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**EMPLOYEE HEALTH BENEFIT PROGRAMS—
WHO ARE THEY REALLY BENEFITTING?**

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I. Introduction

The HIPAA regulations fail to protect privacy by failing to standardize public and private employee health wellness programs that provide incentives. HIPAA regulations also fail to protect privacy by not including regulations that state an individual cannot be penalized for not participating in an employee health wellness program. Standardizing employee health benefit programs could prevent discrimination against employees who do not meet the goals of the program. This could be accomplished by adopting the same model used by the Joint Commission of Accreditation of Health Care Entities (JCAHO) for accrediting hospitals, nursing homes and other health care entities.¹

Although JCAHO is an independent non-profit organization and not a governmental agency such as Health and Human Services (HHS), both share an overall commitment to the public's health.² A bi-annual review that ensures HIPAA compliance and consideration of employees' needs could improve wellness programs. This review should include speaking with individuals that opted out of the wellness program in order to learn more about their specific reasons.

Additionally, if a regulation is created that disallows penalizing employees that do not participate in employee wellness programs; it will assist in streamlining these programs and improving their overall quality.

In April of 2003 HHS' Office for Civil Rights became responsible for enforcing the Privacy and Security Rules for most HIPAA covered entities.³ Currently, there is no specific

¹ "Joint Commission surveyors visit accredited health care organizations a minimum of once every 39 months (two years for laboratories) to evaluate standards compliance. This visit is called a survey. All regular Joint Commission accreditation surveys are unannounced."

² See http://www.jointcommission.org/about_us/about_the_joint_commission_main.aspx

³ See <http://www.hhs.gov/ocr/privacy/hipaa/enforcement/>

regulation that states that its focus is on the monitoring of employee health wellness programs. Without this monitoring, it is easy for incentive based wellness plans to implement wide- ranging benefits and incentives for employees as long as they follow the five rules listed under HIPAA.⁴

OCR could take a more proactive approach to employee wellness programs by creating more standardized regulations for employee wellness programs. Since 2003, the enforcement activities of OCR have obtained significant results. These results have improved the privacy practices of covered entities. OCR's corrective actions have resulted in systemic change that has improved the privacy protection of health information for all individuals served.⁵ Given these facts, with a more streamlined approach OCR can continue to achieve significant results, and positively impact the employees experience in employee wellness programs.

This paper will discuss: 1) the different types of employee wellness programs and some of their advantages, 2) the potential privacy concerns for employee wellness programs, 3) the entities that are regulated under HIPAA 3) the specific types of wellness programs that are regulated under HIPAA, 4) the potential privacy concerns for employee wellness programs addressed under HIPAA, and 5) potential areas for improvement for employee health wellness programs under HIPAA and solutions that will better serve both employer and employee, 6) the conclusion.

II. Overview of Wellness Programs and some advantages of wellness programs

Wellness programs were initially introduced as a carved out exception of the anti-discrimination provisions in the Health Insurance Portability and Accountability Act (HIPAA).⁶

⁴ Id.

⁵ U.S. Department of Health and Human Services, <http://www.hhs.gov/ocr/privacy/hipaa/enforcement/> (last visited November 26, 2015).

⁶ Heather Baird, Comment, *Healthy Compromise: Reconciling Wellness Program Financial Incentives with Health Reform*, 97 Minn. L. Rev.1474, 1506 (2013).

Most recently, employee wellness programs were codified in the Affordable Care Act (ACA), with some changes. The ACA defines a wellness program as, “a program offered by an employer that is designed to promote health or prevent disease that meets the applicable requirements of this subsection.”⁷

There are two main types of workplace wellness programs; the third is more specific in nature. The actual definition of a workplace wellness programs can differ depending on the employer. First, there are “mandatory” wellness programs. Second, there are “Voluntary” Wellness Programs. Third, an employer may implement a more targeted and comprehensive approach to a wellness program. An example would be a smoking cessation program.⁸

“Mandatory” wellness programs are programs that an employee must participate in within the scope of their employment or be penalized. An example would be where an employer required that an employee undergo a “health risk assessment.” This assessment would include screening for things such as high blood pressure and high cholesterol.⁹ Another “mandatory” wellness program may require employees to work collaboratively with advisors that invent and monitor fitness plans on behalf of the employee.¹⁰

Generally organizations tailor these programs to meet the overall goals of the organization. Things that may be taken into consideration are the varying health statuses of the employees, the amount of financial responsibilities an employer has, and the societal value placed on the employee’s health in the workplace.¹¹ In order to ensure compliance for these

⁷ 42 U.S.C. §300gg-4(j)(1)(A).

