

**AN OUNCE OF PREVENTION: THE LEGAL AND BUSINESS CASE
FOR THE IMPLEMENTATION OF WORKPLACE WELLNESS PROGRAMS**

by

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ABSTRACT

The health of American and Canadian citizens is plummeting. Intrinsically tied to this decline has been inflation in the costs associated with poor health, both at the macro-governmental and the micro-employer levels. To curb these spiraling costs, Canadian and American governments and employers have fallen on traditional cost-reduction and benefit roll-backs to secure their economic bottom-lines.

This thesis combats that orthodoxy by proposing that the appropriate course for dealing with poor employee health is charted through an increase in spending on health programs in the workplace. Workplace wellness programs seek to modify unhealthy employee lifestyle decisions by broadening health education efforts and incentivizing healthier changes. Given the reach of the workplace, it is ideally situated as a tool for reformation of employee health habits.

While workplace wellness programs have been shown to substantially increase employee productivity and corporate profitability, there remains a general reluctance on the part of employers to integrate wellness promotion into the workplace. This hesitancy arises, in part, from an educational gap about how to legally and successfully integrate employee wellness messaging. Indeed, employers lack information on a number of key fronts, which has led to concerns about such programs. These areas of incomplete knowledge include: (1) the business costs associated with deteriorating employee health; (2) the emergent statistical research indicating that workplace wellness programs can result in significant returns on investment; (3) how to reduce exposure to legal liability when addressing personal decisions of employees; and (4) what are the necessary wellness program components, and what are the best ways to implement those components successfully. It is the purpose of this thesis to educate employers

on these areas and alleviate the tension arising from corporate involvement in employee decision-making so that the development of workplace wellness programs will increase.

Given the current state of public health in Canada and the United States, employers must recognize and understand their ability to positively influence the health of their employees. While this thesis cannot be the only catalyst in this emerging paradigm shift, it serves as a marking point towards that goal.

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LIST OF ABBREVIATIONS

ACLU	American Civil Liberties Union
ADA	<i>Americans with Disabilities Act of 1990</i> , Pub.L. 101-336, 104 Stat. 327, as amended by 42 U.S.C. §§ 12101-12213 (2000).
ADEA	<i>Age Discrimination in Employment Act of 1967</i> , Pub.L. 90-202, 81 Stat. 602, as amended by 29 U.S.C. §621-634 (2000).
BC	British Columbia
Buck Survey	2009 wellness survey conducted by Buck Consultants, LLC
Buffet Survey	2011 Buffett National Wellness Survey
Charter	<i>Canadian Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act</i> , 1982 being Schedule B to the <i>Canada Act 1982</i> (U.K.), 1982, c. 11.
CFTC	Children’s Fitness Tax Credit
CHRA	<i>Canadian Human Rights Act</i> , R.S.C., 1985, c. H-6.
Code	<i>Criminal Code</i> , R.S.C., 1985, c. C-46
EEA	<i>Employment Equity Act</i> , S.C. 1995, c. 44.
ERISA	<i>Employee Retirement Income Security Act of 1974</i> , Pub.L. 93-406, 88 Stat. 829, as amended by 5 U.S.C., 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.
FIC	Fitness Industry of Canada
GDP	Gross Domestic Product
GINA	<i>Genetic Information Nondiscrimination Act of 2008</i> , Pub.L. 110-233, 122 Stat. 881 (2008).
HIPAA	<i>Health Insurance Portability and Accountability Act of 1996</i> , Pub.L. 104-191, 110 Stat. 1938 (1996).
SCC	Supreme Court of Canada
Scotts	The Scotts Company, LLC

US	United States of America
Wal-Mart	Wal-Mart Stores, Inc.
WELCOA	Wellness Council of America
WHO	World Health Organization
WWP	Workplace Wellness Program

GLOSSARY

Health: Health is most appropriately defined as the “state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”.¹

Health Behaviour: Denotes a behaviour or action which encourages or promotes an individual’s physical, mental or social health.

Health Education: Health education consists of deepening knowledge surrounding health and wellness issues including, among other things, nutritional literacy, role of physical activity, and physiological impact of poor health.

Health Promotion: Refers to the process of encouraging individuals and communities to adopt healthier and more sustainable decisions. Health promotion is the responsibility of a variety of social organs, including government, business, and the individual. The aspirations of health promotion are to empower individuals to make health-conscious decisions which have downstream benefits for the individual and his or her community.

Health Outcomes: Relates to positive perceived or actual changes in individuals’ or communities’ health status. Health outcomes often engaged subsequent to the specific coordination of a policy designed to promote or alter health patterns.

¹ Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19 June - 22 July 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100).

Lifestyle: Refers to aspects of an individuals' repeated behaviour or conduct as it relates to personal decision-making.

Lifestyle Discrimination: The practice of regulating employee conduct with respect to their use or engagement in legal activities outside of the workplace.

Needs Assessment: A review of the weakness or deficiencies in a company's overall health and wellness picture impression. Needs assessment are often conducted to review areas corporate health and wellness that require improvement. Relying on the results of a needs assessment, companies can tailor specific health and wellness promotion program to address specified concerns.

Risk Behaviour: Any Behaviour which positions the employee as a greater risk for manifesting preventable illnesses. Typical risk behaviours include use of tobacco products, alcoholism, obesity, or high levels of physical inactivity.

Wellness: Refers to the optimal physical, mental, emotional, and social health of an individual or community.²

Wellness Committees: Wellness committees establish the underlying corporate health objectives for the WWP, and design its strategic components. Wellness committees should represent of a number of workplace actors including representatives from the union, human

² Smith, B., Tang, K., & Nutbeam, D. *WHO Health Promotion Glossary: new terms*. (Oxford University Press, 2006) at 5.

resources department, information technology department, senior management, employee representatives nominated by the workers; and communications team.

Workplace Wellness Programs: Given the diverse nature of wellness, there is no universally accepted definition of a workplace wellness program. Workplace wellness programs are ways in which the workplace looks to improve and protect employee health. It involves a considered approach to health by both management and the employees, and operates on the belief that both actors are responsible for promoting and reflecting health ideals.

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And finally, to those reading this thesis, know that in all things the grass is greenest under your own two feet. Live well.

An ounce of prevention is worth a pound of cure.
Henry de Bracton, *De Legibus*, 1240

CHAPTER 1. Introduction

1.1 Contextual Foundation

In October 2011 Wal-Mart Stores, Inc. (“Wal-Mart”) substantially curtailed the scope of its employee healthcare benefit coverage. The company’s revised benefit policy instated significant reductions in reimbursable healthcare expenses per employee, as well as increased healthcare premiums for employees that use tobacco products.³ This shift marked a radical departure from the employee benefit coverage historically offered by Wal-Mart.⁴ The cutbacks manifested, in part, from the company’s recognition that healthcare costs were too great a burden on its economic bottom line. Indeed, in defending the seismic cuts, Wal-Mart spokesperson Greg Rossiter stated, “[t]he current healthcare system is unsustainable for everyone and like other businesses we’ve had to make choices we wish we didn’t have to make... [o]ur country needs to find a way to reduce the cost of healthcare, particularly in this economy.”⁵

Wal-Mart’s roll-back of health benefit coverage proceeds on the assumption that the most appropriate solution for addressing rising healthcare costs is to decrease business-covered health expenses. While such cuts may lead to short-term economic stabilization, the policy merely transitions the costs of poor health to employees and fails to address the underlying cause. Importantly, Rossiter’s comments and Wal-Mart’s policy change, evidence two familiar and interconnected themes: first, that the spiralling costs of poor individual health must be controlled, and second, that businesses are neither interested, nor view themselves as responsible or capable for engineering solutions to the healthcare crisis.

³ Wohl, J. “Wal-Mart Trims some U.S. health coverage” *Reuters* (12 October 2011), online: Reuters <<http://www.reuters.com/article/2011/10/21/us-walmart-idUSTRE79K43Z20111021>> [December 11, 2011].

⁴ *Ibid.*

⁵ *Ibid.*

At the core of this thesis is the premise that the workplace can be a lever for social and attitudinal change in employees (particularly in the sphere of health and wellness), and that businesses can no longer ignore their role in promoting healthy and sustainable lifestyle decisions. Reinforcing healthy behaviours⁶ in employees will curb rising healthcare costs on a macro-level and also result in productivity gains and profit increases at the individual business level. Indeed, emerging empirical evidence indicates that a healthier workforce is significantly more productive and profitable, thus supporting the “business case” for corporate wellness initiatives.

Progressive workplaces in Canada and the United States (“US”) have already begun the process of integrating health goals into their corporate structure through workplace wellness programs (“WWP”s).⁷ The picture drawn from these attempts is that WWPs can be tremendously successful in altering employee behaviour to be healthier and more sustainable.

Despite the statistical support, to date, there has been no consistent focused strategy for administering Canadian and American health promotion programs in the workplace. Policies that have been implemented appear largely *ad hoc*, and in many cases are ineffectual. Companies choosing to adopt WWPs also struggle with determining whether to deploy voluntary programs supported by incentivization, or mandatory programs compelling employee participation.

⁶ An action or behavior which encourages or promotes an individual’s physical, mental or social health.

⁷ Workplace wellness programs refer to employer-instituted programs which seek to modify or improve employees’ health. The programs involve a considered approach to health by both management and the employees and operate on the belief that both actors are responsible for promoting and reflecting health ideals.

1.2 Purpose

This thesis considers two core employer concerns regarding WWP: firstly, what is an employer's legal exposure when instituting a WWP, and secondly, how can such programs be successfully integrated into the existing workplace to enhance the employer's productivity. Once these answers are revealed, it is hoped that the corporate aversion to developing full and expansive WWP will be dispelled. Ultimately, it is possible to achieve two major public policy goals through WWP: a more competitive economy and a healthier population.

1.3 Foundational Research Questions

What is sought is a deeper understanding of whether WWP can stem spiralling healthcare costs in Canada and the US while also improving workplace productivity. To properly consider this context, it is necessary to answer the following questions:

1. What is the current health climate of the Canadian and American workforces?
2. Can WWP effect positive change on the current health diagnosis? If yes, to what degree have existing programs been successful at shaping employee health behaviours?
3. Have WWP resulted in economic gains for the employer? If yes, what is the typical return on investment for such programs?
4. What are the logistical impediments to instituting WWP? How can these impediments be managed or circumscribed?
5. How can WWP be implemented in a manner consistent with relevant statutory and regulatory frameworks?
6. How should employers implement WWP? What are the commonalities among successful programs?

7. What policy instruments are available to governments to incentivize the adoption of WWP's by employers?

1.4 Methodology

Principally, this thesis' discussion of WWP value exists within a comparative analysis between the US and Canada. The comparative methodology offers a unique perspective into the similar healthcare crises faced by both nations and how employer-based wellness programs have emerged as a potential solution. While both countries have followed similar trajectories in developing WWPs, there have been nuanced differences among the program options, arising, in part, from the divergence of the two legal regimes.

A comparative analysis is also utilized to evaluate the relative benefits and liabilities presented by voluntary and compulsory WWPs. This analysis concludes by finding that to successfully change individual behaviours, non-mandatory programs are the preferred approach.

This thesis further relies on a legal research methodology to illuminate the boundaries within which an employer may properly regulate or influence their employees' behaviour. Significant attention is paid to Canadian and American laws that may be engaged by the development of WWPs. Particularly relevant to this analysis are anti-discrimination and privacy protection statutes in both countries. A fully informed understanding of Canadian and American legal regimes provides clarification on the liability exposure of employers who institute WWPs.

Finally, this thesis uses a general research methodology to explore rising healthcare costs and the economic benefits of implementing comprehensive WWPs. Relevance is placed on a number of academic and industry surveys which chronicle the economic indicators relating to

employer-led health promotion. Other secondary sources, such as journal and newspaper articles, have also been used in support of the above-noted themes.

1.5 Analytical Framework

Chapter 2 provides a comparative analysis of the population health patterns in Canada and the US, and further considers the economic strain imposed by an unhealthy workforce.

Chapters 3 and 4 present the argument that the workplace is the ideal environment through which to reduce the healthcare costs burden extant in both countries. Chapter 4 also considers the economic benefits associated with WWPs, and maintains that such programs result in a significant return on investment for employers.

Chapters 5 and 6 elucidate the Canadian and American laws relevant to WWPs. The chapters further consider parameters on when and how far an employer can delve into the personal lives and lifestyle choices of his or her employees. The illumination of such legal boundaries should serve to alleviate many employer concerns about adopting WWPs.

Chapter 7 will then undertake a comparative analysis of mandatory and voluntary WWPs with a view to determining which delivery method affords a better foundation to reinforce health and wellness change. An examination of the benefits and liabilities associated with each scheme reveals that workplaces should implement WWPs on a non-mandatory basis.

Chapter 8 resolves the substantive portion of this thesis by examining how businesses should engineer and implement WWPs to maximize program success.

Chapter 9 considers governmental policy instruments which can be used to incentivize the development of WWPs.

This thesis concludes by suggesting that major facets of American and Canadian society, including government, business, and individuals, can derive substantial benefits from maintaining healthier workplaces. To this end, WWPs should be adopted to facilitate change in employee health behaviours.

1.6 Future Prognosis

In both Canada and the US the current fiscal burdens imposed by unhealthy behaviours are not sustainable. As the workforce experiences further declines in its overall health, businesses face steady decreases in worker productivity and profitability. The solution to these recessions lay in a progressive reformation of the employer's role in promoting health values to its employees. The integration of health messaging and education within the workforce should be viewed as an important instrument in bringing about a health revival to stem the high costs of poor health.

To facilitate the adoption of WWPs, employers must be confident that these programs will be successful and that they do not entail substantial litigation risks. Provided employers have access to accurate information in these areas, the natural hesitancy to wade into the otherwise personal lifestyle decisions of employees may be more easily overcome. Where this employer hesitancy remains, governments should step in to provide appropriate incentives for the creation of WWPs.

CHAPTER 2. **Analysis of the Healthcare Costs Burden in the US and Canada**

The following chapter will outline the current state of citizen health in the US and Canada. As will become clear, both countries face a daunting challenge in addressing the costs consequences of poor worker health. While individuals face the personalized consequences of unhealthy lifestyle decisions, the costs of such choices are also disbursed among a variety of actors including, but not limited to, government, community networks, and the business complex.

2.1 Health Patterns in American Adults

The American health and fitness impression is a bleak one. Major indicators of health in a population, as measured by the World Health Organization (“WHO”), show that Americans are one of the least healthy industrial nations; this is in spite of spending approximately 16.2% of the country’s Gross Domestic Product (“GDP”) on healthcare.⁸ The swell of obese and overweight individuals has been so drastic that the WHO has now defined it as an “epidemic.”⁹

A study of Americans aged 20 and over conducted by the National Center for Health Statistics revealed that,

- 34.2% are considered overweight (with a body mass index is between 25 and 29);

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⁸ Centers for Medicare and Medicaid Services. *National Health Expenditure Predictions: 2009-2019* (2010), online: <http://www.cms.gov/NationalHealthExpendData/downloads/NHEProjections2009to2019.pdf> at 3.

⁹ World Health Organization. *Controlling the global obesity epidemic* (undated), online: World Health Organization <<http://www.who.int/nutrition/topics/obesity/en/>> [February 4, 2012].

¹⁰ Ogden, C.L. & Carroll, M.D. *Prevalence of Overweight, Obesity, and Extreme Obesity Among Adults: United States, Trends 1960–1962 Through 2007–2008* (June 2010), online: Centers for Disease Control and Prevention <http://www.cdc.gov/nchs/data/hestat/obesity_adult_07_08/obesity_adult_07_08.pdf> at 1.

- 33.8% are considered obese (with a body mass index is between 30 and 40);¹¹ and
- 5.7% are considered extremely obese (with a body mass index over 40).¹²

Individually, the health consequences of being overweight or obese are far-reaching, as poor fitness can lead directly to a host of secondary conditions or exacerbate existing disorders. Being overweight increases an individual's susceptibility to type-2 diabetes, cardiovascular and heart disease, hypertension and stroke, and cancer.¹³ Indeed, the US has one of the highest rates of death by heart disease – as of 2009 there were 195 deaths linked to heart disease for every 100,000 individuals.¹⁴

Generally, employees evidencing high-risk factors significantly inflate the medical care costs of their employers.¹⁵ On average, high-risk employees cost employers \$3,321 more per year in healthcare costs relative to the average employee.¹⁶ Further, employees that are high-risk have decreased productivity; on average, they are 12.2% less productive than their lower-risk counterparts.¹⁷

Arguably, one of the principal factors for Americans' weight issues is the lack of physical activity during non-work hours. According to a survey by the US Centers for Disease Control

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Kochanek, K. *et al.* "Deaths: Preliminary Data for 2009" (16 March 2011), 59(4) *Vital Health Stat.*, online: Centers for Disease Control and Prevention <http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_04.pdf> at 5.

¹⁵ See Appendix E of this thesis for a chart evidencing the impact of high-risk employees on employer-based medical coverage as at 1998.

¹⁶ Edington, D. "Emerging Research: A View from One Research Center" (May/June 2001), 15(5) *Am. J. Health Promot.* pp. 341-349 at 344.

¹⁷ Burton, W. "The Association of Health Risks with On-the-Job Productivity" (August 2005), 47 *J. Occup. Environ. Med.* pp. 769-777.

and Prevention, 36% of American adults were considered inactive during their leisure time.¹⁸ Further, 59% of American adults stated they did not engage in vigorous physical activity lasting at least 10 minutes per week during their leisure-time.¹⁹ This sedentary lifestyle is significant as a study by Colditz estimates that physical inactivity costs the US \$24.3 billion per year.²⁰

2.2 Health Patterns in Canadian Adults

Statistical analysis indicates that the health picture of the average Canadian citizen is also troubling. One of the most concerning features for Canadians is an increased exposure to a variety of preventable conditions resulting from excess body weight. In 2010, approximately 52.3% of adult Canadians self-reported that they maintained a body mass index considered as either overweight or obese.²¹ Put differently, 18,183,054 Canadians have an unhealthy body mass index.²²

A principal cause of Canadians' unhealthy weight is increasingly sedentary lifestyles. In 2007, Statistics Canada commissioned a report of leisure time activities and found that:

- 29% of Canadians reported spending 15 or more hours watching television per week (approximately 2 hours per day);²³ and

¹⁸ Pleis, J., Lucas, J. & Ward, B. "Summary Health Statistics for U.S. Adults: National Health Interview Survey" (Dec. 2009), 10(242) *Vital Health Stat.*, online: Centers for Disease Control and Prevention <http://www.cdc.gov/nchs/data/series/sr_10/sr10_242.pdf> at 11.

¹⁹ *Ibid.*

²⁰ Colditz G.A. "Economic costs of obesity and inactivity" (Nov. 1999), 31 *Med. Sci. Sports Exerc.*, Suppl. 11, pp. S663-S667.

²¹ Statistics Canada. *Body mass index, overweight or obese, self-reported, adult, by age group and sex* (June 2011), online: Statistics Canada <<http://www40.statcan.ca/101/cst01/health81b-eng.htm>> [September 2, 2011].

²² Calculation generated using Canada's population of 34,766,835 as at 2:40pm on April 13, 2012. *Statistics Canada*, online: Statistics Canada <<http://www.statcan.gc.ca/ig-gi/pop-ca-eng.htm>> [April 13, 2012].

²³ Shields, M. & Tremblay, M. *Screen Time Among Canadian Adults: A Profile* (2008), online: Statistics Canada <<http://www.statcan.gc.ca/pub/82-003-x/2008002/article/10600-eng.pdf>> at 32.

- 19% of Canadians reported spending 21 or more hours watching television per week (approximately 3 hours per day).²⁴

These findings were further supported by a 2011 General Social Survey conducted by Statistics Canada. The results of the study found that the average Canadian now spends 2 hours and 52 minutes per day watching television.²⁵

While viewing 2 to 3 hours of television per day may not definitely indicate a sedentary lifestyle, these statistics are compounded by Canadians' computer usage during leisure time. Approximately, 14.8% of Canadian citizens were "frequent leisure-time computer users," meaning they allocate 11 or more hours per week of their leisure-time to computer usage.²⁶ The 2011 General Social Survey also found that the average Canadian spends 1 hour and 23 minutes per day of their leisure-time using a computer²⁷, and a further 2 hours and 20 minutes using video game systems.²⁸ Nearly half of the Canadian population self-reported a lack of physical exercise during their non-working time.²⁹

Physical inactivity is one of the principal causes of the deteriorating health of Canadians and the consequential increase in healthcare related costs. In British Columbia alone, physical inactivity has been found to be a causative factor in:

- 15% of heart disease;

²⁴ *Ibid.* at 31.

²⁵ Béchar, M. *General Social Survey – 2010: Overview of the Time Use of Canadians* (July 2011), online: Statistics Canada <<http://www.statcan.gc.ca/pub/89-647-x/89-647-x2011001-eng.pdf>> at 9.

²⁶ See Shields and Tremblay, *Screen Time*, *supra* note 23 at 35.

²⁷ See Béchar, *supra* note 25 at 9.

²⁸ *Ibid.*

²⁹ There is a clear correlation between leisure-time spend in non-active states and overall physical health. 27% of "sedentary men" were categorized as obese in contrast to the 19.6% of men who viewed themselves as active and were obese. See Tjepkema, M. *Adult obesity in Canada: Measured height and weight* (2005), online: Statistics Canada <<http://www.statcan.gc.ca/pub/82-620-m/2005001/pdf/4224906-eng.pdf>> at 4.

- 19% of stroke;
- 10% of hypertension;
- 14% of colon cancer;
- 11% of breast cancer;
- 16% of type-two diabetes; and
- 18% of osteoporosis cases.³⁰

Strikingly, it has been estimated that physical inactivity costs the national healthcare system over \$9.14 billion annually.³¹ Further, a 2004 study conducted by Katzmarzyk and Janssen found that the total direct and indirect cost of Canadian adult obesity was approximately \$5.3 billion.³²

From an employer perspective the costs of an unhealthy workforce are unsettling. On average, obese employees are absent from work 13 times more than their non-obese counterparts.³³ Obese employees also claim for medical costs seven times higher than non-obese employees.³⁴ In respect of smoking, the cost of employing a cigarette smoker is, on average, \$3,396 more per year than employing a non-smoker³⁵ (this is of concern given that, as of 2010,

³⁰ Patra, J., Popova, S., Rehm, J., Bondy, S., Flint, R., & Giesbrecht, N. *Economic Cost of Chronic Disease in Canada 1995-2003* (Mar. 2007), online: Ontario Chronic Disease Prevention Alliance <http://www.ocdpa.on.ca/docs/OCDPA_EconomicCosts.pdf> at 15.

³¹ *Ibid.* Premature deaths costs an additional \$23 million.

³² Starky, S. *The Obesity Epidemic in Canada* (2005), online: Library of Parliament <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0511-e.htm>> [September 2, 2011]; Katzmarzyk, P.T. and Janssen, I. "The Economic Costs Associated With Physical Inactivity and Obesity in Canada: An Update" (Feb. 2004), 29(1) *Can. J. Appl. Physiol.* pp. 90-115 at 104.

³³ *Ibid.*

³⁴ Sun Life Financial. *Profits of Wellness: Turning the high cost of poor health habits into healthy returns* (May 2011), online: Sun Life Assurance Company of Canada <<http://www.sunlife.ca/static/canada/Sponsor/Bright%20papers/CHI%20BrightPaper%20E.pdf>> at 5.

³⁵ *Ibid.* The higher costs arise from increased absenteeism, decreased productivity, and the costs of smoking facilities.

approximately 20.8% of Canadians over the age of 12 years old self-reported that they were smokers).³⁶

Unfortunately, few attempts have been made to nationally value the costs of an unhealthy workforce. According to the research which has been undertaken, Canadian employees miss an average of 8.5 days of work due to illness³⁷ and Canadian businesses can expect to lose \$33 billion due to lost productivity arising from worker absenteeism.³⁸

2.3 Healthcare Expenditures in the US and Canada

In 2008, the US spent approximately 16.2% of its GDP on healthcare.³⁹ In real cash terms this percentage equates to nearly \$2.4 trillion.⁴⁰ Economic forecasts conducted by the Centers for Medicare and Medicaid Services estimate that by 2019 the total governmental expenditure on healthcare services will approximate \$4.482 trillion.⁴¹

Given that Canada has a markedly smaller population relative to the US it is unsurprising that the economic costs for healthcare are significantly lower. In 2005, Canadian spending on health care was 9.7% of the country's GDP (the typical percentage for an Organization for Economic Co-operation and Development country was 8%).⁴² As a reflection of total government spending for all social services, healthcare costs accounted for 17.5% of such

³⁶ Statistics Canada. *Smokers, by age group and sex* (June 2011), online: Statistics Canada <<http://www40.statcan.ca/101/cst01/health73b-eng.htm>> [September 2, 2011].

³⁷ Blotnick, K.A. *Should there be caution tape around the office door?* (2006), online: Sobey School of Business <http://www.smu.ca/academic/sobey/workplace/archives/WPR5_art.pdf> at 8.

³⁸ *Ibid.* Outside of these figures, little information is available to quantify the effect of unhealthy workers for employers.

³⁹ Centers for Medicare and Medicaid, *National Health*, *supra* note 8 at 3.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² World Health Organization. *World Health Statistics: Health systems resources* (2008), online: World Health Organization <<http://www.who.int/entity/whosis/whostat/4.xls>> [February 4, 2012].

spending. In real dollar terms, public spending on healthcare in 2007 was approximately \$160 billion,⁴³ up over 4% from 2006.⁴⁴

It is clear that illness and/or injury treatment comprise a sizeable portion of American and Canadian government healthcare expenditures, but this immense spending has not curtailed the deteriorating citizen health in both countries.

⁴³ Canadian Institute for Health Information. *Health Care in Canada* (2008), online: Canadian Medical Health Association <http://www.cmha.ca/data/1/rec_docs/1985_HCIC_2008_e.pdf> at 71.

⁴⁴ *Ibid.*

CHAPTER 3. Health and Wellness Promotion in the Workplace

3.1 What is a WWP?

By and large employers have been slow to understand their role as a catalyst for health and wellness change. However, some innovative employers have attempted to confront the economic pressures associated with poor health by constructing a series of workplace programs that facilitate employees living a healthier and more sustainable life.

WWPs are, in their broadest sense, an attempt to recognize individual health matters within the business environment. More narrowly, wellness programs are a direct attempt to provide employees the tools required to make healthier lifestyle decisions and mould individual perceptions regarding a variety of health concerns. WWPs are unique in that, under such regimes, management seeks to modify or reinforce attitudinal behaviours of their workers. Employer oversight is expanded as they become involved in employees' individual choices or preferences.

WWPs are fluid in their design and implementation which makes generalized analysis difficult. However, WWPs have traditionally focused on the following common objectives:

- smoking cessation;
- dietary and nutritional education;
- occupational health and safety education;
- employee fitness and exercise; and
- addiction counselling.

