# STATE OF NEW YORK

336

2021-2022 Regular Sessions

# IN SENATE

(Prefiled)

January 6, 2021

Introduced by Sen. THOMAS -- read twice and ordered printed, and when printed to be committed to the Committee on Insurance

AN ACT to amend the insurance law, in relation to the establishment of the "Wellness Program Privacy Act"

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. This act shall be known and may be cited as the "Wellness Program Privacy Act".

§ 2. The insurance law is amended by adding a new section 3239-a to read as follows:

§ 3239-a. Wellness program privacy. (a) Definitions. For purposes of this section:

(1) "Employer" means:

(i) any person who directly employs fifty or more persons to perform services for a wage or salary; or

(ii) the state and any political or civil subdivision of the state, or any county or city or other municipality.

(2) "Collects," "collected," or "collection" means buying, renting, gathering, obtaining, receiving, or accessing any personal information or protected health information pertaining to a consumer by any means. This includes receiving information from such consumer, either actively or passively, or by observing such consumer's behavior.

(3) "Administration and operation of a wellness program" means, but is not limited to, the use of personal information when reasonably necessary and proportionate to achieve one of the following purposes:

(i) detecting and responding to security incidents arising from a wellness program and protecting against malicious, deceptive, fraudulent, or illegal activity related to a wellness program;

(ii) executing functions of a wellness program for the benefit of the insured;

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD00553-01-1

(iii) undertaking internal research for technological development and demonstration related to a wellness program; or

(iv) undertaking activities to verify or maintain the quality or safety of a service or device that is owned by, manufactured by, manufactured for, or controlled by the insurer, or to improve, upgrade, or enhance the service or device that is owned by, manufactured by, manufactured for, or controlled by the insurer related to a wellness program.

(4) "Personal information" means information that identifies or could reasonably be linked, directly or indirectly, with a particular consumer, household, or consumer device. "Personal information" shall not include publicly available information.

(5) "Publicly available" means information that is lawfully made available from federal, state, or local government records, if any conditions associated with such information. "Publicly available" shall not mean information collected by an employer or insurer about an enrollee without the enrollee's knowledge. "Personal information" does not include enrollee information that is de-identified or aggregate enrollee information.

(6) "Retaliatory" or "adverse action" in the context of an employer offering a wellness program to its employees shall include: denial of coverage, termination of employment, requiring one hundred percent payment of medical care premiums when an employer pays a portion of the premium for wellness program participants, or reducing contributions to participants' health savings accounts.

(7) "Retaliatory" or "adverse action" in the context of an insurer offering a wellness program shall include: denial of coverage, termination of coverage based on non-participation or failure to achieve wellness targets, or adjustments to insurance premiums.

(b) Fair collection and use of personal information. (1) Any insurer or employer that collects a wellness program participant's personal information in the administration and operation of a wellness program shall limit its collection to what is reasonably necessary to operate the wellness program in which a consumer is enrolled.

(2) Any insurer or employer that collects a wellness program participant's personal information in the administration and operation of a wellness program shall limit its use and retention of personal information to what is reasonably necessary to administer and operate the wellness program in which a consumer is enrolled and for related administrative and operational purposes.

(3) No insurer or employer shall share with third parties any personal information or data collected through a wellness program.

(4) Following the close of a wellness program, an employee's termination, or the end of an enrollee's term of insurance, any personal information or data shall be deleted or de-identified.

(5) Wellness program participants shall have the right to obtain a copy of their wellness program data, and shall have the right to challenge the completeness and accuracy of any data the program has about them.

(6) The requirements described in this subdivision shall apply, to the extent that they are applicable, to any entity that an insurer or employer contracts with for purposes of administering or operating a wellness program on such insurer or employer's behalf.

(c) Transparency. Any insurer or an employer that collects a wellness program participant's personal information in the administration and

operation of a wellness program shall provide such participant with a written explanation of:

(1) all data collected in the program;

(2) practices related to data sharing, including who will have access to such data; and

(3) the wellness program enrollee's rights concerning the wellness program under federal and state laws, rules, and regulations.

(d) Prohibition of discrimination based on participation. (1) Any employer that offers a wellness program to its employees, or any insurer that offers a wellness program to enrollees, shall not engage in retaliatory or adverse action against individuals who do not participate in wellness programs.

(2) The total amount of all wellness program incentives shall be limited to an amount deemed by the superintendent not to be coercive.

(e) Enforcement and enrollee private right of action. (1) Any consumer who has suffered from a violation of this section by an employer or insurer may bring a lawsuit against such employer or insurer. A violation of this section shall be deemed to constitute an injury in fact to the consumer who has suffered from such violation, and the consumer need not suffer a loss of money or property as a result of the violation in order to bring an action for a violation of this section.

(2) A consumer who prevails in such a lawsuit shall obtain the following remedies:

(i) damages in an amount not greater than the increased health or life insurance premium cost due to penalties or lost incentives, or seven hundred fifty dollars per consumer per incident, or actual damages, whichever is greater;

(ii) injunctive or declaratory relief, as the court deems proper;

(iii) reasonable attorneys' fees and costs; and

(iv) any other relief the court deems proper.

(3) In assessing the amount of statutory damages, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(4) A consumer bringing an action shall notify the attorney general within thirty days that the action has been filed.

(5) The attorney general may bring a civil action, in the name of the people of the state, against any employer or insurer in violation of this section.

(6) The department may pursue enforcement action against health insurers, health plans, or life insurers in violation of this section.

(7) Any employer or insurer that violates this section may be liable for a civil penalty of up to seven thousand five hundred dollars for each intentional violation, and up to two thousand five hundred dollars for each unintentional violation.

§ 3. This act shall take effect immediately.