⁸ Daniel Charles Rubenstein, Comment, *Ethics of Health Care Law Reform: The Emergence of Mandatory Wellness Programs in the United States: Welcoming or Worrisome?*, 12 J. Health Care L. & Pol’y 99,118 n.99 (2009).

⁹ Id. at 100 (providing additional examples of “mandatory wellness programs.”)

¹⁰ Id.

¹¹ Id at 101-102.

programs employers have taken actions such as increasing employee health-related contributions, garnishing wages, and even restricting employees' access to their workplace.¹² These measures are most prevalent in the Midwest; however regionally based companies such as the Baltimore Sun have also taken actions. The Baltimore Sun has suggested a proposal to raise the monthly costs of insurance premiums if any employee's family member smokes cigarettes.¹³ Generally, if a program provides non-monetary incentives such as free lunches to an employee that attends a health seminar, then it would be considered nondiscriminatory under HIPAA. These programs would be considered nondiscriminatory because there is no compelled requirement of disclosure of confidential and protected health information.¹⁴

Unlike "mandatory" wellness programs, "voluntary" wellness programs do not penalize employees that chose not to participate.¹⁵ These programs allow employers greater flexibility than their mandatory counterparts. The information that is obtained from employees through wellness clinics, and voluntary surveys does not compel action on either the part of the employer or the employee that can violate various federal regulatory provisions.¹⁶ Overall, voluntary wellness programs avoid many of the legal pitfalls that a mandatory wellness program may encounter--while still providing important health benefits to the employee, and financial advantages to the employer.¹⁷ Similar to mandatory wellness programs the results may not be immediate. However, even if a small percentage of the company's employees participate in the program the benefit to both the employee and the employer could be significant.¹⁸ An example

¹² Id.

¹³ Id. at 101 (describing that the Baltimore Sun is not alone as more and more employers are considering implementing employee wellness programs).

¹⁴ Rubenstein, Ethics of Health Care Reform, Id. at 108.

¹⁵ Id. at 102.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

would be an employer providing employees access to a program that makes information available, but does not require the employee to access the information, or engage in the activity.¹⁹ For example, if a company offers a monthly seminar about the benefits of physical activity.

The third type of wellness program is a more targeted approach. An example of this more targeted approach would be a smoking cessation program.²⁰ In the Baltimore-Washington D.C. metropolitan area a number of employers have implemented smoking bans. These bans are targeted to improving working conditions, and employee safety and health, specifically in the hospital setting.²¹ As of November 2008, the Fort Washington Medical Center in central Maryland went completely smoke free.²²

Employee health wellness programs provide the opportunity to improve the health of the enrollees, but also can help to control health care spending for employers.²³ A review about the effectiveness of wellness programs done by researchers at the University of San Diego confirmed that employee participation in exercise programs yielded significant improvement in a number of measured statistics.²⁴ These areas included stress-reduction, diminished levels of health-related absenteeism, improved self-image, increased energy and improved job performance.²⁵

In addition to the qualitative impact of employee participation in wellness programs, a recent IBM study showed the quantitative effects of program participation, specifically focusing

¹⁹ Id.

²⁰ Id. at 103.

²¹ Id.

²² Id. (Further discussing that 40 other Maryland hospitals in 2008, were, or were in the process of becoming smoke free.)

²³ Id.

²⁴ Rubenstein, Ethics of Health Care Reform, Id. at 106.

²⁵ Id.

on cost-savings.²⁶ The study found that the avoidance of one cancer operation resulting from an employee's successful participation in a wellness program, would allow the corporation to enroll an additional 15,000 additional employees in smoking cessation programs.²⁷ Additionally, the avoidance of the necessity for long-term drug treatment for one employee would fund drug prevention classes for up to 9,000 additional employees.²⁸

III. Potential privacy concerns for wellness programs

Privacy concerns are of the utmost importance when implementing employee wellness programs.²⁹

One example of a potential privacy concern would be if an employer sought verification from the health care provider to confirm that an employee is eligible for a reduced premium or financial reward.³⁰ Employer based wellness programs will likely encounter more judicial criticism when the administration of the wellness program requires specific, identifying information.³¹

One of the largest potential breaches related to employee wellness programs is the sharing of information with outside vendors.³²

In Houston, Texas an employer required their employees to notify an online wellness company about their disease history, blood pressure, drug and seat belt use, and other delicate

²⁶ Id.

²⁷ Id.

²⁸ Rubenstein, Ethics of Health Care Reform, Id. at 105.

²⁹ Rubenstein, Ethics of Health Care Reform, Id. at 108.

³⁰ Id. at 270.

³¹ Rubenstein, Ethics of Health Care Reform, Id. at 108.

