Wellness Capitalism:

Employee Health, the Benefits Maze, and Worker Control

DATA&
SOCIETY

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Executive Summary

This primer presents a brief history and critical analysis of employee health and wellness programs in the United States. These programs come in many varieties, from "employee assistance programs" that address conditions such as alcoholism, to "employee wellness programs" that provide incentives for employees to work toward aspirational forms of "wellness." Both types of program have surged in popularity over the past half-century, in part because of their powerful *win-win narrative*. Proponents of these programs argue that everyone wins when employers pay for wellness benefits—workers are told they will be healthier, and employers are told they will save money. Lawmakers have embraced this narrative, and continue to show increasing support for these initiatives, allowing companies to offer a higher percentage of total benefits through such wellness programs.

The result is what we call "wellness capitalism," a model of public health involving the state, employers, and a wellness industry in which worker behaviors are monitored to improve society's health.
There are real problems with this model. There has been inconsistent evidence as to whether wellness programs improve health outcomes (or save money). In addition, government support for these programs has outpaced their regulation. Companies in the benefits industry often sidestep traditional health privacy regulations like the Health Insurance Portability and Accountability Act (HIPAA). Today, this industry is a conglomeration of third-party providers, a *benefits maze* that can collect, exploit, and transmit worker data in mysterious ways. In order to truly benefit workers, we need to disassemble the promises of wellness capitalism's win-win narrative and question the value of increasingly invasive data collection from workers in the name of wellness.

Introduction

Lamenting a 2012 agreement between Kaiser Permanente, the United States' largest health maintenance organization, and the Service Employees International Union (SEIU), John Borsos noted in a 2013 essay that it includes a provision "that smacks of the pre-UAW days in the automotive industry at Ford, when social workers on the Ford Motor Company payroll visited workers at home to ensure that they were living lifestyles befitting the puritanical prejudices of the company patriarch Henry Ford."[1] What, exactly, did this provision allow that would hearken back to Progressive Era–management? As detailed by Borsos, then the secretary-treasurer of the National Union of Healthcare Workers, "the agreement includes an extensive, invasive 'wellness' program that ties workers' earnings to participation in company-supervised programs that measure and track workers' body mass index, alcohol consumption, drug use, sexual activities, and other metrics that may indicate a less-than-healthy lifestyle."[2]

Trying to sound the alarm for his fellow healthcare workers, Borsos was describing what is now a common feature of work as companies offer wellness benefits to improve employee health, morale, and productivity and, in the process, collect vast amounts of data. What has changed since the Progressive Era is how employee wellness is now promoted by more than just employers. Today, governments, elected officials, and health organizations proclaim "employee wellness" as key to a healthier society. So too does a growing employee wellness industry. Moreover, in terms of how workers participate in activities or seek services, employee wellness is no longer as localized, as technology and big data are changing how work, health, and wellness are managed.

This primer examines the realities of employee wellness benefits in an increasingly digitized world. We focus on how, in the United States, employee wellness has been promoted through public policies and government regulation, and how this has led to a rapidly expanding, data-collecting employee wellness *industry.* This industry emerged from two kinds of government-recognized services: "employee assistance programs" (EAPs),[3] which attempt to correct "personal" (individual or family) problems that impinge on productivity, and "employee wellness programs" (EWPs),[4] which incentivize employees' behavior toward specific ideals of health and wellness. Examining the histories and regulation of these programs is crucial to understanding the modern employee wellness industry.

In the United States, the earliest EAPs were created in the 1970s as an outgrowth of "welfare capitalism"—a Progressive Era management technique by which employers provided various services for workers to cut costs, raise worker morale, and prevent unionization.[5]

Since the 1970s, companies and governments have used the concept of "wellness" to further transform worker benefits. EAPs and EWPs are now the foundations of *wellness capitalism*: a model of public health involving the state, employers, and a wellness industry in which worker behaviors are monitored to improve society's health. Wellness capitalism relies on a *win-win narrative,* which claims that supporting employees' health can simultaneously benefit workers, employers, and society. Workers are told they will be healthier and happier using these services, and companies often believe providing these benefits will be profitable by raising worker productivity and lowering healthcare costs. Faith in this narrative has made lawmakers eager to support EWPs. However, the broad embrace of this win-win narrative overlooks a number of crucial problems with the entangling of worker health and companies' bottom lines.

The companies that make up the benefits maze trumpet their use of data collection and algorithmic prediction—from applications that allow employers to track workers' movements, to machine-learning (ML) models that "nudge" workers toward certain health goals.

