

# Health Promotion Program Legal Update: 2019 (May 15, 2019)

Barbara J. Zabawa, JD, MPH

## HEALTH PROMOTION PROGRAM LEGAL UPDATES

May 15, 2019

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## LEGAL CONSIDERATIONS WHEN HIRING WELLNESS PROVIDERS

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## AGENDA

- Why should you care?
  - Negligence
  - Worker's Compensation
  - Lack of Uniform Standards
- Scope of Practice
- Delivering "Medical Care"
- Corporate Practice of Medicine
- Case Examples
- Q&A

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## WHY SHOULD WORKPLACE WELLNESS CARE?

- Corporate wellness programs hire variety of professionals to conduct:



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## WHY SHOULD WORKPLACE WELLNESS CARE?



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## WHY SHOULD WORKPLACE WELLNESS CARE?



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## WHY SHOULD WORKPLACE WELLNESS CARE?



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## WHY SHOULD WORKPLACE WELLNESS CARE?

- Professionals may include:
  - Health coaches
  - Health educators
  - Nurses
  - Fitness trainers
  - Dietitians or other nutrition experts
  - Therapists
  - Chiropractors

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## WHY SHOULD WORKPLACE WELLNESS CARE?

- If not delivered competently, wellness services can adversely impact an employee's health.
- Professionals must account for an employee's health status, work and home environment, prescriptions or other medications.
- Need to know:
  - Are they qualified? Training, education, experience
  - Do they have the appropriate certifications or licenses?
  - Are those certifications or licenses up to date? How do they stay up to date?

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## NEGLIGENCE

Negligence is "careless" conduct by either  
OMISSION or COMMISSION

Failure to Perform    Improper Performance

**Negligence** can be defined as failing to do something (inaction/omission) that a reasonably, prudent professional would have done under the circumstances or doing something (improper action/commission) that a reasonable prudent professional would not have done under the circumstances.

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## NEGLIGENCE CLAIMS

- Occur when a wellness professional is accused of causing harm.
- To determine if wellness professional is negligent, the professional is measured against the "standard of care" of a qualified professional for that situation.
- Qualified professional:
  - Possesses necessary credentials (education, certification, experience)
  - "For that situation" includes three factors:
    - Nature of activity
    - Type of participants
    - Environmental conditions

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## NEGLIGENCE CLAIMS

- Nature of activity: the professional must be aware of the skills and abilities a participant needs to participate "safely" in an activity.
- Type of participants: the professional must be aware of individual factors of the participant (e.g., medical conditions that can impose increased risks) and know how to minimize those risks.
- Environmental conditions: The professional must be aware of any conditions that may increase risks (weather conditions such as heat/humidity, floor surface conditions, exercise equipment condition) and know how to minimize those risks.

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## FOUR ELEMENTS PLAINTIFF MUST PROVE IN NEGLIGENCE LAWSUIT

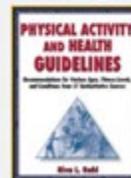
**Duty** -- the legal duty (or standard of care) the defendant owed to the plaintiff

**Breach of Duty** -- the conduct (action or inaction) of the defendant that was a breach of the duty

**Harm** -- the plaintiff must have suffered a physical or emotional injury or damage to property

**Causation** -- the breach of duty must be the reason (cause) for the harm that occurred to the plaintiff

Duty (or the standard of care) will likely be determined from the testimony of expert witnesses who will introduce standards (e.g., standards, guidelines, position papers) published by professional and independent organizations.