³² PRIVACY CONCERNS ARISE WHEN WELLNESS PROGRAMS SHARE DATA WITH VENDORS, <http://www.fiercehealthpayer.com/story/privacy-concerns-arise-when-wellness-programs-share-data-vendors/2015-09-30> (last visited November 25, 2015).

information.³³ While reading the fine print of their authorization forms employees found that the online wellness company could pass their data to third party vendors that were acting on the company's behalf. Additionally, the employees' information could potentially be posted in areas that were reviewable to the public. Their information could also be subject to re-disclosure and no longer protected by privacy law. Employees were given the choice to provide authorization to the online wellness program, or pay an additional \$300 a year (a cost that would be added to their medical coverage).³⁴

Another potential privacy concern for small companies is the identification of women in the workplace that are pregnant. This could present a potential privacy concern when a woman has not yet notified her job that she is pregnant. Employers only receive aggregate-level data, not individual responses, to help them develop and tailor their employee health and wellness programs. However, if there are only a few female employees in a company it will be significantly easier to identify the pregnant employee.³⁵ This potential breach of privacy could have lasting effects for the woman that is pregnant. Unfortunately, some negative perceptions still exist regarding pregnant women and job productivity. Should these perceptions exist at the woman's place of employment, they could be used to discriminate against her.³⁶

Another potential privacy concern exists because as technology advances the existing laws have not changed to support the advances.³⁷ For example, there has been an increase in the

³³ WORKPLACE WELLNESS PROGRAMS PUT EMPLOYEE PRIVACY AT RISK, <http://www.cnn.com/2015/09/28/health/workplace-wellness-privacy-risk-exclusive/> (last visited November 22, 2015)

³⁴ Id.

³⁵ PREGNANCY – A TOUCHY SUBJECT IN EMPLOYEE WELLNESS HEALTH ASSESSMENTS, <http://khn.org/news/pregnancy-a-touchy-subject-in-employee-wellness-health-assessments/> (last visited November 26, 2015).

³⁶ Id.

³⁷ SURGE IN WELLNESS PROGRAMS SPARKS CONCERNS OVER DATA PRIVACY, <http://www.healthcarefinancenews.com/news/surge-wellness-programs-sparks-concerns-over-data-privacy> (last visited November 25, 2015).

use of fitness trackers.³⁸ Fitness trackers report information about a wearer's location, activity levels and sleep patterns, however there have been no changes to the privacy laws to include information about such advances in technology.³⁹

Overall, these are only some of the potential privacy concerns related to employee wellness programs. It can be expected that as technology continues to advance, it will be necessary for additional privacy protections to be implemented in order to ensure overall protection of employee's health information.

IV. Overview of the entities that are regulated under HIPAA

The HIPAA rules apply to business associates and covered entities.⁴⁰

A business associate includes (i) A Health Information Organization, E-prescribing Gateway, or other person that provides data transmission services with respect to protected health information to a covered entity and that requires access on a routine basis to such protected health information; (ii) A person that offers a personal health record to one or more individuals on behalf of a covered entity; (iii) A subcontractor that creates, receives, maintains, or transmits protected health information on behalf of the business associate.⁴¹

If a covered entity engages a business associate to assist it in carrying out its health care functions and activities, the covered entity must have a written business associate contract or another agreement with the business associate that specifically establishes what the business associate has been engaged to do. Additionally, it must require the business associate to comply with the Rules' requirements to protect the security and privacy of protected health information

³⁸ Id.

³⁹ Id.

⁴⁰ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, HEALTH INFORMATION PRIVACY--FOR COVERED ENTITIES AND BUSINESS ASSOCIATES, <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/> (last visited November 25, 2015).

⁴¹ 45 CFR §160.103(3)

(PHI). Business associates are also directly liable for compliance with specific provisions of the HIPAA Rules.⁴²

A covered entity includes (1) A health plan; (2) A health care clearinghouse; (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.⁴³

Health plans include HMOs, health insurance companies, company health plans and government health programs that pay for healthcare such as Medicaid and Medicare and veterans and military health care programs.⁴⁴ A health care clearinghouse includes entities that process nonstandard health information that they receive from another entity into standards such as data content or standard electronic format.⁴⁵ A health care provider is a provider of services⁴⁶, a provider of medical or health services⁴⁷ or any other person or organization who furnishes, bills or is paid for health care in the normal course of business. Examples would be doctors, psychologists, clinics, dentists, and pharmacies and nursing homes, but only if they if they transmit information in an electronic form that is connected with a transaction that Health and Human Services has adopted a standard.⁴⁸

V. Specific types of wellness programs that are regulated under HIPAA

⁴² U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, HEALTH INFORMATION PRIVACY-FOR COVERED ENTITIES AND BUSINESS ASSOCIATES, <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveridentities/> (last visited November 25, 2015).

