

Legal Issues Obesity Surveillance



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Legal Implications of Obesity Surveillance

- **Discrimination**
- **Confidentiality**
- **Informed Consent**
- **Insurance coverage**
- **Privacy**
- **Others?**

Others?

**Legal precedent lags behind
advances in technology, science
and public policy**



- **Texas HPV vaccine mandate meets swift resistance**
- **State lawmakers create a bill to rescind the governor's mandate for preteen girls, and several parents file suit**
- **HOUSTON – When Texas governor, Rick Perry, ordered that all of the state's middle-school-aged girls be vaccinated against a sexually transmitted virus that causes cervical cancer, the backlash was swift and sure**
- **Critics argued that the executive order promoted promiscuity, trampled on parental rights and subjected children to a new vaccine with unknown long-term effects**

Lianne Hart: Times Staff Writer, Feb 25, 2007

Weight Discrimination

- **Gerdom V. Continental Airlines Inc, 692 F.2d 602, 610 (9th Cir 1982; en banc)**
- **The judge ruled that weight discrimination held no place in the ability to do the job**



McLawsuits

2002

- **Suit filed against McDonalds in New York for failure to provide nutritional information**

2003

- **Congress passed Responsibility in Food Consumption Act – prevents similar lawsuits against fast food industry**

School vs Parental Responsibility

- Failure to provide nutritional alternatives to fast food lunch menu
- Reliance on corporate sponsors – food and soft drink industry
- Lack of physical fitness programs
- Too much homework

Americans With Disabilities Act 1990

- Prohibits discrimination on the basis of a disability
- Includes discrimination based on having or “regarded as” having a disability
- Obesity has been recognized as a disability under ADA
- Requires reasonable accommodation for qualified persons with disability

Employment Discrimination

- “Perceived as” – even where obesity does not constitute a disability

Adverse employment actions

Discipline

Failure to hire/promote

Termination

- **Employee perception of events and timing of events**

ADA – Title III

“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation...”

42 USC 12182

Title III Prohibitions

- Denial of participation in goods, services, etc
- Participation in unequal benefit
- Providing separate benefit, unless necessary and as effective

42 USC 12181 (b)

Confidentiality

- **State and Federal laws protect privacy of health information**
- **State law requirement for authorization prior to release of information to third parties**
- **Does HIPAA apply?**

Employee health information

State health councils

Who Must Comply?

- Health care providers who electronically transmit health information in connection with a HIPAA designated transaction
- Health plans
- Health care clearinghouses

The HIPAA Privacy Rule

- Protected Health Information (“PHI”) is individually identifiable health information that is transmitted or maintained in any form or medium, including electronically, on paper or orally
- A covered entity may not use or disclose PHI , except as permitted or required under the Privacy Rule

HIPAA Privacy Rights

- **Access**
- **Request Amendment**
- **Notice of Privacy Practices**
- **Accounting of Certain Disclosures**
- **Request Restrictions**
- **Request Confidential Communications**
- **Complaints to Covered Entity and/or Secretary of HHS**

In Sum, HIPAA Requires

- **Notifying patients about their privacy rights and how their information can be used**
- **Adopting and implementing privacy procedures for its practice, hospital, or office**
- **Training employees so that they understand the privacy procedures**
- **Designating an individual to be responsible for seeing that the privacy procedures are adopted and followed**
- **Securing patient records containing individually identifiable health information so that they are not readily available to those who do not need them**

Potential Penalties

- **Civil penalties**

\$100 per incident, up to \$25,000 per person, per year, per standard

- **Criminal penalties**

Range from \$50,000 and/or up to 1 year imprisonment for a basic offense to \$250,000 and/or 10 years imprisonment for commercial advantage, personal gain or malicious harm

HIPAA Research Issues

- HIPAA Limits permissible uses and disclosures of “protected health information,” including uses for research purposes
- Health information is “protected” if it is “identifiable”

Research

- **OHRP Regulations (45 CFR 46):
Apply to all “research” involving
“human subjects”**
- **Research includes collection of data
with the intent to publish**
- **Requires informed consent**

Insurance Coverage Disputes

- **Employer-sponsored health plans**
ERISA preempts private employer sponsored plans from state insurance regulation
- **Will access to bariatric procedures be required of traditional health plans?**
- **www.obesitylaw.com obesity Law and Advocacy**

Questions

- **What information is collected?**
- **How will it be used?**
- **Will it ever be published?**
- **Who may be impacted by use or misuse of information?**
- **To whom will it be disclosed?**
- **Are there state laws governing this activity?**

***Legal Implications of Worksite and
School Health Status Surveillance
Programs***

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- **Were legal implications of worksite and school surveillance programs discussed?**

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- **Did the information of legal implications on worksite and schools meet our objective?**