**Compensatory Damages** – plaintiff seeks monetary (compensation) damages:  
Economic (e.g., medical expenses, lost wages)  
Non-economic (e.g., pain and suffering) pain and

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## CASE EXAMPLE

- Mrs. Capati was a young mother of two children who was also taking medication for hypertension. Her personal fitness trainer advised her to take a variety of nutritional and dietary supplements, including some that contained ephedra. One day while performing squats with her trainer, Mrs. Capati became very ill and later died of a stroke at the hospital. Her husband filed a \$320 million wrongful death claim against the trainer, the fitness club, the Vitamin Shoppe and others, seeking compensatory and punitive damages. The trainer admitted that he did not inform Mrs. Capati that the foods or supplements he recommended might have negative health consequences while on hypertension medication and while working out. It is likely that the trainer did not realize that the combination of hypertension medication and ephedra can be lethal. The case was settled out of court for more than \$4 million, with the trainer and club being liable for \$1.75 million and the other defendants being held liable for the remainder.
- *Capati v. Crunch Fitness (1999)*.

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## CASE EXAMPLE

- During a steps aerobics class, Ms. Santana fell while performing simultaneous exercises (stepping and arm exercises with a Dynaband) as directed by the instructor. While performing the simultaneous exercises, the participants were instructed to look straight ahead at their reflection in a mirror versus looking at their feet. Ms. Santana fractured her ankle, requiring surgery. A expert witness stated that the instructor increased the risks over and above those inherent in the activity when participants performed the simultaneous exercises. The court found that the trainer and club were negligent; they could not rely on the "assumption of risk" defense because the risk was beyond an inherent risk.
- *Santana v. Women's Workout and Weight Loss Centers, Inc.*, 2001 WL 1521959 (Cal. Ct. App. 2001).

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## CASE EXAMPLE

- Baldi-Perry, a female with known back/neck injuries, informed her personal trainer of her health history prior to training. He told her that he had extensive experience training individuals with such injuries and that he could design a safe program for her. One day prior to starting the training session, the trainer informed Baldi-Perry that he had established a new routine for her (circuit training with no/little rest periods) that was being performed by many at his fitness center. She reminded him of her past injuries and he responded by stating that she need to trust him; he was the professional and did this for a living. Baldi-Perry performed the routine, but it resulted in many injuries and serious outcomes such as herniated cervical discs, required surgery to decompress and fuse cervical discs, ongoing pain/medical care, and future surgery. Baldi-Perry sued the trainer and facility and won her case, receiving jury verdict of \$1.4 million. She was awarded \$980,000 because she was found to be 30% at fault.
- *Baldi-Perry v. Kaifos and 360 Fitness Center, Inc.*

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## WORKERS' COMPENSATION

### ➤ Form of Strict Liability:

- Injured employee is compensated (e.g., medical expenses, portion of lost wages) regardless of who is at fault

### ➤ Purposes:

- Protect and compensate workers
- Promote efficiency by offering system to provide prompt relief to employee
- Protect employer by precluding employee from bringing a tort lawsuit for negligence against the employer
- Promote safety by motivating employers to make safer workplaces



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## WORKERS' COMPENSATION – CONT.

### ➤ Case Example: *Stanner v. Compensation Appeal Board*\*

- Stanner (Manager, Westinghouse Electric) died of a MI shortly after a workout in the company's fitness center
- His widow filed a claim to seek workers' compensation death benefits
  - Arbitrator dismissed the claim
  - State Workers Compensation Board affirmed the dismissal
  - She appealed to the Intermediate Court of Appeals in Pennsylvania

### ➤ Court's Ruling

Reversed. When an employer encourages its employees to participate in activities to improve their health, it is an "activity in furtherance of the employer's business, and thus, "in the course of employment"

\* 604 A.2d 1167 (Pa. Commw. 1992)

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## WORKERS' COMPENSATION – CONT.

**Factors\* to determine if an injury during participation in an employer-sponsored exercise or recreation program is compensable under workers' compensation:**

- Did the injury occur during working hours?
- Did the injury occur on the employer's premises?
- Did the employer initiate the employee's exercise?
- Did the employer exert any control or direction over the employee's exercise program?
- Did the employer stand to benefit from the employee's exercise program?

