

Health Promotion Program Legal Update: 2019 (December 18, 2019)

Barbara J. Zabawa, JD, MPH

Health Promotion Program Legal Updates

December 18, 2019

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TOPICS FOR 2020

Please make your suggestions for topics for the 2020 Health Promotion Program Legal Updates series.

Complete this brief survey to submit what you want to hear in next year's sessions.

Go to: welcoa.org/2020-legal-series-survey/

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WHAT DATA CAN BE SHARED, AND WITH WHOM, IN WORKPLACE WELLNESS PROGRAMS?

Barbara J. Zabawa, JD, MPH
Center for Health and Wellness Law, LLC

Dan Keith, CEO
It Starts With Me Health

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- ▶ **Legal Background**
 - ▶ HIPAA
 - ▶ ADA
 - ▶ FTCA
- ▶ **Q&A with Dan**
- ▶ **Q&A with Attendees**

AGENDA

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- ▶ Is your wellness program subject to HIPAA privacy and security rules?
- ▶ ___ Yes
- ▶ ___ No
- ▶ ___ Not sure
- ▶ ___ It doesn't matter as we comply with HIPAA regardless

POLL QUESTION

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DATA PRIVACY LAWS

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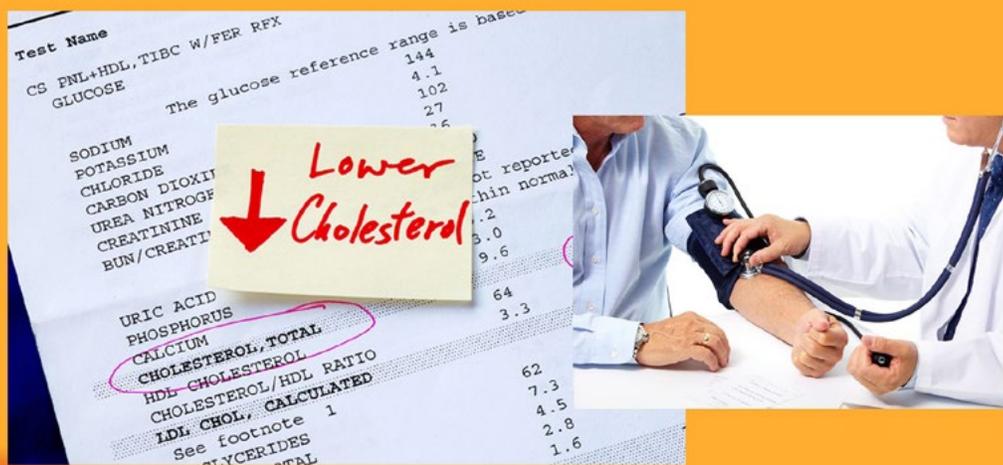
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WORKPLACE WELLNESS AND DATA COLLECTION

- ▶ A number of platforms connect data collected from different sources
 - ▶ Wearable technology
 - ▶ Mobile device applications
 - ▶ Biometric screen data
- ▶ Information collected from wearables and apps can be uploaded to the cloud for storage and analysis.
- ▶ Other cloud contributors are Amazon, Google, Apple, Microsoft and Facebook
 - ▶ This means your personal data is stored in massive data centers around the world instead of on a device in your home, business or hand.

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WORKPLACE WELLNESS AND DATA COLLECTION



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WELLNESS DATA PRIVACY LAWS

- ▶ **HIPAA**
- ▶ ADA
- ▶ **FTCA**
- ▶ GINA
- ▶ Best Practices and Self-Regulation

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HIPAA

- ▶ Two preliminary questions
 - ▶ **Must** my workplace wellness program comply with HIPAA privacy and security rules?
 - ▶ **Should** my workplace wellness program comply with HIPAA privacy and security rules?

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MUST MY WORKPLACE WELLNESS PROGRAM COMPLY WITH HIPAA PRIVACY AND SECURITY RULES?

▶ **IT DEPENDS...**

- ▶ Is Program Part of Group Health Plan?

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HIPAA



- ▶ Applies to
- ▶ **Covered Entities**

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HIPAA

▶ Covered Entities:

- - **Health Plans**
- - **Providers** who conduct one or more of the HIPAA-defined transactions electronically
 - KEY: HIPAA does not apply to entities that don't engage in covered electronic transactions
- - **Clearinghouses**

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SUBJECT TO HIPAA – SO WHAT?

Covered Entities:

- ▶ HIPAA Privacy and Security Policies & Procedures
- ▶ HIPAA Privacy and Security Official
- ▶ Notice of Privacy Practices
- ▶ Patient Authorizations
- ▶ Business Associate Agreements
- ▶ **Minimum Necessary Standards**
- ▶ Breach Standards
- ▶ Plan Sponsor Disclosure Standards

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HIPAA



Many parts also apply to:

Business Associates

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HIPAA

What is a “Business Associate?”

- ▶ **Not a member of the CE’s workforce who, with respect to a CE:**
 1. **Performs a function or activity using individually identifiable health information involving:**
 - Claims processing or administration
 - Data analysis, processing or administration
 - Utilization review
 - QA
 - Billing
 - Benefit management
 - Practice management
 - Repricing

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SUBJECT TO HIPAA - SO WHAT?

