



# Moving in the Right Direction

Addressing Liability Concerns Related to Workplace Physical Activity Programs for Low-Wage Workers



Disclaimer: This document is intended to be a resource for Worksite Wellness and Physical Activities programs implemented in California workplaces, and should not be construed as legal advice. Any questions concerning activities listed in this document that agencies may want to implement, should be first reviewed by the agencies own legal counsel.

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## Introduction

Employers considering Workplace Wellness Programs as a way to improve employee health and reduce costs may have concerns about potential liability. This brief provides an overview of California law on employer liability for employee injury. It focuses on low-wage workers and the potential liability issues associated with the physical activity components of Workplace Wellness Programs.

## Workplace Wellness Programs

Workplace Wellness Programs are policies and activities focused on disease prevention and health promotion. As rates of chronic diseases (particularly those associated with obesity) rise, employers are increasingly looking to Workplace Wellness Programs as a means to reduce health care costs and improve employee productivity.<sup>1,2</sup> In 2012, 61% of U.S. workers were offered health insurance benefits by their employers.<sup>3,4</sup> A 2012 Kaiser Family Foundation survey of 2000 companies that offer health benefits to employees found that nearly two-thirds offered some sort of wellness program.<sup>5</sup> Companies with 200 or more employees are more likely to offer wellness programs than smaller companies.<sup>6</sup> Most companies, a lot of them smaller ones, report that these programs are offered through their health plan.<sup>7</sup>

“Workplace Wellness Programs are estimated to save employers \$3 to \$6 for every \$1 invested generally after two or more years of implementation.”<sup>8</sup> These savings come from reduced use of health care services, fewer absences, and fewer workers’ compensation and disability claims.<sup>9</sup>

Workplace Wellness Programs vary greatly in form and scope. They may be offered directly by an employer, through an outside wellness program provider, or as part of employer sponsored health insurance benefits. Programs can include health screenings and/or chronic disease management and prevention programs.<sup>10</sup> Prevention programs often address healthy eating, physical activity, and smoking cessation. The 2012 Kaiser Family Foundation survey found that wellness newsletters and web-based resources are the most commonly offered wellness programs. Less than one third of surveyed companies offer on-site exercise facilities or discounted gym memberships. These benefits are more common in larger companies and in certain industries.<sup>11</sup>

Wellness newsletters and web-based resources are the most commonly offered wellness programs.

## Examples of Physical Activity Components of Workplace Wellness Programs

Facilities	Programs	Integrated into work day
Opening up stairwells	Education and encouragement	Physical activity and stretch breaks
Bike racks to encourage active transportation	Walking clubs	Allowing use of break time and/or work time or shifted schedules
Onsite fitness center or other dedicated space	Onsite fitness classes	Walking meetings
Changing rooms/showers	Discounted gym memberships	Treadmill desks
Hydration stations	Company-sponsored teams	
	Company-sponsored participation in local charity runs/walks, etc.	
	Contests or challenges (10,000 step challenge, etc.)	

## Workplace Wellness Programs and Low-Wage Workers

Californians with lower incomes and education levels have higher rates of smoking,<sup>12</sup> obesity, and diabetes.<sup>13</sup> Although low-wage workers in California could benefit greatly from Workplace Wellness Programs, they face significant barriers to participation.

**Employers must ensure that Workplace Wellness Programs are accessible for all workers.**

Low-wage workers probably have less access to Worksite Wellness Programs. In California, companies with more low-wage workers are significantly

less likely to offer any health benefits to employees.<sup>14</sup>

Nationwide, of companies that offer health benefits to employees, those companies in industries with more low-wage workers—including agriculture, retail, wholesale, manufacturing, health care, and service—are less likely to offer Workplace Wellness Programs.<sup>15</sup>

Even when Workplace Wellness Programs are available, the nature of low-wage work and the position of low-wage workers in a company may prevent participation. Work based deterrents can include:

- Long hours;
- Job insecurity;
- Hourly, service or shift work that does not permit employees to take advantage of flexible schedule options;
- Inability to use stairs with equipment necessary for work;
- Offerings like walking meetings, treadmill desks, and email or web-based challenges may not be relevant;
- A work culture that prioritizes wellness participation for exempt/salaried and/or higher-wage employees.