⁴³ 45 CFR §160.103

⁴⁴ See <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveridentities/> (last visited November 25, 2015).

⁴⁵ Id.

⁴⁶ SSA § 1861 (u)

⁴⁷ SSA § 1861 (s)

⁴⁸ See <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveridentities/> (last visited November 25, 2015).

The application of the HIPAA Rules to workplace wellness programs depends on the way in which these programs are structured.⁴⁹ When a workplace wellness program is offered as a part of a group health plan the individually identifiable information collected would be considered PHI and protected under HIPAA.⁵⁰

Some employers may offer a workplace wellness program as part of a group health plan for employees. An example would be if an employer offered rewards or incentives related to health plan benefits. These could include reductions in employees' premiums or cost-sharing amounts, in exchange for participating in a wellness program.⁵¹ When a workplace wellness program is offered as part of a group health plan, the individually identifiable health information collected from or created about individuals that participate in the wellness program is PHI, and therefore protected under the HIPAA rules.⁵² Although the HIPAA rules do not apply directly to the employer, a group health plan that is sponsored by the employer would be considered a covered entity under HIPAA. In this case, HIPAA protects the individually identifiable information that is assumed by the health plan (or its business associates).⁵³ PHI is also protected under HIPAA when the employer as plan sponsor on the plan's behalf, has access to the PHI when the plan is administering aspects of the health plan. This includes wellness program benefits that are offered through the plan.⁵⁴

If an employer based wellness program offers a reward grounded in an individual's health status the program must meet five conditions: (1) the reward must not be more than 30%

⁴⁹ "DO THE HIPAA RULES APPLY TO WORKPLACE WELLNESS PROGRAMS?", <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coverentities/wellness/index.html>. (last visited November 1, 2015)

⁵⁰ See <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coverentities/wellness/index.html>. (last visited November 25, 2015).

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Id.

of the cost of coverage;⁵⁵ (2) the program “must be reasonably designed to promote health or prevent disease”;⁵⁶ (3) eligible individuals must have the opportunity to qualify for the reward annually;⁵⁷ (4) the reward must “be made available to all similarly situated individuals;”⁵⁸ and (5) materials describing the terms of the program must disclose the availability of a “reasonable alternative standard” or possibility of waiver for those for whom it would be impossible or unsafe to achieve the given standard.⁵⁹ This standard is relevant for employee wellness programs regulated under HIPAA.⁶⁰

Each factor provides a check on the reasonableness and scope of the wellness program.⁶¹ Regarding the first factor, this requirement is in place to ensure that a participation incentive is not so significant that an employee feels obligated to participate in the wellness program.⁶² The second factor ensures that qualified employees or their dependents that are eligible to enroll in the program obtain all applicable discounts at least once per year.⁶³ The third requirement entails providing a proper justification for the employee health benefits program. At minimum employers that implement these programs, should discuss the qualitative components of improving employee’s health in relation to employee satisfaction and overall productivity.⁶⁴ Examples of quantitative justifications that may qualify are a reduction in overall cost for health-

⁵⁵ “Cost of coverage” is equal to the total of both employer and employee contributions to the insurance plan. §300 gg-4(j)(3)(A).

⁵⁶ Id. §300gg-4(j)(3)(B) (“A program complies with [this provision] if [it] has a reasonable chance of improving the health of, or preventing disease in, participating individuals and it is not overly burdensome, is not a subterfuge for discriminating based on a health status factor, and is not highly suspect in the manner chosen to promote health or prevent disease.”)

⁵⁷ Id. §300gg-4(j)(3)(C).

⁵⁸ Id. §300gg-4(j)(3)(D).

⁵⁹ Id. §300gg-4(j)(3)(E).

⁶⁰ Rubenstein, Ethics of Health Care Reform, *Id.* at 110.

⁶¹ *Id.*

⁶² *Id.* at 110

⁶³ *Id.*

⁶⁴ *Id.*

related expenses.⁶⁵ The fourth factor is crucial to indicating the legitimacy of an employee wellness program. This factor shows reasonableness and flexibility from the employer with employees that may have challenges in meeting program objectives.⁶⁶ An example would be an employee that is required to reduce their cholesterol, but is unable to do so because it is not advised medically, or otherwise significantly challenging. This individual may nevertheless be able to obtain the benefits designed by the wellness program for an alternate effort, such as eating foods rich in Omega-3 in substitution for less healthy dietary options.⁶⁷ Lastly, the fifth requirement ensures that the employer is providing reasonable and proper notice to all the employees that there is an alternative program. One of the most effective ways to achieve this requirement is through providing notice of the alternative program in materials that discuss the wellness program.⁶⁸

The Valley Health System and the Mercy Health Plan of Philadelphia are two examples of employee wellness programs that perform their own internal review, and from this review were able to determine the success of their programs.