Wellness capitalism has produced a large employee wellness industry—a marketplace where employers contract with third-party vendors to make health and wellness services available to workers. The consequence of this expansive industry is that many workers must now navigate a *benefits maze:* an industry knit together by the collection of worker data and the transmission of that data between companies. The companies that make up the benefits maze trumpet their use of data collection and algorithmic prediction—from applications that allow employers to track workers' movements, to machine-learning (ML) models that "nudge" workers toward certain health goals. For workers, the problem is not only that this maze is hard to navigate, but that there is limited transparency around what data is collected, stored, and shared with whom. In fact, because of the complexity of contractual relations, many of these "benefit providers" are not subject to traditional health privacy regulations.

The purpose of this primer is to examine wellness capitalism and its impact on workers and public health. We untangle the rhetoric of wellness capitalism's win-win narrative from the risks to workers—particularly new challenges for control over worker data, health privacy, and autonomy. Section one provides a brief history of welfare capitalism, the win-win narrative, and the transition to wellness capitalism. Section two provides a snapshot of the contemporary employee wellness industry and the benefits maze. Section three examines the potential harms workers may experience in terms of health privacy, lifestyle discrimination, and social control, particularly the pressure to participate in health and wellness programming and surveillance and criminalization. Finally, we conclude by considering the implications of wellness capitalism for the US labor movement as well as what role employers should play in the health of workers and the nation.

Ultimately, we argue that modern health and wellness benefits—an outgrowth of wellness capitalism and its pervasive, win-win narrative—have produced a complex and privatized approach to public health. While workers may find some of these services useful, wellness benefits have also emerged as a new site of worker struggle. It is clear that new regulations around privacy and discrimination are needed to protect workers navigating a growing wellness industry.

From Welfare Capitalism to Wellness Capitalism

The origins of employee wellness programming in the United States is welfare capitalism, which involves businesses, as opposed to the state, providing social welfare. And even within the corporate benefits field, this origin is openly acknowledged as less than altruistic; writing for the Employee Assistance Research Foundation, Dale A. Masi describes welfare capitalism as "a strategy of management control to shape employee behavior, primarily aimed at strengthening the attachment between workers and employers, obtaining compliance with worksite requirements to ensure efficiency and steady, if not increased, work productivity." This style of worker management emerged in the second half of the nineteenth century as the United States industrialized.[6] With the rise of the factory and a new, previously rural workforce, employers implemented social services to quell agitation and avoid a worker revolt. Thus, welfare capitalism was "partly self-serving and designed to combat worker dissatisfaction that could lead to unionism and prevent costly strikes."[7] In offering benefits, employers like Ford Motor Company, H.J. Heinz, and Pullman Coach Car provided employees many of the goods and services associated with a robust social welfare state, such as housing, medical care, schools, and recreational centers.

While seemingly good for workers, welfare capitalism relied on the presumption that employee wellbeing is not intrinsically valuable, but valuable because of its relationship to a company's success.

During this time, "employer-sponsored services were often a necessity in the absence of a yet-to-be developed system of public social services."[8] Indeed, many companies employed their own social workers. Along with administering services, occupational social workers focused on health promotion by encouraging health education and healthy behaviors, and in the process engaged

in early forms of worker surveillance.[9] According to a US Bureau of Labor Statistics survey, by the mid-1920s, most large companies had some type of welfare program.[10] The adoption of these programs slowed following World War I and the end of the Progressive Era as workers began to organize and grew suspicious of the motivations driving welfare capitalism: increased productivity, placation, and anti-unionism.[11]

While seemingly good for workers, welfare capitalism relied on the presumption that employee wellbeing is not intrinsically valuable, but valuable because of its relationship to a company's success. Tying the importance of workers' health to productivity, profits, and cost-saving has become a powerful *win-win narrative,* one that claims that workers, companies, and society all benefit from employee wellness. According to this narrative, workers benefit by becoming healthier and happier by using various wellness programs. Companies benefit by lowering their healthcare costs, reducing employee turnover and absenteeism, and raising worker productivity and morale.[12]

The power of this win-win narrative is that it treats as common sense the belief that public health should be equated with financial goals, whether it is the worker trying to save on healthcare costs, employers making profits, or society cutting health spending.