Pressures outside of work can also prevent participation in Workplace Wellness Programs. Low wage workers may:

- Work multiple jobs;
- Live in remote and/or unsafe neighborhoods where walking or biking to work is not feasible;
- Be unable to afford even discounted fitness center membership fees;
- Have caretaking responsibilities for children and other family members.

Workplace Wellness Programs that are tied to employee health insurance costs are an additional barrier for low-wage workers, who are more likely to feel the pinch of higher health care costs.<sup>16</sup>

For these reasons, employers should ensure that Workplace Wellness Programs are accessible for all workers.

Accessibility is particularly critical for low-wage workers who are more likely to face the chronic health problems the programs aim to address. Employers who consciously consider the needs and concerns of low-wage employees in the design, implementation, and evaluation of Workplace Wellness Programs can more effectively improve health and reduce health care costs for *all* employees.

The Nutrition Education and Obesity Prevention Branch (NEOPB)—Worksite Program has developed the *California Fit Business Kit*, a suite of tools and resources to help employers support healthy eating and active living among workers. The *Kit* is available online at [www.cdph.ca.gov/programs/cpns/pages/worksitefitbusinesskit.aspx](http://www.cdph.ca.gov/programs/cpns/pages/worksitefitbusinesskit.aspx).





## How Local Health Departments Can Support Workplace Wellness

- Work with employers to figure out what programs are the best fit and provide technical assistance as programs are put in place.
- Offer materials—like toolkits, fact sheets, and posters—that highlight the public health benefits of worksite wellness.
- Sponsor meetings and events for employers to learn from each other about successes and challenges in developing Workplace Wellness Programs that benefit low-wage workers.
- Serve as role models for other employers by adopting their own Workplace Wellness Programs that encourage and facilitate low-wage worker participation.

## California Law on Employer Liability for Employee Injury

The Workers' Compensation and Insurance portion of the California Labor Code governs employer liability for employee injury.<sup>17</sup> Most employers are required to provide worker's compensation benefits to employees who get sick or injured because of their work.<sup>18</sup> Whether an employee is eligible to receive workers' compensation benefits for a work-related injury depends on a number of factors. These factors boil down to when, where, and how the injury occurred.<sup>19</sup>

Generally speaking, three things are necessary for an injury to be covered by workers' compensation:<sup>20</sup>

- 1) The employee was on duty (i.e., on the clock and being paid).
- 2) The employee was at the job site, or, if off-site, traveling for work.
- 3) The employee was doing something within his or her job duties.

On the other hand, generally speaking, an injury is not covered by workers' compensation if it occurs:

- Outside of work hours (including unpaid breaks);<sup>21</sup>
- While the employee is traveling to or from work;<sup>22</sup> and/or
- While the employee is doing something personal that is not related to his or her job.<sup>23</sup>

*Workers' compensation also does not cover an employee who is injured while voluntarily participating in "off-duty recreational, social, or athletic activit[ies] not ... part of the employee's work duties."*<sup>24</sup> This general rule is meant to encourage employers to sponsor recreational and social activities for employees.<sup>25</sup> Employers are allowed to limit their liability for athletic and recreational injuries.<sup>26</sup>

The exception to this general rule is when an employer **expects** or **requires** employees to participate in the activity.<sup>27</sup> The exception can apply when:

- The injured employee is vulnerable to pressure to participate;<sup>28</sup>
- The employer subsidizes the activity;<sup>29</sup>
- The activity is regularly scheduled;<sup>30</sup>
- Employee evaluations depend on participation;<sup>31</sup> and/or
- The activity directly benefits the employer.<sup>32</sup>

## Employer Liability for Employee Injuries Sustained During Participation in Workplace Wellness Programs

Is an employer liable to provide workers' compensation benefits for an employee injury sustained in a Workplace Wellness Physical Activity Program?

