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Going To The Heart Of Workplace Health Programs And Apps

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The wearable technology market is booming and shows no sign of slowing down anytime soon. From watches to glasses, to chips and sensors built into clothing and accessories, wearable technology seems to have reached every corner of our wardrobe, while mobile apps that measure, collect and analyze everything from steps to sleep patterns dominate our smartphones.

While some apps and devices, such as fitness trackers or Google Glass, are marketed to consumers for use in their "off-duty" life, employers are eager to apply these apps and devices to optimize their workforce as well. Moreover, a host of apps and devices are designed specifically for employees to augment or optimize tasks in the course of their job. And with a myriad of abilities, from tracking a heart rate to sharing a GPS location, it is no surprise that these devices are poised to become ubiquitous in companies hoping to increase their ability to measure workflow and productivity. With such robust data, however, employers must be wary of attendant legal obligations and privacy concerns.

Value Proposition: Promoting Healthy Employees and Employers

According to PricewaterhouseCoopers' recent report on wearable technology, 77 percent of respondents think one of the most important benefits of wearable technology is its potential to make employees more efficient and more productive at work.[1] And indeed, wearable technology is already a reality in many industries. In logistics and delivery, for example, parcel handlers may wear scanning devices that offer "tactile feedback" — a short buzzing sensation — if the handler misplaces a package.[2] In the aircraft industry, heads-up displays ("HUDs") increase flight safety by improving the situational awareness of pilots during bad weather conditions and night flights. And across industries, employees who are constantly on their feet may be equipped with watches that allow them to interface with a screen while remaining hands-free.[3] According to the State of Workplace Productivity report, three out of five respondents say they'd be willing to try a wearable device if it helped them do their job better. This is especially true for millennials, who responded yes 66 percent of the time.[4]

In addition to increasing productivity and efficiency, wearable devices can also inspire a healthy workforce. Employers are seeking ways to reduce health-related costs and view wearables as a valuable tool to promote healthy behaviors among employees. Again, such a notion is more than speculative: Some companies are already offering their employees health wearables as a part of a wellness plan initiative. In 2014, for example, a California-based technology consulting firm reported that it negotiated

a reduction in its health insurance costs by offering a wellness program that included giving employees activity trackers and offering employees live video sessions with a trainer.[5]

Outside of the wearable industry, employers are working to develop cyberphysical systems that aim to encourage the adoption of healthy behaviors in the workplace. One system consists of an indoor network of proximity beacons that send context-appropriate messages to users via their cellphones to encourage healthy behaviors, such as walking whenever possible. For example, a beacon placed near an elevator could suggest a nearby user take the stairs instead. A second beacon in the stairwell would then give the user points for taking the stairs.[6] Another project developer unveiled a vending machine that uses facial recognition technology to deny would-be snackers from buying certain foods that don't fit their personal profile. The machine can be programmed to identify users and remember their snack preferences, even accessing their age, medical records and vending purchase histories.

These devices and systems allow an employer to gather and analyze vast amounts of data about its employees, in ways that are intended to benefit both company and worker. At the same time, however, employers need to be aware of laws that may restrict their collection and use of these types of information.

Are You Using Your Employee's Mobile App or Wearable to Conduct a Medical Exam?

Health-related mobile apps and wearable devices are designed to collect a wide range of health-related information. However, employers are subject to special legal constraints on their collection and use of health-related information, including under laws like the Americans with Disabilities Act, and should evaluate these constraints before they seek to tap into health-related data from mobile apps, wearable devices or similar technology.

