

# 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:

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

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

5 § 3239-a. Wellness program privacy. (a) Definitions. For purposes of  
6 this section:

7 (1) "Employer" means:

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

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

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

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

20 (i) detecting and responding to security incidents arising from a  
21 wellness program and protecting against malicious, deceptive, fraudu-  
22 lent, or illegal activity related to a wellness program;

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

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

LBD00553-01-1

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

3 (iv) undertaking activities to verify or maintain the quality or safe-  
4 ty of a service or device that is owned by, manufactured by, manufac-  
5 tured for, or controlled by the insurer, or to improve, upgrade, or  
6 enhance the service or device that is owned by, manufactured by, manu-  
7 factured for, or controlled by the insurer related to a wellness  
8 program.

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

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

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

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

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

35 (2) Any insurer or employer that collects a wellness program partic-  
36 ipant's personal information in the administration and operation of a  
37 wellness program shall limit its use and retention of personal informa-  
38 tion to what is reasonably necessary to administer and operate the well-  
39 ness program in which a consumer is enrolled and for related administra-  
40 tive and operational purposes.

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

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

46 (5) Wellness program participants shall have the right to obtain a  
47 copy of their wellness program data, and shall have the right to chal-  
48 lenge the completeness and accuracy of any data the program has about  
49 them.

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

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

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

3 (1) all data collected in the program;

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

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

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

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

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

22 (2) A consumer who prevails in such a lawsuit shall obtain the follow-  
23 ing remedies:

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

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

29 (iii) reasonable attorneys' fees and costs; and

30 (iv) any other relief the court deems proper.

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

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

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

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

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

49 § 3. This act shall take effect immediately.