The Valley Health System's wellness program provides incentives to employees who exercise, eat properly, don't smoke and keep down their cholesterol and blood pressure levels.⁶⁹ Their program is titled "The Wellness Challenge."⁷⁰ The program begins by providing employees a health appraisal that measures health factors such as weight, height, blood pressure, glucose, body fat and cholesterol.⁷¹ Employees are then challenged to improve their health one

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Thomas J, Parisi. *"The Onus is on you."* Id at 259.

year at a time, at which point there will be a repeat health appraisal.⁷² If the employee improves in eight out of the ten criteria, then they receive a \$250 cash reward for the first year, and for subsequent years increased amounts if the criterion continues to be met.⁷³ The Valley Health System tracked the results of its wellness plan, and found that there was a significant difference in overall health outcomes and health improvement when incentives were provided.⁷⁴

Another example of an employee wellness program with internal monitoring is Mercy Health Plan of Philadelphia.⁷⁵ Mercy decided not to use discounts on payments. Instead they provided parents with a \$10 gift certificate for shoes or diapers when a child was appropriately immunized.⁷⁶ The reward was given as part of a program that also included home visits by registered nurses, ongoing education and transportation assistance. These additional components made the focus of the program unclear, but the comprehensive program, achieved a statistically significant increase in the number of children that received all of their immunizations.⁷⁷

These programs are examples of successful employee wellness programs, both for the employer and employee. Additionally, these programs seem fairly easy to implement. The company-monitoring processes utilized by Mercy Health Plan and Valley Health System can serve as a model for a more streamlined process through OCR. These models can be used in conjunction with the model utilized by the Joint Commission.

VI. Potential privacy concerns for employee wellness programs addressed under HIPAA

⁷² Id.

⁷³ Id.

⁷⁴ Id.

⁷⁵ Id. at 267

⁷⁶ Id.

⁷⁷ Id.

There are many potential privacy concerns for employee wellness programs addressed under HIPAA. One potential privacy concern under HIPAA may be the permitted disclosures of PHI by health providers or plans.⁷⁸

A. Treatment

First is the, “treatment, payment, or health care operations” (TPO) exception. “Treatment” generally means the coordination, provision, or management of health care.⁷⁹ “Treatment” also allows a provider to share private medical data in order to obtain consultations, second opinions, and referrals for a patient without requiring written authorization.⁸⁰ However, this provision does not provide a definitive “green light” for disclosure.⁸¹

B. Payment

The examples of common payment activities included in the privacy rule relate to payments for the services of the plan or the provider.⁸² “Payment” includes the wide range of activities undertaken to provide and receive reimbursement, collect premiums, and determine benefits and coverage.⁸³ In many cases, the plan’s definition of “payment” is “to obtain payment or to be reimbursed for their services and of a health plan to obtain premiums.”⁸⁴ The examples of payment discussed in the rule and guidance all relate to the disclosures necessary to obtain payments for plans and providers. These include determining coverage or eligibility; collection and billing; and reviewing health care services for medical necessity.⁸⁵ Payment is definitely involved in financial awards and premium adjustments considered by a number of wellness

⁷⁸ Jesson, *Weighing the Wellness Programs*, Id. at 271.

⁷⁹ Id. at 272.

⁸⁰ Jesson, *Weighing the Wellness Programs*, Id. at 272.

⁸¹ Id..

⁸² Id.

⁸³ Id.

⁸⁴ Id.

⁸⁵ Jesson, *Weighing the Wellness Program*, Id. at 271.

plans. However, that “payment” to the individual seems to be different than the “payment” described as the reason for permitted disclosure of medical information under HIPAA.⁸⁶ If PHI is being sought to verify an individual’s compliance with a wellness program, arguably the exchange of information could relate to payment.⁸⁷

C. Health Care Operations

“Operations” are financial, legal, administrative, and quality improvement activities required to run a business.⁸⁸ The following would be considered permitted disclosures under HIPAA. These activities which are limited to the activities listed in the definition of “health care operations”, include: 1) Conducting quality assessment and improvement activities, population-based activities relating to improving health or reducing health care costs, and case management and care coordination; 2) Reviewing the competence or qualifications of health care professionals, evaluating provider and health plan performance, training health care and non-health care professionals, accreditation, certification, licensing, or credentialing activities; 3) Underwriting and other activities relating to the creation, renewal, or replacement of a contract of health insurance or health benefits, and ceding, securing, or placing a contract for reinsurance of risk relating to health care claims; 4) Conducting or arranging for medical review, legal, and auditing services, including fraud and abuse detection and compliance programs; 5) Business planning and development, such as conducting cost-management and planning analyses related to managing and operating the entity; and business management and general administrative activities, including those related to implementing and complying with the Privacy Rule and other Administrative Simplification Rules, customer service, resolution of internal grievances,