California law does not expressly address this question. Determining liability in the Workplace Wellness Physical Activity context requires looking at the when, where, and how of the injury.<sup>33</sup> The examples below consider potential employer liability for injuries that may occur during these popular programs.

- **Riding a bicycle to work:** employer is probably **not liable**. Injuries that occur while an employee is traveling to and from work are typically not covered by workers' compensation.
- **Taking a stretch break in the middle of a work shift:** employer is probably **liable**. "Personal comfort" activities—like drinking water or using the restroom— are treated as part of employment.
- **Participating in a walking meeting:** employer is probably **liable**. Attending the meeting is considered part of an employee's job duties. Even if the walking meeting takes an employee off site, an injury that occurs while an employee is on the clock and doing something within his or her job duties is covered.
- **Using the stairs instead of the elevator to go to a meeting on another floor:** employer is probably **liable**. Attending the meeting is considered part of an employee's job duties. However, stairwells are not likely to impose any greater liability risk than use of other common areas, such as hallways or elevators.<sup>34</sup>
- **Joining a lunch-time walking club:** employer is probably **not liable**. The walking club is not within job duties, and injuries that occur while an employee is "off the clock" are not covered.
- **On-site exercise class during unpaid lunch break or after work hours:** employer is probably **not liable**. The exercise class is not within job duties and injuries that occur while an employee is "off the clock" are not covered.
- **Exercising after work at gym where employer helps pay for membership fees:** employer is probably **not liable**. Injuries that occur while an employee is "off the clock" are not covered.

## Addressing Liability Concerns

Employers may take steps to minimize potential liability for employee injuries sustained during Workplace Wellness Physical Activity Programs.

- Have employees sign **waivers or releases of liability** before participating in employee-sponsored walking clubs, teams, or on-site facilities or classes. Waivers usually stress that participation is voluntary and not a requirement of employment. Waivers often also advise that employees get their doctor's okay to participate.
- Specify that physical activity is to be done **outside of work hours** (before or after work or during unpaid breaks).
- Hire only **certified instructors** who have liability insurance to teach on-site classes.
- Provide **safe and well-maintained exercise equipment, and explain proper use**. New, commercial-grade equipment is safest. Perform regular inspections and maintenance. Require an equipment orientation before starting use. Post signs that explain proper use of exercise equipment. Encourage warm-up and stretching before physical activity.



## Workplace Wellness Programs and The Affordable Care Act

The Affordable Care Act (ACA) classifies Workplace Wellness Programs into two types:

- 1) participatory wellness programs, and
- 2) health contingent wellness programs.<sup>35</sup>

**Participatory wellness programs** are voluntary programs that are not tied to employee health status. Examples include flu shots at work, healthy vending machine policies, and lunch-time walking clubs. Participatory wellness programs fall outside the scope of the ACA; these programs are *not* regulated by the ACA.

**Health contingent wellness programs** require employees to meet specific standards to get an incentive or reward. Only 11% of companies that offer health benefits—and more large companies than small companies—provide financial incentives for wellness program participation.<sup>36</sup>

Standards for health contingent wellness programs can take the form of biometric targets, like cholesterol, blood pressure, or body mass index levels. Standards can also take the form of healthy activities, like quitting smoking, completing a diabetes management program, or undergoing a Health Risk Assessment. Rewards and incentives can be lower health insurance premiums, deductibles, or cost-sharing for health programs. (On the other hand, employees who do not meet standards can face increased health insurance premiums.)

Health contingent programs are regulated by the ACA. These programs must follow federal privacy regulations and anti-discrimination laws. The ACA limits the value of rewards employers can provide to employees under health contingent programs.<sup>37</sup>

More information about the ACA is online at [www.hhs.gov/healthcare/rights/index.html](http://www.hhs.gov/healthcare/rights/index.html).

More information about the ACA and Wellness Programs is online at [www.dol.gov/ebsa/newsroom/fswellnessprogram.html](http://www.dol.gov/ebsa/newsroom/fswellnessprogram.html).



