Worker Inactivity: the Next Wellness Frontier?

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Researchers and some employers are using technology to measure the incidence and health impact of worker inactivity due to long periods behind the wheel of a car, or in front of a computer. This article from the online publication MIT Technology Review covers some of the measuring methods in use, including thumb-sized activity monitors called "Fitbits," and accelerometers and inclinometers to measure active versus sedentary work time. Use of the latter two devices is teamed with blood chemistry analysis to determine the link between sedentary behavior and long-term health conditions including diabetes, high blood pressure and elevated blood cholesterol. The article also describes a few ways employers are trying to change office landscapes to encourage more physical activity, including testing of a $1,000 worktable that adjusts to workers' standing or seated positions. (My thanks to Dave Baker for circulating the article in BenefitsLink Health & Welfare Plans Newsletter for August 15, 2011.)

It appears to be medically beyond dispute that protracted sedentary behavior takes a long-term toll on employee health, and that integrating moderate activity in the workplace may reduce the incidence of expensive chronic health conditions. I can't help but remark, however, on the similarities between the studies described in the MIT articles, and author Gary Shteyngart's vision of the workplace in a dystopian near-future, in his latest novel *Super Sad True Love Story* (Random House, 2010). In that future, employees' blood chemistry levels are posted on a repurposed train schedule board, and co-workers jibe one another about less-than-stellar readings:

> "Instead of the arrivi and partenze times of trains pulling in and out of Florence or Milan, the flip board displayed the names of Post-Human Services employees, along with the results of our latest physicals, our methylation and homocysteine levels, our testosterone and estrogen, our fasting insulin and triglycerides, and, most important, our 'mood + stress indicators,' which were always supposed to read 'positive/playful/ready to contribute' but which, with enough input from competitive co-workers, could be changed to 'one moody betch today' or 'not a team playa this month.'"

It is interesting to contrast this scenario with current conditions under which employers, through wellness programs, may collect employees' biometrics and other health information. The laws governing an employer's ability to do so, particularly in exchange for cash incentives, are evolving on a number of different fronts, including federal (and state) laws governing disability discrimination in the workplace, privacy of health information, and privacy of genetic information including family histories. (The applicable federal laws are, respectively, the Americans with Disabilities Act of 1990 ("ADA"); the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the Genetic Information Nondiscrimination Act of 2008 ("GINA").) Some basic parameters, sourced in regulations under these laws and in other EEOC guidance, are as follows:

- Employers may provide any level of financial incentive in connection with "participation-only" wellness programs that do not require achievement of certain results (such as lowered BMI or blood pressure).
- Financial incentives to participate in results-based wellness programs may not exceed 20% of the applicable premium (this percentage will rise to 30% under PPACA and possibly may increase to 50%).
- Results-based wellness programs must provide alternative options for persons whose disabilities or other health conditions keep them from achieving program goals.
- Participation in a "voluntary" wellness program that obtains medical data is not a violation of the ADA provided that employers maintain the data as confidential and do not misuse it.
- The EEOC has defined "voluntary" as neither requiring employees to participate nor penalizing employees for non-participation. It has also stated that financial inducements that are within the 20% rule are deemed to be "voluntary."
- Disability-related questions must be "job related and consistent with business necessity" to satisfy the ADA, and generalized questions on various diseases that are typical of health risk assessments (HRAs) do not meet this standard.

• With specific regard to genetic information, including family history, the following rules apply:
o No financial inducement may be offered when such information is sought, nor may such information be collected "prior to or in connection with" enrollment in a group health plan. (The combined effect of these rules means that HRAs must either avoid any genetic information or family history inquiries altogether, or must be taken only after enrollment and without any financial incentive.)
o Further, health risk assessments should contain a disclaimer to discourage employees from volunteering family history or other genetic information in response to HRA questions. Final GINA regulations contain a template for the disclaimer.
o Employers must follow procedural requirements for the collection of genetic information: participants must grant prior, written authorization to the disclosure and the authorization must describe both the information being sought and the safeguards that are in place to protect against unlawful wellness programs.
• Employers may not receive any individualized health data from wellness providers, only aggregate information. However participant and their health care providers may receive individualized data resulting from wellness programs.
Most recently, a June 2011 opinion letter by EEOC Legal Counsel Peggy R. Mastroianni responded to two wellness program queries: (1) whether financial incentives for wellness program participation violated the ADA or GINA, (refused to take a position vis-a-vis ADA violation, and "Yes" re: GINA violation) and (2) whether family medical history provided voluntarily could be used to guide employees into disease management programs. In response to the latter question, the opinion letter reiterates that no financial incentive may be offered in exchange for genetic information, but that an employer that lawfully obtains genetic information (e.g., without a financial inducement, after enrollment in a health plan, and disclosed only on an aggregate basis) may provide a financial incentive to guide employees into disease management programs. You can read the opinion letter here. You can buy Gary Shteyngart's novel many places, including local bookstores, and here.

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