While the individualized program goals may vary, there is an even greater disparity in the ways in which these goals are pursued. The transmittal of health and wellness messaging can be

facilitated through a host of differing delivery options ranging from coercive strategies compelling employee participation to voluntary schemes reliant on the earnest participation of workers and unions (where present). Each delivery model evidences its own set of benefits and deficiencies, which must be considered by employers prior to advancing in the health promotion field.

Despite the variance in program delivery, each WWP seeks to assist and support employees in making healthier choices which, in turn, results in numerous direct benefits to both the employer and the employee. Some of these positive benefits include:

Table 3.1: Benefits of Workforce Health Promotion

To the Organization	To the Employee
• a well-managed health and safety program	• a safe and healthy work environment
• a positive and caring image	• enhanced self-esteem
• improved staff morale	• reduced stress
• reduced staff turnover	• improved morale
• reduced absenteeism	• increased job satisfaction
• increased productivity	• increased skills for health protection
• reduced health care/insurance costs	• improved health
• reduced risk of fines and litigation	• improved sense of well-being

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Employers should also recognize the positive economic gains resulting from decreased medical absenteeism. Absenteeism results not only from illness, but also encompasses time taken off to attend physicians, undergo medical tests, and care for ill family members; all of which decreases corporate productivity. Additionally, unhealthy employees are more prone to

⁴⁵ World Health Organization. *Workplace Health Promotion* (undated), online: World Health Organization <http://www.who.int/occupational_health/topics/workplace/en/index1.html> [February 4, 2012].

presenteeism, which sees employees attending the worksite, but performing their duties in unproductive ways. Importantly, the costs of presenteeism often dwarf the economic costs of straight absenteeism.⁴⁶

It remains in the employer's best interest to seek out programs which maximize productivity and profit recovery. The ultimate goal for WWP's is to alter an employee's (and their family's) health trajectory from one which is sedentary, high-risk, and costly, to one that is health-educated, lower-risk, and sustainable. While employees reap the personal and physical benefits of greater health, employers will gain equally from worker productivity increases and lower absenteeism.⁴⁷

3.2 Why use the Workplace as a Health Promoting Mechanism

For both employers and employees the workplace offers an ideal location on which to broach the topic of health. For employers, the incentive in maintaining healthier workplaces is that it translates into greater productivity and overall profitability.⁴⁸ Employees benefit from being healthier through, among other things, reduced insurance premiums and lower healthcare costs as they age.⁴⁹ Given that both parties are aligned in their interest in maintaining health, employers and employees should work together to bring health promotion into the workplace.

⁴⁶ Goetzel R.Z., *et al.* "Health, absence, disability, and presenteeism cost estimates of certain physical and mental health conditions affecting U.S. employers" (Apr. 2004), 46(4) *J. Occup. Environ. Med.* pp. 398-412 at 410.

⁴⁷ This 2010 survey conducted by Towers Watson found that workplaces which instituted comprehensive WWP's reduced employee absenteeism by an average of 1.8 days. See Towers Watson. *The Health and Productivity Advantage* (2010), online: Towers Watson <http://www.towerswatson.com/assets/pdf/648/TW_NA_2010_16703_SatW.pdf> at 2.

⁴⁸ Healey, B.J. & Zimmerman, Jr., R.S. *The New World of Health Promotion: New Program Development, Implementation, and Evaluation*. (Maine: Jones and Bartlett Publishers, 2010) at 148.

⁴⁹ *Ibid.*

Few environments can offer as direct access to as wide an audience as the workplace. Depending on the size of the company, the workplace as a delivery vehicle for wellness messaging allows dissemination to hundreds, thousands, or tens of thousands of individuals. Additionally, the workplace maintains the added benefit of being able to lever off of existing programs or services provided by the company. Employers are able to integrate workplace wellness with other core initiatives, such as occupational health and safety, disability systems, or other assistance programs. These linkages to existing programs serve to enhance the legitimacy of the wellness schemes in the eyes of workers.

The workplace should be considered a proper medium in which to shape employee behaviours. For the average person the workforce is one of the centralizing forces in their lives. Workers can expect to spend the bulk of their waking hours at work and, as such, it offers the ideal location to revolutionize individual lifestyle choices. According to the US Bureau of Labor Statistics, in 2009 the average American worker spent approximately 7.44 hours of their day at the workplace⁵⁰; this figures increases to 7.78 hours per day when “work-related activities” is also considered.⁵¹ Similarly, in 2010 the average Canadian spent 8.04 hours per day at work.⁵² When coupled with “activities related to paid work” the figure increases to 8.12 hours per day.⁵³

It is not just the time spent at the workplace which positions it to be a health promoting mechanism. The workplace is unique in its ability to generate a critical mass audience. Indeed, the vast majority of citizens attend a workplace and engage in its contextual and individualized community, and many view their workplace as an essential component to their own identity.

⁵⁰ Bureau of Labor Statistics. *American Time Use Survey – 2009 Results* (2011), online: Bureau of Labor Statistics <<http://www.bls.gov/news.release/pdf/atus.pdf>> at Table 5.

⁵¹ *Ibid.* Among the American population this allocation of time is second only to sleep.

⁵² Béchard, *supra*, note 25 at 10.

⁵³ *Ibid.*

Therefore, not only does the workplace allow access to a widespread and diverse audience, but by virtue of its societal importance, it enhances the weight of its message. The workplace has become the nucleus for the organization of individuals' lives and is the ideal site on which to seek innovation and modification in employee health and wellness habits.

CHAPTER 4. Corporate Awareness of WWP

4.1 Employers' Opinions on WWP

In Canada, a number of national surveys have considered the issue of employer acceptance of WWP. One of the most comprehensive Canadian studies is the 2011 Buffett National Wellness Survey (the “Buffett Survey”) conducted by the Sun Life Wellness Institute.⁵⁴ The survey canvassed 677 Canadian employers with workforces ranging from 100 to 2,500 employees.⁵⁵ The results of the survey are telling, and give a proper snapshot of employer experiences with WWP, and the remaining barriers to the proliferation of health promotion strategies in the workplace.

Of the employers polled in the Buffett Survey, 72% stated that they offer wellness initiatives to their employees.⁵⁶ While this is an encouraging percentage, the figure is contrasted by the fact that only 26% of employers polled viewed themselves as taking a strategic approach to wellness.⁵⁷ Accordingly, while certain incentives may be provided by the employer, they are not done within a larger wellness framework.⁵⁸

A further message arising from the Buffett Survey is that maintaining wellness in the workplace is an important employer goal. 60% of employers polled indicated that they had

⁵⁴ Sun Life Wellness Institute. *2011 Buffett National Wellness Survey* (2011), online: Sun Life Assurance Company of Canada
<<http://www.sunlife.ca/static/canada/Sponsor/About%20Group%20Benefits/Group%20benefits%20products%20and%20services/Sun%20Life%20Wellness%20Institute/Articles%20and%20Insights/BNWS%202011%20ENG.pdf>>
at 4.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* at 6.

⁵⁷ *Ibid.* at 6.

⁵⁸ Examples of how programs fail without a larger corporate vision will be discussed in Chapter 9.

received positive feedback from employees who had participated in the wellness programs.⁵⁹ Additionally, a staggering 97% of employers polled answered positively to the question “[d]o you feel that the health of your employees influences overall corporate performance?”⁶⁰ It is clear, that employers are conscious of the need to maintain, to some degree, a WWP.

Despite employers’ tacit acceptance of the value of workplace wellness, many remain reluctant to fully develop health promotion programs. The hesitancy arises, in part, from a number of perceived obstacles. According to the Buffett Survey, employers encountered, among others, the following barriers to the implementation of WWPs:

- lack of budget resources;
- lack of staffing;
- lack of ability to quantify results;
- insufficient participation;
- concerns about making wellness available to all employees; and
- lack of senior level support.⁶¹

These perceived obstacles help reconcile the disconnect in the fact that 97% of employers view health as fundamental to business performance, though only 26% of those employers have developed a strategic plan to support health and wellness in the workplace. Critical to the

⁵⁹ Sun Life, *Buffett*, *supra* note 54 at 7.

⁶⁰ *Ibid.* at 33.

⁶¹ *Ibid.* at 30. These factors were taken from the Sun Life Wellness Institute annual wellness survey of Canadian employers. The survey polled 677 Canadian employers on their current understanding of health and wellness issues. The survey results revealed that the largest obstacles to workplace wellness initiatives, broken down by percentage were: lack of budget resources (51%), lack of staffing (36%), lack of ability to quantify results (36%), insufficient participation (34%), concern about making wellness equally available to all employees (31%), concerns over implementation costs (29%), lack of senior level support (19%), unconvinced of cost savings (16%), little knowledge of wellness (12%); experienced no barriers (10%), and lack of union support (5%).

emergence and expansion of WWP is combating these perceived roadblocks to program development.

The results of the Buffett Survey mirror findings of an earlier survey conducted by Buck Consultants, LLC in 2009 (the “Buck Survey”).⁶² As part of a global survey of companies, the Buck Survey canvassed 57 Canadian employers with workforces ranging from less than 1,000 to over 50,000 employees.⁶³ The companies were surveyed on their progress (or lack thereof) in integrating health and wellness initiatives into their workplace.⁶⁴

The Buck Survey revealed both encouraging and discouraging trends. On the one hand, of the Canadian corporations surveyed, all but 2% had plans to develop and implement a workplace health strategy or offer incentives to employees to achieve health goals.⁶⁵ Formidably, 98% of companies polled considered health and wellness to be legitimate corporate objectives.⁶⁶ On the other hand, only 35% of the companies with stated health goals had developed a concrete workplace policy.⁶⁷

It is apparent that employers are alive to the fact that the promotion of health and wellness ideals is an important business concern. Specifically, the Buffett and Buck Surveys indicate that Canadian employers recognize the intrinsic value in promoting health in their workplace. Also trending from the research is that many employers have not made the leap in

⁶² Buck Consultants, LLC. *Working Well: A Global Survey of Health Promotion and Workplace Wellness Strategies* (2009), online: Buck Consultants, LLC <http://www.acsbuckcanada.com/ENG/Portals/0/Documents/publications/surveys/Canada_Special_Report_2009_Global_Wellness.pdf> at 2.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.* at 3.

translating health ideals to an actual framework to achieve those goals. It is this disconnect which needs to be addressed in order for employers to fully benefit from WWP.

4.2 Statistical Success of WWPs

Employers should not look at WWPs as optional benefits, but rather consider them requirements for a productive and profitability workplace. While previously, health-related incentives may have been viewed as “bonus” features for employees, WWPs are rapidly becoming a business necessity.

WWPs, by and large, have been successful at reducing corporate expenditures on health and increasing profitability. Empirical research clearly indicates that unhealthy workers (understood as those who have more than one risk factor, such as smoking or heavy drinking) are a far greater financial burden upon their employer relative to healthy workers.

4.2.1 Statistical Success of WWPs within the US

The economic gains from WWPs typically arise not from direct expenditure savings, but rather from reduced absenteeism and increased productivity from the healthier labour force.⁶⁸ By comparison, the rate of absenteeism for higher-risk individuals⁶⁹ was double the rate evidenced by low-risk workers.⁷⁰

⁶⁸ Silberman, R. “Workplace Wellness Programs: Proven Strategy or False Positive” (2007), 4 *Michigan Journal of Public Affairs* pp. 1-8, online: Michigan Journal of Public Affairs <<http://www.mjpa.umich.edu/uploads/2/9/3/2/2932559/silberman-workplacewellness-final07.pdf>> at 3.

⁶⁹ Defined as those workers evidencing “more than one” risk factor.

⁷⁰ Serxner, S.A. “The Impact of Behavioural Risks on Worker Absenteeism” (Apr. 2001), 43(4) *J. Occup. Environ. Med.* pp. 347-354.

Additionally, employer healthcare costs are 4.5 to 8 times higher for high-risk employees versus their healthier counterparts.⁷¹ Higher-risk employees also cost employers anywhere between 2 and 12 times the amount in workers compensation benefits, as paid out for injuries and disabilities occasioned by unhealthy and unsustainable lifestyles.⁷²

Larry Chapman was one of the first scholars to extensively survey the benefits of WWP. He undertook a meta-evaluation of 42 peer-reviewed academic studies regarding WWP with a view to aggregating the reductions in absenteeism rates and savings in healthcare costs.⁷³

Chapman's meta-evaluation found that WWP reduced:

- employee sick leave absenteeism rates by 28.30%;⁷⁴
- employer healthcare costs by 26.1%;⁷⁵ and
- workers' compensation and disability costs by 30.1%.⁷⁶

Chapman's research also indicated that for every one dollar a company spent on health and wellness initiatives, there was a coincident savings of \$5.93 dollars.⁷⁷

In some instances the statistical return on investment in WWP is staggering. Johnson & Johnson, an American-based healthcare and pharmaceutical company, estimates that the introduction of WWP has:

⁷¹ Yen, L., Edington, D., & Witting, P. "Associations between Health Risk Appraisal Scores and Employee Medical Claims Costs" (Sept-Oct. 1991), 6(1) *Am. J. Health. Promot.* pp. 46-54.

⁷² Musich, S., Napier, D., & Edington, D.W. "The Association of Health Risks with Workers' Compensation Costs" (June 2001), 43(6) *J. Occup. Environ. Med.* pp. 534-541 at 535.

⁷³ World Health Organization. *Preventing Noncommunicable Diseases in the Workplace through Diet and Physical Activity* (2008), at 16, online: World Health Organization Library <https://members.weforum.org/pdf/Wellness/WHOWEF_report.pdf>, citing Chapman L.S. "Meta-evaluation of worksite health promotion economic return studies" (2003), 6(6) *The Art of Health Promotion* pp. 1-16.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* Chapman's aggregation chart can be found at Appendix D to this thesis.

- reduced the percentage of employees who smoke by two-thirds;⁷⁸
- reduced the number of employees that have high-blood pressure or are physically inactive by half;⁷⁹ and
- reduced its expenditure on healthcare by over \$250 million dollars between 2002 and 2008.⁸⁰

Further, Johnson & Johnson maintains that the aggregate return on investment from the introduction of WWP was \$2.71.⁸¹

Statistical analysis of American WWPs has also been conducted by the *Employee Retirement Income Security Act* (“ERISA”) Industry Committee, which represents major employers and advocates for employee benefits in the US. In 2008, a joint report between the ERISA Industry Committee, the National Association of Manufacturers, and IncentOne Inc. summarized the survey results of 225 employers representing 7.6 million workers.⁸² The survey showed that the number of employers who had WWPs had increased from 62% to 71% over the previous year,⁸³ with employers offering between \$5 to \$600 as incentive for participating in the wellness programs.⁸⁴ More strikingly, over 83% of the companies surveyed stated that they had a return on investment which was more than break-even.⁸⁵

⁷⁸ Berry, L.L., Mirabito, A.M., & Baun, W.B. *What’s the Hard Return on Employee Wellness Programs?* (Dec. 2010), online: Harvard Business Review <<http://hbr.org/2010/12/whats-the-hard-return-on-employee-wellness-programs/ar/1>>[March 28, 2012] at 2.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² ERISA Industry Committee. *Eric-NAM Employer Wellness and Disease Management Incentives Survey Results Released* (26 June 2008), online: ERISA Industry Committee <<http://www.eric.org/forms/documents/DocumentFormPublic/view?id=12E8A00000014>> [September 1, 2010].

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

Successful WWPs can also assist in reducing employee turnover. A 2009/2010 survey of 352 businesses with more than 1000 employees conducted by Towers Watson found that companies with successful WWPs had a voluntary attrition rate of approximately 14.8% versus 21.0% for businesses with WWPs that were ineffective.⁸⁶ High employee turnover leads to decreases in productivity and requires significant financial outlays, not only through added human resources costs, but also for the time and funds required for retraining an individual for the position. Reducing voluntary employee turnover is yet another way in which WWPs can result in financial and productivity gains in the workplace.

4.2.2 Statistical Success within Canada

Among the available research, there does appear to be general optimism that health promotion in Canadian workplaces is economically beneficial. One ten-year study conducted by Blotnicky determined that Canadian companies who have instituted WWPs experienced a 13.8% increase in corporate profitability.⁸⁷ Indeed, after instituting health promotion initiatives, the surveyed companies experienced an 8.7% increase in corporate sales coupled with a 3.1% increase in profit margins.⁸⁸ Overall, the study indicated that businesses received a 10.2% increase on their investment in WWPs.⁸⁹

⁸⁶ Towers Watson, *supra* note 47 at 10.

⁸⁷ Blotnicky, *supra* note 37 at 9.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

Arguably, the results of the Blotnick survey reflect the general rule and not the exception. As employers have begun to publish the economic results of their WWPs, it has become typical to see returns on investment hedged between \$1.15 to \$8.00.⁹⁰

In Canada, scholars such as Weiler and Mohan are generating comprehensive reviews of WWPs and shedding light into this otherwise modest area of research. Weiler and Mohan analyzed data compiled by the Canadian Labour and Business Centre, and conducted their own empirical studies, to obtain a clearer picture of the prevalence of WWPs in Canada.⁹¹ Notably, Weiler and Mohan highlighted eight Canadian businesses which achieved substantial success in implementing WWPs. The following represents a cursory review of those findings:

Table 4.1: WWP Case Study Results

Company	Substantive Results of WWP
Rideau Construction, Inc.	Over a five-year period, experienced a significant decline in its workers' compensation premiums as the total amount of claims filed by employees decreased. ⁹²
Petro-Canada's Burrard Products Terminal	Over a span of five years, the company had no employee work days lost due to injuries on the job. ⁹³

⁹⁰ Burton, J. *Creating Healthy Workplaces* (2006), online: Industrial Accident Prevention Association <http://www.iapa.ca/pdf/2004_HWP_Healthy_Workplace_FINAL.pdf> at 7.

⁹¹ Weiler, J. & Mohan, A. (2009). *A Canada - United States Comparative Analysis of WWPs: The New Frontier of Human Resource Management and Law Reform*" (A Report prepared for the Foundation for Legal Research) [unpublished, archived at the Foundation for Legal Research] at 33-35.

⁹² *Ibid.*

⁹³ *Ibid.*

Company	Substantive Results of WWP
City of Regina's Transit Department	The amount of days lost from workers' compensation injuries decreased from 597 days in 1992 to 337 days in 2000. This translated into savings of approximately \$500,000 over the eight sample years. ⁹⁴
Vancouver International Airport Authority	Saw its lost time due to accidents decrease by 70% from 1993 to 2000, and the number of workers' compensation/workplace injury related lost days decrease by 25% between 1999 and 2001. ⁹⁵
Vancouver Shipyards Co. Ltd.	Between 1998 and 2001 the company had an 85% reduction in the number of disability claims. Consequently, costs associated with workplace injury claims fell from \$2.2 million to \$500,000 per year over that period. ⁹⁶
Irving Paper Limited	Short term disability costs decreased by more than 50% since the mid-1990s. This translated into savings of \$800,000 per year and reduced monthly workers' compensation costs by 60%. ⁹⁷
Moose Jaw-Thunder Creek Health District	Experienced a 60% reduction in employee sick days from 1997 to 2000, as well as a 5% reduction in workplace accident frequency from 1997 to 2001. ⁹⁸

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

Company	Substantive Results of WWP
ArcelorMittal Dofasco Inc.	From 1991 to 2000 Dofasco had a 70% reduction in lost time due to injury (that is, working time lost as a result of injuries or illnesses caused at work). In actual time, this was a decrease from 1.4 hours per 100 hours worked in 1994 to 0.6 by 2001. During the same period, steel shipments went up, increasing from under 3.5 million tons to 4.5 million tons. Additionally, the company's payments to the Ontario Workplace Safety and Insurance Board dropped from \$4.71 per \$100 of payroll in 1995 to \$1.76 per \$100 of payroll in 2001, which created savings of more than \$6 million for the company. ⁹⁹

Each of the eight surveyed corporations experienced significant reductions in expenses associated with preventable injuries and illness as a result of their WWP. The case studies undertaken by Weiler and Mohan illustrate the significant cost reductions that can result from the implementation of WWPs.

⁹⁹ *Ibid.* See also DiGiacomo, G. *Case Study: Dofasco's Healthy Lifestyles Program* (2002), online: Canadian Labour and Business Centre <<http://www.clbc.ca/files/CaseStudies/dofasco.pdf>> at 16.

CHAPTER 5. Legal Issues Arising from WWPs

5.1 Introduction

The preceding chapters noted that health and wellness programs have been successful at both promoting sustainable employee lifestyles and increasing business productivity. Despite encouraging success, there has not been a dramatic push towards the institutionalization of concerted workplace health strategies. Given the potential return on investment that accompanies successful initiatives, it remains to be answered why employers are hesitant to bridge the spheres of health and wellness?

A key factor for this timidity is the uncertainty surrounding the potential legal consequences of WWPs. Employers' insecurity about expanding their role into the personal lives of employees is rightly justified, as the legal parameters of what they may or may not do is far from clear. A misstep in the construction or implementation of a WWP may catalyze a host of court challenges and, in the worst of scenarios, result in significant financial liability to the company.

One of the potential aims of this thesis is to illuminate the legislative and regulatory instruments which affect WWPs. Canadian and American statutory regimes place hard-line boundaries on the conduct of employers in relation to their employees. Each of these statutes also provides some punitive consequence if an employer violates its provisions – a factor which buoys business hesitancy about instituting health initiatives.

In both the US and Canada, the dominant legislative objective in terms of employee rights has centred on combating discrimination. Indeed, there is an abundance of legislation

which ensures employees are treated equally, and that no distinction is made where it cannot be properly justified. The proceeding chapter will examine the relevant anti-discrimination law in the US and Canada with an aim towards better understanding potential conflicts with the implementation of WPPs.

5.2 “Lifestyle Discrimination” in American Law

The US has implemented policies to discourage and prevent workplaces from engaging in what has been aptly titled “lifestyle discrimination.” Discriminating based on “lifestyle” generally refers to the practice of regulating employee conduct with respect to the use or engagement in legal activities outside of the workplace.¹⁰⁰ Instinctively, this type of discrimination is troubling in that it enlarges the employer’s sphere of influence at the cost of an individual’s liberty in making lifestyle choices.

“Lifestyle” decisions encompass a broad spectrum of behaviours which, whether related to workplace duties or not, become the interest of the employer due to their effect on workplace economic or cultural outcomes. Lifestyle discrimination may occur with respect to a number of conditions, including weight, alcohol and drug use, and leisure activities which are otherwise viewed as dangerous.¹⁰¹

Reinforcing the severity of lifestyle discrimination is the example of Michael Price, the former head coach of the University of Alabama football team, who was fired four months into

¹⁰⁰ Sugarman, S.D. “‘Lifestyle’ Discrimination in Employment” (2003), 24(2) *Berkeley Journal of Employment & Labor Law* pp. 377-438, online: Berkeley Law <<http://www.law.berkeley.edu/faculty/sugarman/Sugarman%20lifestyle%20090303.pdf>> at 105.

¹⁰¹ *Ibid.* at 142.

his tenure for being heavily intoxicated at a Florida strip-club.¹⁰² When his conduct came to light he was immediately fired by Alabama's president, who defended the dismissal on grounds that the behaviour did not align with the university's desire to shed its image as a "party school."¹⁰³ Similarly, Wal-Mart fired two workers for violating an employee ban on engaging in a romantic relationship *outside* of the workplace.¹⁰⁴ While the aggrieved employees brought a civil suit against Wal-Mart, the New York Court Appeal Division affirmed the validity of the ban and the subsequent terminations.¹⁰⁵

Given its intrusive nature, attempts to discriminate on the basis of lifestyle have raised the consternation of the public. According to the American Civil Liberties Union ("ACLU"), which has been at the forefront of the lifestyle discrimination critique, "[p]ermitting employers to act as 'health police' will not solve our nation's health care crisis; it will only destroy the private lives of working Americans."¹⁰⁶

The persistent debate surrounding lifestyle discrimination, particularly in relation to choices affecting health, has been buttressed by an ever-increasing portfolio of employee complaints. Such complaints have included the following:

¹⁰² Longman, J. "Alabama Fires Coach for Off-Field Indiscretions" *The New York Times* (04 May 2003), online: The New York Times <<http://query.nytimes.com/gst/fullpage.html?res=9B0DE5DE133CF937A35756C0A9659C8B63>> [September 2, 2009].

¹⁰³ *Ibid.*

¹⁰⁴ *State of New York v. Wal-mart Stores, Inc.* 207 A.D. 2d 158, 1995 621 N.Y.S. 2d 158 (N.Y. App. Div.).

¹⁰⁵ *Ibid.*

¹⁰⁶ American Civil Liberties Union. *Lifestyle Discrimination in the Workplace: Your Right to Privacy Under Attack* (2002), online: American Civil Liberties Association <http://www.aclu.org/racial-justice_womens-rights/lifestyle-discrimination-workplace-your-right-privacy-under-attack> [September 1, 2010].

- in 2003, McDonalds dismissed an obese employee after they were unable to obtain an appropriately-sized uniform;¹⁰⁷
- the Borgota Hotel Casino and Spa in Atlantic City, New Jersey, has an official policy which allows for the termination of any of its 200 bartenders or servers if they gain more than 7% of their body weight;¹⁰⁸
- Alaska Airlines requires any new potential employee to consent to a nicotine test;¹⁰⁹ and
- the Tacoma-Pierce County Health Department requires individuals to sign an affidavit of non-tobacco use.¹¹⁰

While such policies have been justly defended, they nevertheless expose the employer to potential legal liability under federal or state anti-discrimination legislation.

5.3 American Legislation Engaging Workplace Wellness

The following is a necessarily brief examination of the relevant statutory instruments which address discrimination in the American workplace. For the purposes of this thesis the relevant American statutes are:¹¹¹

- *Health Insurance Portability and Accountability Act;*
- *Americans with Disabilities Act;*
- *Employee Retirement Income Security Act;*
- *Age Discrimination in Employment Act;*

¹⁰⁷ National Workrights Institute. *Lifestyle Discrimination: Employer Control of Legal Off Duty Employee Activities* (undated), online: National Workrights Institute <<http://workrights.us/wp-content/uploads/2011/07/Legislative-Brief.pdf>>.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ This list is not meant to be exhaustive of the statutory and regulatory instruments which affect WWP. It merely serves as an overview of the most notable enactments.

- *Genetic Information Nondiscrimination Act*; and
- residual state legislation.

While there are numerous legislative instruments which alter the complexion of WWPs, the principal law affecting employer-initiated wellness programs in the US is the *Health Insurance Portability and Accountability Act* (“HIPAA”).¹¹²

5.3.1 Health Insurance Portability and Accountability Act

When the US Congress passed HIPAA on August 21, 1996,¹¹³ it codified plenary employee rights with respect to medical insurance and increased constraints on employers’ ability to regulate employee conduct.

HIPAA Title I establishes procedural checks on group health plans to prevent discrimination of employees based on pre-existing conditions.¹¹⁴ The principle underscoring the title provisions is that an individual cannot be compelled to pay more for health coverage compared to other similarly-situated individuals because of any health factor.¹¹⁵ Group health plans must treat like persons alike with respect to medical health coverage.

