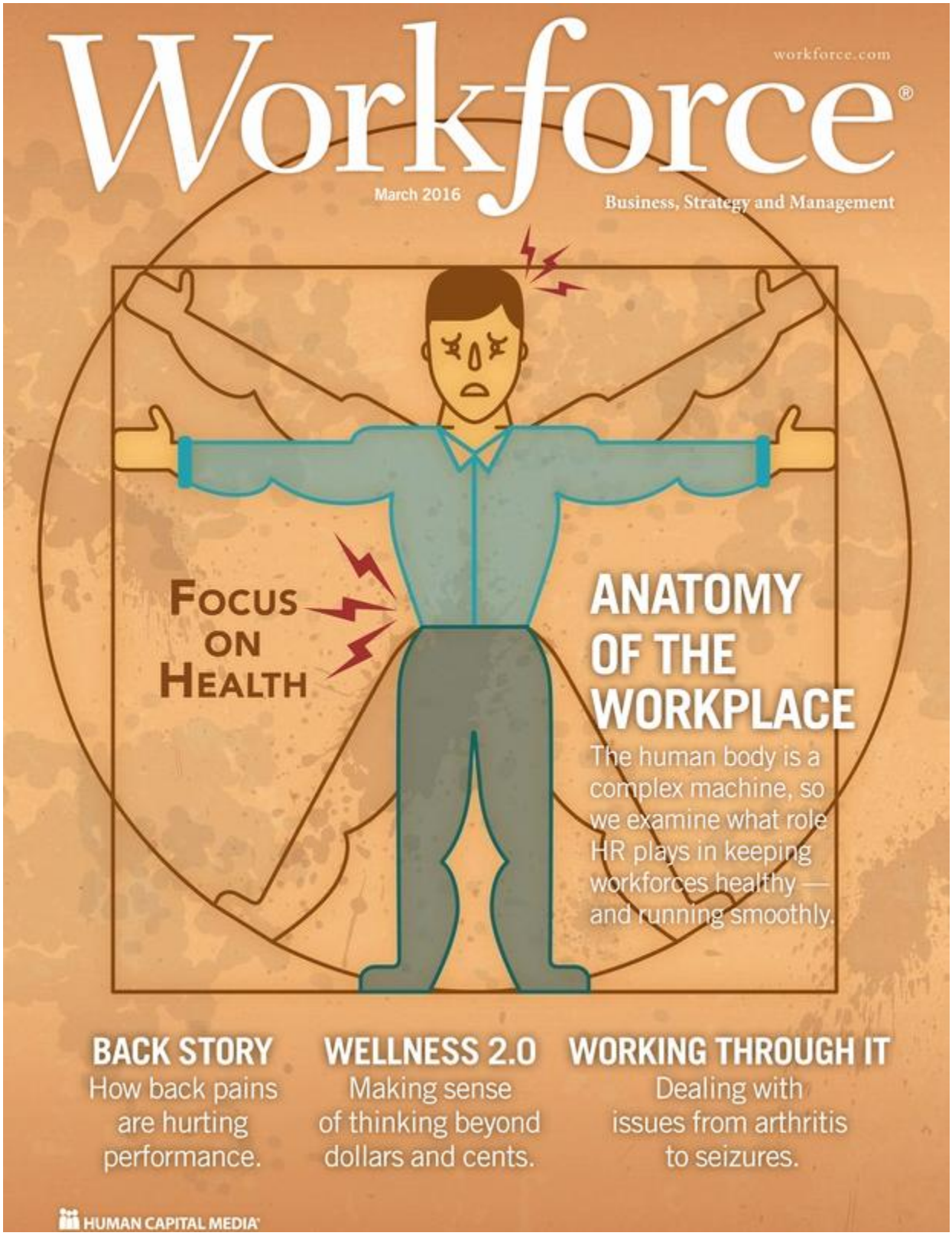
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Navigating Employee Wellness Programs

The legal landscape for wellness programs is evolving, but this primer will help guide you down the right path.

By Nicole Baldwin

Employee wellness programs have become increasingly popular over the years. However, companies are hesitant to implement these programs because of lack of legal guidance and uncertainty about the return on investment of corporate wellness.

Despite the unknowns, there are plenty of reasons to implement a corporate wellness program. In fact, there have been numerous accounts of the positive effect wellness programs have on employers largely reporting that the programs are delivering its intended benefit — improving health and reducing costs.

While the exact numbers for a company's return on investment will differ, statistics on the effectiveness of wellness programs are promising. According to a 2012 review of 62 studies published in the *American Journal of Health Promotion*, companies with wellness programs had an average reduction of 25 percent in costs related to sick leave, health plans, workers' compensation and disability insurance.

In a 2014 study by *Harvard Business Review* of 20 companies, those with wellness programs had less of an increase in annual health care costs (1 to 2 percent) compared with the national average (7 percent). Other reports also show that, for each dollar invested into a corporate wellness program, companies have seen returns of approximately $1.50 or more.

While some employers focus on the bottom line (i.e., the financial impact of wellness programs), improved employee morale and loyalty should be considered as contributing factors. There are numerous ways to go about creating and implementing a wellness program. First, consider the various regulations pertaining to them.