\*Factors will vary by state

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## LACK OF UNIFORM STANDARDS

- Scope of practice laws provide protection for licensed professionals,
- Not all wellness professionals hold state-issued licenses.
- How do employers and liability insurers know whether the professional is qualified?
  - Lack of uniform standards of practice and expectations for all workplace wellness professionals.
  - Many wellness certifications lack government regulation and may be deficient in prior training, education or practical application of concepts.
- Employers who hire unqualified personnel who then cause injury can be held liable under *respondet superior* doctrine.
- Wellness Compliance Institute has developed standards.

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## LACK OF UNIFORM STANDARDS

- Examples of WCI standards:
- Use products, strategies and methods that do not pose a risk of harm to individuals but rather promote well-being and that are grounded in, and contribute to, the development of professional standards, evidence-based guidelines, theories, data and experience, as verified by a neutral, reputable organization.
- Maintain a level of competency in professional practice to provide high quality services. If the workplace wellness professional maintains a credential for purposes of delivering workplace wellness products or services, the professional shall comply with all requirements of obtaining and maintaining that credential.
- Do not misrepresent qualifications, limitations of education, training, expertise and experience, such as by using misleading titles (e.g., a wellness coach using the title "Disease Manager" when the wellness coach has no clinical training).
- See [www.wellnessci.org](http://www.wellnessci.org)

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## SCOPE OF PRACTICE

- Activities that an individual health care practitioner is permitted to perform within a specific profession.
  - Activities should be based on appropriate:
    - Education
    - Training
    - Experience
  - Established by the "practice act" of the specific practitioner's state board, and the rules adopted pursuant to that act.

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## SCOPE OF PRACTICE

- Addresses professions licensed by the state
- May include:
  - Athletic Trainers
  - Dietitians
  - Therapists
  - Chiropractic
  - Nurses
  - Physicians

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## SCOPE OF PRACTICE

- Violations can be:
  - Criminal
  - Civil
    - Negligence actions



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## SCOPE OF PRACTICE

- Examples of criminal behavior:
  - Crossing into practice of medicine (e.g., diagnosing and treating a medical condition) without a license in medicine, physical therapy, athletic training.
  - Practicing "dietetics" (or portraying oneself as a dietitian) without a dietitian's license.
  - Practicing "counseling" without a social work or psychology license.

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## SCOPE OF PRACTICE

- How to avoid criminal charges:
  - **REFER** employee clients to appropriately-licensed professionals.
    - A poor referral could also increase liability if harm occurs
  - Familiarize yourself with the state licensing statutes and regulations that may cross over into your practice domain
  - If wellness professional does not hold a state-issued license, avoid providing individualized advice and services.
    - General education is less risky.

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## SCOPE OF PRACTICE

**Penalties for Violating State Licensing Statutes\***

**A Cease and Desist Notice:** Issued to any person violating this statute. The violation can result in a fine between \$500 and \$5000. Each day the unlicensed practice continues after the notice, a separate violation can be charged.

**3rd Degree Felony:** Minimum penalty -- Fine of \$1000 and mandatory period of incarceration of 1 year.

**2nd Degree Felony:** Practice results in serious bodily injury; Minimum penalty same as 3rd degree felony.

**1st degree Misdemeanor:** Minimum penalty is a fine of \$500 and imprisonment for 30 days

**\*Florida's Law: Unlicensed practice of a health care profession. Fla Stat. § 456.065**

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## SCOPE OF PRACTICE

**Practice of Dietetics and General Non-Medical Nutrition Information**

**Practice of Dietetics\*** – restricted to those with a license

- Nutritional assessment to determine nutritional needs and to recommend appropriate nutritional intake, including enteral and parenteral nutrition.
- Nutritional counseling or education as components of preventive, curative, and restorative health care.
- Development, administration, evaluation, and consultation regarding nutritional care standards.