Title I also establishes an extensive list of factors which cannot form the basis of discrimination, including health status, medical illness (both physical and mental), claims experience, receipt of healthcare, medical history, genetic information, evidence of insurability, and disability.¹¹⁶ Of note is that Title I jettisoned the ability of medical plans to discriminate against persons for reasons relating to their current health status. Rejecting that prior paradigm

¹¹² *Health Insurance Portability and Accountability Act of 1996* (HIPAA). P.L. No. 104-191, 110 Stat. 1938 (1996).

¹¹³ *Ibid.*

¹¹⁴ *Ibid.* at s.701.

¹¹⁵ *Ibid.* at s.702(a)(2)(B).

¹¹⁶ *Ibid.* at s.702(1)(A)-(H).

instituted a solid foundation for the provision of WWP, which would become the focus of later HIPAA regulations.

On December 13, 2006, after joint consultation with the Internal Revenue Service, the Department of Labor, and the Employee Benefits Security Administration, the US government passed regulations to HIPAA (the “Regulations”). The Regulations provided, among other things, conditions that must be followed in order to create a legally enforceable WWP.¹¹⁷ Importantly, the Regulations apply equally to any wellness program, regardless of if it is buttressed on mandatory or voluntary participation.¹¹⁸

As a means to assist employers, the Regulations legislated a “*bona fide* wellness program” exemption to the Title I discrimination articles.¹¹⁹ This had the effect of allowing employers, who satisfied the mandated tests, to loosely discriminate against employees through WWP. According to the Regulations, WWP will be considered non-discriminatory provided they do not offer a reward based on a general health factor. Distinguishing between what is a reward based on a health factor (which is *prima facie* discriminatory), and an incentive for participation in a health program (which would be exempt under the HIPAA regulations), can lead to confusion for employers.

¹¹⁷ Barter, A.R. *HIPAA wellness program nondiscrimination requirements issued* (2007), online: Massachusetts Bar Association <<https://www.massbar.org/for-attorneys/publications/lawyers-journal/2007/december/beyond-the-headlines>> [September 1, 2010].

¹¹⁸ Littler Mendelson, P.C. *Employer Mandated Wellness Initiatives: Respecting Workplace Rights While Controlling Health Care Costs* (2007), online: Littler Mendelson, P.C. <<http://www.littler.com/files/press/pdf/16359.pdf>> at 7.

¹¹⁹ Jackson Lewis LLP. *Final HIPAA Nondiscrimination Regulations Spur Employers to Review Workplace Wellness Programs* (Dec. 2006), online: Jackson Lewis LLP <<http://www.jacksonlewis.com/legalupdates/article.cfm?aid=1040>> [September 1, 2010].

According to HIPAA, employers can encourage participation in WWPs through rewards, however cannot base the reward on a requirement that the employee actually achieve the program goals.¹²⁰ By way of example, employers can offer \$100 to participate in a smoking cessation program, however cannot provide the \$100 reward only if the employee actually stops smoking. In all cases, the incentivization must be based on program participation rather than goal achievement.

The Regulations also state that certain incentives or program measures are presumptively non-discriminatory. The following health promotion initiatives are not considered discriminatory under HIPAA and the Regulations:

- reimbursement for all or part of the cost for membership in a fitness centre;¹²¹
- diagnostic testing program which provides a reward for participation and does not base any part of the reward on test outcomes;¹²²
- waivers of the co-payment or deductible requirement under a group health plan for the costs to encourage preventative care;¹²³
- reimbursement for the costs of smoking cessation programs without regard to whether the employee quits smoking;¹²⁴ and
- rewards to employees for attending monthly health education seminars.¹²⁵

Beyond these enumerated exemptions, the Regulations also prescribe a framework for determining if a WWP will fall within the *bona fide* exemption of the Regulations. In order for a

¹²⁰ Littler, *Employer Mandated*, *supra* note 118 at 7.

¹²¹ Jackson, *supra* note 119.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

WWP to be considered *bona fide* and thus non-discriminatory, the following five requirements must be satisfied.¹²⁶

5.3.1.1 Limitations on Quantum of Incentives

The total value of the offered incentives cannot be larger than 20% of the total cost of the employee health coverage, or 20% of employee and dependent coverage.¹²⁷ The 20% limit is designed to protect those individuals who may not be able to fulfill the program standards. Indeed, a reward greater than 20% would serve as a penalty against those who find the WWP requirements too rigorous to satisfy.¹²⁸

5.3.1.2 Reasonably Designed

A *bona fide* program must also be “reasonably designed” to aid in disease prevention or promote health. “Reasonably designed” requires that the incentive must have a “reasonable chance of improving the health of participants and it is not overly burdensome, is not a subterfuge for discriminating based on a health factor and is not highly suspect in the method chosen to promote health or prevent disease.”¹²⁹ This requirement addresses the concern that WWPs could be implemented simply to achieve collateral objectives, such as the collection of personal employee information or the punishment of employee lifestyle choices without a legitimate justification.

¹²⁶ Information regarding the five factors was obtained from Littler, *Employer Mandated*, *supra* note 119 at 8.

¹²⁷ Barter, *supra* note 117.

¹²⁸ Jackson, *supra* note 119.

¹²⁹ National Archives and Records Administration. “Nondiscrimination and Wellness Programs in Health Coverage in the Group Market” (December 13, 2006), 71(239) *Federal Register*, online: Department of Labor <<http://www.dol.gov/ebsa/regs/fedreg/final/2006009557.pdf>> at 75018.

5.3.1.3 Accessible at Least Once a Year

WWP incentives must be accessible at least once a year. WWPs should encourage individuals to make better and more sustainable health choices, and a WWP which effectively bans incentive access for upwards of a year cannot be said to be serving this function.¹³⁰

5.3.1.4 Similarly Situated Individuals

The most influential requirement arising from the Regulations is that WWP incentives must be made available equally to all “similarly situated employees.” No distinction in coverage can be made between individuals who are similarly-situated in terms of their health. Where distinctions are drawn, they must be “bona-fide employment-based classifications consistent with the employer’s usual business practice.”¹³¹

Individuals having the same employment terms are considered similarly situated. However, individuals who have differing lengths of employment or who work full-time rather than part-time can be treated differently as between one another.¹³² For example, an employer cannot treat two part-time employees differently because one has high-blood pressure. The employer may utilize different incentives as between employee different groups, but not between individuals in the same group.

Additionally, if an employer implements a WWP, all targeted employees must be able to participate. The Regulations state that a WWP must provide “reasonable alternative standards” for individuals who, as a result of a medical condition, cannot satisfy the common program

¹³⁰ *Ibid.*

¹³¹ United States Department of Labor. *FAQs About the HIPAA Nondiscrimination Requirements* (undated), online: United States Department of Labor <http://www.dol.gov/ebsa/faqs/faq_hipaa_ND.html> [October 22, 2010].

¹³² *Ibid.*

standard. The reasonable alternative standard allows the non-participating employee to collect the benefits of the reward by achieving a different objective.¹³³ For example, if a WWP rewards individuals who maintain a body weight of less than 225 pounds, it is conceivable that it would be medically dangerous for an individual with a gland condition to participate in the program. In such a scenario, a reasonable alternative must be instituted to allow that individual to achieve the same incentive offered to other employees. The alternative must also be designed with the individual's specific health factor in mind; in the preceding example, the reasonable alternative must account for the gland condition.¹³⁴

5.3.1.5 Disclosure of Information

The final requirement under the Regulations is that the WWP must disclose all relevant information regarding qualifications for the incentive.¹³⁵ Information about each program element must be readily available to all employees who wish to utilize the program. Generally, the disclosure of information provisions are relatively easy for employers to satisfy and the Regulations themselves provide examples of what type of information should be disseminated.

Information regarding reasonable program alternatives must also be disclosed. However, the employer does not need to release any information other than that an alternative standard exists. The onus is then on the employee to proactively seek out further information regarding the alternative method.¹³⁶

¹³³ *Ibid.*

¹³⁴ National Archives, *supra* note 129 at 75019.

¹³⁵ Barter, *supra* note 117.

¹³⁶ National Archives, *supra* note 129 at 75019.

5.3.1.6 Summary

Assuming the preceding five criteria are satisfied, the WWP is *prima facie* valid and non-discriminatory under the Regulations.

Failure to comply with HIPAA or the Regulations can result in excise taxes being levied under the Internal Revenue Code. A breaching employer could be forced to pay \$100 per day *and* per employee for the time the WWP violated the Act.¹³⁷ For example, if an employer had 20 employees affected by a discriminatory WWP that had been in place for two months prior to challenge, the excise tax would be approximately \$120,000. Clearly, there is a financial interest to remain compliant with HIPAA and the Regulations.

Even if an employer's WWP does *prima facie* comply with HIPAA and the Regulations, this is by no means the end of the legal inquiry. WWPs often chart a course through a labyrinth of labour, contract, and human rights legislation. As one scholar notes, "the [Regulations] caution that efforts to comply with the HIPAA non-discrimination requirements may cause plan sponsors to run afoul of other federal or state laws, such as the Americans with Disabilities Act's provisions governing disability-related inquiries and medical examinations."¹³⁸ Accordingly, it is necessary to recognize other potential avenues of legal attack on WWPs, and understand how employers can navigate these potential pitfalls.

¹³⁷ *United States Internal Revenue Code*, 26 U.S.C. § 4980D(b)(1).

¹³⁸ Jackson, *supra* note 119.

5.3.2 Americans with Disabilities Act

5.3.2.1 Introduction

In 1990 the US Congress passed the *Americans with Disabilities Act* (the “ADA”).¹³⁹ The statute was an attempt to protect individuals with disabilities¹⁴⁰ from discrimination (a protection which was already available for grounds such as race and sex).

Among other things, the ADA is concerned with how workplace policies affect individuals with disabilities that are otherwise qualified for a position. Where an individual is a “qualified individual”¹⁴¹ an employer¹⁴² is prohibited from discriminating against them on enumerated grounds including, job application procedures, hiring, advancement, discharge, employee compensation, job training, and any term, condition, and privilege of employment.¹⁴³ Consequently, the ADA imposes a statutory prohibition on detrimental changes to a qualified individual’s employment position on the basis of disability.

Where an individual applicant or employee alleges a disability, the employer must make reasonable accommodations to the point where it becomes an undue hardship¹⁴⁴ to business

¹³⁹ *Americans with Disabilities Act of 1990*, Pub.L. 101-336, 104 Stat. 327, as amended by 42 U.S.C. §§ 12101-12213 (2000).

¹⁴⁰ *Ibid.* at s.12102(1). Subsection 12102(1) defines *disability* as “a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such impairment; or being regarded as having such an impairment.” Whether a disability is such that it affects a major life activity is evaluated on an individual case by case basis.

¹⁴¹ *Ibid.* A *qualified individual* is defined as “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” See *Americans with Disabilities Act*, *supra* note 139 at subsection 12111(8).

¹⁴² *Ibid.* at s.12111(5). Subsection 12111(5) states that the ADA will only apply to employers who “[engage] in an industry affecting commerce 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.” Notably, the US government and its affiliated corporations, as well as private membership clubs, are specifically excluded from the definition of an employer.

¹⁴³ *Ibid.* at s.12112(a).

¹⁴⁴ An *undue hardship* is any action which would engender significant difficulty or expense for the employer. See *Ibid.* at s.12111(10)(A). Subsequent provisions of the act elucidate the following four factors which are considered when assessing what is an *undue hardship*: (1) nature and cost of accommodation; (2) overall financial resources of

operations. If the employer does not make such reasonable accommodations it is considered discrimination.¹⁴⁵

Relative to HIPAA, the ADA is broader in its scope of application, as it can be utilized to scrutinize a more diverse category of employers. However, the ADA remains constrained in that it applies only to the protection of individuals with identifiable disabilities, and where such a disability cannot be proven then no statutory protection applies. For example, if an individual was fired for being overweight, the ADA would not apply until the individual could prove that his or her obesity was to such a degree that it impaired a major life activity.

US ADA jurisprudence reaffirms employers' right to discriminate between groups of differing individuals, but not as between individuals within those groups. In *Lewis v. K-mart Corporation*¹⁴⁶ and *EEOC v. Staten Island Savings Bank*¹⁴⁷, the US Circuit Court of Appeals held that employers were not liable for constructing incentive-based programs that made a distinction between physical and mental benefits.¹⁴⁸ In *Lewis* and *EEOC* a challenge was brought against the employer on grounds that its workplace policies bestowed higher benefits on employees with physical disabilities in comparison to those with mental disabilities. In both cases the Court found that there was no discrimination as the ADA was "not designed to ensure

the facility...number of persons employed...effect on expenses; (3) financial resources of the covered entity; and (4) type of operation or operations of the covered entity. See *Ibid.* at s. 12111(10)(B)(i)-(iv).

These factors are intrinsically tied to the economic condition of the business and, in some instances, may collide with the objective of workplace equality. For instance, in *Siekaniec v. Columbia Gas Company*, 2002 U.S. App. Lexis 21091 (6th Cir. Oct. 4, 2002), the US Court of Appeals for the 6th Circuit held that compelling an employer to hire a substitute employee for every instance when a regular employee experienced a migraine was an undue hardship. The Court made this ruling despite the fact that the employee suffered chronic migraines which justly impaired her ability to work.

¹⁴⁵ *Americans with Disabilities Act*, *supra* note 139.

¹⁴⁶ *Lewis v. Kmart Corp.*, 180 F.3d 166, 170 (4th Cir. 1999), cert. denied, 120 S. Ct. 978 (2000).

¹⁴⁷ *EEOC v. Staten Island Savings Bank*, 207 F. 3d 144.

¹⁴⁸ *Lewis*, *supra* note 146.

that persons with one type of disability are treated the same as persons with another type of disability.”¹⁴⁹

How one conceptualizes a distinction between a disabled employee and a non-disabled employee for purposes of WWPs, is the subject of discretion. Practically speaking, if an employer has a group health plan and remains apprehensive about potential liability under the ADA, they can seek to tailor “reasonable alternatives” in a manner which is inclusive of the disability in question.¹⁵⁰ By expanding the available alternatives, the employer can satisfy both the HIPAA and ADA reasonable alternative requirements, and avoid breaching the respective statutes.

5.3.2.2 ADA and Voluntary Medical Examinations

Subsection 12112(d) of the ADA institutes boundaries on the degree to which employers can utilize, either directly or indirectly, medical examinations in their WWPs.¹⁵¹ Importantly, the medical examinations contemplated by the subsection are permissible only where they are undertaken with full voluntary consent of the employee. Further, the information arising from the examinations or medical history reviews must be held in strict confidence and isolated from the employee’s general file.¹⁵²

The ADA medical examination provisions are not insignificant. WWPs often rely heavily on the ability to conduct interval testing on employees to determine the program’s success and

¹⁴⁹ *Ibid.* See also *EEOC*, *supra* note 147.

¹⁵⁰ Moran, A.E. “Wellness Programs at Work” *Get Fit Mississippi* (2008), online: Get Fit Mississippi <<http://www.getfitmississippi.com/node/2699>> [September 2, 2009].

¹⁵¹ Specifically, the subsection provides that “[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.” See *Americans with Disabilities Act*, *supra* note 139 at s.12112(d)(4)(B).

¹⁵² *Americans with Disabilities Act*, *supra* note 139 at s.12112(d)(4)(C).

the consequential health effects on the employee. To remain in compliance with the ADA, employers must be mindful of these provisions to ensure that such tests are voluntary and the resultant information is kept strictly confidential.

In *Seff v. Broward County*, the US District Court for the Southern District of Florida considered whether the terms of a county wellness program violated the medical examination and inquiry provisions of the ADA.¹⁵³ The challenge centered on the County's Open Enrolment health and wellness program which generally sought to increase disease detection and improve the health of county employees.¹⁵⁴ As part of the wellness program, employees were required to complete a "Health Risk Assessment" questionnaire and also submit to biometric screening.¹⁵⁵ To compel better participation rates in the program, the County levied a \$20.00 charge on each bi-weekly pay cheque for any employee who did not complete the survey or the biometric testing.¹⁵⁶

The Plaintiff, Bradley Seff, was a former employee of the County during the levying of the \$20.00 surcharge. He objected to the medical testing and filed a class action complaint against the County on grounds that the wellness program's medical testing violated his legal rights under the ADA.¹⁵⁷ In defending against the claim the County relied on the provisions of the ADA which entitled it to administer a *bona fide* benefit plan and can require an employee to submit to medical examinations.¹⁵⁸ In response, Seff contended that the wellness program was

¹⁵³ *Seff v. Broward County*, 778 F.Supp.2d 1370 (2011), online: Employment and Labour Insider <<http://www.employmentandlaborinsider.com/Blog.9.30.11.Seff%20v%20Broward%20County.pdf>>.

¹⁵⁴ *Ibid.* at 2.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.* at 3. This additional charge was discontinued as of January 1, 2011.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Americans with Disabilities Act*, *supra* note 139 at s.12112(d)(4)(A).

independent of the County's group health insurance plan and, thus should not be protected by the ADA exemption provisions.

On April 11, 2011 US District Judge Moore pronounced judgment, dismissing all of the Plaintiff's claims. In so doing, Moore J. held that the County's wellness program was a term of the group insurance plan given: the sufficient nexus between the administration of the wellness program and the insurance, exclusivity in the program to County employees, and inclusion of the wellness program in other insurance benefit hand-outs.¹⁵⁹ The Court further held that the County's wellness program was focused on mitigating risk and decreasing insurability costs among the employees, and that in many cases the desire of employers to develop WWP's will be based on financial reasons (given the economic losses incurred from an unhealthy and aging workforce).¹⁶⁰ Taking these factors into account, Moore J. found that the County's plan, including the \$20 levy, was properly within the ADA exemptions and its operation did not violate Seff's rights under the legislation.

Seff v. Broward is a fundamental case as it is one of the most complete examples of using the ADA to legally challenge the provisions of a WWP. The decision highlights the Court's recognition that WWP's are properly motivated by financial priorities and that there are significant financial impacts to employing unhealthy workers. Despite the positive result for the County in this case, employers must be guarded in how they collect and utilize employee health information, and ensure that medical histories or examinations are implemented in compliance with the ADA and its applicable exemptions.

¹⁵⁹ *Seff*, *supra* note 153 at 5.

¹⁶⁰ *Ibid.* at 8.

5.3.2.3 ADA Summary

The introduction of the ADA has had a profound influence on individuals' ability to challenge discriminatory labour policies. The fact that the ADA applies to all private business and is enforceable even absent the existence of a group health plan (the major limitation on HIPAA applicability) greatly expands the use to which the statute can protect vulnerable employees from discriminatory practices. The principle of equal treatment within groups, but not between them, is a paramount consideration, and employers should be hyper-vigilant in not differentiating employees based on a condition which is, or could be, classified as a disability.¹⁶¹

5.3.3 Employee Retirement Income Security Act

In 1974 the US Congress passed the *Employee Retirement Income Security Act* ("ERISA")¹⁶² which set benchmarks for the voluntary provision of private employer-instituted healthcare services and employee pensions.¹⁶³ Generally, ERISA covers all "employee welfare benefit plans"¹⁶⁴ that include health and medical benefits, and allows companies to create group

¹⁶¹ Employers may discriminate where it is for a safety concern, out of business necessity, or if instituting reasonable alternatives would otherwise impose an undue hardship on the employer. When instituting a WWP, businesses should be cautious that reasonable alternatives are established, and that all individuals, including those with disabilities, have an access point to achieve the reward. Doing so will greatly limit the employer's potential liability exposure arising from the ADA.

¹⁶² *Employee Retirement Income Security Act of 1974*, Pub.L. 93-406, 88 Stat. 829, as amended by 5 U.S.C., 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.

¹⁶³ United States Department of Labor. *Health Plans & Benefits: Employee Retirement Income Security Act* (undated), online: United States Department of Labor <<http://www.dol.gov/dol/topic/health-plans/erisa.htm>> [December 19, 2011].

¹⁶⁴ *Employee Retirement Income Security Act*, *supra* note 162 at s.1002(1). Subsection 1002(1) defines an *employee welfare benefit plan* as "any plan...established or maintained by an employer...to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (a) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment..."

health plans which provide benefits for participation in WWPs.¹⁶⁵ If an employer provides services relating to medical benefits, they are within the jurisdiction of ERISA, and must comply with its statutory requirements.

ERISA section 702 directly affects the administration of WWPs as it requires health plans to not discriminate against individuals based on their health status.¹⁶⁶ Pursuant to the section if an employer initiates a general health benefit scheme, the level of benefits afforded to individual employees cannot be based on any enumerated health factor.¹⁶⁷

ERISA section 510 prohibits employers who institute WWPs from denying or interfering with the attainment of benefits by employees on the basis of health.¹⁶⁸ This is an important federal provision as it was a proper cause of action in the one of the leading challenges to a WWP, *Rodrigues v. Scotts Company* case.¹⁶⁹

Even if the employer believes that its employee plan or WWP falls outside the scope of ERISA, this will not absolve them of liability under the ERISA regulations. In *Moorman v. Unum Provident Corporation*¹⁷⁰, the US 11th Circuit Court of Appeals ruled that while there was no stated intention to adhere to ERISA or its regulations, the company's conduct was sufficient

¹⁶⁵ Rubin, B. *Post-HIPAA Implementation of Employee Wellness Programs: Practical Tips and Pitfalls* (undated), online: Health Care Conference Administrators, LLC <http://www.ehcca.com/presentations/HIPAA13/7_01.pdf> at 12.

¹⁶⁶ *Employee Retirement Income Security Act*, *supra* note 162.

¹⁶⁷ *Ibid.* Similar to the ADA, ERISA holds employers accountable for differentiating between benefit recipients on the basis of a transparent condition.

¹⁶⁸ *Ibid.* at s.510. Section 510 of the ERISA states “it shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . .”

¹⁶⁹ This case will be discussed further in Chapter 7. *Rodrigues v. The Scotts Company, LLC*, No. 07-10104-GAO, United States District Court for the District of Massachusetts (July 23, 2009), online: PACER <<http://pacер.mad.uscourts.gov/dc/cgi-bin/recentops.pl?filename=otoole/pdf/rodrigues%20v%20scotts%20order.pdf>>.

¹⁷⁰ *Moorman v. UnumProvident Corp.*, 464 F. 3d 1260.

to lead a reasonable employee to believe that the program was employer-sponsored and, as such, the plan was within ERISA's jurisdiction.¹⁷¹ The Court held that a number of indicia demonstrated that the company's plan should be governed by ERISA, including that:

- the plan was billed as a benefit to full-time employees;¹⁷²
- the plan was the only one in existence within the company;¹⁷³
- it was the employees that declared who would be covered under the plan;¹⁷⁴
- the employer utilized claim forms which the employee needed to complete prior to receiving the benefits;¹⁷⁵ and
- an objective and reasonable employee would view the plan as being operated by the company.¹⁷⁶

Provided these factors are satisfied, it is arguable that an employer's general benefit plan or WWP is subject to ERISA regulation and must conform to its statutory requirements.

5.3.4 Age Discrimination in Employment Act

The *Age Discrimination in Employment Act* (the "ADEA"), passed in 1967, seeks to prevent discrimination against individuals currently employed and those seeking employment, on the basis of age.¹⁷⁷ Similar to the ADA, the ADEA gives legal recourse to workers to bring a discrimination action against an employer if they have committed an age-based distinction.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ Under the ADEA it is unlawful "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." See *Age Discrimination in Employment Act of 1967*, Pub.L. 90-202, 81 Stat. 602, as amended by 29 U.S.C. §621-634 (2000).

The ADEA could be used to formally challenge a WWP on the basis of discrimination. For instance, an individual who, as a result of age, is unable to meet the physical qualifications to achieve a WWP incentive (or meet a mandatory program requirement) may properly claim discrimination under the act. However, to be successful the employee must demonstrate that the impact on older workers is disproportionate to that faced by other employees.¹⁷⁸ It is unclear how broadly a court would interpret the provisions of the ADEA when considering a legal challenge to a wellness plan, however the act should be considered by any employer wishing to promote health at the worksite.

5.3.5 Genetic Information Nondiscrimination Act

In 2008 the US Congress passed the *Genetic Information Nondiscrimination Act* (“GINA”).¹⁷⁹ The purpose of the statute is to prohibit employment and health insurance discrimination on grounds relating to an individual’s genetic information.¹⁸⁰ GINA sought to extend the anti-discrimination framework established by the ADA and the ADEA to include an individual’s genetic information.¹⁸¹

The GINA ensures that covered individuals will not be discriminated against on the basis of information obtained by their employer, and which relates to their genetic composition or pre-

¹⁷⁸ Metropolitan Corporate Counsel. *Employers Considering Wellness Programs Are Advised To Look Before Leaping* (November 2007), online: Metropolitan Corporate Counsel <<http://www.metrocorp.counsel.com/current.php?artType=view&artMonth=February&artYear=2009&EntryNo=7425>> [September 2, 2009].

¹⁷⁹ *Genetic Information Nondiscrimination Act of 2008*, Pub.L. 110-233, 122 Stat. 881 (2008).

¹⁸⁰ *Ibid.* This legislation applies to both private and public sector employers provided they employ 15 or more workers.

¹⁸¹ *Ibid.* *Genetic information* includes any genetic test of an individual, tests conducted on family members of that individual, and information pertaining to any manifestation of a disease or disorder in family members of such individual. See *Genetic Information Nondiscrimination Act*, *supra* note 179 at s. 101(d)(6). Entrenched in this definition is a recognition that both retrospectively and prospectively acquired genetic information, is within the scope of the act.

disposition to illness or disease. Accordingly, it was hoped that the statute would encourage individuals to better utilize genetic testing and other forms of genetic therapy, as the misuse of such information by the individual's employer would be punishable under the act.¹⁸²

GINA prohibits employers from using genetic information to discriminate against individuals in two principal ways. Firstly, employers may not discriminate against an individual with regard to direct employment terms, including hiring, firing, compensation, terms and conditions, or privileges of employment.¹⁸³ Secondly, employers may not discriminate indirectly, which refers to forms of limiting, segregating, or classifying the employee in an adverse manner or, which would otherwise lead to a deprivation of an opportunity.¹⁸⁴

The GINA provisions also restrict an employer's ability to collect and distribute employee health information. Specifically, the act prohibits an employer from requesting or requiring an employee to provide genetic information regarding themselves or their family members.¹⁸⁵ Importantly, the act carves out an exemption for employer's collecting genetic information in support of a WWP. Where the genetic information is provided voluntarily under a WWP, and where the individual's disclosed genetic information cannot be individually identified, then the collection and use of genetic information will not be discriminatory under GINA.¹⁸⁶

The design and implementation of a WWP must consider the constraints imposed by GINA. Data collected pursuant to a WWP cannot be used in any manner which tends to discriminate against an employee. As such, employers must be keenly aware that purported

¹⁸² *Ibid.* at s. 2(5).

¹⁸³ *Ibid.* at s. 202(a)(1).

¹⁸⁴ *Ibid.* at s. 202(a)(2).

¹⁸⁵ *Ibid.* at s. 202(b).