The ADA prohibits employers from conducting medical examinations or making disability-related inquiries of current employees unless the exam or inquiry is job-related and consistent with business necessity.[7] According to the U.S. Equal Employment Opportunity Commission, a "medical examination" conducted by an employer is a procedure or test that seeks information about an individual's physical or mental impairments or health.[8] Medical exams may include an employer's measuring of an employee's heart rate or blood pressure, for instance. Many fitness wearables now measure heart rate, which blurs the distinction between these devices and medical examinations. When this data is used in the employer-employee relationship it could blur the distinction between promoting healthy habits and conducting medical examinations. According to the EEOC, a disability-related inquiry extends to an inquiry that is likely to elicit information about a disability, even if the inquiry does not on its face ask about a disability.[9] This raises the question of whether the information collected by a wearable device, even if it doesn't constitute a medical examination by an employer, may be likely to elicit information about a disability. There is no bright-line standard and, as the collection of health-related data through mobile apps and wearables continues to expand, employers face should remain cautious of conducting prohibited medical examinations or inquiries under the ADA or similar state laws.

The ADA's Wellness Program Exception (and Its Limitations)

If the collection of health-related data may involve a medical examination or disability-related inquiry regulated by the ADA, what options are available to the employer? Under the ADA, employers are allowed to conduct voluntary medical examinations as part of an employee health program, such as a voluntary wellness program, subject to certain restrictions.[10] Employee wellness programs are gaining in popularity. Nearly 80 percent of companies with more than 1,000 employees provided some type of

wellness program in 2012.[11] To be truly voluntary, however, employees must neither be required to participate nor penalized for nonparticipation in the program.[12] In 2014, the EEOC filed three lawsuits against companies alleging that their employee wellness programs were insufficiently voluntary because they imposed financial penalties on employees who did not choose to participate.[13]

Even if the program is truly voluntary, and employees consent, any information collected that could reveal a disability must be handled in accordance with the ADA. Employers must:

1. maintain such information separately from the employee's personnel file;
2. provide access only to human resources or benefits employees with a need to know and not to supervisors or other employment decision makers;
3. not disclose the information to a nonagent third party, with the exception of first responders and agencies empowered to enforce the ADA; and perhaps most importantly, and
4. not use the information for employment purposes.[14]

The EEOC has shown further interest in wellness programs recently, publishing in April a proposed rule addressing the interaction between the ADA and financial incentives in corporate wellness programs. The proposed rule offers guidance about how wellness programs can comply with the ADA, as well as ealth Insurance Portability and Accountability Act, as amended by the Affordable Care Act.

The proposed rule would clarify that an employee wellness program will be considered "voluntary" only if employees are not required to participate and not denied health coverage or disciplined if they refuse to participate. The proposed rule also explains that the ADA provides important safeguards to employees to protect against discrimination based on disability. Accordingly, it proposes that companies may only offer incentives of up to 30 percent of the total cost of employee-only coverage in connections with wellness programs, and medical information collected as a part of a wellness program may be disclosed to employers only in aggregate form that does not reveal the employee's identity. In addition to setting these limits, the proposed rule would require employers to provide employees with a notice that describes what medical information will be collected, with whom it will be shared, how it will be used and how it will be kept confidential. The proposed rule received substantial public feedback and critique during the 60-day comments period and it remains to be seen what changes the EEOC may make in the final regulation.[15]

In addition to the ADA, wellness programs may be regulated by a variety of other laws, including HIPAA (such as if the wellness program is part of a group health plan) and the Genetic Information Nondiscrimination Act (such as if the wellness program seeks information about family medical history). As a result, employers looking to implement wearables as a part of a wellness program also need to take a close look at the other legal restrictions that may come into play.

Preventing Discrimination Based on Disability or Perceived Disability

Employers should avoid considering participation and fitness results in making employment decisions, and should consider limiting access of employment decision makers to this data. Even if the use of the mobile app or wearable device does not constitute an employer medical examination or disability-related inquiry regulated by the ADA, an employer may still face claims under the ADA and similar state laws if an employee believes that the employer has discriminated against him or her based on disability — or even perceived disability. For example, a manager may praise and favor team members who choose to use the wearable and/or report high levels of fitness activity. An employee with a serious

health condition may be unable to keep up, and may feel that she is being discriminated against based on her disability. Or an employee may not actually have a disability, but feel that she is being discriminated against because others assume she has a disability.