But "win-win" is corporate jargon; indeed, research shows it is one of the most recognizable—and annoying—corporate buzzwords.[13] Thus, we want to examine this win-win narrative to underscore how wellness capitalism normalizes troubling anti-labor assumptions. The power of this win-win narrative is that it treats as common sense the belief that public health should be equated with financial goals, whether it is the worker trying to save on healthcare costs, employers making profits, or society cutting health spending. These assumptions are reproduced far beyond employee wellness marketing materials. For instance, a 2017 *Psychology Today* article states, "…it's possible to create a win-win situation through socially responsible health care policies and programs that improve both workers' wellness and their economic value to the company's bottom line."[14] The more widespread this win-win narrative becomes, the more it helps to justify a focus on employee wellness and the need for an employee wellness industry.

If nineteenth-century welfare capitalism described the provision of benefits by an employer in the absence of a developed social service system, the transition to *wellness capitalism* involves the state explicitly—enrolling law and policy makers in supporting employee wellness. This is a direct acceptance and expansion of the win-win narrative: it's not just workers and companies who benefit, but society too. Today, employee wellness is lauded by government and industry as a tool to improve population health. Proponents of employee wellness emphasize that people spend a significant portion of their lives at work, "which makes it a natural venue for investments in health."[15]

The rise of wellness capitalism, and the formal government support of public health through workplace programs, began in earnest in the 1970s, when the first EAPs were implemented. These early EAPs targeted "personal" problems among workers, with alcoholism treated as a major priority.[16] In 1970, President Richard M. Nixon signed the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act, which established the National Institute on Alcohol Abuse and Alcoholism (NIAAA) as part of the National Institute of Health.[17] Seeking to "reframe alcohol use disorder as a medical—rather than a moral—issue," NIAAA also promoted the implementation of other addiction treatment services for employees.[18] As Paul M. Roman details, NIAAA's work created a bridge between the delivery of health services and the operations of companies as EAPs medicalized certain behaviors among workers.[19] NIAAA helped institutionalize the term employee assistance program, when, in the early 1970s, it funded EAPs through state and local grants. By 1974, NIAAA (*emphasis added*):

> had adopted the term employee assistance program to describe *job performance-based intervention programs* in the workplace. The institute noted that while deterioration in job performance could most often be attributed to the misuse of alcohol, it could also be related to other personal problems. Thus, EAPs broadened the scope of employer involvement beyond alcohol misuse and have evolved into multiservice programs to address all types of personal problems, including illicit drug use, family and mental health problems that affect job performance, and the general personal welfare of workers.[20]

Alcoholism intervention programs are paradigmatic examples of EAPs—addressing a specific, already-existing medical condition among workers. However, during the same period, programs focused on more aspirational and abstract notions of "wellness" also gained state support. As Ifeoma Ajunwa, Kate Crawford, and Joel S. Ford detail, the US federal government increasingly promoted "wellness via the workplace."[21] For example, The President's Committee on Health Education was established in 1973 and out of that, in 1975, came the National Center for Health Education which "pushed for expanded worksite programming." In the following decades, the US Department of Health and Human Services prioritized health promotion and wellness programming.

Additionally, a series of reports were issued on how cultivating health could be a tool for disease prevention.[22] The focus on preventive care was decades in the making, and reflected a debate among health organizations and medical experts on conceptualizing health and wellness as more than the treatment of illness.[23] Overall, the federal government championed "the idea of wellness as a national goal" and by the 1980s, this goal was increasingly being realized via EWPs.[24] In short, the growth of EAPs and EWPs stems from a laudable shift in the medical field to prioritize preventive care, but does so within a larger framework that distorts individual wellness through the lens of productivity and corporate profit.

The idea that wellness is a way to save money has become a particularly potent rhetorical device as the United States has endured a decades-long crisis of healthcare costs.[25] As during the Progressive Era, public health organizations still promote education and healthy habits.[26] Unlike the Progressive Era, the United States now has a private health insurance industry that dominates how healthcare operates, as well as established systems of public health and social services.[27] There is also more concern about health spending, particularly as it relates to chronic diseases.[28] The latest data from the National Health Expenditure Accounts, which provides

official estimates of US total health spending, shows that healthcare spending is $4.3 trillion—or $12,914 per person—and 18% of the country's Gross Domestic Product.[29] Many adults cannot afford healthcare, even with health insurance, and thus delay or avoid medical care, and a significant portion of the population has incurred health debt.[30] In the United States, there is currently $88 billion in outstanding medical debt in collections.[31] Debate abounds on how to cut healthcare costs.[32]

Wellness capitalism is posed as a structural intervention, but its proponents espouse a market logic by tethering societal health and wellbeing to changing individual behaviors and saving money.