**\* Dietetics. Ohio Rev, Code Ann § 4759-01, 2013. <http://codes.ohio.gov/orc/4759>**

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## SCOPE OF PRACTICE

- General Non-Medical Nutrition Information\*\* -- not restricted
- Providing information on the following:
  - principles of good nutrition and food preparation;
  - food to be included in the normal daily diet;
  - the essential nutrients needed by the body;
  - recommended amounts of the essential nutrients;
  - the actions of nutrients on the body;
  - the effects of deficiencies or excesses of nutrients; or
  - food and supplements that are good sources of essential nutrients
- \*\* Dietetics, Ohio Rev. Code Ann § 4759-2-01 (M), 2009.
- <http://www.dietetics.ohio.gov/bulletins/bulletin8.pdf>.

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## CASE EXAMPLE

- Wellness professional in Ohio represented himself as nutritionist. He performed nutritional assessments, recommended nutritional supplements and engaged in nutritional counseling for the purpose of treating certain complaints and ailments of his clients. The Ohio Board of Dietetics found the professional to be practicing dietetics without a license, even though he did not identify himself as a dietitian. The Board issued a "cease-and-desist" notice.
  - *Ohio Board of Dietetics v. Brown*, 83 Ohio App. 3d 2424 (Ohio Ct.App. 1993).

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## CASE EXAMPLE

- Wellness professional started a website called "Diabetes Warrior" that provided various types of nutrition information, including a fee-based "Diabetes Support Life-Coaching" service in which the professional charged a fee for providing individualized dietary advice. The North Carolina Board of Dietetics/Nutrition informed the professional that the coaching services on the website must be removed because those services constituted the practice of dietetics without a license pursuant to North Carolina law. The Board's director stated that the professional should not be addressing a diabetic's specific conditions. The professional is no longer just providing information when he or she engages in assessing and counseling. Those activities require a license.
- *Cooksey v. Futrell*, 724 F.3d 226 (4<sup>th</sup> Cir. 2013).

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## DELIVERING MEDICAL CARE

- Wellness professionals who practice outside their scope could also turn wellness program into a group health plan.
- GHP wellness programs subject to:
  - ERISA
  - COBRA
  - HIPAA

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## DELIVERING MEDICAL CARE

- Whether a wellness program is a “group health plan” based on whether it delivers “medical care”
- “Medical care” is “amounts paid for diagnosis, cure, mitigation, treatment, or prevention of disease”
- “Prevention of disease” = if a present existence or imminent probability of developing a disease, physical or mental defect, or illness exists.
  - A clinician that indicates treatments are necessary for alleviation of a physical or mental defect or illness steps into “medical care”
  - Information beneficial to the general health of an individual is not medical care
  - See IRS Memo 2010-0175 (June 25, 2010).

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## DELIVERING MEDICAL CARE

- Wellness programs that are GHPs and subject to ERISA must comply with
  - SPD
  - Annual reporting requirements
  - Fiduciary duties
  - Grievance/appeals process
  - COBRA
  - HIPAA
  - See <https://www.dol.gov/general/topic/health-plans/erisa>

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## LESSONS LEARNED

- Clients trust their wellness professionals and follow their instructions.
- The general public often believes that if a wellness professional is "certified," he or she is automatically qualified and competent.
- It is essential that only wellness professionals with advanced knowledge and skills train or advise individuals who have medical conditions.
  - 50% of US adults have at least one chronic condition; 25% have two or more
- Employers can be held liable for the negligent conduct of their employees (respondeat superior doctrine).
- Employers may have additional regulatory requirements if wellness professional oversteps their role

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## RISK MANAGEMENT STRATEGIES

- Hire competent employees
  - During the interview:
    - Ask questions that assess candidate's knowledge and skills;
    - Ask situational-type questions (common situations that occur in wellness activities and programs) to determine if candidate knows how to properly handle the situation;
    - Ask the interviewee to teach a mock group class or session.