Location Data: It's More Than Step Counting

Collecting location information from these devices has other legal implications for employers. Mobile apps and wearable devices often record an employee's location. Employers should consider the granularity of location tracking and the implications of that information.

For example, location data may reveal when a nonexempt employee is working, which might be relevant in litigation alleging unpaid overtime or failure to provide mandatory meal or rest periods. Location data may also reveal patterns of activity that may be sensitive in nature and that the employee would reasonably expect to be kept private, such as personal appointments. Employers should consider offering employees the option of turning off the location tracking, at least when off-duty.

Best Practices

Employers should think carefully about how they are collecting data about employees from mobile apps and devices, and how they are using and sharing that data. More specifically, employers will want to consider the following before adopting wellness plans or wearable initiatives in the workplace:

- What is the objective of the program? Is it essential for your company to collect health-related data to achieve that objective?
- What are your legal obligations under the ADA, HIPAA, GINA and other health and privacy-related laws?
- If you do need to collect this data, must you do the collection in-house? Could you obtain aggregated data directly from the provider instead?
- If you do collect the data, how can you ensure that you collect only the data that you actually need?
- What measures will you take to limit access to health-related data on a need-to-know basis?

In general, employers would be wise to ensure that participation in the program is purely voluntary, provide employees with transparent notice and choices regarding the use and collection of their data, and be mindful of the sensitive nature of the information which these devices capture. Through careful planning and administration, employers can best achieve their goal of a healthy workforce and healthy company.

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[1] http://www.cio.com/article/2836877/wearable-technology/employees-excited-concerned-about-wearables-in-the-workplace.html

[2] http://i-cio.com/innovation/internet-of-things/item/cios-prepare-for-the-wearable-workplace

[3] http://www.forbes.com/sites/jacobmorgan/2014/12/11/how-wearables-are-changing-the-workplace/

[4] http://www.cornerstoneondemand.com/news/press-releases/new-research-explores-whether-today%E2%80%99s-workers-are-drowning-sea-ineffective

[5] http://gcn.com/articles/2014/06/30/hhs-project-boundary.aspx

[6] 42 U.S.C. § 12112(d)(4)

[7] http://www.eeoc.gov/policy/docs/guidance-inquiries.html

[8] 3 EEOC, Enforcement Guidance on Pre-Employment Disability-Related Inquiries, EEOC Notice No. 915.002, available at http://www.eeoc.gov/policy/docs/waiver.html; ADA Manual (BNA) 70:1103 (1995)

[9] 42 U.S.C. § 12112(d)(4)(B)

[10] ADP, Why You Should Care About Wellness Programs (2012) at 15, available at http://www.adp.com/tools-and-resources/adp-research-institute/research-and-trends/~/media/RI/whitepapers/Why-You-Should-Care-About-Wellness-Programs.ashx

[11] EEOC, EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), EEOC Notice No. 915.002, at Q&A 22 (July 27, 2000), available at http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

[12] Petition for a Temporary Restraining Order and Preliminary Injunction, EEOC v. Honeywell International Inc., No. 0:14-cv-04517-ADM-TNL (D. Minn. Oct. 27, 2014); Complaint, EEOC v. Flambeau Inc., No. 3:13-cv-00638 (W.D. Wis. Sept. 30, 2014); Complaint, EEOC v. Orion Energy Systems, No. 1:14-cv-01019 (E.D. Wis. Aug. 20, 2014) (249 PRA, 12/30/14)

[13] 42 U.S.C. § 12112(d)(4)(C). Note that even stricter rules may apply under other laws, such as the Genetic Information Nondiscrimination Act.

[14] https://www.federalregister.gov/articles/2015/04/20/2015-08827/amendments-to-regulations-under-the-americans-with-disabilities-act