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Id.

sale or transfer of assets, creating de-identified health information or a limited data set, and fundraising for the benefit of the covered entity. ⁸⁹

D. Authorization

Another potential privacy concern is how consent is measured. There are many different approaches to obtaining consent in employment and medical settings. These can provide a context for determining what form of consent is necessary for different wellness plans. ⁹⁰

Another potential privacy concern under HIPAA are the restrictions placed on the circumstances that a group health plan may allow an employer to sponsor access to PHI. This includes PHI without written authorization of the individual. ⁹¹ In many instances the employer as plan sponsor will be involved in administering specific aspects of the group health plan. This may include administering wellness program benefits offered through the plan. If this occurs, and the individual hasn't provided written consent to disclose the information, the group health plan may provide the employer as plan sponsor with access to the PHI necessary to perform its plan administration functions. However, this can only occur if the employer as plan sponsor amends the plan documents, and certifies to the group health plan that it agrees to the four components below (along with other things): ⁹² 1) Establish adequate separation between employers who perform plan administration functions and those who don't ⁹³; 2) Not to use or disclose PHI for employment-related actions or other purposes not permitted by the Privacy Rule ⁹⁴; 3) When electronic PHI is involved, they must implement reasonable and appropriate physical

⁸⁹ 45 CFR 164.501

⁹⁰ Jesson, *Weighing the Wellness Programs*, Id. at 288.

⁹¹ "DO THE HIPAA RULES APPLY TO WORKPLACE WELLNESS PROGRAMS?", <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveridentities/wellness/index.html>. (last visited November 1, 2015)

⁹² 45 CFR.314(b)

⁹³ 45 CFR.314(b)

⁹⁴ 45 CFR.314(b)

and technical safeguards to protect the information. These include ensuring that there are firewalls, or other security precautions to support the required separation between employment functions and plan administration ⁹⁵; 4) The group plan must be informed of any unauthorized use or disclosure, or any other security incident that they become aware of. ⁹⁶

Despite these potential privacy concerns, where a group health plan has knowledge of a breach of unsecured PHI (i.e. an unauthorized use of disclosure that compromises the security or privacy of PHI), the group health plan, as a covered entity under HIPAA, is required to notify the affected individuals. They are also required to notify Health and Human Services, and if necessary the media of the breach. ⁹⁷ This notification has to be done in accordance with the requirements of the Breach Notification Rule. ⁹⁸ Without written authorization by the employee, if the employer as plan sponsor does not perform plan administration functions on behalf of the group health plan, then access to PHI by the plan sponsor is much more restricted. ⁹⁹ “In these cases, the Privacy Rule generally would permit the group health plan to disclose to the plan sponsor only: (1) information on which individuals are participating in the group health plan or enrolled in the health insurance issuer or HMO offered by the plan; and/or (2) summary health information if requested for purposes of modifying the plan or obtaining premium bids for coverage under the plan.” ¹⁰⁰

If a program is regulated under HIPAA, the employees will have both their individual rights and most importantly the protections of the Security rule.

⁹⁵ 45 CFR.314(b)

⁹⁶ 45 CFR.314(b).

⁹⁷ 164.314(b)

⁹⁸ 164.314(b)

⁹⁹ 164.314(b)

¹⁰⁰ “DO THE HIPAA RULES APPLY TO WORKPLACE WELLNESS PROGRAMS?”

<http://www.hhs.gov/ocr/privacy/hipaa/understanding/coverentities/wellness/index.html>. (last visited November 1, 2015)

VII. Potential areas for improvement for employee health wellness programs under HIPAA, and solutions that will better serve both employer and employee

Despite the challenges that may exist in handling privacy of employees, there are multiple ways that an employer can alternatively administer employee health wellness programs to ensure that their employee's health information is protected.

A. Standardization of employee wellness programs and limiting public health incentive programs until a more successful model is developed in the private sector

One of the main ways that employee wellness programs can be improved is through standardization of the programs. In standardization of these programs there should be inclusion of a provision in the HIPAA rules that disallows penalizing individuals that do not participate in employee wellness programs.

HIPAA could create standardized plans either based upon size of company, or region of the country. If the programs were standardized in terms of size potential challenges could be ensuring that across all industries, various things were taken into consideration such as the employees age, race, ethnicity, religion, etc. For example, depending on the location of a company the age of their employees might vary significantly, or the ethnicity of the individuals. This could present potential challenges because the motivations of the employees may be different. These different factors may have some influence on the types of incentives that would be most successful for the employees.