This is one of the reasons that wellness capitalism's win-win narrative has been so successful: according to the logic of wellness-as-productivity, the problem to be reformed is not the structure of healthcare in the United States (market approach, for-profit health systems, the dominance of the private health insurance industry, a lack of universal healthcare), but rather the behaviors and mentalities of workers.[33] Wellness capitalism is posed as a structural intervention, but its proponents espouse a market logic by tethering societal health and wellbeing to changing individual behaviors and saving money. Consider, for instance, the Centers for Disease Control and Prevention's (CDC) hinting that EWPs are innovative:

> The US spends billions of dollars treating chronic diseases but directs few resources to proactively address the health, safety, and well-being of working adults. To improve population health, public health agencies should consider engaging adults where they spend most of their waking hours—at work.[34]

Under wellness capitalism, the state permits the private health insurance industry and market approach to healthcare to remain the norm and simultaneously *authorizes* employers—through public policies, regulations, and the permitting of incentives—to capture and transform the delivery of health and wellbeing services.

The reach of corporate interests in writing wellness capitalism into law is perhaps best demonstrated by the 2010 Patient Protection and Affordable Care Act (ACA), which aggressively promoted the adoption of EWPs.[35] Along with expanding eligibility and establishing an employer mandate, the ACA incentivized employers to adopt EWPs focused on healthy lifestyles and preventive care. Specifically, the ACA's "Safeway Amendment" allowed employers to adjust premiums and cost-sharing in accordance with a company's wellness program. This amendment increased the incentives a company is permitted to offer by 10%, amounting to up to 30% of total premium costs.[36] And to be clear, this amendment's nickname is a nod to Safeway CEO Steven Burd, whose wellness programs—before being debunked—were lauded as having significantly reduced healthcare costs.[37]

The debunking of Safeway's EWPs is far from an isolated affair. Studies examining whether EAPs and EWPs reduce insurance costs or improve workers' health and job performance show mixed results.[38] Analysts underscore that determining the societal impact of employee wellness can be difficult because health and wellness programs vary in scope, content, and timeline, making their isolated effect on a workforce, let alone a society, unclear. Additionally, some research suggests that workers who are already "healthy" might be more likely to participate; therefore, these studies might not offer much insight into how other workers' health may change.[39]

Despite inconclusive evidence, surveys show that the supporters of employee wellness claim providing health and wellness benefits is good for companies' bottom lines. A study conducted by RAND and sponsored by the US Department of Labor and the US Department of Health and Human Services reported that "employers overwhelmingly expressed confidence that workplace wellness programs reduce medical cost, absenteeism, and health-related productivity losses." Yet only half of respondents had formally assessed the impact of their wellness programs.[40] Nevertheless, adoption of these programs shows no signs of slowing down; according to a recent benefits trend report, employers' number one priority is providing workers with more benefits and customization.[41]

Along with being posited as good for workers, employee wellness is touted as beneficial to national health by US federal agencies and health organizations. The US Office of Personnel Management (OPM) and the CDC have entire pages dedicated to the positive impact of EWPs, with the latter offering resources to employers for implementing and measuring employee wellness programs. According to both the OPM and the CDC, employee wellness will improve national health while cutting healthcare costs and the strain on healthcare systems. The CDC states, "with science-based workplace wellness programs, employers can control their healthcare costs while improving America's overall health."[42] Similarly, a web page for OPM reads,

> "Worksite health and wellness programs help employees modify their lifestyles and move toward an optimal state of wellness. They can also produce organizational and employee benefits, such as lower healthcare costs, increased productivity, improved recruitment and retention, reduced absenteeism and presenteeism, and enhanced employee engagement."[43]

The Employee Wellness Industry and the Benefits Maze

> *It took a pandemic for people to understand what I've meant all these years when I say that every employer (no matter your industry) is in the business of health.*
>
> *—Glenn Llopis, Forbes leadership strategy contributor and corporate consultant*[44]

The embrace of wellness capitalism and its win-win narrative has given rise to an enormous employee wellness industry. In 2013, half of all organizations with over 50 employees offered a health and wellness benefit of some kind—representing an industry worth $6 billion.[45] Less than 10 years later, in 2022, the employee wellness market has ballooned to approximately $56 billion and is expected to reach $109 billion by 2030.[46] Startups in this industry are raising large sums of money from venture capital. For example, in January of 2022, the mental health platform Lyra Health raised $235 million (the company has raised over $910 million in total).[47] This funding round came just weeks before articles circulated criticizing the company for its data sharing and treatment practices. One former Lyra employee told *Buzzfeed News,* "The bottom line is, this is a business. So the bottom line is money…And how can you get money? By data. By saying, 'Look how successful we are. Please invest in us.'"[48]

The profitability of data is one of many reasons that the employee wellness industry is quickly digitizing its services.