¹⁸⁶ *Ibid.* at s. 202(b)(2).

human resources decisions may be scrutinized or, at worse, result in liability on the employer, where genetic information has been collected. Additionally, GINA imposes strict regulation on the collection and use of employees' genetic information. Where an employer seeks to collect such information for purposes of developing or revising a WWP, that information must be properly administered and protected.

5.3.6 Applicable State Legislation

The federal government is not the only legislative body in the US which possesses authority to regulate the employer-employee relationship and institute prohibitions on discrimination. Currently, 30 US states have passed “lifestyle” statutes that restrict the ability of employers to make “adverse employment decisions” about employees based on their off-duty use of lawful products.¹⁸⁷ The lifestyle discrimination statutes are designed to shore up ambiguity about how far an employer can reach out to regulate an employee's personal conduct.

In most instances, the laws restrict the employer's ability to terminate an employee for use of lawful products (i.e. cigarettes or alcohol) outside the workplace, or to deny the hiring of an individual based on the use of such products. These statutes serve as a primary check on the power of the employer to engage in lifestyle discrimination under the guise of health-related policy.

The following list summarizes the various state statutes engaging lifestyle discrimination:

¹⁸⁷ *Ibid.* at s. 202(b)(2).

Table 5.1: Synopsis of US State Lifestyle Discrimination Statutes

State	Nature of Statutory Rights
California	Gives rights to employees discriminated against on basis of off-duty lawful conduct.
Colorado	Employer cannot terminate on basis that employee engaged in an off-duty lawful activity.
Connecticut	Prohibits employment discrimination on basis of off-duty smoking or use of tobacco products.
District of Columbia	Prohibits employment discrimination on basis of tobacco use.
Illinois	Prohibits employment discrimination on basis of use of lawful products. Prohibits employer from keeping record of employee's non-employment activities unless authorized.
Indiana	Prohibits employment discrimination on basis of off-duty tobacco use.
Kentucky	Prohibits employment discrimination on basis of tobacco use or nonuse. Prohibits employment discrimination on basis of off-duty smoking or use of tobacco products.
Louisiana	Prohibits employment discrimination on basis of tobacco use. Prohibits employment discrimination on basis of off-duty smoking or use of tobacco products.
Maine	Prohibits employment discrimination on basis of off-duty smoking or use of tobacco products.
Minnesota	Prohibits discrimination on basis of off-duty use of lawful consumable products.
Mississippi	Prohibits employment discrimination on basis of off-duty smoking or use of tobacco products.
Missouri	Prohibits employment discrimination on basis of off-duty, off-worksites use of tobacco products or lawful alcohol.
Montana	Prohibits employment discrimination on basis of off-duty, off-worksites use of a lawful product.
Nevada	Prohibits employment discrimination on basis of off-duty, off-worksites lawful use of any product.
New Hampshire	Prohibits employment discrimination on basis of off-duty use of tobacco products.
New Jersey	Prohibits employment discrimination on basis of smoking or non-smoking, and use or nonuse of tobacco products.

State	Nature of Statutory Rights
New Mexico	Prohibits employment discrimination on basis of smoking or non-smoking. Prohibits employment discrimination on basis of off-duty smoking or use of tobacco products.
New York	Prohibits employment discrimination on basis of legal use of consumable products or legal recreational activities provided the use is off-duty, off-premises, and does not involve employer's equipment or property.
North Carolina	Prohibits employment discrimination on basis of off-duty use of lawful products.
North Dakota	Prohibits employment discrimination on basis of off-duty, off-worksites participation in lawful activities
Oklahoma	Prohibits employment discrimination on basis of smoking or non-smoking, and use or nonuse of tobacco products. Prohibits employment discrimination on basis of off-duty smoking or use of tobacco products.
Oregon	Prohibits employment discrimination on basis of off-duty use of lawful tobacco products.
Rhode Island	Prohibits employment discrimination on basis of off-duty use of tobacco products.
South Carolina	Prohibits employment discrimination on basis of off-duty use of tobacco products.
South Dakota	Employer cannot terminate on basis of off-duty, off-worksites use of tobacco products.
Tennessee	Prohibits employment discrimination on basis of off-duty use of an agricultural product not regulated by the Alcoholic Beverage Commission that is not otherwise proscribed by law
Virginia	Prohibits employment discrimination in the Commonwealth on the basis of off-duty smoking or use or nonuse of tobacco products.
West Virginia	Prohibits employment discrimination on basis of off-duty, off-worksites use of tobacco products.
Wisconsin	Prohibits employment discrimination on basis of off-duty, off-worksites use or nonuse of lawful products.
Wyoming	Prohibits employment discrimination on basis of off-duty use of tobacco products.

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¹⁸⁸ Chart summarizes information obtained from Gudas, T.A. "State Lawful Products Statutes" in National Conference of State Legislatures. *Discrimination Laws Regarding Off-Duty Conduct* (October, 18, 2010), online: <<http://www.ncsl.org/documents/employ/Off-DutyConductDiscrimination.pdf>> at 6.

Each of the above-noted statutes imposes a further legal hurdle to the development of WWP. Employers must be conscious of the terms of any relevant law and be cautious not to institute WWP which might otherwise be considered discriminatory.

5.3.7 Summary

The breadth and scope of American anti-discrimination laws is impressive, and serves to restrict employers' ability to institute WWP. Specifically, HIPAA, ADA, ERISA, ADEA, GINA, and various other state statutes all affect the construction of WWP. Provided American employers understand the constraints imposed by these legal frameworks, they can properly navigate them, and implement legally compliant and effective WWP.

Please note that the statutory rights outlined in the chart represent a broad overview of the substantive rights contained therein. Each statute contains exceptions to the discrimination rights as described. Though state legislation has been mostly confined to the issue of tobacco use, Michigan has sought to expand the scope of its lifestyle protection. While the state has no legislation in relation to lawful products, it has legislated an express prohibition on discrimination on the basis of employee weight. See Mello, M. & Rosenthal, M. "Wellness Programs and Lifestyle Discrimination – The Legal Limits." (10 July 2008), 359 *N. Engl. J. Med.* pp. 192-199.

CHAPTER 6. Canadian Law Engaging WWP

6.1 Introduction

Canadian law's effect on WWP has been less ubiquitous than in the US. As a general proposition, many Canadian employers have safeguarded the separation between examining on and off-duty conduct of employees. Canadian law, as it relates to workplace health promotion, has been formed principally to serve the interests of workers who have been subjected to employer-mandated drug testing. Beyond this testing, employers have not been so bold as to ingratiate themselves into the lifestyle choices of their employees. For Canada then, legal notions of workplace wellness are articulated primarily through conceptions of occupational health and safety and, as will become clear, preventive wellness programs merely lie on the fringes of becoming adapted policy.

As will be discussed, Canada's legislative framework can elaborate on the extent to which an employee's conduct may be regulated by his or her employer. For the purposes of this thesis the following enactments are relevant to WWP¹⁸⁹:

- the Canadian Charter of Rights and Freedoms;
- *Employment Equity Act*;
- Federal and Provincial Human Rights legislation; and
- Canadian Criminal Code.

¹⁸⁹ This list is not meant to be exhaustive of the statutory and regulatory instruments which affect WWP. It merely serves as an overview of the most notable enactments.

Interestingly, this debate remains largely academic, as there has been no substantive jurisprudence in Canada that confronts the tension between employment law and WWPs. Nevertheless, the touchstones of Canadian law do impose numerous barriers to the successful implementation of WWPs.

6.2 Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms (the “Charter”)¹⁹⁰ is the zenith of Canadian individual rights protection. Representing an integral part of the Constitution, the Charter recognizes a series of rights inherent in each Canadian. The Charter places constraints on government in an attempt to balance the competing interests of liberty for individual action versus the collective welfare of society and the administration of the state.

To date, there has been no constitutional challenge of a WWP in Canada and, as such, it is difficult to determine the extent to which the Charter will impact an employer’s exposure to liability for instituting such programs.¹⁹¹ The following section will highlight Charter sections 7, 8, and 15, and gauge their potential as an avenue for attack against an employer-instituted WWP.

¹⁹⁰ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982 being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁹¹ *Ibid.* at s. 32(1). According to subsection 32(1) the Charter applies “(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of each province.” Importantly, the Charter is capable of reviewing and overriding more than express federal and provincial legislation. The Charter’s ambit extends to the review of a host of actions or decisions undertaken by the government, including those done pursuant to the common law. See *RWDSU v. Dolphin Delivery*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174, [1987] 1 W.W.R. 577; *Hill v Church of Scientology*, [1995] 2 S.C.R. 1130, 24 O.R. (3d) 865, 126 D.L.R. (4th) 129. Private businesses employing private employees are presumptively not subject to Charter scrutiny. As such, there is no Charter recourse for an employee if his or her enumerated rights are breached by a private employer. See *RWDSU*, *supra* note 191. However, employers who operate pursuant to statute are potentially subject to the purview of the Charter. To classify as under Charter review there must be sufficient control of the entity by the government. See *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 2 O.R. (3d) 319, 76 D.L.R. (4th) 545; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416. For example, where a Crown Corporation engages in discriminatory action against employees,

6.2.1 Section 7

Section 7 of the Charter provides that every individual's right of life, liberty, and security of the person cannot be infringed unless it is in accordance with the principles of fundamental justice.¹⁹² The language of the section identifies three core rights: the right to life, the right to liberty¹⁹³, and the right to security of the person.¹⁹⁴

Challenges to governmental action engaging health issues have been grounded in a section 7 security of the person analysis. In addition to the *R. v. Morgentaler*¹⁹⁵ decision, which ruled unconstitutional provisions of the Criminal Code restricting access to abortion, the

a legal action based on a breach of the Charter could be initiated against the company. In order for the Charter to apply to a company or agency, there must be a "structural link" between the government and the employer, and the employer must be implementing a government policy. See *McKinney*, *supra* note 191. If it can be shown that a corporation is empowered by the government to fulfill a specific government policy, then the Charter may be brought to bear on the corporation's employment decisions. Likewise, it is conceivable that if a Crown corporation instituted a WWP that discriminated against an employee, and it was demonstrated that there was sufficient government control over the entity, then a Charter action could be pursued.

¹⁹² "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." See *Charter*, *supra* note 190. To qualify as a principle of fundamental justice, the principle must be: (1) a legal principle, (2) have consensus that it is fundamental to the way in which the legal system ought to fairly operate, (3) identified with sufficient precision to yield a manageable standard against which to measure the deprivations of life, liberty, or security of the person. See *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3. at para. 46; *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571. at para. 113.

¹⁹³ Liberty encompasses an individual's ability to make free and unrestrained decisions. The essence of the right is to protect the individual from state interference that offends the principles of fundamental justice. While the right previously focused on physical interferences to decision-making (i.e. arrest and detention) the section now champions an individual's right to make fundamental life choices which protects a broader sphere of individual conduct. See *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, 190 D.L.R. (4th) 513, [2000] 10 W.W.R. 567. at para. 49.

¹⁹⁴ The right to security of the person ensures that governmental action does not interfere with an individual's bodily integrity, whether physical or psychological, unless in accordance with the principles of fundamental justice. Broad notions of physical or psychological integrity have been used as a springboard to consider a number of governmental actions, including the criminalization and restriction of abortion (See *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 63 O.R. (2d) 281), limitations on obtaining access to legal counsel in child custody disputes (See *New Brunswick v. G.(J.)*, [1999] 3 S.C.R. 46), and restrictions on an individual's right to die (See *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, 107 D.L.R. (4th) 342, [1993] 7 W.W.R. 641).

¹⁹⁵ *Morgentaler*, *supra* note 194.

Supreme Court of Canada (“SCC”) also found that individual security of the person was breached by Quebec’s prohibition on the provision of private medical insurance.¹⁹⁶

Section 7 is a potential ground on which to contest the governmental imposition of a WWP. For example, if a business or agency controlled by government instituted a mandatory wellness scheme requiring individuals to quit smoking or alter nutritional intake, this would be challengeable as a breach of an individual’s liberty to make unrestrained life decisions. Additionally, if a program required mandatory medical examinations, this may constitute a breach of the individual’s physical security.

6.2.2 Section 8

Section 8 of the Charter provides that “[e]veryone has the right to be secure against unreasonable search or seizure”.¹⁹⁷ While this section seeks to protect individual privacy, the scope of this protection varies depending on the reasonable privacy expectations of the employee.¹⁹⁸

Section 8 has been engaged in cases considering whether drug and alcohol testing breaches an individual’s privacy rights. In *R. v. Dyment*,¹⁹⁹ the SCC considered whether the non-consensual collection and use of an accused’s blood sample was a violation of his section 8 rights. In its ruling the Court impressed the importance of maintaining individual privacy,

¹⁹⁶ *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, 254 D.L.R. (4th) 577.

¹⁹⁷ *Charter*, *supra* note 190.

¹⁹⁸ *R. v. Collins*, (1987), 33 C.C.C. (3d) 1.

¹⁹⁹ *R. v. Dyment*, [1988] 2 S.C.R. 417, 55 D.L.R. (4th) 503.

specifically noting that, an individual's reasonable expectation is that personal information remains confidential.²⁰⁰

The *Dyment* decision raises distinct concerns for employers wishing to engineer WWP, where those programs require the collection or analysis of individual medical information. For instance, where a government employee's medical information is released without consent or other authority, the employer is exposed to constitutional challenge. These concerns are further amplified in mandatory WWP, where employees may be compelled to provide personal health information.

6.2.3 Section 15

Subsection 15(1) of the Charter states that individuals are to be free from discrimination on any of the enumerated grounds, including mental or physical disability.²⁰¹ Discrimination occurs where there is differential treatment in relation to an enumerated ground.²⁰² In the context

²⁰⁰ The Court stated, "[i]n modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected." See *Ibid.* at para. 22. While the court was speaking with regard to evaluating conduct involving search or seizure, the policy applies equally as to employee health information collected by an employer. The court further noted that the public's "trust and confidence" would be weakened where private information was casually released. See *Ibid.* at para. 38. Inherent in the Court's analysis is the paramountcy of protecting individual private information.

²⁰¹ Section 15 states "every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". See *Charter, supra* note 190. Section 15 also includes protection from discrimination on any other grounds not listed, but nevertheless justly implied. See *Halpern v. Canada*, (2003), 65 O.R. (3rd) 161 (Ont C.A.), [2003] O.J. No. 2268.

²⁰² In 1999 the SCC analyzed the scope of section 15 in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1. According to *Law*, in the context of a section 15 challenge, the court will determine whether "the treatment discriminates substantively by imposing a burden or withholding a benefit in a way that reflects stereotyped application of presumed characteristics, or that otherwise has demeaning or devaluing effects on the individual." The Court's judgment makes clear that discrimination will be found when an employee is subject to differential treatment in relation to one of the enumerated categories. See *Law, supra* note 202; Hurley M. *Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions* (Mar. 2007), online: Library of Parliament <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/bp402-e.pdf>> at 6.

of WWP, the most probable enumerated ground to be offended would be disability (either on the basis of mental or physical health). For instance, a program rewarding weight loss may discriminate against those unable to participate due to a physical disability.

6.2.4 Summary

Despite the lack of concrete legal challenge to date, employers should be aware of the Charter's reach, and the component sections which could be used to ground a constitutional attack on WWP. Provided an entity is properly under Charter jurisdiction, there are a number of sections available to challenge a WWP, including sections 7, 8, and 15.

6.3 Employment Equity Act

The *Employment Equity Act*²⁰³ (the "EEA"), a federal statute enacted in 1996, was introduced to reduce discrimination within Canadian workplaces.²⁰⁴ The EEA sought to ensure that individuals with disabilities received equal treatment relative to their non-disabled co-workers in respect of employment decisions such as hiring, firing, and allocation of benefits. Under the EEA, employers²⁰⁵ are required to scrutinize their employment policies with a view to eliminating barriers to employment for individuals with disabilities.²⁰⁶

²⁰³ *Employment Equity Act*, S.C. 1995, c. 44.

²⁰⁴ More specifically, the purpose of the act was to, "achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfillment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities..." See *Ibid.* at s. 2.

²⁰⁵ Much like the *Charter*, the EEA is a federal statute, and is therefore constrained in its scope of control. The EEA applies to federal public administration employers and other public sector employers with over 100 employees. See *Ibid.* at s. 4(1). This definition includes private entities which are mandated to exercise a governmental objective, including banks, broadcasters, telecommunication companies, railroads, among others. Interestingly, section 4(1)(a) indicates that the act also covers *private sector employees* defined as "any person who employs one hundred or more employees on or in connection with a federal work, undertaking or business... and includes any corporation established to perform any function or duty on behalf of the Government of Canada that employs one hundred or more employees." See *Ibid.* at s. 4(1)(a); Human Resources and Skills Development Canada. *Employment Equity Act Review: A Report to the Standing Committee on Human Resources Development and the Status of Persons with*

The EEA applies to employers implementing a WWP. As an example, if a construction company with over 100 employees, and which has received a government contract of \$200,000, institutes a maximum weight requirement for its employees, an employee over that threshold would *prima facie* have grounds to challenge the policy as a breach of the EEA. Provided the overweight individual frames his or her obesity as a legal disability, then the WWP could be a violation of the employment equity provisions.

Employers must ensure that their WWPs operate with equal treatment to all employees, and, where appropriate, maintain reasonable accommodations for anyone who, as a result of disability, may not be able to achieve the program rewards.²⁰⁷

6.4 Human Rights Legislation

Both the Canadian federal and provincial human rights regimes directly confront discriminatory workplace actions by employers. The introduction of such human rights legislation necessitates hesitation on the part of employers in seeking to influence employee conduct.

The *Canada Human Rights Act*²⁰⁸ (“CHRA”) serves to prevent and address unequal treatment of employees within federally-regulated companies.²⁰⁹ Each Canadian province has

Disabilities (Dec. 2001), online: Human Resources and Skills Development Canada <<http://www.hrsdc.gc.ca/eng/lp/lo/lsw/we/review/report/main.shtml>> [December 7, 2011]. Additionally, the federal government has also instituted the Federal Contractors’ Program which mandates that “non-federally regulated contractors with 100 or more employees who “receive government goods or services contracts of \$200,000 or more” uphold the principles of employment equity. See Human Resources, *supra* note 205. Employers who are investigated and found to violate these principles may lose the ability to bid on future federal contracts. Impressively, the Federal Contractor Program includes approximately 936 contractors, accounting for 1.1 million employees (or 6.9% of the Canadian workplace). See Human Resources, *supra* note 205.

²⁰⁶ *Employment Equity Act*, *supra* note 203 at s. 5(a)-(b).

²⁰⁷ The EEA maintains a provision which gives employers the power to deny accommodations to individuals with disabilities where such accommodations would cause *undue hardship* to the employer. See *Ibid.* at s. 6(a).

adopted its own human rights protection legislation which reiterates, to some degree, the rights substantiated by the CHRA, but applies those rights at the provincial level.²¹⁰ It is beyond the scope of this paper to engage in a discussion of the varying provincial human rights statutes and, as such, the CHRA will be used as an analytical tool to demonstrate the potential conflux of human rights issues facing WWP.

CHRA section 7 protects employees in federally-regulated companies against any adverse differentiation on the basis of any of the act's enumerated grounds, including disability.²¹¹ For example, it would be discriminatory for a federally-regulated company to terminate employees pursuant to an anti-smoking program, if an employee could prove that their smoking constituted a disability. Provided the employee could make out the case for their disability, the adverse differentiation by the employer would *prima facie* violate section 7 of the act.

²⁰⁸ *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

²⁰⁹ British Columbia Human Rights Coalition. *Overview of Human Rights Law*, online: British Columbia Human Rights Coalition <<http://www.bchrcoalition.org/files/lawoverview.html>> [January 2, 2012]. The CHRA was enacted with the stated principle of ensuring that all individuals are treated similarly in the accommodation of their needs and that they are not discriminated against on any of the legislatively enumerated grounds. See *Canadian Human Rights Act*, *supra* note 208 at s. 2.

²¹⁰ The various provincial and territorial human rights statutes are as follows: *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5 (Alberta); *Human Rights Code*, R.S.B.C. 1996, c. 210 (British Columbia); *Charte des droits et libertés de la personne*, L.R.Q., c. C-12 (Quebec); *The Human Rights Code*, C.C.S.M. c. H175 (Manitoba); *Human Rights Act*, R.S.N.B. 2011, c. 171 (New Brunswick); *Human Rights Act*, S.N.L. 2010, c. H-13.1 (Newfoundland and Labrador); *Human Rights Act*, S.N.W.T. 2002, c. 18 (Northwest Territories); *Human Rights Act*, R.S.N.S. 1989, c. 214 (Nova Scotia); *Human Rights Act*, S.Nu. 2003, c. 12 (Nunavut); *Human Rights Code*, R.S.O. 1990, c. H.19 (Ontario); *Human Rights Act*, R.S.P.E.I. 1988, c. H-12 (Prince Edward Island); *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 (Saskatchewan); *Human Rights Act*, R.S.Y. 2002, c. 116 (Yukon).

²¹¹ The full list of enumerated grounds protected by the CHRA are “race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.” See *Canadian Human Rights Act*, *supra* note 208 at s. 3. The act specifically states that “[i]t is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.” See *Canadian Human Rights Act*, *supra* note 208 at s. 7 [Emphasis added].

Section 10 of the CHRA also redresses employee discrimination by prohibiting employers from instituting any policy or practice which tends to deprive an employee of a benefit on the basis of a protected ground.²¹² The scope of section 10 is broad, as it prohibits discrimination with respect to employer-initiated *policies* and *practices*. If an employer created a WWP which fast-tracked employees for promotion provided they satisfied the WWP requirements, this may be discriminatory towards individuals with a provable disability which renders them unable to participate in the program.

Both sections 7 and 10 of the CHRA are capable of influencing the trajectory of WWPs. If an employer's WWP adversely differentiates or maintains a policy which deprives an employee of an employment opportunity on the basis of disability, then the employer has committed discrimination under the act, and may be subject to penalty. Where an employer breaches provisions of the CHRA it may be liable for monetary damages.²¹³

²¹² See *Canadian Human Rights Act*, *supra* note 208 at s. 10. Section 10 states “[i]t is a discriminatory practice for an employer, employee organization or employer organization, (a) to establish or pursue a *policy or practice*, or (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, *that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.*” See *Canadian Human Rights Act*, *supra* note 208 at s. 10 [Emphasis added]. In certain circumstances, actions or practices which are *prima facie* discrimination may nevertheless be justified. By operation of section 15(a)(1) of the CHRA, a practice will not be discriminatory if “(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement...” See *Canadian Human Rights Act*, *supra* note 208 at s. 15(a)(1). Section 15(2) of the CHRA further states that “[f]or any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement...it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.” See *Canadian Human Rights Act*, *supra* note 208 at s. 15(2). Whether or not a practice is a *bona fide* occupational requirement or an undue hardship has been subject to extensive Canadian jurisprudence. See *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 S.C.R. 561, 294 D.L.R. (4th) 407 at 16 which states “[t]he employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.” Provided the employer has arranged accommodation up to the point of undue hardship, any discriminatory practice which is based on an occupational requirement, may be properly defensible.

²¹³ Where, after inquiry by the Canadian Human Rights Tribunal, a claim of discrimination is substantiated, an employer may be liable for monetarily compensating the discriminated employee for their expenses incurred, lost

6.5 Criminal Code of Canada

Amendments to the Criminal Code of Canada (the “Code”) also affect WWPs. In 2003, the federal government passed Bill C-45 which introduced section 217.1 into the Code.²¹⁴ The offence permits criminal punishment against employers who are negligent in protecting their employees, and where bodily harm results.

This new legal duty serves as a further deterrent to employers from interfering with the behaviours of their employees, including through WWPs. For example, if it may be considered criminal negligence to task an improperly trained employee on a certain worksite for a specific task, it may also be criminal negligence to allow an improperly trained employee to participate in a fitness regime where they are subsequently injured. While there is a significant distance between these two scenarios, the provisions of the Code may allow criminal punishment to be levied on the employer.

6.6 Summary

There is a plurality of legislative instruments in both the US and Canada that seek to address and prevent discrimination in the workplace. While each statute varies in the scope and severity of its interference with employer autonomy, each reinforces the societal desire to treat similarly-situated individuals as equals. Where differential treatment is displayed, the statutes

wages, costs of obtaining alternative services or accommodation, and/or general damages of up to CDN\$20,000. Accordingly, employers should be cognizant of their potential exposure under the CHRA. See *Canadian Human Rights Act*, *supra* note 208 at s. 53(1)(c)-(e).

²¹⁴ Bill C-45, *An Act to Amend the Criminal Code (Criminal Liability of Organizations)*, 2nd Sess., 37th Parl., 2003 (Royal Assent, 7 November, 2003). Section 217.1 states that “everyone who undertakes, or has authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.” See *Criminal Code*, R.S.C. 1985, c. C-46 at s. 217.1.

engage a host of remedies to punish the offending employer or to compensate, as best possible, the individual who suffered loss arising from the discrimination.

When designing WWPs, employers must be cognizant of how anti-discrimination statutes operate in their jurisdiction. While it is unlikely that wellness programs will display overt forms of discrimination, it is conceivable that an inadvertent preference may be bestowed on certain individuals, thereby constituting discrimination under one or more of the Canadian anti-discrimination statutes. A well-crafted WWP will recognize these concerns, and seek to reward participation in the program and not the individual's results within the program. By framing wellness initiatives in this way, employers can skirt some of the potential liability exposure generated from the aforementioned legislation.

CHAPTER 7. Analysis of the Structural Forms of WWP

7.1 Introduction

WWPs are by no means universal in terms of their scope or function. Employees respond differently to various health programs, in part, due to idiosyncrasies affecting their likelihood to participate and adhere to the program design. To the extent possible, WWP should be inclusive of a broad cross-section of individuals, while at the same time being loyal to the stated health goals of the program.

Despite their statistical success, one of the consistent problems faced by WWP is a lack of employee participation. According to a survey conducted by the Wellness Council of America (“WELCOA”) approximately eight out of ten employees hold the view that WWP are a “good idea”, however only three out of ten participate in the offered programs.²¹⁵ Arguably, employers have yet to fully and effectively engage employee participation in WWP.

WELCOA’s study found that varying the incentives offered to employees has a positive correlation on the employee participation rate. In surveying employees on various incentives the study revealed that:

- 10%-15% of employees participated when “Trinket and T-shirt” were offered;²¹⁶
- 15%-50% of employees participated when more expensive “merchandise” giveaways were offered;²¹⁷
- 35%-70% of employees participated when cash rewards were offered;²¹⁸ and

²¹⁵ Roethel, C. “Can Wellness Be Mandated?” *Core Health Group*, online: Core Health Group <http://www.corehealthgroup.com/articles/Mandated_Wellness.pdf> at 1.

²¹⁶ Hunnicutt, D. “Utilizing Incentives to Maximize Participation” (Apr. 2008), 7(5) *Absolute Advantage*. pp. 2-17, online: Wellness Council of America <https://www.welcoa.org/freeresources/pdf/aa_7.5_apr08.pdf> at 10.