The greatest benefit to having employee wellness programs standardized by size would be the monitoring process, and the ability for the companies to learn from one another. These companies would be able to compare both their challenges and successes. Additionally, the standardization of private programs could encourage participation from new companies. This might occur because the potential companies would see a successful model, which may lessen

their fears about implementing a new program. Standardization of wellness programs could also encourage more employees to become involved in their company's existing programs.

If programs were standardized by region, it could assist companies in learning if certain illnesses or health issues are predominant in their region. Companies could then create programs that better target their employees, for example programs focused on specific illnesses that affect a large percentage of the company's employees. In addition by creating a database that each company's plan administrator could easily access and input information; standardization and monitoring of the programs would be significantly easier. For example, if a company conducted an anonymous survey where employees listed high blood pressure as one of the chronic illnesses that they were facing, employers could input this information into the database. From there, the employer could create more targeted approaches that improved their employee's health, contained costs, and served as a model for other companies hoping to implement similar programs.

One of the components that should be included in the standardization process is a technique that is used for internal monitoring. If a company conducted their own internal monitoring, any existing problems could be quickly remedied. This internal monitoring could be implemented similarly to The Valley Health System and the Mercy Health Plan of Philadelphia employee wellness programs.¹⁰¹

Although there are broad standards for employee wellness programs, these standards provide the companies with great discretion. Language such as, "The Secretaries of Labor, Health and Human Services, and the Treasury may increase the reward available under this subparagraph to up to 50 percent of the cost of coverage if the Secretaries determine that such an

¹⁰¹ Rubenstein, *Ethics of Health Care Reform*, Id. at 110.

increase is appropriate,”¹⁰² indicates that if requested and approved that the employee wellness programs can provide substantially greater incentives to enrollees. This means that if an effective argument is made, and the increase is deemed appropriate, then plans will be able to provide their employees with even greater rewards. Greater rewards may come at a cost, because they could further encourage people to join the programs, because of a financial incentive. Although employees still have a “choice” with an incentive of 50% employees may feel coerced to participate in order to receive a reward of 50%.

Until a more successful model is developed in the private sector another potential change could be limiting public health plan incentive programs¹⁰³ Public health wellness programs that provide rewards like completion of a smoking cessation program or weight loss program (assuming these programs don’t rely on verification from a physician) should be implemented on a pilot basis.¹⁰⁴ These programs should be measured to determine whether they are effective tools in cutting costs and improving health.¹⁰⁵

Several of the proposed public plans go beyond these “easily quantifiable goals.”¹⁰⁶ West Virginia is a state that has a public health program.¹⁰⁷ Until it can be measured whether the incentives provided achieve health and cost containment goals these public health programs should not continue.¹⁰⁸ Disadvantaged populations, such as those in the public health programs should not be the test subjects of the effectiveness of these programs.¹⁰⁹ Children who are on Medicaid should not lose important benefits because their mothers do not (and sometimes

¹⁰² 42 U.S.C. § 300gg-4 (j)(3)(a)

¹⁰³ Id. at 298.

¹⁰⁴ Id.

¹⁰⁵ Lucinda Jesson, *Weighing the Wellness Programs*, Id. at 298.

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ Id.

cannot) arrive to all of their appointments on time.¹¹⁰ Additionally, it is difficult to determine whether involvement in these public health wellness programs is truly voluntary, when many times vulnerable populations have fewer economic choices.¹¹¹ For example, an individual that participates in the public health plan, lives in New York City, and solely commutes by public transportation may feel as if they have no choice if the wellness program provides a monthly metro card for participating in the program. With the cost of a monthly metro card being over \$100, the individual may see participation as necessary in order to cut their transportation costs.

It is also likely that it would be challenging to create a successful monitoring program for public health wellness programs. One of the main issues would be lack of financial resources. It is unlikely that additional public funds will be allotted to monitoring these programs, however without adequate monitoring it is difficult to assess effectiveness. However, it could be possible similar to private wellness programs that a overall assessment survey could be given to participants of the wellness program that come to the clinics. If these surveys are one-page, and can be quickly completed this is one way that the public health wellness programs could assess their overall effectiveness. Additionally, each survey could be numbered therefore protecting the anonymity of the individuals that complete the survey. This is one of the ways that portions of the public health wellness programs could be analyzed, and continue to improve overall effectiveness of the programs.

B. Employers adopting anonymous systems of data entry to protect confidentiality

¹¹⁰ Id.

¹¹¹ Id.

Other solutions include employers adopting anonymous system of data entry where employees' names are replaced with random numbers, and employers utilizing a third-party administrator in order to protect confidentiality.¹¹²

One way of protecting employee's privacy would be if an employer implemented an anonymous system of data entry where workforce statistics are compiled and analyzed as a whole, but employees' names are replaced with random numbers that are not attributed to a particular person.¹¹³ This could be beneficial because employees would not be specifically identified, and this would still allow the employer to ascertain the benefits of the program.