Business Associates must:

- ▶ Comply with the Business Associate Agreement (BAA)
- ▶ Comply with HIPAA Security Rule
 - ▶ Implement HIPAA Security Policies and Procedures
- ▶ Enter into a BAA with their subcontractors.
- ▶ Cooperate with government investigations into HIPAA compliance
- ▶ Designate a Security Official
- ▶ Notify CE's of breaches

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- ▶ More stringent analysis

HIPAA AND STATE PRIVACY LAWS

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HIPAA

- ▶ According to federal Department of Health and Human Services:
- ▶ "Where a workplace wellness program is offered as part of a group health plan, the individually identifiable health information collected from or created about participants in the wellness program is PHI and protected by the HIPAA Rules. While the HIPAA Rules do not directly apply to the employer, a group health plan sponsored by the employer is a covered entity under HIPAA,^[1] and HIPAA protects the individually identifiable health information held by the group health plan (or its business associates). HIPAA also protects PHI that is held by the employer as plan sponsor on the plan's behalf when the plan sponsor is administering aspects of the plan, including wellness program benefits offered through the plan.^[2]
- ▶ Where a workplace wellness program is offered by an employer directly and not as part of a group health plan, the health information that is collected from employees by the employer is not protected by the HIPAA Rules. However, other Federal or state laws may apply and regulate the collection and/or use of the information."
- ▶ From <https://www.hhs.gov/hipaa/for-professionals/privacy/workplace-wellness/>.

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HIPAA

- ▶ So, if your wellness program is offered through a group health plan, then your program **must** comply with HIPAA privacy and security rules.
- ▶ **Should** your program comply?

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HIPAA

- ▶ Voluntarily complying with HIPAA security rule may:
 - ▶ Reduce risk of breaches (ransomware and other hacking on the rise)
 - ▶ Instill confidence in program participants
 - ▶ Boost compliance with other state and federal rules that protect the confidentiality of employee health information, such as....**ADA and FTCA.**

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ADA REQUIREMENTS

- ▶ Employers and vendors must protect health information confidentiality



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ADA REQUIREMENTS

EEOC expects group health plan programs to abide by HIPAA privacy/security rules

- ▶ Employer certification requirements for those who administer programs
- ▶ Best practice: separate those who handle individually identifiable health information from those who make employment-related decisions
- ▶ Use of a third-party vendor may help

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ADA REQUIREMENTS

▶ Employers and Vendors should have clear privacy policies and procedures related to medical information:

- ▶ Collection
 - ▶ Storage
 - ▶ Disclosure
 - ▶ Encryption
 - ▶ Notice of Breach
- ▶ Include employee training



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ADA REQUIREMENTS

- ▶ May not Require Employee to Agree to Sale, Exchange, Sharing, Transfer of Information
- ▶ Review vendor agreements to ensure employees do not unwittingly waive confidentiality protections.

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FEDERAL TRADE COMMISSION ACT (FTCA)

- ▶ **Prohibits unfair or deceptive practices in the marketplace.**
- ▶ **A practice may be unfair, deceptive or both.**
- ▶ **Unfair:**
 - ▶ Causes or is likely to cause substantial injury to consumers
 - ▶ Cannot be reasonably avoided by consumers; and
 - ▶ Is not outweighed by the benefits.

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FTCA

▶ Deceptive:

- ▶ A representation, omission or practice misleads or is likely to mislead the consumer
- ▶ A consumer's interpretation of the representation, omission or practice is considered reasonable under the circumstances; and
- ▶ The misleading representation, omission or practice is material.

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FTCA

▶ Covers most companies in the U.S.

▶ Exceptions:

- ▶ Banks
- ▶ Air carriers
- ▶ Companies subject to Packers and Stockyards Act.

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FTCA

- ▶ **FTC uses FTCA s. 5 to protect consumer data privacy and security.**
- ▶ **FTCA s. 5 has addressed numerous privacy issues such as:**
 - ▶ Spam
 - ▶ Social networking
 - ▶ Behavioral advertising
 - ▶ Spyware
 - ▶ Peer-to-peer file sharing
 - ▶ Mobile technology uses

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FTCA

- ▶ **Relevant case examples:**
 - ▶ PaymentsMD, LLC
 - ▶ GMR Transcription Services
 - ▶ Genelink & Foru International
- ▶ **FTCA demands transparency and follow-through on privacy/security obligations.**

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- ▶ **Wisconsin Right to Privacy Law (Wis. Stat. s. 995.50):**
- ▶ Invasion of privacy means
 - (a) Highly offensive intrusion where there is an expectation of privacy.
 - (b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without written consent.
 - (c) Publicly announcing private information that would be highly offensive to a reasonable person.

STATE LAW

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Q&A WITH DAN KEITH

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- ▶ **What are some common issues that you see regarding employers and data privacy?**

QUESTION #1

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- ▶ **What legal exposure do wellness coordinators have, if any, with respect to data privacy protection?**

QUESTION #2

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▶ **Should wellness coordinators see biometric results?**

QUESTION #3

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▶ **Do you think there is adequate understanding and transparency within the wellness community as to how data collected flows?**

QUESTION #4

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- ▶ What issues do you see with self-funded group health plans and data privacy?

QUESTION #5

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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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Q&A WITH ATTENDEES

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QUESTIONS?



► For more information, contact:

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