The profitability of data is one of many reasons that the employee wellness industry is quickly digitizing its services—many popular benefits are now *completely* digital. A recent survey reported that 68% of employers plan to invest more in digital health benefits in the coming years.[49] Another survey found that, in 2022, 61% of employers had added a new benefit vendor with digital content in the past two years.[50]

Today's digital benefits are not simply platform-mediated resources, but systems characterized by data collection and algorithmic decision-making. The potency of wellness capitalism's win-win narrative alongside the pandemic-induced turn toward digital benefits has encouraged benefits providers to adopt hyped technologies like artificial intelligence (AI). As scholars such as Lee Vinsel have detailed, exaggerated claims about new technology are often a strategic tool to garner venture capital.[51] The reality is that oftentimes these hyped technologies aren't fully developed and can involve hidden human labor.[52] What's more, new technologies are heralded as a way for companies to achieve greater efficiency, and, in doing so, further promote the win-win narrative that wellness benefits save employers money.

The corporate appetite for wellness programs, alongside the push for investment into the space, means the employee wellness industry is flush with new, digitally focused vendors—third-party startups selling health and wellness services to employers. This is how we arrive at the *benefits maze*: an industry knit together by the collection of worker data and the transmission of that data between companies. These entities interact in different ways depending on the employer and the health and wellness benefits offered, which can vary, particularly by company size.[53] While exact policies may differ from company to company, the industry as a whole is complex, and characterized by a fundamental lack of transparency. Additionally, each third-party service has its own policy for worker outreach and referrals between vendors; this can create complicated, messy, or camouflaged information flows between parties.

Examining a typical "benefits manager" makes the complexity and sheer number of actors in this ecosystem clear. The image from benefit navigator Accolade's investor presentation illustrates some of the possible third-party benefit providers who could serve a single large employer. Accolade has different relationships with some of these companies (trusted supplier and partner program) and this suggests differences in integration, interoperability, and data sharing.[54] Unfortunately, the contours of these partnerships—what they mean for referrals, operations workflow, and data sharing—are not clearly articulated on the company's website. This ambiguity is typical of the industry: what happens to worker data in the benefits maze is shrouded behind obtuse (and often permissive) terms of service.

Categories of Entities in the Benefits Maze

Employee assistance program (EAP)—services and programs that offer resources and support for personal or family problems, including mental health, addictions, relationships, and financial or legal issues.

Employee wellness program (EWP)—services and programs focused on encouraging healthy lifestyles, behavior modification, and chronic disease management or prevention.

Benefits manager—in-company staff who design the benefits structure, select and manage vendors related to benefits, and ensure benefits comply with federal and state regulations.

Benefits navigator—a third-party service dedicated to helping workers access and navigate all their benefits.

Point solution—a service, program, or resource focused on a particular health or wellness ailment, topic, or demographic.

Employee benefits center—an employer-run website, app, or physical office dedicated to helping workers navigate their benefits.

Third-party benefits administrator (TPA)—a third-party vendor that processes insurance claims on behalf of an employer.