²¹⁷ *Ibid.*

- 50%-80% of employees participated when reductions to employee health care premiums were offered.²¹⁹

It is clear that superficial inducements for WWP participation often bear little fruit, as there is scant continuing motivation for employees to participate. As a result, employers should provide more complex incentives or develop coercive schemes to ensure employee participation.

WWP initiatives can be delivered in broadly two ways. The first, known as *mandatory* programs, are rooted in the assumption that employees will not modify their behaviours unless there is some external pressure demanding compliance. The second option is a *voluntary* approach, which understands that health programs must be linked to proper incentivization in order to gain widespread acceptance by employees. While both options attempt to fortify the value of health within the workplace, they go about it from two principally distinct methodologies, each with its own attendant benefits and detriments.

7.2 Mandatory Programs

A mandatory workplace wellness scheme relies on forced participation and compliance.²²⁰ The underlying premise is that without some measure of compulsion the programs are less likely to be used. Under a mandatory scheme, if an employee chooses to not participate there will be some form of external punishment or denial of a benefit typically received. This punishment often takes the form of a financial penalty such as an increase to insurance premiums or other monetary fee.²²¹ In more extreme circumstances an employee may

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ Littler, *Employer Mandated*, *supra* note 118 at 6.

²²¹ *Ibid.*

be denied medical insurance by the employer or be dismissed for their non-compliance with the program terms.

The benefit of mandatory programs is that they are able to defuse one of the largest sticking points for the successful implementation of WWPs: employee participation. While non-mandatory programs may wither from lack of adequate employee support, forced compliance guarantees that the WWP terms are adhered to. While such compulsion does not guarantee achievement of the program objectives, it greatly assists in that regard.

One of the principal criticisms of mandatory WWPs is that they engage in corporate paternalism, as the individual employee has no say in how or why they should participate in the WWP. Employees lose complete authority over their health choices. As such, employees are rightly reluctant to participate in mandatory WWPs. This hesitancy in allowing employers to dictate health choices was confirmed by a J.D. Power and Associates survey which found that only 3% of polled individuals “trust the employer the most” when obtaining advice on health issues.²²²

7.2.1 Scotts Miracle-Gro Mandatory Wellness Strategy

One of the largest and most controversial mandatory WWPs was administered by The Scotts Company, LLC (“Scotts”) in the US.²²³ In 2005, Scotts spearheaded a workplace wellness campaign known as the “LiveTotal Health Initiative” which, among other things, required

²²² Butcher, L. “Big Companies Holding Fast To Employer-Sponsored System” *Managed Care Magazine* (2007), online: *Managed Care Magazine* <<http://www.managedcaremag.com/archives/0706/0706.employer.html>> [December 11, 2011].

²²³ The Scotts Company, LLC is a subsidiary of Scotts Miracle-Gro Company which “holds itself as the world’s largest marketer of branded consumer lawn and garden products”. See *Rodrigues v. The Scotts Company, LLC*, No. 07-10104-GAO, US District Court for the District of Massachusetts (January 24, 2007), online: *Massachusetts Trial Court Law Libraries* <<http://www.lawlib.state.ma.us/docs/rodriguescomplaint.pdf>> at para. 3.

individuals to participate in a health assessment engineered to identify high-risk employees and develop health action plans.²²⁴ Employees who did not take part in the evaluations were required to pay \$107 more per month in insurance premiums compared to those who completed the assessments.²²⁵

Additionally (and most controversially) the company stated that it would no longer employ individuals who smoked. In fact, the dominant purpose of the LiveTotal Health Initiatives program was to limit the sky-rocketing healthcare costs paid out by the company for cigarette smoking employees.²²⁶ As part of the LiveTotal Health program, individual employees were prohibited from smoking regardless of whether or not it was during non-working hours. To enforce this policy Scotts subjected its employees to random urine tests to ensure they were nicotine free.²²⁷

An employee of Scotts, Scott Rodrigues, submitted to the required urine test, and was subsequently fired after he tested positive for nicotine.²²⁸ Aggrieved, Rodrigues filed suit in Massachusetts Federal Court.²²⁹ In his Amended Complaint to the US District Court for the District of Massachusetts Rodrigues claimed, among other things, that,

²²⁴ Littler Mendelson, P.C. *Employer Mandated Wellness Incentives: The Continuum from Voluntary to Mandatory Plans* (2008), online: Littler Mendelson, P.C. <<http://www.littler.com/files/press/pdf/18868.pdf>> at 3.

²²⁵ *Ibid.* \$40 dollars was charged for not doing the original assessment, and an additional \$67 dollars was billed for not developing the action plan.

²²⁶ *Rodrigues*, January, 24, 2007, *supra* note 224 at para. 9.

²²⁷ *Ibid.* at paras. 16-23.

²²⁸ *Ibid.* at para. 9.

²²⁹ Conlin, M. "Get Healthy - Or Else" *Business Week* (26 February 2007), online: Business Week <http://www.businessweek.com/magazine/content/07_09/b4023001.htm?campaign_id=nws_insd_r_feb17&link_position=link1> [September 2, 2010].

- being compelled to provide a sample of his urine violated his reasonable expectation of privacy without legitimate justification;²³⁰
- the Scotts’ testing for nicotine violated his civil rights to be free from “unreasonable, substantial and serious interference with his personal privacy” as prescribed by the *Massachusetts Civil Rights Act*;²³¹
- he was wrongfully terminated from Scotts²³²; and that
- his termination violated his rights, or alleged right, to participate in Scotts’ employment benefit plans, and, as such, constituted a violation of ERISA.²³³

Prior to trial, Scotts motioned to dismiss the action on grounds that Rodrigues had failed to disclose a cause of action on which relief could be granted. After considering the facts of the case, O’Toole, D.J. held that Rodrigues’ claim that he was wrongfully terminated on the basis of being a smoker was not a proper ground through which he could pursue a wrongful termination claim.²³⁴ Accordingly, the law did not give Rodrigues a “right to smoke”. O’Toole, D.J. also dismissed Rodrigues’ claim that Scotts violated his state civil rights as the complaint failed to identify any “threats, intimidation, or coercion” surrounding Rodrigues’ taking of the urine test, as required by the Massachusetts legislation.²³⁵

Rodrigues’ remaining claims, that his privacy was invaded and that his termination violated ERISA, were summarily determined in favour of Scotts in reasons pronounced on July

²³⁰ *Rodrigues*, January, 24, 2007, *supra* note 223 at para. 9.

²³¹ *Ibid.* at paras. 24-30.

²³² *Ibid.* at paras. 31-35.

²³³ *Ibid.* at paras. 36-44.

²³⁴ *Rodrigues v. The Scotts Company, LLC*, No. 07-10104-GAO, US District Court for the District of Massachusetts (January 30, 2008), online: PACER <<http://pacer.mad.uscourts.gov/dc/cgi-bin/recentops.pl?filename=otoole/pdf/rodrigues%20v%20scotts%20co%20mot%20to%20dismiss%20order.pdf>> at para. 4.

²³⁵ *Ibid.* at para. 3.

23, 2009.²³⁶ With respect to the invasion of privacy claim, the court held that Rodrigues had no protected privacy interest, as it was common knowledge that he was a smoker. Important was the fact that he never kept his smoking a secret from other employees or the general public.²³⁷ Given that he had no privacy interest in the information, he had no foundation for an invasion of privacy claim. On the ERISA claim, the court found that because Rodrigues was not a “regular, full-time associate” under the Scotts benefit plan, he was not a participant in that plan.²³⁸ As he had no right to participate in the benefit scheme, he was not deprived of that right by the nicotine test.

The Scotts litigation highlights the myriad of concerns arising from the implementation of a mandatory WWP. In addition to being viewed as oppressive by the employee, they also expose the employer to legal challenges by those from which it seeks participation. While Scotts was able to avoid liability for their WWP, it is evident that a few changes in the underlying facts could have resulted in a different judicial disposition. For instance, what if Rodrigues had kept his smoking a secret and the nicotine test revealed that he was a smoker? What if Rodrigues had been a full-time employee? Would Scotts’ actions then have violated ERISA? While the court did not find liability in the Rodrigues case, this does not exonerate the Scotts program nor shield it from further legal challenge.

²³⁶ *Rodrigues*, July 23, 2009, *supra* note 170 at paras. 5-6. The defendant, Scotts, motioned for summary judgment of the remaining claims on grounds that those claims failed to disclose a cause of action to which there was remedy in law.

²³⁷ *Ibid.* at para. 4.

²³⁸ *Ibid.* at paras. 5-6.

7.2.2 Other Mandatory Wellness Programs

Scotts is not the only corporation utilizing WWP's which possess some punishment or enforcement mechanism to compel employee participation:

- the Tribune Co., the owner of daily newspapers including the Baltimore Sun, requires employees or their families who smoke cigarettes to pay an additional \$100 per month in increased health insurance premiums.²³⁹
- the Cleveland Clinic has instituted a policy of not hiring any new employees who fail a nicotine test.²⁴⁰
- Meritain Health, developed a hard-line policy against smokers, requiring employees to complete annual nicotine tests, subsequent health assessments, and forfeit \$50 per paycheck if they or their spouse smokes. In an effort to water-down the severity of these policies, employees were given a one-year grace period in which to quit smoking. If they were not able to do so within the allotted one year they were summarily fired.²⁴¹
- Weyco, a health benefits management company, was one of the first American corporations to institute an aggressive mandatory wellness program. The company prohibited the use of nicotine outside the workplace, and conducted random urine tests to ensure compliance with the anti-smoking policy.²⁴² Employees who refused to submit to the tests or failed to enroll in smoking cessation programs were, as of January 1st, 2005, terminated. Prior to the January 1 deadline three employees quit in protest of the mandatory initiative.²⁴³

²³⁹ Baker, B. "Now, the Stick" *The Washington Post* (13 November 2007), online: The Washington Post <<http://www.washingtonpost.com/wp-dyn/content/article/2007/11/09/AR2007110902102.html>> [December 11, 2011]. It is worth noting that the \$100 deduction is the minimum amount which may be appropriated from a smoking employee by the company.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² Weyers, H. *Smokers need not apply: smoking isn't a civil right* (Mar. 2005), online: California Bar Journal <<http://archive.calbar.ca.gov/%5CArchive.aspx?articleId=61630&categoryId=61423&month=3&year=2005>> [September 5, 2010].

²⁴³ *Ibid.*

- Clarian Health, a hospital system in Indianapolis, announced that, commencing in 2009, any employees with a high risk body-mass index would have \$5 subtracted from each paycheck. These deductions were eliminated after outraged employees resisted the program.²⁴⁴ Clarian was subsequently forced to adopt voluntary wellness incentives.

The fundamental problems with compulsory WWPs are that they are vulnerable to employee legal attacks on multiple fronts and engender employee resistance to the programs. Given that mandatory WWPs significantly curtail employee freedom and foster animosity to the program ideals, other WWP delivery methods should be considered.

7.3 Voluntary Programs

A voluntary program is one which does not *require* the employee to participate in the health promotion strategy.²⁴⁵ Under voluntary programs employers maintain no authority to punish employees, whether disciplinarily or financially, for choosing not to participate in the WWP.²⁴⁶ The very essence of the voluntary scheme is that employees are simply given the choice of whether or not to participate.

One of the obvious benefits of such programs is that they do not manifest the type of employee resistance typically experienced by mandatory programs. Voluntary initiatives represent an air of collaboration which, if properly harnessed, can nurture the employer/employee relationship while achieving the desired health promotion objectives.

²⁴⁴ Roethel, *supra* note 215.

²⁴⁵ Littler, *Employer Mandated*, *supra* note 118 at 9.

²⁴⁶ *Ibid.*

7.3.1 Challenges/Deficiencies of Voluntary Programs

While voluntary programs offer the least heavy-handed approach to facilitating employee lifestyle change, critics argue that relying on individual choice weakens the effectiveness of these programs. Implicit in this argument is that the workplace cannot cause an individual to restructure their health or life priorities merely through the institution of optional programs. Indeed, it is an uncontested point that voluntary programs are successful only if the individual chooses to participate - a decision which cannot be conclusively secured.

Ultimately, the incentives utilized under a voluntary WWP can be disregarded by employees.²⁴⁷ This type of failure was illustrated by Wachovia Corporation when it launched a WWP which rewarded employees who participated in an individual health assessment with a \$50 gift certificate.²⁴⁸ Within its first year of implementation only 10% of the company's employees chose to complete the questionnaire.²⁴⁹ In light of the failed participation rate, management dropped the program from its corporate strategy.

A further complication with voluntary incentivization in WWPs is that it primarily benefits those who are already in a healthy physical condition or who place value on the promoted health behaviour. Successful voluntary WWPs should not simply reward the existing healthy workforce, but should rather provide substantive incentive to those who are the greatest beneficiaries of WWPs – unhealthy workers. This issue can be alleviated by: (1) tailoring

²⁴⁷ A 2007 study by IncentOne, a health consulting firm, found that “maintaining employee motivation” was the most serious challenge for employers administering a health and wellness program. See Capps, K. & Harkey, Jr., J. *Employee Health & Productivity Management Programs: The Use of Incentives* (2007), online: ERISA Industry Committee <<http://www.eric.org/forms/uploadFiles/c92d0000001a.filename.IncentOne-Survey-Results1.pdf>> at 2.

²⁴⁸ Terry, P. “Rethinking Rewards – Using Incentive to Improve Wellness Program Results” *Human Resources Management*, online: Human Resources Management <<http://www.hrmreport.com/pastissue/article.asp?art=272143&issue=230>> [December 11, 2011].

²⁴⁹ *Ibid.*

program requirements in such a way as to reward substantial changes to individual health rather than a base health factor, or (2) better educating employees on the program's individual health benefits. As well, some incentives encourage behavioural changes, such as providing free or subsidized gym memberships. This type of incentive helps to engage non-healthy workers who might otherwise be gym adverse.

7.3.2 Ensuring Participation in Voluntary WWP

The following table illustrates four American multi-national corporations which, through proper incentivization, have increased employee participation rates in their WWP:

Table 7.1: Incentives and Employee Participation Rates within Voluntary WWP

Company	Incentive	Program	Participation Rate
Johnson & Johnson	\$500 rebate on medical premiums	HRA Wellness programs	No incentive: 20% With incentive: 90% (HRA)
Quaker Oats	Up to \$300 rebate allocated across numerous activities	HRA Health screening Lifestyle programs	No incentive: 50% With incentive: 82% (HRA)
We Energy	Point-based program \$200-\$300/year	HRA Online programs Fitness challenge 3	5-year participation rates sustained at 50%.
Hoffman LaRoche	\$25 gift certificate	Participation in 12 health-related activities	No incentive: 10% With incentive: 30%

250

²⁵⁰ Chart reproduced from: Finkelstein, E., Kosa, K.M., & Brown, D.R., "Use of Incentives to Motivate Healthy Behaviors Among Employees." (Summer, 2003), 21(3) *Gender Issues* pp. 50-59.

Each of the above-noted companies has experienced tremendous success utilizing a voluntary WWP based on incentivization. Accordingly, despite the inherent difficulties with participation and compliance, one should be cautious to dismiss voluntary programs as impotent or incapable of catalyzing substantive change.

7.4 Summary

Voluntary programs can generate long-standing change within employees if the measures of incentivization are properly ascribed. Low participation rates can be proactively addressed through incentivization which takes into account the nature of the company and health priorities of its employee base. Not all forms of incentive will drive similar employee engagement and, as such, properly evaluating each incentivization method is required to ensure the overall success of the WWP. In the aggregate, voluntary programs appear more likely to achieve individual health goals, and are arguably the preferred method for instituting WWPs.

CHAPTER 8. Substantive Implementation of WWP

8.1 Introduction

Earlier chapters of this thesis have discussed the economic gains from instituting WWP, and the legal obstacles affecting such implementation. The aggregate result of this analysis is that WWP can properly alter employee health habits to make business more efficient and productive. If WWP can assist in addressing social and business costs associated with poor worker health, the issue then becomes how best to implement these programs. Indeed, what is the proper genesis of a WWP and what are the core components to the successful modification of employee health outcomes? The following analysis will attempt to answer some of these questions, and construct a framework checklist for employers wishing to develop WWP.

It should be noted that these factors will be for informational purposes and can serve only as a general roadmap. As each business will be unique in its goals and its employees, no universal checklist can be created. However, the following factors will provide a useful starting point for any employer considering the development of a WWP.

8.2 The Evolution of a WWP

8.2.1 Ascertaining Corporate Health Goals and the Role of the Wellness Committee

Traditionally, it has been management's role to facilitate the selection and prioritization of corporate health goals, however successful WWP often establish "wellness committees" to do so. The primary goal of the wellness committee is to construct the underlying corporate health objectives and design the strategic components of the WWP.

Wellness committees should bring together a variety of actors under the common rubric of determining health promotion objectives. It is imperative that the committee be representative of a number of workplace groups to maximize the legitimacy of the program amongst the target audience: namely, the workers.²⁵¹ The most effective wellness committees will include, but not necessarily be limited to, members of the following:

- employees' union;
- human resources department;
- information technology department;
- senior management;
- employee representatives nominated by the workers; and the
- communications officer.

The wellness committee is of fundamental importance as it ensures that the design, implementation, maintenance, and evolution of the WWP are not conducted unilaterally by the employer. The lack of employer imposed terms generates better buy-in from employees and enhances the capacity for program expansion.

If the workplace is unionized it is imperative that the WWP and the wellness committee receive union support. Generally, workplace wellness is a topic that is conducive to management and union cooperation. Although each side will have differing objectives, the primary goal is to find ways to maintain a healthy and stable workforce. Unions carry significant suasion for the legitimization of managerial decisions and fully engaging union support for WWPs will

²⁵¹ Lowe, G. *Healthy Workplace Strategies: Creating Change and Achieving Results* (Jan. 2004), online: Graham Lowe Group <<http://www.grahamlowe.ca/documents/93/Hlthy%20wkpl%20strategies%20report.pdf>> at 22.

positively reinforce the optics of such programs and validate the managerial intentions behind their institution.

In its foundational report, *Twelve Case Studies on Innovative Workplace Health Initiatives*, the Canadian Labour and Business Centre found that union backing was, in fact, an “essential” element for the successful integration of business wellness strategies.²⁵² By way of an example, Irving Paper Ltd., a large Canadian industrial company, identified a high degree of dissent between management and labour during the negotiations of a new collective bargaining agreement. While the two sides remained distant on a host of issues they were able to use workplace wellness as a unifying topic, leading to improved relations and communication between the parties for the remainder of the negotiations.²⁵³ In a unionized environment, union support is a factor for improving the prospects of designing and implementing a successful WWP.

Once the wellness committee has been appointed, the members will initiate the process of considering the overall health picture of the company, desired corporate health goals, and the most appropriate WWP delivery methods. In developing the WWP the wellness committee also acts as a conduit to promote acceptance of the program among the employees.

8.2.2 Cultural Transformation

One of the key factors for ensuring the viability of WWPs is the concomitant recognition by management that health is a pillar of its business operations. Health must be integrated into an

²⁵² Canadian Labour and Business Centre. *Twelve Case Studies on Innovative Workplace Health Initiatives* (2002), online: Canadian Labour and Business Centre <http://www.clbc.ca/files/Reports/summary_of_key_conclusions-final-e.pdf> at 4.

²⁵³ *Ibid.* at 15.

employer's underlying culture to reinforce to employees that health promotion programs are valued and stand as long-term organizational commitments.

A principal reason for the failure of WWPs is that employers often neglect to cultivate the programs within the incubus of a larger corporate strategy. A study conducted in the United Kingdom by Harden, Peersman, Oliver, Mauthner, and Oakley discovered that of the 110 surveyed employers, only one-quarter had made any attempt to transpose health values into their overall corporate philosophy. The inception of a WWP, absent any alteration to the underlying corporate philosophy, greatly weakens the long-term sustainability of the programs. Providing singular WWPs with no foundational commitment is tantamount to triage, and while the programs may provide some measurable short-term success, long-term consistent gains will not be attainable.

Individual health programs often operate without a larger transformational strategy because initiating such a cultural change may take years to foster. According to Canadian health commentator Lowe, modifying cultural aspects of a business typically requires three to five years, and such a shift only results where there is a concerted managerial effort to transform the culture step-by-step, not via meta-alterations.²⁵⁴ Indeed, Goetzel also argues that the success of WWPs is linked to an organization's ability to adopt an "integrated approach" where management understands and develops the inter-relationship between corporate culture and

²⁵⁴ Lowe, *Healthy Workplace Strategies*, *supra* note 251 at 3.

WWPs.²⁵⁵ There are numerous ways in which a corporation can seek to reflect health as an organizational priority, and consequently, affirm its long-term commitment to health promotion.

An organization should ensure that health promotion is formally merged into the corporate strategy of the company.²⁵⁶ Health promotion should be constitutionalized via inclusion into the company's vision statement or corporate values statement.²⁵⁷ For instance, Bell Canada Enterprises' Codes, Policies & Rules references its commitment to wellness:

Bell regards Health, Safety and Wellness as a corporate priority. We have in place effective policies and practices to protect the health, safety and well-being of our employees, customers and the public. Reflecting the value Bell attaches to health, safety and wellness, this policy statement outlines the company's commitment and how it will be met.²⁵⁸

Likewise, PepsiCo Inc. has also constitutionalized its commitment to health and wellness. Among the statements included in its Human Sustainability Policies, PepsiCo Inc. states

Our company-sponsored approach to health and wellness encompasses physical, emotional and financial well-being and includes prevention... We are a socially responsible company and committed to collaborating on solutions to major social and economic issues. We are eager to continue to share our substantial experience in

²⁵⁵ Goetzel, R.Z. *Examining the Value of Integrating Occupational Health and Safety and Health Promotion Programs in the Workplace* (Jan. 2005), online: National Institute for Occupational Safety and Health <http://www.factsforhealthcare.com/management/Assets/NIOSH_Background_Paper_Goetzel.pdf> at 13.

²⁵⁶ Quintiliani, L., Sattelmair, J., & Sorensen, G. *The Workplace as a Setting for Interventions to Improve Diet and Promote Physical Activity: Background paper prepared for the WHO/WEF Joint Event on Preventing Noncommunicable Diseases in the Workplace* (Sept. 2007), online: World Health Organization <<http://www.who.int/dietphysicalactivity/Quintiliani-workplace-as-setting.pdf>> at 12-13.

²⁵⁷ *Ibid.*

²⁵⁸ *Bell Canada Enterprises*, online: Bell Canada Enterprises <<http://www.bce.ca/webarchives/2008/en/responsibility/governance/ethicsconduct/issues/>> [February 4, 2012].

providing healthcare benefits to a large and diverse workforce and in developing comprehensive workplace wellness programs.²⁵⁹

This integration of wellness messaging into the formal corporate infrastructure significantly legitimizes the notions of health and wellness in the workplace. It notionally and symbolically cements the employer's long-standing commitment to the enhancement of worker health.

The corporate WWP should also feature prominently in the company's employee recruitment and retention structure. Highlighting the WWP within the labour relations context solidifies health as a centralizing corporate tenet at the very start of the employer-employee relationship.

Re-imagining health as a corporate sustainability goal will increase buy-in for the WWP by fostering a synergy between the corporate vision and the individual employee. It is critical that companies recognize that the sole construction of a WWP will likely not be successful in permanently altering employee health outcomes. Rather, a cultural transformation reflecting the value of health in the workplace must also occur.

8.2.3 Collection of Workplace Statistics

The collection of base statistical information is a prerequisite for evaluating the progress and success of WWPs.²⁶⁰ Baseline information as to employees' current health must be collected in order to properly understand what type of programs will be most beneficial in each workplace

²⁵⁹ *PepsiCo Inc.*, online: PepsiCo Inc. <<http://www.pepsico.com/Purpose/Overview/Policies.html>> [February 4, 2012].

²⁶⁰ O'Donnell, M.P. *Health Promotion in the Workplace*. 3rd Ed. (New York: Delmar, 2002) at 55.

environment.²⁶¹ Traditionally, the WHO has referred to this process as a “needs assessment”.²⁶² While the WHO considers the macro-level, at the level of an individual corporation a needs assessment serves to highlight current health trends and provides a snapshot of the health needs of employees.

There are a variety of ways in which a needs assessment can be completed. For most employers, the simplest method will be to construct a base of knowledge from existing workplace statistics. For instance, information regarding annual health insurance claims may be used to determine the historical strain that workplace-related injuries cause on the employer. Additionally, if collected historically, absenteeism rates also provide a method with which to track the progress of a WWP initiative.

Other administrative data that sheds light on a workplace’s current health diagnosis includes worksite accident numbers, employee turnover rates, and medical expenses. Each of these data sets serves to forge an analytical baseline of employee health information.²⁶³ This foundational data may then be used for comparative analysis, once new data is collected after program implementation.

One of the principal sources of utilizable health measurements is derived from surveys. Surveys offer employees a voluntary and confidential method to communicate information regarding their current or projected health objectives. Surveys also possess the added benefit of enabling the surveyor to examine non-empirical classes of information, such as motivators,

²⁶¹ Bray, Ilona. *Healthy Employees, Healthy Business: Easy Affordable Ways to Promote Workplace Wellness*. 2nd Ed. (California: Nolo, 2012) at 32.

²⁶² Smith, *supra* note 2 at 4.

²⁶³ Goetzel, *Examining the Value*, *supra* note 255 at 21.

stresses, and perceived goals of the employees. This type of data reflects subjective mentality information which cannot be discerned by the utilization of objective scale measures.

Problematic with the use of surveys is that employees may be reluctant to disclose their personal information, specifically health information, to employers or third-party survey administrators. This hesitancy arises, in part, from the concern that collected data will be used for some collateral purpose. Of major concern is that employers will use collected information to justify human resources decisions such as termination.

To combat this reluctance, employers should ensure that a comprehensive confidentiality policy is in place, and that it outlines the discreet uses for all health information. Additionally, the fear of providing personal health information will be lessened where the employer has properly positioned health as a cultural pillar of the company.

8.2.4 The Implementation Process

Current academic research regarding WWPs echoes a definitive and hallmark principle: that there is no standardized approach for WWP development and implementation. Cross-sectional analyses of multiple WWPs indicate that each program must be tailored to reflect the cultural and historical idiosyncrasies of its workforce.²⁶⁴ While certain initiatives may breed success for one employer, the direct transfer of that program to another distinct workplace may easily result in failure. Employee health concerns and priorities also vary considerably among industry sectors, and WWPs must take into account these specific sector characteristics.²⁶⁵

²⁶⁴ Lowe, *Healthy Workplace Strategies*, *supra* note 251 at 4.

²⁶⁵ *Ibid.* at 11.

While WWP's differ in complexity and structure, one common feature is that they are implemented during workplace hours. Doing so, allows the employee to develop a participation routine and a support network with other employees enrolled in the program.

If feasible, organizations should allow spouses, partners, and family members, to participate in the WWP. Integration of the employees' family network reinforces the "habit"²⁶⁶ of the program and deepens health gains, buy-in, and peer acceptance of the WWP. Allowing family access also collaterally benefits the employer by reducing employee absenteeism resulting from the required care of ill family members. If families are generally healthier, there will be reduced employee days off to care for them. Thus, employers should expand access to the WWP to an employee's family for the purpose of supporting participation and collaterally, improving the long-term sustainability of the program.