Alternatively, the employer could also chose to obtain the same benefit by utilizing a third-party administrator in order to protect confidentiality. The employer could also request that employees complete separate authorization forms with respect to their HIPAA privacy rights.¹¹⁴ For the employer, the advantages would be that if an employee should say that they are unaware of their HIPAA privacy rights, they would have a separate signed document that verifies that they were given their rights. For the employee, the benefit in using a 3rd party administrator would be limiting the information that is given to their employers. A disadvantage for the employer in utilizing a 3rd party administrator could potentially be the cost. As discussed in the previous section a potential disadvantage for the employee could be that another entity has access to their personal information. This other entity may not be held to the same privacy laws, thereby increasing the chances that other individuals could access the employee's health information. The difficulties exist in the ability to secure waivers that may differ depending on

¹¹² Rubenstein, *Ethics of Health Care Reform*, Id. at 109.

¹¹³ Rubenstein, *Ethics of Health Care Reform*, Id. at 110.

¹¹⁴ Id.

the state, and could have a different impact depending on the additional statutory or common law provisions.¹¹⁵

C. Monitoring compliance with individualized wellness plans while protecting doctor-patient relationship

Monitoring compliance with individualized wellness plans in a manner highly protective of the doctor-patient relationship is another potential change that could be made to the HIPAA regulations related to wellness plans.¹¹⁶ Currently, the HIPAA wellness plan regulations do not specifically address how health plans should monitor compliance with wellness plans.¹¹⁷

Without addressing how health plans should monitor compliance there is great room for mischief from health plans and may also influence risk adverse health plans from creating wellness programs.¹¹⁸

Unless it is voluntary, meaning that a patient is making an informed choice in exchange for a benefit doctors should not be the proctors for compliance of wellness programs.¹¹⁹ With honest exchanges between patients and doctors there would be fewer medical errors, better outcomes and less unnecessary tests.¹²⁰ If a wellness plan seeks physician verification of a health goal, there should be a reward for compliance. This should be done after receiving a time sensitive, voluntary written consent form from a patient that can be revoked at any time.¹²¹ If a patient knows that incentives are given to their doctor based upon their compliance to a particular program, it could limit the open and honest conversation that should occur between providers and patients. This loss of honesty may restrict the doctor from providing the best

¹¹⁵ Rubenstein, *Ethics of Health Care Reform*, Id. at 110.

¹¹⁶ Lucinda Jesson, *Weighing the Wellness Programs*, Id. at 296.

¹¹⁷ Id. at 296.

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ Id.

¹²¹ Id.

possible care to their patient, because the patient may not feel comfortable in disclosing all of the information to their provider. Additionally, the only information provided should be a “yes or no” answer regarding whether a health goal was met.¹²² This would allow more honesty between the provider and the patient, and help to ensure that health plans with wellness programs are adhering the HIPAA guidelines.

D. Current regulations

Currently, OCR enforces the Privacy and Security Rules in several ways:

1) by investigating complaints filed with it, 2) conducting compliance reviews to determine if covered entities are in compliance, and 3) performing education and outreach to foster compliance with the Rules' requirements.¹²³ By waiting until an employee files a complaint with OCR, or audits are performed it can potentially delay improvements that can impact the success of all wellness programs. Rather, if a model employee wellness program were created along with clear timeframes for monitoring outcomes there would likely be greater understanding of the HIPAA regulations, and overall improvements to the existing wellness programs. Additionally, by having a standardized model for employee wellness programs it would make it easier for a new company to implement a wellness program.

VIII. Conclusion

In conclusion, wellness programs provide many benefits both for the employee and the employer. Not only can they improve overall employee morale, and health outcomes but wellness programs can have significant financial gains for employers. However, without standardizing plans it leaves much discretion to the employer to determine what is most

¹²² Id.

¹²³ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <http://www.hhs.gov/ocr/privacy/hipaa/enforcement/process/index.html> (last visited November 25, 2015).

important to implement. Until private wellness program models are improved public health wellness programs should be limited. Additionally, HIPAA should include a regulation that states employers cannot penalize their employees for not participating. By including this regulation, it would limit the amount of “coercion” that an employee may feel to join their employee wellness programs. Providers also should not be the ones monitoring compliance with wellness programs. By providers monitoring their patient’s compliance, it can limit honesty between the provider and their patient. Overall, there are many positive aspects of the programs and with the continued improvement of regulations and implementation of new programs, employee wellness programs will continue to be a success both for the employers and the employees.