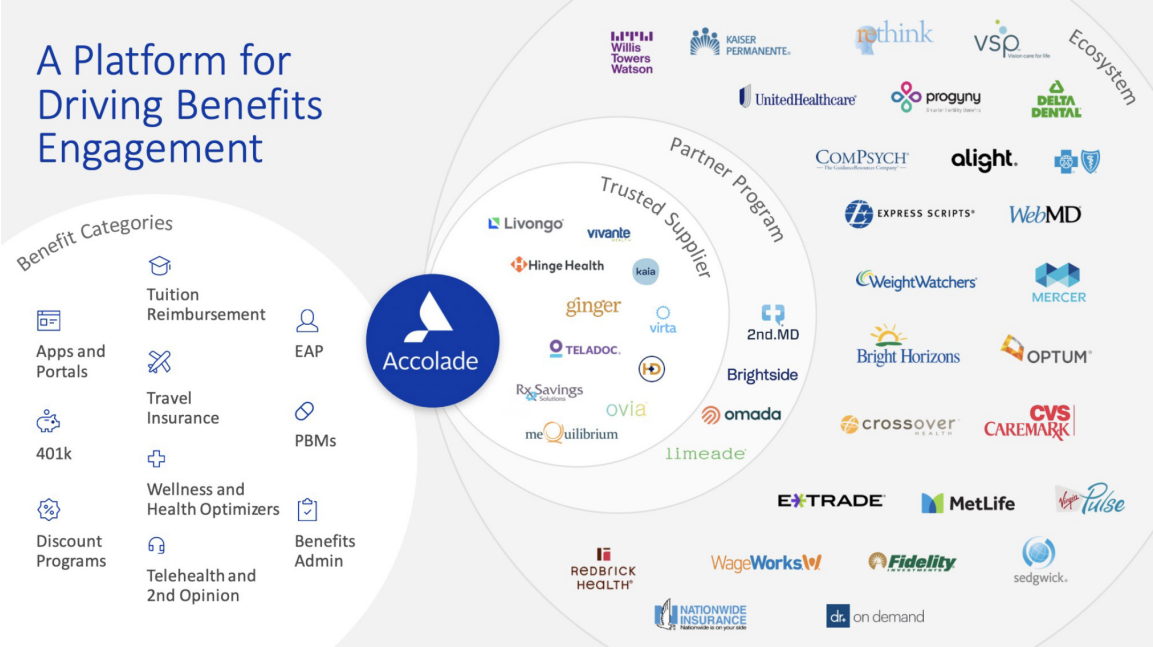

Figure 1. Benefit Navigator Accolade, January 2021 Investor Presentation, accessed May 8, 2023, https://accolade.gcs-web.com/static-files/9567546e-46cb-46dc-8400-5e71cfeafa16.

In the remainder of this section, we present a snapshot of several different third-party vendors that are part of the employee wellness industry, paying particular attention to what their services and lack of transparency reveal about the benefits maze workers navigate when participating in employee wellness. With examples ranging from mental health to fertility and family planning, the following cases are emblematic of how wellness capitalism involves increasingly invasive methods of data collection, supposedly automated methods of data analysis, and opaque data sharing.

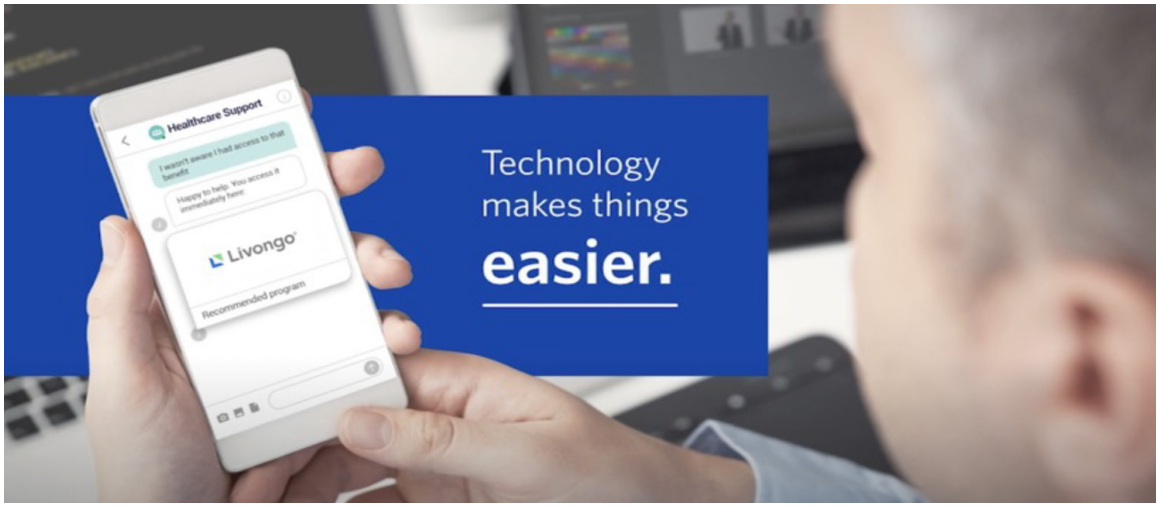

Figure 2. Image from Accolade Total Benefits and Total Care Video, uploaded November 22, 2019, video, 0:58, https://www.youtube.com/watch?v=qJx58Zr8moE.

Get your mind right while the boss watches

Since the beginning of the COVID pandemic, employers have taken a greater interest in mental health and mindfulness; 23% of workers reported that their employer introduced a new mental health service during the pandemic, while 36% said their employers already offered a mental health benefit.[55] Mental health benefits can look like apps that provide guided meditations, such as *Headspace,* or more comprehensive services like *Spring Health*, which provides coaching, tele-therapy, and medication management.