Given that "health promotion" is a broad amorphous term, there is significant employer discretion in determining what types of initiatives should be implemented. Indeed, there are numerous health strategies which can be deployed to combat unhealthy lifestyles and to increase the productivity of the workforce. While not an exhaustive list, the following WWP options have traditionally been utilized:

- nutritional courses focused on healthier eating;
- exercise classes during workplace hours;
- tobacco cessation programs;
- weight loss or weight management classes;
- substance abuse courses;

²⁶⁶ O'Donnell, *supra* note 260 at 69.

- seminars dealing with mental health issues;
- financial management; and
- injury prevention.

Which programs are implemented is largely defined by the wellness committee after considering the foundational administrative data collected at the outset of program development and the underlying corporate health philosophy of the business.

8.2.5 Education

Even the most sophisticated WWP will remain ineffectual if employees are not comprehensively educated as to the program requirements and its component incentives. It is also critical that employees receive adequate education regarding the consequences of unhealthy habits, as it is a substantial factor in leading to behavioural change.²⁶⁷ The following are a few examples of methods through which employers can communicate wellness initiatives to employees:

- weekly or monthly newsletter focusing on health-related issues circulated to all employees;
- weekly or monthly lunch-and-learn sessions whereby the company provides lunch in exchange for employee attendance at a health-related seminar;
- wellness or lifestyle coaching provided for high-risk employees;
- skill-building classes focusing on issues such as healthy cooking or proper exercise techniques;
- placing health tips on the company website;
- creating employee email list for the dissemination of healthy lifestyle tips;

²⁶⁷ Gebhardt, D.L. & Crump, C.E. "Employee Fitness and Wellness Programs in the workplace" (Feb. 1990), 45(2) *Am. Psychol.* pp. 262-272.

- providing onsite support by healthcare professionals such as ergonomics or other medical testing; or
- orientation programs for newly recruited employees emphasizing available WWP options.

Depending on the size of the organization and the financial resources available, methods of employee education will differ. However, all organizations should have a written policy regarding the stated goals for the WWP and ensure that it is clearly communicated to employees. Additionally, employees should be given ample notice as to the start time for any health and wellness initiative.

Employers should recognize that a one-time communication approach will not be sufficient to successfully foster long-standing employee participation in the WWP. Repetition of the health message is required to ensure that the health initiatives are fully and completely adopted and embraced by the workplace.

8.2.6 Solidifying “Buy-In” for the Programs

The successful implementation of a WWP hinges not only on the types of programs selected, but also on achieving managerial and employee health leaders “buy-in” for those programs. Managerial acceptance of WWPs must be sustained if the programs are to be viable in the long-term.

Obtaining managerial “buy-in” for WWPs is critical, as employees assess the legitimacy of the programs, in part, on management’s perceived commitment to the health goals.²⁶⁸ Where a business presents top-down managerial acceptance of the new health policies, workers are given

²⁶⁸ Lowe, *Healthy Workplace Strategies*, *supra* note 251 at 11.

assurance that the programs are legitimate and are considered a valued cultural component of the workplace. As one scholar notes, “middle managers are the final gatekeepers to the employees’ participation in the program[s].”²⁶⁹ While managerial buy-in for WWPs is not the sole determining factor of success, it is a clear catalyst in encouraging employee participation.

Assessing degrees of support can be achieved through the distribution of anonymous surveys to be conducted by upper-echelon and middle management.²⁷⁰ Tracking managerial perception of the initiatives allows the programs to be retooled if they begin to fail in their mandate.

WWPs will also be successful where a small number of employees “champion” the cause of health in the workplace. These champions should be keenly interested in health issues and be committed to their application in the workplace. Champions should be at the forefront of constructing and marketing the WWP and communicating with stakeholders during the development process.²⁷¹ Collaterally, champions often become the face of the health initiative and can rally support by integrating “an overall sense of purpose and passion about health, safety and productivity management.”²⁷² Given this set of responsibilities, champions should also be imbued with decision-making power relating to project implementation. The delegated authority will reduce bureaucratic backlog in the decision-making process and limit potential employer frustration with the initiatives.

²⁶⁹ O’Donnell, *supra* note 260 at 59.

²⁷⁰ *Ibid.* at 59-60.

²⁷¹ Goetzel, *Examining the Value*, *supra* note 255 at 28.

²⁷² *Ibid.*

What is critical to note is that combating apathy and apprehension towards WWP starts with management. Whether they view the programs as valuable or merely tangential largely sets the tone for how employees measure the worth of the initiatives. In similar fashion, workplace champions reinforce the positive impacts of participating in health programs. The coordination of both management and workplace champions should be cultivated during the early stages of project development, as it will greatly enhance downstream worker buy-in for the WWP.

8.2.7 Evaluate and Enhance

The final stage in the development of WWPs is the review and modification stage. It is inevitable that some aspects of a WWP will be ineffective or require amendment after implementation. Consequently, WWPs must be subject to comprehensive evaluation to determine how to obtain greater program success.²⁷³ While this evaluation process can be conducted utilizing a number of different techniques to measure a variety of different objectives, it is not the scope of this paper to expound on the various conceptual models used to analyze collected data. Rather, it is sufficient to reiterate the value of proper empirical review of any WWP.²⁷⁴

Generally, the evaluation stage should examine the structure of the program, the process of implementation, and the attendant outcomes.²⁷⁵ In cases of larger organizations the review process may be highly technical; however the best practice is to organize data into simple analytical categories. Measures such as absenteeism rate of workers, expenses associated with this absenteeism, and other healthcare costs arising over the measurable course of the program,

²⁷³ Lowe, *Healthy Workplace Strategies*, *supra* note 251 at 5.

²⁷⁴ For a description of various review mechanisms and applied research see Chapter 5 in O'Donnell, *supra* note 260.

²⁷⁵ *Ibid.* at 121-122.

should be considered.²⁷⁶ This type of data can be collected by utilizing follow-up surveys of employees and management and through statistical analysis of current data versus foundational administrative data.

Interestingly, the evaluation process stage is most often neglected by employers. A 2011 survey conducted by Sun Life Wellness Institute found that only 36% of employers with WWPs evaluated its substantive progress.²⁷⁷ Additionally, less than one-third of those employers, 31%, calculated their rate of return on the investment in their WWP.²⁷⁸

Providing tangible evidence of the WWP's positive impact will solidify organizational and employee commitment to the programs.²⁷⁹ Without a proper review and evaluation period, WWPs may lose legitimacy as there is no concrete support for the continuing application of the program. This loss of momentum is one of the principal reasons why WWPs fail.²⁸⁰ Therefore, consistent monitoring of the program should be conducted and, where appropriate, revisions should be instituted to increase its effectiveness.

8.2.8 Summary on Implementation Process

The following figure represents the required components to successfully implement a WWP:

²⁷⁶ *Ibid.* at 124.

²⁷⁷ Sun Life, *Buffett*, *supra* note 54 at 24.

²⁷⁸ *Ibid.* at 25.

²⁷⁹ O'Donnell, *supra* note 260 at 118.

²⁸⁰ *Ibid.* at 120.

Figure 8.1: Key Steps for the Implementation of Successful WWPs



Properly instituting a WWP often seems a difficult proposition given the array of available program options and diversity among employee groups. To implement successful WWPs employers must foster health within a larger corporate strategy, have a sense of the current health status of the workplace and its corporate health goals, properly disseminate WWP details, ensure sufficient managerial and key employee buy-in, and conduct a comprehensive evaluation of the program once undertaken. If these components are fruitfully administered the WWP stands a far greater chance of being successful.

CHAPTER 9. Governmental Incentivization of Employer WWP

9.1 Introduction

Despite the statistical benefits derived from improving worker health, the implementation of comprehensive WWP by employers has been slow-going. This hesitancy is, in part, due to potential legal liability arising out of the anti-discrimination statutory and regulatory frameworks in Canada and the US. Faced with criminal or civil liability under any (or all) of the anti-discrimination statutes, employers are justified in their reluctance to intervene in the health and lifestyle choices of their employees. Consequently, governments must take an active role in encouraging employers to create and administer WWP.

There are many policy instruments available to government to stimulate the development of WWP. Specifically, the government may institute tax credits, provide grants or subsidies, encourage flex-benefit plans, or develop variations to compulsory insurance premiums.²⁸¹ While each policy instrument incentivizes the adoption of WWP in different ways, they all encourage employers to focus on improving employee health. Both the Canadian and American governments should be alive to these instruments and deploy them as a means to address employer hesitancy in implementing WWP.

²⁸¹ Importantly, Canadian governmental incentives are not without tax consequences. Pursuant to the Canada *Income Tax Act* measures such as grants, subsidies, and tax credits can be considered taxable income. See *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). Specifically 12(1)(x) of the *Income Tax Act* states that certain inducements, reimbursements, refunds, or allowances (such as grants, subsidies, forgivable loans, tax deductions, etc.) are taxable income to the extent that the particular amount was not, among other things, otherwise included in the taxable income. See *Income Tax Act*, *supra* note 281 at s.12(1)(x). Accordingly, Canadian employers should be aware of the current adverse tax consequences which may arise from the utilization of certain governmental incentives.

9.2 Tax Credits

Tax credits are an amount of money deducted from income tax which would otherwise be payable.²⁸² The purpose of the credit is to reduce the effective price of a product or service to increase consumer uptake for it. By lessening financial barriers, tax credits encourage program use.

Using the tax credit system has, and can continue to have, positive impacts on the adoption of health and wellness promotion programs. Firstly, providing tax credits to individuals for health and fitness programs serves to effectively reduce the price of those programs which stimulates enrolment and participation. Secondly, tax credits can also be offered to workplaces which provide WWP to their employees. Under such a regime, the individual employer receives a tax benefit to offset the infrastructure costs in developing its WWP. In either scenario, the consequential increase in physical activity arising from the credit arguably lessens overall healthcare expenses and increases workplace productivity.

9.2.1 Health and Wellness Tax Credits in the US

Various federal bills have proposed to implement tax credits to promote WWPs. Bills 1753²⁸³ and 3717²⁸⁴, otherwise known as the *Healthy Workforce Act*, would have amended the US Internal Revenue Code to provide companies with a tax credit of \$200 per employee for the first 200 workers participating in a WWP, and \$100 per employee thereafter.²⁸⁵ Despite support among the health community, the bill failed to become law (though minor elements of the bill

²⁸² *Department of Finance Canada*, online: Department of Finance Canada <http://www.collectionscanada.gc.ca/eppp-archive/100/201/301/plan_budgetaire/2000/html/glossaire/gloss-t_e.html#TaxCredit> [April 4, 2012].

²⁸³ *Healthy Workforce Act of 2007*, S. 1753, 110th Cong. (2007).

²⁸⁴ *Healthy Workforce Act of 2007*, H.R. 3717, 110th Cong. (2007).

²⁸⁵ Business and Legal Reports. *Senators Propose Tax Credit for Employee Wellness Programs* (17 August 2007), online: Business and Legal Reports <<http://compensation.blr.com/display.cfm/id/155624>> [March 29, 2012].

were introduced in the *Patient Protection and Affordable Care Act*).²⁸⁶ The provisions of another proposed federal bill, the *Wellness and Prevention Act of 2007* (HR 853), also purported to introduce tax credits for WWPs and allow for the screening of chronic diseases in employees.²⁸⁷ Again, despite best intentions, the bill failed to achieve critical support and did not pass into law.²⁸⁸

State level governments have also considered legislating incentives to encourage the adoption of WWPs. While nine states and the District of Columbia have contemplated legislating tax incentives for WWPs, only Indiana has successfully passed such a law.²⁸⁹ The Indiana Small Employer Wellness Tax Credit Program gives employers with two to 100 employees a yearly tax credit valued at 50% of their costs for implementing state-certified WWPs.²⁹⁰ As of 2009, Indiana's tax credit program had achieved modest but consistent success, rising from 50 employers claiming \$104,960 in tax credits in 2007 to 186 employers claiming \$225,085 in 2009.²⁹¹

While Indiana's program has achieved relative success, other states have not managed to pass legislation along similar lines. The following chart outlines various failed (or proposed) state legislation providing tax credit incentives for WWP development:

²⁸⁶ *The Patient Protection and Affordable Care Act*, Pub.L. 111-148. 124 Stat. 119 through 124 Stat. 1025.

²⁸⁷ Levin-Epstein, M. "Federal and State Government Pressed to Give Tax Breaks for Wellness Initiatives" *Managed Care* (2008), online: Managed Care <http://www.managedcaremag.com/archives/0802/0802.wellness_taxbreaks.html> [April 1, 2012].

²⁸⁸ *Ibid.*

²⁸⁹ National Conference of States Legislatures. *Employer-Sponsored Health Promotion Programs* (2010), online: National Conference of States Legislatures <<http://www.ncsl.org/portals/1/documents/health/WorksiteWellness-2010.pdf>> at 2.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.* at 3.

Table 9.1: US States with Failed/Proposed WWP Tax Credit Incentive Legislation

State	Description
Connecticut	<ul style="list-style-type: none"> • Corporate Business Tax Deduction (2010, did not pass, CT SB 78): Would have provided a corporate business tax deduction for employers providing wellness and preventive care programs for their employees. Would have permitted employers to deduct up to one million dollars from their corporate tax liability for the costs incurred for providing wellness and preventive care programs to employees.
Iowa	<ul style="list-style-type: none"> • Income Taxes (2010, did not pass, IA HB 2154): Would have provided deductions from net income for individual or corporate taxpayers on income taxes for a specified percent of the cost associated with conducting wellness programs and providing memberships at fitness facilities for employees.
	<ul style="list-style-type: none"> • Income Taxes (2010, did not pass, IA HB 2155): Would have provided a deduction from net income for individual income tax purposes for amounts paid for the purchase of personal wellness services for the taxpayer or the taxpayer's spouse or dependent. Personal wellness services would have included a fitness club or gym membership, consultations with a personal trainer, or consultations with a nutritionist or dietician.
Illinois	<ul style="list-style-type: none"> • Wellness Tax Credit (2009, proposed, IL HB 893): Would create an income tax credit for employers who pay costs in connection with a qualified wellness program. Would provide that a credit of 50 percent of costs per year up to \$200 per employee for the first 200 employees and \$100 per employee for the remaining employees and would set the requirements for qualified wellness programs. Would provide that the credit may not be carried forward or back and may not reduce the taxpayer's liability to less than zero.

State	Description
Illinois	<ul style="list-style-type: none"> • Income Tax Act (2010, proposed, IL HB 5238): Would create an income tax credit for employers who pay costs in connection with a qualified wellness program. The amount of the credit would be 50 percent of those costs per year up to \$200 per employee for the first 200 employees and \$100 per employee for the remaining employees. A qualified wellness program would consist of at least three of the following components: a) a health awareness component that provides for the dissemination of health information that address the specific needs and health risks of employees and opportunity for periodic screenings for health problems and referrals for appropriate follow-up measures; b) an employee engagement component; c) a behavioral change component that provides for altering employee lifestyles to encourage healthy living; and d) a supportive environment component that includes worksite policies and services that promote a healthy lifestyle.
Massachusetts	<ul style="list-style-type: none"> • Employee Wellness Program Tax Credit (2009, proposed, MA HB 2806 and SB 1262): Would establish the Employee Wellness Program Tax Credit. The amount of the "Employee Wellness Program Tax Credit" in the first tax year would be 50 percent or ten thousand dollars, whichever is lesser, of the entire amount of the expenditure made by a business during the tax year. The amount of such credit in the second tax year would be 25 percent or five thousand dollars, whichever is lesser, of the entire amount of such expenditure made by the business during the tax year. An employee wellness program certified by the department would have to provide rewards to employees for: a) weight loss; b) smoking cessation; and c) pursuit of preventative health care services.
Maine	<ul style="list-style-type: none"> • Wellness Tax Credit (2009, did not pass, ME HB 428): Would have provided a tax credit to employers of 20 or fewer employees for the expense of developing, instituting and maintaining wellness programs for their employees in the amount of \$100 per employee, up to a maximum of \$2,000. Would have included programs for behavior modification, such as smoking cessation programs, equipping and maintaining an exercise facility and providing incentive awards to employees who exercise regularly.
Pennsylvania	<ul style="list-style-type: none"> • Sales and Use Tax Exclusions (2009, proposed, PA HB 939): Would exempt purchased wellness services and healthy living equipment or products from sales tax, up to \$1000 annually.

State	Description
Washington	<ul style="list-style-type: none"> • Small Business Employee Wellness Program (2009, did not pass, WA HB 2123): Would have allowed a small business or a nonprofit organization to claim credit against the tax otherwise due for the costs of implementing a qualified employee wellness program. The criteria for level one qualified employee wellness programs would have had to include providing a structure, incentives, and other program elements aimed at increasing positive health behaviors by employees, such as physical activity, better nutrition, sleep, hydration, stress management and other accepted healthy living factors. The criteria for level two qualified employee wellness programs would have had to include the elements of a level one qualified employee wellness program, but also incorporate incentives to assure that employees use proven preventive clinical care services, based on the recommendations of the United States Clinical Preventive Services Task Force. Small businesses or nonprofit organizations adopting a level one qualified employee wellness program would have been allowed to claim a credit of up to \$2,500 for the costs associated with implementing the program and those adopting a level two qualified employee wellness program would have been allowed to claim a credit of up to \$5,000 for the costs associated with implementing the program.
Wisconsin	<ul style="list-style-type: none"> • Income and Franchise Tax Credit (2009, did not pass, WI AB 91 and SB 56): Would have allowed for an income and franchise tax credit of up to 30 percent spent for employers who run wellness programs.
District of Columbia	<ul style="list-style-type: none"> • Good Corporate Citizenship Business (2009, proposed, DC B 862): Would allow corporations that establish qualifying wellness programs for their employees to receive a tax credit for employee participation in the approved wellness program. Wellness programs would be eligible for a tax credit equal to one fifth of the cost of the program per participating employee, with a maximum tax credit of up to \$5,000 total per tax year.

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While the preceding chart indicates a legislative push to incentivize the adoption of WWPs, none of the aforementioned legislation has been enacted.

²⁹² National Conference of State Legislatures. *2010 Wellness Legislation: Tax Credits* (2010), online: National Conference of State Legislatures <http://www.ncsl.org/issues-research/health/wellness-legislation-2010-state-activity.aspx#Tax_Credit> [April 1, 2012].

The US government has a vested stake in ensuring that employers institute WWP. Oregon Senator Gordon Smith echoed this sentiment in stating, "...by encouraging businesses to educate and motivate their employees to take their health seriously, we can take a significant step toward lowering healthcare costs and keeping our population healthy."²⁹³ Indeed, by curbing some of the high risk behaviours of workers and encouraging physical activity, there will be less stress placed on the government's health care system. To accomplish this goal the US government should implement tax credit incentives for companies which maintain WWP.

9.2.2 Health and Wellness Tax Credits in Canada

Unlike the US, Canada has not witnessed the same degree of struggle in instituting tax credit incentives for the promotion of health and wellness. Indeed, Canada, since 2007, has maintained the Children's Fitness Tax Credit ("CFTC") and is poised to expand that program to include adults.

9.2.2.1 Children's Fitness Tax Credit

On January 1, 2007 the Canadian government instituted the CFTC which is designed to reduce the financial barriers to children's participation in sport and physical activity programs. The CFTC allows Canadian taxpayers to deduct from their income tax a percentage spent for registration or membership fees (up to \$500) for a "prescribed program of physical activity"²⁹⁴ for children less than 16 years of age.²⁹⁵ The definition of "physical activity" under the Income

²⁹³ Business and Legal, *supra* note 285.

²⁹⁴ Canada Revenue Agency, online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/tx/ndvdl/tpcs/ncm-tx/rtrn/cmptng/ddctns/lrs360-390/365/lgbly-eng.html>> [April 2, 2012]. While families can spend up to \$500 on a covered program, the actual tax deductible amount for the credit will be a percentage of the amount spent.

²⁹⁵ *Ibid.* The tax credit is also available for those under the age of 18 provided the child qualifies for the disability amount.

Tax Regulations includes any activity which contributes to “cardio-respiratory endurance”,²⁹⁶ or muscular strength,²⁹⁷ muscular endurance,²⁹⁸ flexibility,²⁹⁹ and balance,³⁰⁰ and includes horseback riding.³⁰¹

According to the Canadian Income Tax Regulations, the CFTC applies to programs which meet the following criteria:

- it is not part of a school’s curriculum;³⁰²
- if it is a weekly program for eight or more consecutive weeks, all or substantially all of the activities must include a significant amount of physical activity;³⁰³
- if it is a daily program for five or more consecutive days, more than 50% of the daily activities must include a significant amount of physical activity;³⁰⁴
- if it is a program offered by a club or agency or similar organization, is eight or more consecutive weeks, and the participant chooses from a variety of activities, than more than 50% of the activities or time scheduled for activities must include a significant amount of physical activity;³⁰⁵ or
- if it is a group membership for eight or more consecutive weeks, 50% of all the activities offered must include a significant amount of physical activity.³⁰⁶

Generally, the program must be ongoing, supervised, suitable for children, and otherwise include a significant amount of defined physical activity.³⁰⁷

²⁹⁶ *Income Tax Regulations*, C.R.C. c. 945 at s. 9400(1)(b).

²⁹⁷ *Ibid.* at s. 9400(1)(b)(i).

²⁹⁸ *Ibid.* at s. 9400(1)(b)(ii).

²⁹⁹ *Ibid.* at s. 9400(1)(b)(iv).

³⁰⁰ *Ibid.* at s. 9400(1)(b).

³⁰¹ *Ibid.* at s. 9400(5).

³⁰² *Ibid.* at s. 9400(2)(a)-(d).

³⁰³ *Ibid.* at s. 9400(2)(a).

³⁰⁴ *Ibid.* at s. 9400(2)(b).

³⁰⁵ *Ibid.* at s. 9400(2)(c)(i)-(ii).

³⁰⁶ *Ibid.* at s. 9400(2)(d).

³⁰⁷ Activities which do not qualify for the children’s fitness tax credit are: “activities where riding in, or on, a motorized vehicle is an essential part of the activity; self-directed (unsupervised) activities; activities that are part of

The CFTC has gained approval among Canadian families. In 2010 Spence et al. surveyed 2,135 Canadians on topics relating to the CFTC.³⁰⁸ Among other things, the survey revealed that 55.4% of the parents of children aged 2 to 18 had enrolled their children into physical programs, and 55.5% were aware of the tax credit. Additionally, according to the federal government over 1.5 million Canadian families take advantage of the tax credit every year.³⁰⁹ The CFTC has also sparked movements in Manitoba,³¹⁰ Nova Scotia,³¹¹ and the Yukon³¹² to use tax credits to affect health changes in their youth.³¹³

Under the CFTC, the federal government expects to forgo approximately \$160 million in tax revenue annually.³¹⁴ While this amount appears considerable, the government maintains that this figure is dwarfed by the potential savings in healthcare costs.³¹⁵ To date, no data has been

a regular school program; or sports-academics programs.” See Canada Revenue Agency. *Information for organizations providing prescribed programs of physical activity* (18 November 2008), online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/tx/ndvdl/tpcs/ncm-tx/rtrn/cmpltnng/ddctns/lns360-390/365/rgnztns-eng.html>> [April 1, 2012].

³⁰⁸ Spence, J., N. Holt, J. Dutove, & V. Carson. “Uptake and effectiveness of the Children’s Fitness Tax Credit in Canada: the rich get richer.” (21 June 2010), 10 *BMC Public Health* pp. 356, online: Bio Med Central <<http://www.biomedcentral.com/content/pdf/1471-2458-10-356.pdf>> at 1.

³⁰⁹ Fitzpatrick, M. “A fitness tax credit with a catch or two, no pun intended” *CBC News* (04 April 2011), online: CBC News <<http://www.cbc.ca/news/politics/canadavotes2011/realitycheck/2011/04/a-fitness-tax-credit-with-a-catch-or-two-no-pun-intended.html>> [March 29, 2012].

³¹⁰ *The Income Tax Act*. C.C.S.M. c. 110.

³¹¹ *Government of Nova Scotia*, online: Government of Nova Scotia

<<http://www.gov.ns.ca/finance/en/home/taxation/personalincometax/healthyliving.aspx>> [March 29, 2012].

³¹² Yukon Government. *Yukon to introduce new child tax credits* (24 September 2007), online: Yukon Government <<http://www.gov.yk.ca/news/07-201.html>> [April 1, 2012]; *Income Tax Act*, R.S.Y., 2002, c. 118.

³¹³ Additionally, in 2008 members of the Alberta Parliament proposed a bill which would allow families to deduct \$500 from their taxes for youth sport and fitness expenses. Combined with the Federal tax credit, Albertan families would have been able to claim the deductible portion of \$1000 spent on enrolling their children in sport programs. Despite general support for the credit, the program was sidelined in 2009, and it remains to be seen whether the provincial children’s tax credit will be revived. See CBC News. *Albertans to get \$500 fitness tax credit* (18 November 2008), online: CBC News <<http://www.cbc.ca/canada/edmonton/story/2008/11/18/fitness-alberta-credit.html?ref=rss>> [March 29, 2012].

³¹⁴ Bliss, P. “Child fitness tax credit in effect for parents” *CTV* (05 January 2007), online: CTV <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070105/fitness_tax_credit_070105/20070105?hub=Canada> [March 29, 2012].

³¹⁵ *Ibid.*

uncovered which estimates the savings incurred from the implementation of the CFTC; accordingly, further research should be conducted to approximate the CFTC's economic impact.

On April 3, 2011, the Federal government committed to extend the CFTC and increase the available spending limit under the program to \$1,000.³¹⁶ The government proffered no definitive schedule as to when the expanded tax credit would be accessible, announcing only that it will be available sometime within the government's current mandate.³¹⁷

9.2.2.2 Adult Fitness Tax Credit

Amid the success of the CFTC, there has been a rallying cry for further exploitation of tax credits to promote broader fitness goals, including the introduction of an adult fitness tax credit. Indeed, a 2007 survey of over 1200 Canadians aged 18 or older found that 61% would support an expansion of the CFTC to include adults.³¹⁸

One of the major proponents of creating an adult fitness tax credit has been the Fitness Industry of Canada ("FIC") which commissioned a full report on the potential benefits of such a credit. In its report, the FIC found that an adult fitness tax credit would encourage 1 million new Canadians to be physically active (1.5 million if the provinces matched the strategy),³¹⁹ resulting in healthcare cost savings of over \$135 million in 2010 and over \$692 million in 2029; the figures are \$220 million and \$1.1 billion respectively, if the provinces equalled federal

³¹⁶ CBC News. *Harper would extend fitness tax credit* (03 April 2011), online: CBC News <<http://www.cbc.ca/news/politics/canadavotes2011/story/2011/04/03/cv-election-harper-ottawa.html>> [March 29, 2012].