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## RISK MANAGEMENT STRATEGIES

- Train Employees
  - Go over company policies and procedures with regard to scope of practice
  - Sample policies might include:
    - Exercise staff members must first complete formal education course if no previous formal education/training;
    - Wellness professionals should not provide "individualized" advice but may provide general education on wellness topics;
    - Only exercise professionals with advanced knowledge and skills should work with clinical populations;
    - Wellness professionals should not conduct professional counseling with participants.
- Document the training.

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## RISK MANAGEMENT STRATEGIES

- Supervise employees during probationary period
  - Give feedback to employee
- Companies that hire wellness vendors can reduce risk of "respondent superior" should negligence occur by ensuring that the vendor does not hold themselves out as or appear to be employees of the company, such as through wearing company gear.

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## RISK MANAGEMENT STRATEGIES

- **Waiver:** A contract signed by an individual prior to participation that can absolve or protect the defendants, such as fitness/wellness staff members and the facility from their own "ordinary" negligence; waivers do not provide protection for "gross" negligence.
  - Waivers are not enforceable for personal injury in some states
- **Primary Assumption of Risk:** A defense for injuries due to "inherent risks" – injuries that just happen (are inseparable from the activity) and they are no one's fault. However, the plaintiff must know, understand and appreciate the inherent risks and voluntarily assume them.
- **Waiver and A/R Document**
  - Section including the exculpatory clause
  - Section that lists inherent risks – minor injury, major injury, life-threatening injury, and death
  - Must have legal counsel prepare the waiver – waiver law varies by state
- **Defenses That do NOT Work:**
  - Not enough staff
  - Takes too much time
  - Costs too much
  - That's how other employers do it
  - Ignorance of the law/legal duties



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## CORPORATE PRACTICE OF MEDICINE

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## CORPORATE PRACTICE OF MEDICINE

- One profession that doesn't usually suffer from scope of practice issues is medicine.
- Practice of medicine is very broad.
  - "Practice of medicine and surgery" means: (a) To examine into the fact, condition or cause of human health or disease, or to treat, operate, prescribe or advise for the same, by any means or instrumentality; (b) To apply principles or techniques of medical sciences in the diagnosis or prevention of any of the conditions described in par. (a) and in sub. (2); (c) To penetrate, pierce or sever the tissues of a human being; (d) To offer, undertake, attempt or do or hold oneself out in any manner as able to do any of the acts described in this subsection.
- Wis. Stat. s. 448.01(9).

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## CORPORATE PRACTICE OF MEDICINE

- Companies think they can minimize scope issues by hiring physicians who can then delegate to others health and wellness services.
- Not unauthorized practice of medicine in Wisconsin if physician supervises "any person."
  - "Any person other than a physician assistant or an anesthesiologist assistant who is providing patient services as directed, supervised and inspected by a physician who has the power to direct, decide and oversee the implementation of the patient services rendered." Wis. Stat. s. 448.03(2)(e).
- Corporate practice of medicine may prevent such hires.

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## CORPORATE PRACTICE OF MEDICINE

- What is it?
  - A doctrine from the 1800s that seeks to prohibit a non-physician from interfering with a physician's professional judgment.
  - Prohibits corporations not owned or controlled by physicians from employing physicians to practice medicine and charge for those professional services.

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## CASE EXAMPLE

- ABC Company wants to provide flu shots to corporate wellness programs in California. ABC has hired licensed vocational nurses to administer the flu shots at the worksite. Is this sufficient?

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## ANSWER

- No, not in California. According to California Business and Professional Code s. 2860.7, licensed vocational nurses must be under the supervision of a physician when administering immunizations. ABC will not be able to employ a physician, however, to supervise, because Section 2400 of the Business and Professions Code prohibits corporations (other than professional corporations) from exercising professional rights, privileges and powers. This means that ABC may not employ a physician to supervise the licensed vocational nurse.

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## Q&A REMINDER

The following Q&A session does NOT constitute legal advice and should not be used as such.  
It is for educational purposes only.

WELCOA Members should retain legal counsel to obtain definitive answers.

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## QUESTIONS?

• **For more information, contact:**

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