For example, in 2013, the U.S. Labor, Treasury and Health and Human Services departments set forth rules for

Race for Compliance

I recently participated in the sixth annual Del Mar (California) Mud Run, a 5K produced by a San Diego sport and social club, which offers activities for corporations seeking to provide wellness opportunities to their employees through kickball tournaments, field days and a host of other sports events that employees can participate in with their co-workers.

Before the run, I was not looking forward to getting dirty or running. However, after completing the run with my law firm's team, I felt a sense of accomplishment and had fun, too.

That is what corporate wellness is all about: inspiring employees to do things that contribute to their health, while reminding them it is fun to be active.

—Nicole Baldwin

wellness programs in the final regulations of the Affordable Care Act. The regulations require wellness programs to be reasonably designed to promote health or prevent disease and describe two basic program types: participatory and health-contingent.

Participatory programs are those that offer employees health-related benefits, with or without a reward tied to them, such as free gym memberships, paid entries for 5K runs or paid membership to a softball league.

Health-contingent programs require participants to satisfy a standard related to a health factor to obtain a reward, and such programs are divided into two categories: activity-only and outcome-based. Activity-only programs require employees to participate in an activity to obtain such a reward.

Outcome-based programs require employees to achieve a specific outcome to receive an incentive. There are several requirements health-contingent programs must meet to comply with the ACA, so it is important to consult these rules prior to implementing such a program.

Employers also must provide reasonable accommodations to allow employees with disabilities to participate in wellness programs. They should be mindful of additional rules set forth in the Americans with Disabilities Act of 1990; the Health Insurance Portability and Accountability Act of 1996; the Consolidated Omnibus Budget Reconciliation Act, better known as COBRA; the Employee Retirement Income Security Act, better known as ERISA; the Genetic Information Nondiscrimination Act, better known as GINA; and related state laws.

Additionally, the U.S. Equal Employment Opportunity Commission proposed rules in April 2015, which, if enacted, would provide further regulation with regard to issues such as disability-related inquiries and medical examinations. Specifically, the EEOC seeks to clarify how wellness programs are affected by the ADA.

While the legal landscape of corporate wellness programs continues to evolve, employers should remain optimistic given the positive reports thus far, and seek legal counsel for guidance on compliance issues. Based on my own experience, incorporating wellness into the workplace can be both fun for employees and rewarding for employers mindful of the bottom line. *wf*

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Legal Briefings

RULING KEEPS JUST BETWEEN US TRULY HUSH-HUSH

A properly drafted nondisclosure agreement can be crucial to protecting information. It can also potentially allow you to prevent an employee from disclosing information that would not qualify as a trade secret. In the recent *Orthofix Inc. v. Hunter* case, the 6th Circuit found that Eric Hunter, a former Orthofix employee, had violated a nondisclosure agreement when he disclosed nontrade secret information. Hunter worked as a medical-device salesman for Orthofix. In that capacity, he learned detailed information regarding schedules, preferences, prescribing practices and other aspects of Orthofix's clientele. Hunter left the company to work at a competitor and used the information he learned to divert business to his new employer. Orthofix sued Hunter, claiming, among other things, he had breached his nondisclosure agreement. The trial court found for Hunter. It held that Orthofix had not established that the alleged confidential information qualified as a trade secret. The 6th Circuit reversed, noting that while the information used by Hunter might not qualify as a trade secret, it could still qualify as confidential. Finding that Hunter had made use of confidential information as defined by the employment agreement, the 6th Circuit ruled in favor of Orthofix. *Orthofix Inc. v. Hunter, Case No. 15-3216* (Nov. 17, 2015).

IMPACT: While this case was an interpretation of Texas law, employers that use nondisclosure clauses should ensure that they are obtaining the maximum protection possible for potentially confidential information.

'ROLE' PLAYING AND PROTECTED ACTIVITY

Most employers know that an employee making complaints related to alleged Fair Labor Standards Act violations has engaged in protected activity. The situation gets complicated when it is not clear if an employee has actually made a protected complaint. Historically, courts have required a manager to "step outside his or her role of representing the company and either file (or threaten to file) an action adverse to the employer, actively assist other employees in asserting FLSA rights, or otherwise engage in activities that reasonably could be perceived as directed toward the assertion of rights protected by the FLSA" before they earned the protection against retaliation. The 9th Circuit Court of Appeals found that a managerial employee can engage in protected activity without "stepping outside her role" or taking "action adverse to the employer." In *Rosenfield v. GlobalTranz Enterprises Inc.*, the court determined that a company's head of human resources making internal complaints still qualified as protected activity even though she had not explicitly taken a position adverse to her employer. Applying the "fair notice" standard the U.S. Supreme Court adopted in *Kasten v. Saint-Gobain Performance Plastics Corp.*, the 9th Circuit found that GlobalTranz had received fair notice that its head of HR was engaging in protected activity. *Alla Rosenfield v. GlobalTranz Enterprises, et al.*, case No. 13-15292 (Dec. 14, 2015).

IMPACT: Following Rosenfield's interpretation of Kasten, employers must be even more cautious in dealing with reports of possible FLSA violations.

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