depend on voluntary disclosure from the employee.

D. Compliance with the Americans with Disabilities Act

West Virginia Code § 5A-1-11 created a State Americans with Disabilities Coordinator, who is charged with, among other duties, facilitating compliance with the federal Americans with Disabilities Act (“ADA”).²⁶ Specifically:

(c) The coordinator shall:

(1) Advise the Director of Personnel in the development of comprehensive policies and programs for the development, implementation and monitoring of a

²³ *Id.*

²⁴ *Id.*

²⁵ W. VA. CODE § 16-29G-8 (2006).

²⁶ W. VA. CODE § 5A-1-11(a) (2006); Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (2005).

statewide program *to assure compliance with 42 U.S.C. § 12101, et seq., the federal Americans with Disabilities Act;*

(2) Assist in the formulation of rules and standards relating to the review, investigation and resolution of complaints of discrimination *in employment, education, housing and public accommodation;*

...

(4) Consult and collaborate with agency Americans with disabilities officers on the appropriate training *for managers and supervisors* on regulations and issues . .

²⁷
...

What is evident from these provisions is that: (1) the legislature intends for the federal ADA to be enforced on the state level in West Virginia, and (2) such enforcement affects employers, among many others. Thus, covered employers in West Virginia utilizing employee wellness programs must be familiar with the provisions of the ADA that may affect activities pursuant to those programs.

Generally, the ADA provides that,

(a) No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, *and other terms, conditions, and privileges of employment.*²⁸

Therefore, to the extent that participation in or the receipt of benefits under an employee wellness program is considered a “term, condition [or] privilege of employment,” the program must be designed in a way that does not discriminate against qualified individuals on the basis of their disabilities. In order to be diligent, an employer must first know which activities relating to a wellness program may constitute discrimination. Of all the ADA’s enumerations of “discrimination,” the following activities may become relevant with regard to wellness programs:

²⁷ W. VA. CODE § 5A-1-11(c)(1), (2) and (4) (emphasis added).

²⁸ 42 U.S.C. § 12112(a) (emphasis added).

(1) *limiting, segregating, or classifying* a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

...

(5) (A) *not making reasonable accommodations* to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, *unless such covered entity can demonstrate that the accommodation would impose an undue hardship* on the operation of the business of such covered entity; or

(B) *denying employment opportunities* to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant²⁹

Apparent from the above-emphasized sections, employers must design wellness programs in a way that will not single-out or otherwise disadvantage, or even prevent from participating altogether, qualified individuals. Where certain aspects of a program may pose challenges to these individuals, the employer must make reasonable accommodations such that the affected individual(s) may participate in the programs, where such accommodation will not impose an undue hardship on the employer.

Further, as initially addressed above in the protected health information section, some wellness programs may involve the collection of medical records, or even medical examination and inquiry. Where this is the case, employers must be aware of the ADA provisions addressing these activities:

(3) (B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in *separate medical files* and is treated as a *confidential* medical record

(4) Examination and inquiry.

(A) Prohibited examinations and inquiries. A covered entity shall *not require a medical examination and shall not make inquiries* of an employee as to *whether such employee is an individual with a disability or as to the nature or severity of the disability*, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

²⁹ 42 U.S.C. § 12112(b)(1), (5)(A), (B) (emphasis added).

(B) Acceptable examinations and inquiries. *A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.*³⁰

Thus, any medical records obtained pursuant to a wellness program (which likely must be voluntarily released, based on the protected health information provisions discussed above) must be kept separate from personnel records and confidential by employers subject to the ADA. Furthermore, any medical inquiries or examinations *required* as a part of a wellness program that relate to an employee's disability must be "job-related and consistent with business necessity." However, employers may be encouraged that the ADA specifically addresses "employee health programs," granting permission to conduct *voluntary* medical exams and inquiries.

IV. Practical Considerations for West Virginia Employers

After processing the laws potentially affecting employee wellness programs in West Virginia, certain themes begin to emerge. To develop and implement a legally responsible employee wellness program, employers may want to remember the following tips:

- **Voluntary is Safer than Mandatory** – While participation may be higher in a mandatory program, requiring participation in a wellness program with job-related consequences can be risky legally. A mandatory program must be carefully designed not to result in discrimination based on health status (with regard to paying employees' insurance premiums) or tobacco use off of the premises, and any medical records or inquiries must be voluntarily disclosed.
- **Provide Non Insurance-Related and Non Job-Related Incentives** – With a little creativity, employers can increase participation with many legally-acceptable incentives, including: discounts on gym memberships; exercise facilities at

³⁰ 42 U.S.C. § 12112(d)(3)(B), (4)(A)-(B) (emphasis added).

work; smoking cessation resources; clothing and other promotional items; coupons; etc.

- Provide a Smoke-Free Workplace – Because the tobacco discrimination statute addresses only “off the premises” use, employers can and should have stringent rules providing a smoke-free work environment.
- Be Careful with Medical Information – Wellness programs should be designed such that participation can occur independent of the receipt of medical information, as that information will be difficult to obtain. Where programs do require such records or inquiry, disclosure must be voluntary (and “job-related” when seeking information on “ability” from individuals covered under the ADA), and any resulting information should be kept confidential and separate from personnel records.
- Ensure That All Employees Can Participate – Employers must be vigilant of the effect of wellness programs on qualified employees with disabilities. Where programs pose a challenge to these individuals, reasonable accommodations must be made to the extent it will not cause undue hardship.

V. Conclusion

Employers developing and implementing wellness programs should be encouraged by recent legislation, such as the *Healthy West Virginia Program* and the *West Virginia Osteoporosis Prevention Education Act*, that places a high value on ambitious efforts to improve the health of West Virginians. However, employers should still err on the side of caution when developing the “teeth” of these programs, considering the statutory obstacles highlighted. The safest route is to develop voluntary programs linked to non job-related incentives, and to avoid

any differential treatment of employees based on the health information received pursuant to, or their ability to participate in, those programs.