Spring Health is emblematic of the trend toward digitizing and data-fying mental health. It advertises, for instance, that it collects a "comprehensive set of data on each individual," which includes information like psychiatric history, sociodemographic information, family mental health history, and more. While the details are undisclosed, Spring Health claims that this data is fed to an ML model that chooses a specific care plan for an individual and connects them to a therapist.[56] As stated on Spring Health's website, "The most successful experience for your employees starts with the best data. Our approach eliminates the trial-and-error in traditional care by leveraging the power of data, across every aspect of care delivery."[57] Crucially, the employee using this service (and, perhaps, also the employer who paid for it) is unaware of how the model came to its decision—how it weighs input data, training data, or its accuracy rates.

Another tech-first health and wellness benefit is *Twill Health,* which offers three digital products focused on chronic condition management, mental health, and wellness. Twill promises "digital-first care that is as connected as the body and mind."[58] AI and ML hype take center stage in Twill's marketing materials. For example, Twill's "Intelligent Healing Platform" includes an AI therapeutic assistant named Taylor who "provides reassurance through realistic conversations—shaped by clinicians, and powered by a patented algorithm—to listen and guide you towards greater understanding of your thoughts, actions, and behaviors." Twill encourages employers to entrust a proprietary, AI-powered robot to guide their workers toward a deeper understanding of their own mind.

On the Twill Care app, workers can join different groups focused on a particular issue (e.g., psoriasis, mental health, multiple sclerosis) and post messages in the group's news feed. In this way, the app is similar to other social media platforms, but instead of life updates, employees are encouraged to share information about their health and ailments. In the "partner" section of the platform, organizations are given the opportunity to create their own page. This means other benefits vendors, health plans, or even the employer can encourage workers to engage with them directly through the app.[59]

Twill does not publicly provide information about their relationship with the many actors who are invited to participate in their platform. Specifically, it is unclear how information on workers (personal information, engagement metrics, etc.) flows from Twill to, say, another benefits vendor, a health insurance plan, or the employer. Twill's privacy policy states:

> We may share personal information with certain service providers whose services and solutions complement, facilitate and enhance our own. These include hosting and server services, communications and content delivery networks (CDNs), data and cybersecurity services, performance measurement services, data optimization and marketing services, content providers and our legal and financial advisers. Such service providers may have access to personal information according to their particular roles and purposes.

This opaque statement does not clarify who exactly is included in the group of providers who "complement, facilitate and enhance" Twill's services, but it is not a stretch to imagine this could be an employer who hosts a page on Twill's platform.[60]

Every breath you take, and every move you make

MoveSpring is another digital benefit that closely monitors its users. MoveSpring bills itself as a health and wellness benefit dedicated to encouraging physical activity, preventing obesity, and improving mental health. To participate, workers must connect some form of worn or carried sensor to MoveSpring's software. In many cases, this means connecting a third-party app on their phone (like GoogleFit or Apple Health) to the MoveSpring servers. Once MoveSpring has access to the movements of employees, it can provide employers with an interface structured around what it calls "physical challenges." Usually created by admins, physical challenges are individual or group competitions among workers. Users compete for the most steps or active minutes during a specified period in the hopes of winning an employer-chosen prize (sometimes no prize at all). If an admin adds an employee to a challenge, their daily steps or active minutes will be ranked on a leaderboard alongside their colleagues.

Once employees set up an account with MoveSpring, admins can add them to challenges and view their activity level. Admins can see worker activity even if they have not joined an ongoing challenge; users cannot make their activity private to admins. The system is designed to place control over worker movement in the hands of employers, who can, using their interface, "easily filter and manage users." This includes identifying employees who are "reporting a low level of activity."[61] Employers can also download reports to see detailed data on individual performance and engagement. This includes when employees joined, the device they are using, and their daily steps and active minutes.[62] Additionally, admins can download reports on the "most improved" workers and workers' "personal best."[63] These features give employers and managers significant control in terms of monitoring workers' physical activity, including that which has nothing to do with their job responsibilities.