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ChangeLab Solutions is a nonprofit organization that provides legal information on matters relating to public health. The legal information in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.



- <sup>1</sup> Volk J and Corlette S. *Premium Incentives to Drive Wellness in the Workplace: A Review of the Issues and Recommendations for Policymakers*. Washington, D.C.: Georgetown University Healthy Policy Institute, February 2012, p. 2. Available at: [www.rwjf.org/content/dam/web-assets/2012/02/premium-incentives-to-drive-wellness-in-the-workplace](http://www.rwjf.org/content/dam/web-assets/2012/02/premium-incentives-to-drive-wellness-in-the-workplace).
- <sup>2</sup> Claxton G, et al. *Employer Health Benefits: 2012 Annual Survey*. Menlo Park, CA: The Henry J. Kaiser Family Foundation and Chicago, Illinois: Health Research & Educational Trust, 2012, p. 179, 187. Available at: <http://kff.org/private-insurance/report/employer-health-benefits-2012-annual-survey/>. Two-thirds of surveyed employers report that primary reasons for providing a wellness program include improving employee health and reduce absenteeism and because the program is part of the health insurance offered. Nine percent of companies expressly report that a wellness program is offered to reduce health costs.
- <sup>3</sup> *Id.* at 34.
- <sup>4</sup> The rate for California is virtually identical at 60%. See, *California Health Care Almanac: California Employer Health Benefits Survey: Fewer Covered, More Cost*. Oakland, CA: California Health Care Foundation, April 2013, p. 2, 4. Available at: [www.chcf.org/~media/MEDIA%20LIBRARY%20Files/PDF/E/PDF%20EmployerHealthBenefits2013.pdf](http://www.chcf.org/~media/MEDIA%20LIBRARY%20Files/PDF/E/PDF%20EmployerHealthBenefits2013.pdf).
- <sup>5</sup> Claxton G, et al, *supra* note 2 at 178. For purposes of the survey, wellness programs were defined to include gym membership or on-site exercise facility, smoking cessation program, web-based resources for healthy living, wellness newsletter, lifestyle or behavioral coaching, biometric screening, weight loss program, classes in nutrition/healthy living, a wellness newsletter, and “other wellness program.”
- <sup>6</sup> *Id.* at 178, 181-182.
- <sup>7</sup> *Id.* at 180, 184.
- <sup>8</sup> Volk and Corlette, *supra* note 1 at 2.
- <sup>9</sup> *Id.*, *supra* note 1 at 2.
- <sup>10</sup> Mattke S, et al. *Workplace Wellness Programs Study: Final Report*. Santa Monica, CA: RAND Corporation, 2013, p. xiv-xv. Available at: [www.rand.org/content/dam/rand/pubs/research\\_reports/RR200/RR254/RAND\\_RR254.pdf](http://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR254/RAND_RR254.pdf).
- <sup>11</sup> Claxton G, et al., *supra* note 2 at 181.
- <sup>12</sup> Moreno D and Houston L. *Smoking in Low-Socioeconomic Status Populations: Prevalence, Health Impact, Challenges and Recommendations*. West Sacramento, CA: Health Education Council and Break Free Alliance, n.d., p.3. Available at: <http://healthedcouncil.org/ADEPTReport.pdf>.
- <sup>13</sup> Diamant AL, et al. *Obesity and Diabetes: Two Growing Epidemics in California*. UCLA Center for Health Policy Research Brief, August 2010, p.4-5. Available at: <http://healthpolicy.ucla.edu/publications/search/pages/detail.aspx?PubID=62>.