³¹⁷ *Ibid.*

³¹⁸ Pollara. *Children's Fitness Tax Credit* (Mar. 2007), online: Fitness Industry Council of Canada <[http://www.adultfitnessstaxcredit.ca/launch/Pollara%20Report\(Eng\).pdf](http://www.adultfitnessstaxcredit.ca/launch/Pollara%20Report(Eng).pdf)> at 7.

³¹⁹ Centre for Spatial Economics. *Economic Benefits of an Adult Fitness Tax Credit* (2007), online: Fitness Industry Council of Canada <[http://www.adultfitnessstaxcredit.ca/launch/FIC%20Long\(eng\).pdf](http://www.adultfitnessstaxcredit.ca/launch/FIC%20Long(eng).pdf)> at pg. 1.

contribution levels.³²⁰ It is estimated that any tax revenue losses from the tax credit would be fully repaid within three to five years due to decreased healthcare expenses.³²¹

Given the potential financial benefits and wide-standing public support for the tax credit, it was unsurprising that on April 3, 2011 the Canadian federal government announced that it intended to introduce an adult fitness tax credit.³²² Similar to the CFTC, the adult fitness tax credit would entitle Canadians to claim a tax deduction on up to \$500 spent on fitness programs.³²³ The tax credit is slated to be introduced once the federal budget is balanced.³²⁴

9.2.2.3 Tax Credit Issues

While there is general support and optimism regarding the Canadian child and adult fitness tax credits, the concept of using tax credits as a policy instrument to effect positive health change has not been uncontested.

In Canada the expansion of the fitness tax scheme looks to be a lengthy process. Both the doubling of the CFTC and the introduction of the adult fitness credit are not scheduled to occur until the federal budget has been balanced, which is not expected to occur until 2015. Even after the budget is successfully balanced, the government intends to convene an expert panel to develop proposals for the expansion and implementation process. Accordingly, the financial gains that stand to be collected from the tax credits are far from swift.

Additionally, the study of the CFTC conducted by Spence et al. raises concerns regarding the disparate impact of the tax credit. The study indicates that those most likely to enroll their

³²⁰ *Ibid.*

³²¹ *Ibid.*

³²² Fitzpatrick, *supra* note 309.

³²³ *Ibid.*

³²⁴ *Ibid.*

children in physical activity programs, and thus take advantage of the credit, are wealthier families.³²⁵ Families in the lowest quartile for household income are the least likely to have children enrolled in physical activity programs, least likely to be aware of the tax credit, and least likely to claim for it.³²⁶ Indeed, the study found that 63% of low-income households paid \$0 to less than \$100 for registrations in children's physical activity programs.³²⁷ As such, there are concerns that tax credits do not stimulate physical activity equally among income lines; rather, tax credits benefit only those who can already afford program enrolment.

9.3 Governmental Grants

Grants and subsidies are another policy instrument which can be used by governments to promote the adoption of a desired policy. Grants are the direct provision of money for the development of a specific program or for compliance with model program specifications.³²⁸

Grants and subsidies have been used throughout Europe to shape occupational health and wellness policy. For example, the European Union funded Poland's "Occupational Safety and Health in the SME Sector" program which utilized grants to improve the health and safety records of small and mid-sized companies in the construction and chemical, rubber, and plastics industries.³²⁹ Specifically, the program made EUR7,729,900³³⁰ available as grant monies for companies to cover the costs of:

³²⁵ Spence, *supra* note 308 at 3.

³²⁶ *Ibid.* at 4.

³²⁷ *Ibid.* at 3.

³²⁸ *United States Government Grants Resources*, online: United States Government Grants Resources <<http://www.grants.gov/aboutgrants/grants.jsp>> [April 1, 2012].

³²⁹ European Agency for Safety and Health at Work. *Economic Incentives to improve occupational safety and health: a review from the European Perspective* (2010), online: European Agency for Safety and Health at Work <http://osha.europa.eu/en/publications/reports/economic_incentives_TE3109255ENC> at 143.

³³⁰ *Ibid.* at 145.

- implementing technical safety measures to curb occupational risks;³³¹
- risk assessment services and the implementation of occupational health and safety systems;³³² and
- 50% of corporate expenditures for advisory services (between EUR500 and EUR4,000) and technical safety measures (between EUR2,000 and EUR50,000).³³³

While the empirical success of the grant program has yet to be determined, it is clear that grants can be a proper tool for re-engineering safety and wellness policy.

The US has also begun using grants to stimulate the growth of WWP. On June 23, 2011 the US Department of Health and Human Services announced that it was allocating approximately \$10 million in grant money for the establishment and evaluation of WWP.³³⁴ Additionally, on September 30, 2011 the Centers for Disease Control and Prevention announced that it was providing approximately \$9 million in grants for the development of WWP.³³⁵ Provided under the auspices of the US *Patient Protection and Affordable Care Act*, the grant funds are designed to encourage employers to support healthier employee lifestyles and engage in wellness promotion.³³⁶

One downside to the utilization of grants is that they require the allocation of significant financial resources at the outset of the program. This may be a non-starter for governments who

³³¹ *Ibid.*

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ U.S. Department of Health and Human Services. *\$10 Million in Affordable Care Act funds to help create workplace health programs* (23 June 2011), online: U.S. Department of Health and Human Services <<http://www.hhs.gov/news/press/2011pres/06/20110623a.html>> [April 1, 2012].

³³⁵ Centers for Disease Control and Prevention. *Affordable Care Act helps improve the health the American workforce, increase workplace health programs* (30 September 2011), online: Centers for Disease Control and Prevention <http://www.cdc.gov/media/releases/2011/p0930_improve_healthcare.html> [April 1, 2012].

³³⁶ *Ibid.*

are not in a position to provide substantial funding for WWP. Despite this hesitancy, it is clear that grants have been viewed as an appropriate policy tool through which to promote WWP.

9.4 Flexible Benefit Plans

Governments can encourage the adoption of WWP through the tax treatment of flexible benefit plans. Under a flexible benefit plan employees purchase “flex credits” from the employer and redeem those credits for a range of differing benefits.³³⁷ Once an employee has made his or her benefit selections, the employer must provide those services.³³⁸

The distinct advantage to flexible benefit programs is that the employee chooses the benefit options which best suit his or her individual needs and budgetary constraints.³³⁹ Rather than a one-size fits all approach, employees can customize and tailor their benefits. Traditional benefit options have included contributions to registered retirement savings plans³⁴⁰, provision of general insurance coverage³⁴¹, cash payments³⁴², and the purchase of additional vacation time.³⁴³

Flexible benefit systems are ideal for helping to shape the health and wellness attitudes of employees. As individual health preferences are idiosyncratic and highly personal, multiple program options allow for a variety of health needs to be serviced. For instance, under a flexible benefit program an employee who smokes can be offered an anti-smoking promotion benefit while an employee who is obese or overweight could choose an exercise regime or nutritional

³³⁷ Typically, the employee can select and use any of the purchased benefits within a given 12 month period.

³³⁸ Canada Revenue Agency. *Income Tax Act: Flexible Employee Benefit Programs* (1998), online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/E/pub/tp/it529/it529-e.pdf>> at 2.

³³⁹ *Ibid.* at 1.

³⁴⁰ *Ibid.* at 5.

³⁴¹ *Ibid.*

³⁴² *Ibid.* at 6.

³⁴³ *Ibid.*

education course. Accordingly, inducements for physical activity and preventative health and wellness programs should always be included in the list of flexible benefit options.

While employers and employees may approve of flexible benefit plans, issues arise as to whether the flexible benefits offered under the plan generate adverse tax consequences. In many instances the benefits offered under flexible benefit plans are considered taxable, and where such benefits are taxable there is generally less incentive for an employer to offer or for an employee to choose that benefit option.

Governments must provide greater clarity as to whether the offering of health and wellness programs under flexible benefit schemes will result in adverse tax implications. Where such benefits are taxable under law, governments should consider mandating a tax exemption to promote greater uptake of WWP.

9.5 Variation of Insurance Premiums or Coverage

A further policy instrument available to governments to shape WWP development is the manipulation of national insurance premiums or coverage. Under insurance premium variation programs, participants adhering to the terms of a set policy agenda receive a discount to their mandated insurance premiums. Conversely, participants who do not adhere to the program specifications receive an increased insurance premium rate.

Premium variation programs have been deployed in the area of occupational health and safety. The goal of such programs is to transfer the costs of poor worker safety from the public health system to the employer by way of increased workers' compensation premiums.

Varying insurance premiums has served as a significant incentive for employers to promote health and safety programs and reduce preventable workplace accidents. Indeed, Europe

has had substantial success in using variations in insurance as a means to catalyze industry changes in occupational health and safety records:

- In Germany, the national occupational safety insurance system requires the butcher industry's statutory accident insurance body to vary coverage premiums based on company accident records. Company insurance rates can be significantly decreased if a butcher reduces the number of notifiable accidents, maintains a level of accidents below the industry standard for five straight years, and funds health and wellness programs which serve to reduce future accidents. If a company satisfies these criteria it can receive up to a 20% reduction in its insurance premiums.³⁴⁴
- In Finland, self-employed farmers, fisherpeople, and reindeer herders are covered by the Finnish Farmers' Employment Accident Insurance program. Since 1997 that insurance regime has maintained a premium discount program.³⁴⁵ Provided the insured had no compensable injury reports for a 12-month period, they received a 10% reduction in their insurance premiums.³⁴⁶ A further 10% is added for every subsequent year that the insured does not claim for a compensable injury (up to a total premium reduction of 50%).³⁴⁷
- In Italy, companies who undertake measures to improve employee health and safety are entitled to a variation of their compulsory worker's compensation insurance premiums.³⁴⁸ Provided the company complies with accident prevention and hygiene protocols mandated by the government, it can receive up to a 15% reduction in its workers' compensation premiums.³⁴⁹

While the preceding examples showcased how insurance premium variation can impact on occupational health and safety, there is no reason why insurance variation cannot be used to

³⁴⁴ European Agency, *supra* note 329 at 107.

³⁴⁵ *Ibid.* at 120.

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*

³⁴⁸ *Ibid.* at 124.

³⁴⁹ *Ibid.* at 126.

promote preventative WWPs. Under such a scheme, employers receive discounts on their mandated workers' compensation premiums provided they implement WWPs. To ensure a level of predictability and consistency, the government agency responsible for administering the reduced premiums could develop a model program to be used a template by employers. If the employer institutes a program which complies with the regulatory model, they would be entitled to receive the premium reduction.

Such legislation has found traction in the US at the state level. The following chart summarizes state legislative experiences with insurance premium discounts or rebates for the development of WWPs:

Table 9.2: State Legislation and Insurance Premium Discounts or Rebates

State	Description
Alaska	<ul style="list-style-type: none"> • Insurance (2009, enacted, AK HB 175): Exempts rewards under a wellness program as insurance discrimination or rebating. The wellness program must meet the following requirements: a) the wellness program is reasonably designed to promote health or prevent disease; b) an individual has an opportunity to qualify for the reward at least once a year; c) the reward is available for all similarly situated individuals; d) the wellness program has alternative standards for individuals who are unable to obtain the reward because of a health factor; e) alternative standards are available for an individual who is unable to participate in a reward program because of a health condition; f) the insurer provides information explaining the standard for achieving the reward and discloses the alternative standards; and g) the total rewards for all wellness programs under the health insurance policy do not exceed 20 percent of the cost of coverage.

State	Description
Colorado	<ul style="list-style-type: none"> • Wellness Incentives Rewards Outcomes (2010, enacted, CO HB 1160): Current law allows health insurance carriers offering individual health coverage plans and small group plans and the board of directors of the CoverColorado program or carriers providing health benefit plans to CoverColorado participants to offer incentives or rewards to encourage persons covered under the plans to participate in a wellness and prevention program. The bill repeals the restriction on incentives based on outcomes and allow carriers to base the incentives or rewards on satisfaction of a standard related to a health factor if the incentive or reward under the wellness and prevention program was consistent with the nondiscrimination requirements of the federal "Health Insurance Portability and Accountability Act of 1996".
Connecticut	<ul style="list-style-type: none"> • Wellness Programs (2010, did not pass, CT HB 5009): Would have allowed any insurer, health care center, hospital service corporation, medical service corporation, fraternal benefit society or other entity that delivers, issues for delivery, renews, amends or continues a group health insurance policy to offer a reasonably designed health behavior wellness, maintenance or improvement program allowing for a reward, a health spending account contribution, a reduction in premiums or reduced medical, prescription drug or equipment copayment, coinsurance or deductible, or a combination of these incentives, for participation in such program. Any incentive or reward would not have been allowed to exceed 20 percent of the paid premiums and would have had to comply with all nondiscrimination requirements under the Health Insurance Portability and Accountability Act of 1996.
Georgia	<ul style="list-style-type: none"> • Insurer Wellness Incentives (2010, enacted, GA SB 411): Provides exemptions from unfair trade practices when an insurer provides incentives, merchandise, gift cards, debit cards, premium discounts, rebates, contributions towards a health savings account and/or copayment modification to reward insureds for participation in wellness programs.
	<ul style="list-style-type: none"> • Insurance (2010, did not pass, GA SB 445): Would have provided that insurers that issue plans of individual accident and sickness insurance in Georgia include within at least one such plan a wellness incentive program under which the insurer shall provide a partial premium reimbursement for those insureds who meet the requirements of the wellness incentive program.

State	Description
Iowa	<ul style="list-style-type: none"> • Health Insurance (2010, did not pass, IA SB 2362): Would have required the commissioner of insurance to certify certain health policies, contracts or plans that promote healthy lifestyles and provide for premium credits. The commissioner would have been required to adopt rules to promote wellness by establishing criteria and procedures for certifying health insurance policies, contracts and plans that meet certain wellness objectives.
Illinois	<ul style="list-style-type: none"> • State Employees Group Insurance Act of 1971 (2009, proposed, IL HB 718): Would allow a group or individual policy of accident and health insurance or managed care plan to offer a reasonably designed program for wellness coverage that allows for a reward, a health spending account contribution, a reduction in premiums or reduced medical, prescription drug, or equipment copayments, coinsurance, or deductibles, or a combination of these incentives, for participation in any health behavior wellness, maintenance, or improvement program approved or offered by the insurer or managed care plan. The insured or enrollee may have been required to provide evidence of participation in a program or demonstrative compliance with treatment recommendations as determined by the health insurer or managed care plan.
	<ul style="list-style-type: none"> • Family and Employers Health Care Act (2009, proposed, IL HB 1081 and SB 1877): Would allow individual and group insurance companies to waive deductibles and other cost-sharing payments by insurer may be made for individuals participating in chronic care management or wellness and prevention programs. Would allow adjustments to base rates using participation in wellness or chronic disease management activities as a factor.
Louisiana	<ul style="list-style-type: none"> • Health and Accident Insurance (2010, enacted, LA HB 821): Authorizes a health insurance issuer to offer a voluntary wellness or health improvement program that allows for rewards or incentives including but not limited to merchandise, gift cards, debit cards, premium discounts or rebates, contributions toward a member's health savings account, modifications to copayments, deductibles, or coinsurance amounts, or any combination of these incentives to encourage participation or to reward participation in the program.

State	Description
New York	<ul style="list-style-type: none"> • Health Insurers (2009, proposed, NY AB 2867 and SB 651): Would allow an insurer or health maintenance organization (HMO) issuing an individual or group health insurance policy to provide an actuarially appropriate reduction in premium rates in return for an enrollee's or insured's adherence to a bona fide wellness program. A bona fide wellness program would be defined as either a risk management system that identifies at-risk populations or any other systematic program or course of medical conduct which helps to promote good health, helps to prevent or mitigate acute or chronic sickness or disease, or which minimizes adverse health consequences due to lifestyle. A bona fide wellness program would have to demonstrate actuarially that it encourages the good health and well-being of the covered population. The insurer or HMO would not be allowed to require specific outcomes as a result of an enrollee's or insured's adherence to the approved wellness program.
Pennsylvania	<ul style="list-style-type: none"> • Affordable Health Insurance (2009, proposed, PA HB 1743): Would make insurers that include and operate wellness and health promotion programs, disease and condition management programs, health risk appraisal programs and similar provisions in their high deductible health policies in keeping with federal requirements, to not be considered to be engaging in unfair trade practices under any provision of law relating to unfair trade practices with respect to the practices of illegal inducements, unfair discrimination and rebating.
Wisconsin	<ul style="list-style-type: none"> • Income and Franchise Tax Credit (2010, enacted, WI AB 699): Allows an insurer to advertise, market, offer, or operate a wellness program without violating an unfair trade or marketing practice. The law provides that if a wellness program contains no conditions for obtaining a reward based on an individual satisfying a health related standard, the wellness program is exempt from unfair trade or marketing practice laws and a wellness program that is based on satisfying such standards is exempt if it satisfies specified requirements.

State	Description
Wisconsin	<ul style="list-style-type: none"> • Wellness Programs (2010, did not pass, WI SB 502): Would have allowed an insurer to advertise, market, offer, or operate a wellness program without violating an unfair trade or marketing practice. Would have provided that if a wellness program contains no conditions for obtaining a reward based on an individual satisfying a standard that is related to a health factor, the wellness program is exempt from unfair trade or marketing practice laws. Alternately, a wellness program based on an individual satisfying a standard that is related to a health factor have been exempt from unfair trade or marketing practice laws if it had all of the following qualities: a) the reward did not exceed 20 percent of the cost of the coverage under the plan; b) the program was reasonably designed to promote health or prevent disease; c) all eligible individuals had the opportunity to qualify for the reward at least once per year; and d) the reward was available to all similarly situated individuals.
Wyoming	<ul style="list-style-type: none"> • Insurance (2010, did not pass, WY H 108): Would have allowed insurers that include and operate wellness and health promotion programs, disease and condition management programs, health risk appraisal programs and similar provisions in their high deductible health policies in keeping with federal requirements to not be considered to be engaging in unfair trade practices under the Unfair Trade Practices Act.

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The utilization of insurance premium variation to encourage WWP is not without issue. Under such a reduction regime, there is an incentive for insureds/employers to under-report their level of accidents or reportable injuries. Additionally, the premium discount offered must be substantial in order to motivate a wide number of employers to develop a WWP. Despite these concerns, insurance premium variation remains a valid tool for encouraging WWP.

³⁵⁰ National Conference of State Legislatures. *2010 Wellness Legislation: Insurance Premium Discounts/Rebates/Incentives* (2010), online: National Conference of State Legislatures <<http://www.ncsl.org/issues-research/health/wellness-legislation-2010-state-activity.aspx#Individual>> [April 1, 2012].

9.6 Industry Cooperation with WWP Development

Both the Canadian and US government should solicit industry participation when seeking to promote the development of WWPs. While much of this thesis has focused on what the independent employer can accomplish when instituting WWPs, it is clear that greater gains could be achieved through inter-sectoral communication and cooperation.

To give WWPs the best possible chance at success each industry sector should take the lead in determining their own ideal WWP parameters, as each industry will likely be concerned with different health and wellness priorities. For example, the forestry sector presumably faces differential health concerns relative to the retail sector or the legal service sector. Each of these industries maintains idiosyncratic health concerns which, arguably cannot be dealt with by way of a universal approach. Accordingly, specific industries should examine factors such as: type and frequency of workers' compensation claims, typical medical claims, absenteeism rates, levels of workplace physical activity, insurance premiums, etc. These factors will then be used to generate an industry health and wellness profile which can be used to determine WWP best-practices.

It is these industry-developed best-practices which should be openly encouraged and supported by government. Whether it be through tax credits or grants, facilitating industry analysis of health and wellness concerns will further WWP advancement and lead to more progressive, innovative, and effective solutions to the healthcare costs crisis.

9.7 Summary

There has been some movement towards using fiscal policy to affect issues pertaining to occupational health and safety. However, governments should more deeply utilize these policy

instruments to actively promote individual physical activity and the development of WWPs. As a preliminary measure, both the Canadian and American governments should streamline the creation of an adult fitness tax credit. Arguably, the deployment of such a tax measure will stimulate individual physical activity thereby lessening healthcare costs and increasing employee productivity. This would be a simple and straightforward method for governments to engender change in employee health. More progressive governmental measures include the provision of grants and subsidies for WWP creation, promotion of tax-friendly flexible benefit plans, and the variation of workers' compensation premiums for employers who focus on health and wellness.

CHAPTER 10. Conclusions

A substantial tipping point has emerged within the Canadian and American healthcare systems. For years both systems were subject to triage solutions and *ad hoc* policies, implemented by varying governments in an attempt to lessen spiralling medical costs arising from an aging and unhealthy workforce. Increasing healthcare costs have been propelled by poor individual health and lifestyle choices within both countries. Inadequate nutritional education, coupled with a failure to exercise, has decimated the overall health status of Canadian and American workers, leading to an increase in preventive medical conditions. With healthcare costs rapidly becoming unsustainable, a new stakeholder should seize responsibility for providing care solutions: the workplace.

10.1 Appropriate Forms of WWPs

One of the latent controversies surrounding WWPs is how such programs should be designed. On one end of the spectrum lie mandatory schemes, which are premised on the coerced participation of the worker. Mandatory initiatives are compulsory and operate on the threat of punishment for the failure to participate. While the end goals of the programs are often benign, mandatory regimes have resulted in substantial litigation.

On the polar opposite end of the program spectrum lies voluntary WWPs, which maintain no formal enforcement mechanism. Despite their voluntary nature, such programs have been shown to drastically increase productivity at the worksite and decrease absenteeism. A derivative benefit of voluntary schemes is a reduced exposure to legal challenge, as employees may opt-in or opt-out of the program with no consequences. This flexibility serves to side-step many of the legal pitfalls facing WWPs arising from Canadian and American law. In designing WWPs,

employers should craft policies based upon a foundation of voluntary rather mandatory compliance.

10.2 Navigating Legal Frameworks

The hesitation on the part of employers to adopt WWP is understandable when one considers the potential legal ramifications. In both the US and Canada there is a multiplex of laws addressing discrimination and an individual's right to privacy, both issues which are touchstones of WWP. Regarding the American legal regime, employers should be aware of the *Health Insurance Portability and Accountability Act*, the *Americans with Disabilities Act*, the *Employee Retirement Income Security Act*, the *Age Discrimination in Employment Act*, the *Genetic Information Nondiscrimination Act*, and other applicable state legislation. In Canada, employers should pay key attention to the provisions of the Charter, the *Employment Equity Act*, Federal and Provincial Human Rights legislation, and the Canadian Criminal Code. This list of applicable American and Canadian legislation is by no means exhaustive, and employers should conduct their own review to ensure compliance with the law in their jurisdiction.³⁵¹

Once employers understand the legal boundaries relating to WWP, the proceeding step is determine how best to implement such initiatives. Programs should be engineered to generate substantive change in the lifestyle choices of employees, and collaterally, result in economic gains for the employer. Success in this arena hinges on having a proactive development strategy involving a conscious shift in the organization's health culture, the collection and analysis of employee health information, and generating managerial and employee "champion" buy-in for

³⁵¹ It is worth reiterating that the legal analysis in this thesis should not be relied upon when establishing a WWP. While this is a broad overview, it is for informational purposes only, and does not constitute legal advice.

the programs. A synergy between these elements will assist in generating widespread acceptance and participation in the WWP.

10.3 Future Research Opportunities

This thesis was principally an attempt to highlight the empirical value of WWPs, and consider the program constraints imposed by Canadian and American law. Despite this overview, there are numerous further research avenues which may be explored.

10.3.1 Further Empirical Research on Existing Corporate WWPs

As WWPs continue to gain acceptance in the corporate community, there will be more emergent anecdotal evidence of their success. As employers have traditionally been hesitant to wade into employees' health, examples of successful programs will serve to heighten such programs' legitimacy and perceived value. Further and better research should resolve to amalgamate these emerging case studies.

Interviews with employers from small, mid-size, and multinational organizations should also be conducted. A better understanding of the behavioural motivations of management will bring clarity to their concerns in designing WWPs, as well as promoting better internal buy-in for the programs.

10.3.2 Impact of Seismic Demographic Shifts

The restricted scope of this thesis necessarily limited the review of American and Canadian economic pressures arising from population demographic shifts. Of concern is that these economic costs are tending towards a seismic shift, as the baby boomer population continues to age, removing further employees from the workplace. The attrition of the baby

boomers from the workplace will result in greater strains on an already stressed healthcare system.

In the US the “baby boomer” population comprises over 76 million individuals.³⁵² This figure only continues to grow as each day approximately 11,000 American workers turn the age of 50.³⁵³ In Canada, in 2008 approximately 15.3% of the labour force was 55 or older and approaching the age of retirement.³⁵⁴ Furthermore, it was extrapolated that in 2036, 24.5% of the Canadian population will be 65 years of age or older.³⁵⁵ It should be equally troubling that for the first time in Canadian history the number of workers over 40 years old is approximately equal to the number of workers under 40.³⁵⁶ The ramifications³⁵⁷ for having an older labour pool could be severe, especially within the next 10 – 15 years when these workers begin to fully eliminate themselves from the American and Canadian workforce, and birth and immigration rates may not be sufficient to compensate for the loss.

The existence of WWPs offers two distinct benefits. Firstly, as a result of better health and lifestyle choices, individual workers (all things being equal) should be healthier and better equipped to work more efficiently as they age. Secondly, workplace wellness and other

³⁵² Kaye, B. & J. Cohen. “Safeguarding the Intellectual Capital of Baby Boomers” (Apr. 2008), 62(4) *T&D*. pp. 30-33 at 30.

³⁵³ *Ibid.*

³⁵⁴ Daily Commercial News. *Statistics Canada census data dramatically highlights looming labour shortage* (07 March 2008), online: Daily Commercial News <<http://www.dailycommercialnews.com/article/id26727>> [November 14, 2009].

³⁵⁵ Canadian Institute, *supra* note 43 at 6.

³⁵⁶ Daily Commercial, *supra* note 354.

³⁵⁷ In 2005, approximately 44% of the total healthcare costs for provincial and territorial governments went to citizens over the age of 65. See Canadian Institute, *supra* note 43 at 6. Overall, the Canadian health care pays \$9,500 in healthcare costs per individual over 65. For seniors over 85 years old this figure more than doubles to \$21,000 per individual. See Canadian Institute, *supra* note 43 at 71.

healthcare programs serve as an incentive for employees who are not able to independently cover the costs of healthcare to remain in the labour market.³⁵⁸

Further research should be conducted highlighting the substantial effect that the removal of the baby boomers will have on the economy, workplaces, and government at large. Coupled with this research should be further data respecting the ability of WWP's to decrease healthcare costs associated with older employees.

10.4 Summary

The discourse surrounding WWP's is shifting. What is emerging is a coherent understanding of the role of the employer in a society struggling to ameliorate the burden of healthcare costs. While the subtext for employers may be focused on the business case for instituting health promotion policies, it is clear that other stakeholders, such as employees and government, will absorb the benefits of having a healthier and more sustainable workforce. Given that WWP's can operate within the bounds of the law and result in significant business gains, employers must no longer hesitate in their decision to confront workplace health and wellness issues.

³⁵⁸ As an incentive to keep baby boomers in the workforce, many companies have begun to supplement their WWP's with flexible work schedules. One Iowa-based company, Stanley Consultants, allows individuals to decrease their working hours yet still retain their healthcare benefits. See Cadrain, D. "Employers prepare to keep, not lose, baby boomers" *HRMagazine* (01 December 2007), online: HRMagazine <<http://www.allbusiness.com/labor-employment/compensation-benefits-workplace-programs/5505028-1.html>> [November 14, 2009]. Florida has also taken the lead in addressing their aging labour force by providing comprehensive health education to senior and mature employees. See Department of Elder Affairs. *Health Promotion, Wellness and Safety* (2006), online: Department of Elder Affairs <<http://elderaffairs.state.fl.us/english/HEALTH/healthwell.html>> [November 14, 2009].

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Appendix A
List of US Statutes Prohibiting Lifestyle Discrimination

State	Legislation	Description
Alabama	None	
Alaska	None	
Arizona	None	Ariz. Rev. Stat. Ann. § 36-601.02 (2004) prohibiting discrimination of the basis of the use or nonuse of tobacco products was repealed effective May 1, 2007.
California	CA Labor Code § 96(k)	Authorizes the California Labor Commissioner to take assignment of claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises.
	CA Labor Code § 98.6	Provides that no employee shall be discharged or otherwise discriminated against for conduct described in § 96(k). Entitles any employee who is discharged, threatened with discharge, demoted, suspended, or discriminated against in any manner in the terms and conditions of his or her employment to reinstatement and reimbursement for lost wages and work benefits.

State	Legislation	Description
Colorado	Colo. Rev. Stat. § 24-34-402.5 (2004)	<p>Makes it illegal for an employer to terminate an employee because that employee engaged in any lawful activity off the employer's premises during nonworking hours unless the restriction</p> <p>1) relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees; or</p> <p>2) is necessary to avoid, or avoid the appearance of, a conflict of interest with any of the employee's responsibilities to the employer.</p>
Connecticut	Conn. Gen. Stat. § 31-40s (2003)	Prohibits an employer from requiring that an employee or prospective employee refrain from smoking or using tobacco products outside the course of his employment, or otherwise discriminating against any individual with respect to compensation, terms, conditions or privileges of employment on that basis. Exempts any nonprofit organization or corporation whose primary purpose is to discourage the use of tobacco products by the general public.
District of Columbia	D.C. Code Ann. § 7 1703.03 (2004)	Prohibits employment discrimination on the basis of tobacco use except where tobacco-use restrictions or prohibitions constitute bona fide occupational qualifications.
Florida	None	
Georgia	None	
Hawaii	None	
Idaho	None	

State	Legislation	Description
Illinois	Ill. Rev. Stat. ch. 820, § 55/5. Ill. Rev. Stat. ch. 820, § 40/9	Prohibits workplace discrimination on the basis of the use of lawful products except where the employer is a non-profit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public. Provides that an employer may offer, impose or have in effect a health, disability or life insurance policy that makes distinctions between employees for the type of coverage or the price of coverage based upon the employees' use of lawful products. Prevents an employer from gathering or keeping a record of an employee's associations, political activities, publications, communications or non-employment activities, unless the employee submits the information in writing or authorizes the employer in writing to keep or gather the information.
Indiana	Ind. Code Ann. § 22-5-4-1	Prohibits an employer from discriminating against an employee or prospective employee based on his/her use of tobacco products outside the course of employment. Allows an employer to implement financial incentives intended to reduce tobacco use or related to employer-provided health benefits.
Iowa	None	
Kansas	None	
Kentucky	Ky. Rev. Stat. Ann. § 344.040 (2004)	Makes it an unlawful for an employer to discriminate against an employee because the individual is a smoker or nonsmoker , as long as the individual complies with any workplace policy concerning smoking. Further prohibits an employer from requiring that an employee or applicant for employment abstain from smoking or using tobacco products outside the course of employment.

State	Legislation	Description
Louisiana	La. Rev. Stat. § 23.966 (2004)	Prohibits an employer from discriminating against an individual with respect to discharge, compensation, promotion, any personnel action or other condition, or privilege of employment because the individual is a smoker or nonsmoker as long as the individual complies with applicable law and any workplace policy regulating smoking. Makes it unlawful for an employer to require that an individual abstain from smoking or otherwise using tobacco products outside the course of employment. Provides for a fine of up to \$250 for the first offense and up to \$500 for any subsequent offense.
Maine	Me. Rev. Stat. Ann. tit. 26, § 597 (2004)	Prohibits an employer from requiring, as a condition of employment, that an employee or prospective employee refrain from using tobacco products outside the course of employment, as long as the employee complies with any workplace policy regarding tobacco use.
Maryland	None	
Massachusetts	None	
Michigan	None	Note: A bill that would protect employee's from discrimination based on off-duty activities passed the House on May 16, 2008, and is now in the Senate.
Minnesota	Minn. Stat. Ann. § 181.938 (2003)	Prohibits an employer from refusing to hire a job applicant or disciplining or discharging an employee for using lawful consumable products , if the products are used off the employer's premises outside of working hours. Provides for an exception related to a bona fide occupational requirement that is reasonably related to the employment activities or responsibilities of a particular employee or group of employees or where it is necessary to avoid a conflict of interest or the appearance of a conflict of interest.

State	Legislation	Description
Mississippi	Miss. Code Ann. § 71-7-33 (2004)	Makes it unlawful for an employer to require that an employee or applicant for employment abstain from smoking or using tobacco products during nonworking hours, provided that the individual complies with laws or workplace policies regarding smoking.
Missouri	Mo. Rev. Stat. § 290.145 (2004)	Makes it unlawful for an employer to refuse to hire, or to discharge, any individual because of his/her use of lawful alcohol or tobacco products off the premises and outside working hours, unless such use interferes with the employee's duties and performance, the duty and performance of the employee's coworkers, or the overall operation of the employer's business. Allows an employer to provide health insurance benefits at a reduced premium rate or deductible level for employees who do not smoke or use tobacco products. Exempts religious organizations, church operated institutions, and not-for-profit organizations whose principal business is health care promotion.

State	Legislation	Description
Montana	Mont. Code Ann. §§ 39-2-313 and 314 (2004)	Provides that an employer may not refuse to employ, license, or discriminate against an individual with respect to compensation, promotion, or the terms, conditions, or privileges of employment because the individual uses a lawful product off the employer's premises during nonworking hours, unless such use 1) affects an individual's ability to perform job-related employment responsibilities or the safety of other employees; 2) conflicts with a bona fide occupational qualification that is reasonably related to the individual's employment; 3) contradicts with a professional service contract where the unique nature of the services provided authorizes the employer to limit the use of certain products; or 4) is prohibited by a nonprofit organization employer that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public. Permits an employer to take action based on the belief that the action is permissible under an established substance abuse or alcohol program or policy, professional contract, or collective bargaining agreement. Allows an employer to offer, impose, or have in effect a health, disability, or life insurance policy that distinguishes between employees for the type or price of coverage based on the employees' use of a product.
Nebraska	None	

State	Legislation	Description
Nevada	Nev. Rev. Stat. Ann. § 613.333 (2004)	Makes it unlawful for an employer to fail or refuse to hire a prospective employee or to discharge or otherwise discriminate against an employee concerning his compensation, terms, conditions or privileges of employment, because he engages in the lawful use of any product outside working hours and off the employer's premises if that use does not adversely affect his ability to perform his job or the safety of other employees.
New Hampshire	N.H. Rev. Stat. Ann. § 275:37-a (2004)	Prohibits an employer from requiring, as a condition of employment, that an employee or applicant for employment abstain from using tobacco products outside the course of employment, as long as the employee complies with any workplace policy.
New Jersey	N.J. Stat. Ann. § 34:6B-1 (2004)	Prohibits an employer from refusing to employ any person or from discharging or taking any adverse action against any employee with respect to compensation, terms, conditions or other privileges of employment because that person does or does not smoke or use other tobacco products , unless the employer has a rational basis for doing so which is reasonably related to the employment, including the responsibilities of the employee or prospective employee.

State	Legislation	Description
New Mexico	N.M. Stat. Ann. § 50-11-3 (2004)	Makes it unlawful for an employer to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual is a smoker or nonsmoker , provided that the individual complies with applicable laws or workplace policies regulating smoking. Further prohibits an employer from requiring, as a condition of employment, that any employee or applicant for employment abstain from smoking or using tobacco products during nonworking hours. Allows an employer to prohibit any activity that materially threatens an employer's legitimate conflict of interest policy when that policy is reasonably designed to protect the employer's trade secrets, proprietary information or other proprietary interests; or relates to a bona fide occupational requirement and is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees.
New York	N.Y. Labor Code § 201-d (2004)	Makes it unlawful for an employer to make hiring or firing decisions, or otherwise discriminate against an employee or prospective employee because of that individual's legal use of consumable products or legal recreational activities outside of work hours, off of the employer's premises, and without use of the employer's equipment or other property.

State	Legislation	Description
North Carolina	N.C. Gen. Stat. § 95-28.2 (2004)	<p>Prohibits an employer from refusing to hire a prospective employee, or discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee or prospective employee lawfully uses lawful products off the employer's premises during nonworking hours and such use does not adversely affect the employee's job performance or the person's ability to properly fulfill the responsibilities of his position or the safety of other employees. Provides that an employer may:</p> <ul style="list-style-type: none"> - Restrict the use of lawful products by employees during nonworking hours if the restriction relates to a bona fide occupational requirement and is reasonably related to the employment activities. Limits the restriction only to a particular employer or group of employees to whom it reasonably relates; - Restrict the use of lawful products by employees during nonworking hours if the restriction relates to the fundamental objectives of the organization; and - Discharge, discipline, or take any action against an employee because the employee fails to comply with the requirements of the employer's substance abuse prevention program or the recommendations of substance abuse prevention counselors employed or retained by the employer. Allows an employer to offer, impose, or have in effect a health, disability, or life insurance policy distinguishing between employees for the type or price of coverage based on the use or nonuse of lawful products.

State	Legislation	Description
North Dakota	N.D. Cent. Code § 14-02/4-03 (2003)	Makes it a discriminatory practice for an employer to fail or refuse to hire a person; to discharge an employee; or to treat a person or employee adversely or unequally with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment, because of participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer.
Ohio	None	
Oklahoma	Okla. Stat. tit. 40, § 500 (2004)	Makes it unlawful for an employer to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment, because the individual is a nonsmoker or smokes or uses tobacco products during nonworking hours; or to require as a condition of employment that an employee or applicant for employment abstain from smoking or using tobacco products during nonworking hours.
Oregon	Or. Rev. Stat. § 659A.315 (2003)	Provides that it is an unlawful employment practice for any employer to require, as a condition of employment, that any employee or prospective employee refrain from using lawful tobacco products during nonworking hours, except when the restriction relates to a bona fide occupational requirement. Exempts applicable collective bargaining agreement that prohibit the off-duty use of tobacco products.
Pennsylvania	None	

State	Legislation	Description
Rhode Island	R.I. Gen. Laws § 23-20.10-14	No employer shall require, as a condition of employment, that any employee or prospective employee refrain from smoking or using tobacco products outside the course of his or her employment or otherwise discriminate against such employee in terms of compensations, conditions or privileges.
South Carolina	S.C. Code Ann. § 41-1-85 (2003)	Prohibits employers from taking personnel actions based on use of tobacco products outside of the workplace.
South Dakota	S.D. Codified Laws § 60-4-11 (2004)	<p>Makes it is a discriminatory or unfair employment practice for an employer to terminate an employee because the employee uses tobacco products off the premises of the employer during nonworking hours unless such a restriction:</p> <p>(1) Relates to a bona fide occupational requirement and is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees; or</p> <p>(2) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.</p> <p>Provides that the sole remedy for discrimination based on the use of tobacco products is a civil suit for damages including all wages and benefits due up to and including the date of the judgment had the discriminatory or unfair employment practice not occurred.</p> <p>Obliges anyone bringing such a suit to mitigate his/her damages. Allows an employer to offer, impose or have in effect a health or life insurance policy that makes distinctions between employees for the type of coverage or the cost of coverage based upon the employees' use of tobacco products. Exempts full-time firefighters from the provisions of the statute.</p>

State	Legislation	Description
Tennessee	Tenn. Code Ann. § 50-1- 304 (2004)	Prohibits an employee from discharging or terminating an employee solely for using an agricultural product not regulated by the alcoholic beverage commission that is not otherwise proscribed by law, provided that the employee uses such agricultural products outside of working hours or complies with all applicable employer policies regarding such use during working hours.
Texas	None	
Utah	None	
Vermont	None	
Virginia	Va. Code Ann. §§ 2.2-2902 and 15.2-1504 (2004)	Provides that no employee of the Commonwealth or applicant for employment with the Commonwealth shall be required, as a condition of employment, to smoke or use tobacco products on the job, or to abstain from smoking or using tobacco products outside the course of his employment.
Washington	None	

State	Legislation	Description
West Virginia	W. Va. Code § 21-3-19 (2004)	Makes it unlawful for a public or private employer to refuse to hire any individual or to discharge any employee or otherwise discriminate against any employee with respect to compensation, terms, conditions or privileges of employment solely because an individual uses tobacco products off the premises of the employer during nonworking hours. Exempts any nonprofit organization which, as one of its primary purposes or objectives, discourages the use of one or more tobacco products by the general public. Allows an employer to offer, impose or have in effect a health, disability or life insurance policy which makes distinctions between employees for the type or price of coverage based upon the employee's use of tobacco products.
Wisconsin	Wis. Stat. Ann. § 111.321 (2004)	Prohibits any employer, labor organization, employment agency, licensing agency or any other person from engaging in any act of employment discrimination on the basis of the use or nonuse of lawful products off the employer's premises during nonworking hours.

State	Legislation	Description
Wisconsin	Wis. Stat. Ann. § 111.35 (2004)	Allows a nonprofit corporation that encourages or discourages the general public from using a lawful product as one of its primary purposes or objectives to make employment decisions based on an employee's use or nonuse of lawful products . Allows an employer to base an employment decision on the use or nonuse of a lawful product if such use or nonuse impairs individual's ability to adequately undertake his/her job-related responsibilities or creates, or appears to create, a conflict of interest, with the employee's job-related responsibilities. Exempts fire fighters from the provision of the statute. Allows the employer to offer or have in effect life, health, or disability insurance that differs in type of coverage or price based on an individual's use of nonuse of a lawful product.
Wyoming	Wyo. Stat. § 27-9-105 (2004)	Prohibits an employer from requiring, as a condition of employment, that any employee or prospective employee use or refrain from using tobacco products outside the course of his employment, unless it is a bona fide occupational qualification. Allows an employer to offer, impose or have in effect a health, disability or life insurance policy that distinguishes between employees for type or price of coverage based upon the use or nonuse of tobacco products.

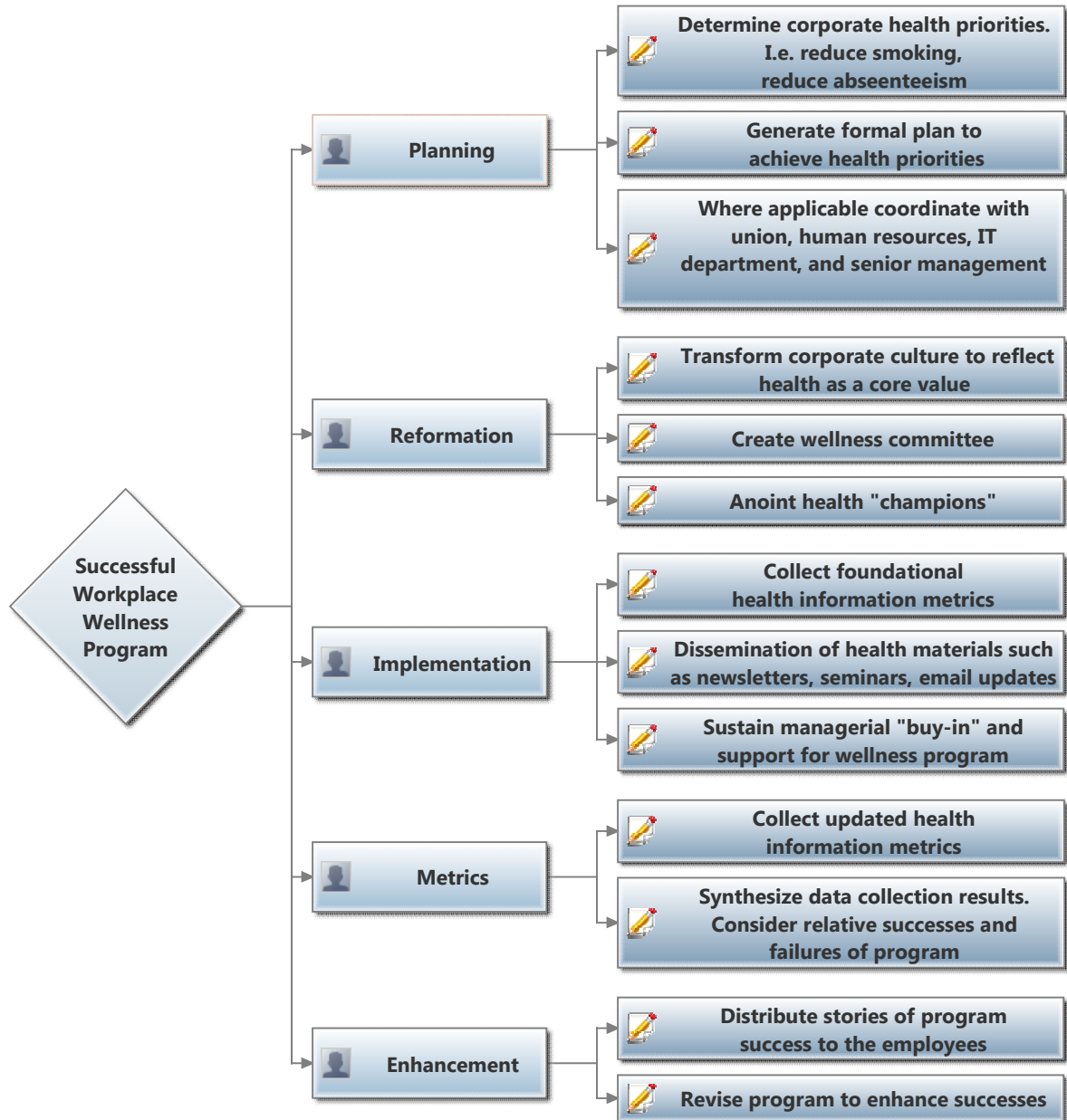
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³⁵⁹ Gudas, *supra* note 188.

Appendix B

Components of Successful Workplace Wellness Programs

Original chart created by Fixter, B. for purposes of this thesis.



Appendix C

Sample Workplace Wellness Program Employee Survey

The following is a sample of a workplace wellness survey designed by the Canadian Centre for Occupational Health and Safety:³⁶⁰

“ABC Company is looking into the need for a workplace health and wellness program. We are interested in learning more about your opinions and interests. Your answers will be used to help plan the program and to decide which types of programs to offer.

- Senior management has agreed to let everyone take a few minutes to complete this survey.
- Please do not put your name on the form because we would like to keep this survey confidential.
- Please return the forms by putting them in a sealed envelope and placing them in the inter-office mail.

1. Sex:

☐ Male ☐ Female

2. Age Group:

☐ under 21 ☐ 21 - 30 ☐ 31 - 40 ☐ 41 - 50 ☐ 51 - 60 ☐ over 60

3. Do you have any health concerns about yourself, your family, or something arising from the workplace?

4. Would you like ABC Company to help with these concerns?

☐ Yes ☐ No ☐ Not sure

Explain your answer

³⁶⁰ Canadian Centre for Occupational Health and Safety. *Sample Workplace Health and Wellness Survey* (2009), online: Canadian Centre for Occupational Health and Safety <http://www.ccohs.ca/oshanswers/psychosocial/sample_wellness.html> [January 30, 2012].

5. Indicate how you feel about the following statements:

	Agree Strongly	Agree	Not sure/ No opinion	Disagree	Disagree Strongly
On the whole, I like my job.					
I feel that I am well rewarded for the effort I put in at work.					
I am happy with the balance between my work time and my leisure time.					
At work, my level of authority is about the same as my level of responsibility.					

6. Which of the following activities would you prefer to participate in? (Check all that you would be likely to join)

	Yes	No	Maybe
Aerobic exercise			
Walking Club			
Recreational Team (e.g. baseball)			
Other exercise programs (specify)			
Healthy Backs			
Healthy Eating (general tips, etc.)			
Weight Management			
Blood Cholesterol Testing			

Flu Shots			
Blood Pressure Screening			
Blood Glucose Screening			
Body/Mass Index (BMI) Testing			
Stress Management (either home/work)			
Alcohol / Drug Abuse Education			
Smoking Cessation			
Parenting			
Marital Situations			
Interpersonal Skills (such as "Dealing with Difficult People", Conflict Resolution, etc.)			
Retirement Planning			
Lunch & Learn Sessions			
Time Management			
Home Budgeting / Financial Planning			
Health Fair (booths)			
Balancing Family and Work			
Other: (please list)			

7. When would you be able to participate?

- | | | |
|------------------------------------|---------------------------------|--------------------------------------|
| <input type="checkbox"/> Monday | <input type="checkbox"/> Spring | <input type="checkbox"/> Before work |
| <input type="checkbox"/> Tuesday | <input type="checkbox"/> Summer | <input type="checkbox"/> Lunch time |
| <input type="checkbox"/> Wednesday | <input type="checkbox"/> Fall | <input type="checkbox"/> After work |
| <input type="checkbox"/> Thursday | <input type="checkbox"/> Winter | <input type="checkbox"/> Evenings |

☐ Friday ☐ Other _____

☐ Weekends (for family events)Weekends (for family events)

8. Where would you prefer to attend a program?

☐ Work

☐ Private health club

☐ Local School or Facility/Hall

☐ Other

9. If necessary, would you be willing to share in the cost of a program? ☐ Yes ☐ No

10. Do you have any additional comments or concerns you would like the committee to know?"

Appendix D
Aggregation of Reported Economic Change from WWPs

Chapman's Aggregation of Reported Change in Economic Variables and Cost/Benefit Ratios arising from the Implementation of WWPs.³⁶¹

#	Author	Study Rank	Percent Change in Sick Leave Absenteeism	Percent Change in Health Costs	Percent Change in Workers' Compensation/ Disability Management Costs	Cost Benefit Ratio
1	Aldana	6		-16.0%		3.60
2	Aldana	12		7.0%		
3	Baun	40	-33.4%	-47.2%		
4	Bertera	14	-12.2%			
5	Bertera	13	-14.0%			2.05
6	Blair	15	-24.0%			
7	Bly	3		-7.4%		
8	Bowne	31	-20.1%	-45.7%	-31.7%	2.90
9	Cady	34			-25.6	
10	Chapman	4	-49.1%	-32.4%		6.52
11	Conrad	28	-16.3%			
12	Dalton	22		-18.4%	-43.2%	7.00
13	Erfurt	25				

³⁶¹ World Health Organization. *Preventing Noncommunicable Diseases*, *supra* note 73 at 16.

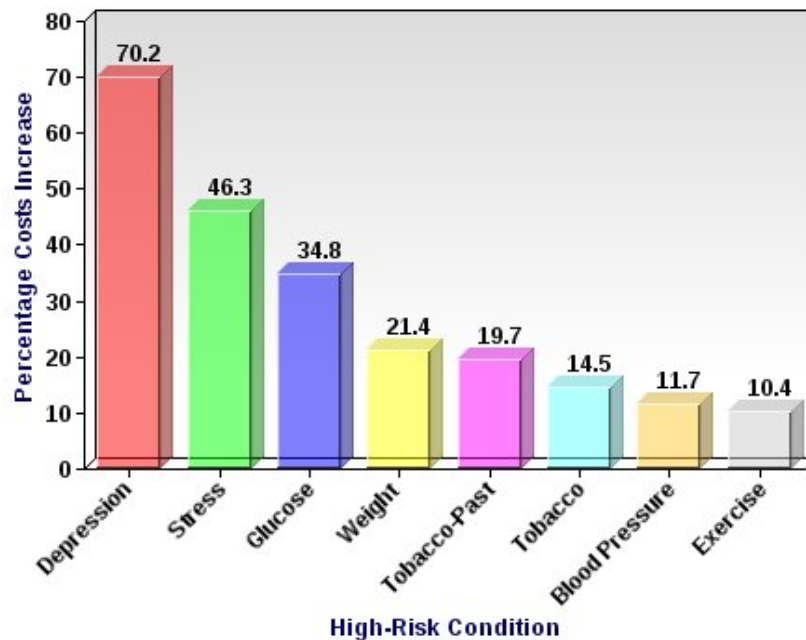
#	Author	Study Rank	Percent Change in Sick Leave Absenteeism	Percent Change in Health Costs	Percent Change in Workers' Compensation/ Disability Management Costs	Cost Benefit Ratio
14	Fries	1		-30.4%		
15	Fries	7	-35.2%	-48.8%		5.96
16	Fries	20				
17	Fries	5	-23.3%	-26.7%		6.00
18	Gibbs	35		-24.2%		2.51
19	Goetzel	16		-14.2%		
20	Goetzel	17		-32.4%		
21	Golaszewski	8	-19.0%			3.40
22	Harvey	2		50.1%		19.41
23	Henritze	39				10.10
24	Henritze	38	-68.2%			
25	Jeffery	18	-22.0%			
26	Jones	29	-31.6%			
27	Knight	19	-33.5%			
28	Lechner	30	-52.4%			
29	Leigh	9	-12.1%	-32.0%		4.73
30	Lorig	36		-7.2%		
31	Lynch	26	-13.8%			

#	Author	Study Rank	Percent Change in Sick Leave Absenteeism	Percent Change in Health Costs	Percent Change in Workers' Compensation/ Disability Management Costs	Cost Benefit Ratio
32	Musich	27		-19.6%		
33	Ozminkowski	10		-41.0%		4.64
34	Ozminkowski	11		-9.7%		
35	Sciacca	32		-12.0%		
36	Serxner	31			-20.0%	
37	Shephard	41		-34.5%		
38	Shephard	37				4.85
39	Shi	23	-21.7%	-28.4%		3.07
40	Spilman	33				
41	Wheat	42		-31.0%		
42	Wood	24	-36.3%			3.50
Number of Studies			19	23	4	16
Averages			-28.3%	-26.1%	-30.1%	5.93

Appendix E

Percentage Increase in Costs Arising from High-Risk Employees

Original chart created by Fixter, B. for purposes of this thesis.



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The chart reflects information collected by Goetzel *et al.* on the healthcare cost inflation of high-risk employees. As noted, individuals that are considered high-risk for depression increased healthcare costs by an astounding 70.2%.³⁶² Further, individuals who are high-risk in weight account for 21.4% higher healthcare costs than their low-risk counterparts.³⁶⁴

³⁶² Goetzel, R.Z. *et al.* "The Health and Economic Implications of Worksite Wellness Programs" (Oct. 1998), 40 *J. Occup. Environ. Med.* pp. 843-854.

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*