- <sup>14</sup> *California Health Care Almanac*, *supra* note 4 at 5 (comparing companies where at least 35% of workers make \$24,000 or less per year to companies where at least 35% of workers make \$24,000 or more).
- <sup>15</sup> Claxton G, et al., *supra* note 2 at 181-182.
- <sup>16</sup> Volk and Corlette, *supra* note 1 at 5-6.
- <sup>17</sup> Cal. Lab. Code § 3200 *et seq.* (2013).
- <sup>18</sup> Cal. Lab. Code § 3600(a) (2013).
- <sup>19</sup> Injuries that are expressly not covered by worker’s compensation include those that: are intentionally self-inflicted (Cal. Lab. Code § 3600(a)(5) (2013)); are caused by intoxication (Cal. Lab. Code § 3600(a)(4) (2013)); arise out of an altercation where the injured employee was the initial aggressor (Cal. Lab. Code § 3600(a)(7) (2013)); are suicide (Cal. Lab. Code § 3600(a)(6) (2013)); or are caused by an employee while committing a crime (Cal. Lab. Code § 3600(a)(8) (2013)).
- <sup>20</sup> Cal. Lab. Code § 3600(a) (2013); *Ralphs Grocery Co. v Workers’ Comp. Appeals Bd.*, 58 Cal.App.4th 647 (1997).
- <sup>21</sup> *Ralphs Grocery Co.*, 58 Cal.App.4th at 652; *Wright v. Beverly Fabrics Inc.*, 95 Cal.App.4th 346, 354-355 (2002).
- <sup>22</sup> *General Ins. Co. v. Workers Comp. Appeals Bd.*, 16 Cal.3d 595, 599-600 (1976); *City of Los Angeles v. Workers Comp. Appeals Bd.*, 157 Cal.App.4th 78, 84-85 (2007).
- <sup>23</sup> *Fireman’s Fund Etc. Co. v. Industrial Acc. Com.*, 39 Cal.2d 529, 538-539 (1952); *Pacific Indem. Co. v. Industrial Acc. Com.*, 27 Cal. App.2d 499, 503 (1938).
- <sup>24</sup> Cal. Lab. Code § 3600(a)(9) (2013).
- <sup>25</sup> *City of Stockton v. Workers’ Comp. Appeals Bd.*, 135 Cal.App.4th 1513, 1520-1521 (2006).
- <sup>26</sup> *Taylor v. Workers’ Comp. Appeals Bd.*, 199 Cal.App.3d 211, 214-216 (1988).
- <sup>27</sup> *Id.* See also, *Ezzy v. Workers’ Comp. Appeals Bd.*, 146 Cal.App.3d 252, 260 (1983).
- <sup>28</sup> *Ezzy*, 146 Cal.App.3d at 263 (law clerk); *Smith v. Workers’ Comp. Appeals Bd.*, 191 Cal.App.3d 127, 141 (1987) (temporary employee).
- <sup>29</sup> *Ezzy*, 146 Cal.App.3d (company sponsored softball team and paid for registration, equipment, and uniforms with company logo).
- <sup>30</sup> *Id.* See also, *Meyers v. Workers’ Comp. Appeals Bd.*, 157 Cal. App.3d 1036, 1043 (1984)
- <sup>31</sup> *Smith*, 191 Cal.App.3d at 141; *Kidwell v. Workers’ Comp. Appeals Bd.*, 33 Cal.App.4th 1130, 1138-1139 (1995).
- <sup>32</sup> *Ezzy*, 146 Cal.App.3d at 263; *Smith*, 191 Cal.App.3d at 141.
- <sup>33</sup> It is unclear how compensation for Workplace Wellness Physical Activity Program injuries will be interpreted in the context of health contingent Workplace Wellness Programs where employee compensation is linked to participation and employers may directly benefit from reduced health care costs and increased productivity.
- <sup>34</sup> ChangeLab Solutions’ website has more information on the risks and benefits associated with unlocking stairwells for physical activity, available at: [www.changelabsolutions.org/publications/opening-stairwells-physical-activity](http://www.changelabsolutions.org/publications/opening-stairwells-physical-activity).
- <sup>35</sup> The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2705, 124 Stat. 156-160 (2010) (codified as 42 U.S.C. 300gg-4).
- <sup>36</sup> Claxton G, et al., *supra* note 2 at 185.
- <sup>37</sup> For further discussion and analysis of health contingent wellness programs, see Volk and Corlette, *supra* note 1.