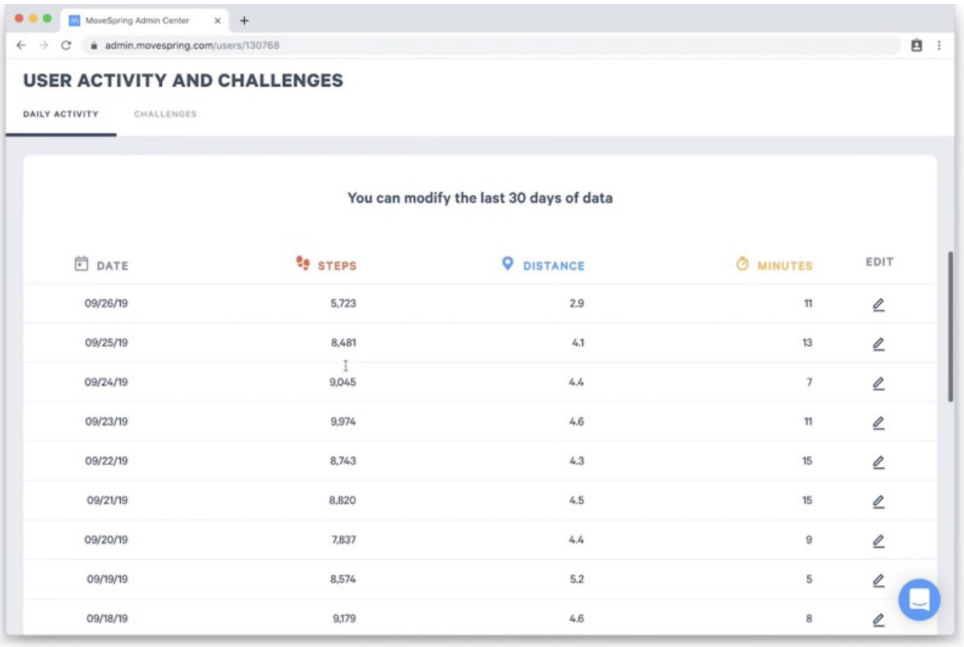

Figure 3. View from Admin Profile of an employee's activity. "The MoveSpring Admin Center," video, uploaded September 27, 2019, 2:07, https://www.youtube.com/watch?v=ptlU30nAf28.

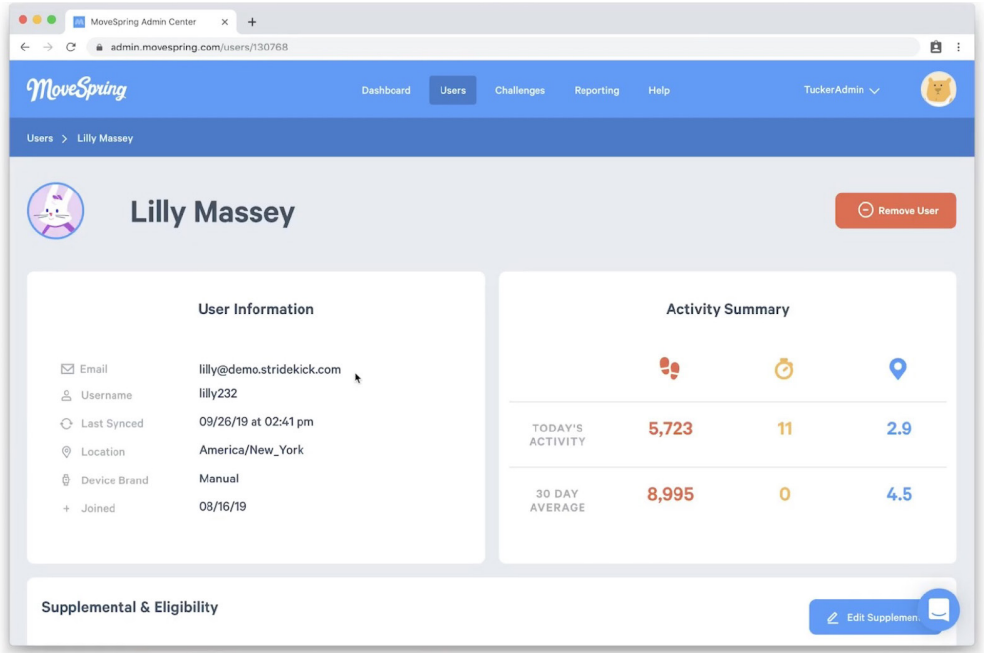

Figure 4. View from Admin Profile of an employee's activity. "The MoveSpring Admin Center," video, uploaded September 27, 2019, 2:04, https://www.youtube.com/watch?v=ptlU30nAf28.

Family planning includes your boss

The reliance of health and wellness benefits on increasing surveillance is particularly clear in the case of fertility and family management services like *Maven*, which brands itself as "the largest virtual clinic for women's and family health." Its services focus on providing support throughout many stages of family planning—from fertility treatment to pediatric care. After providing Maven with personal health information such as one's medical history, current medications, and more, employees are connected to a care advocate.[64] The advocate can connect workers with specialists and holistic care workers depending on their needs. The benefit also has a reimbursement management tool, called Maven Wallet, which handles administering fertility and family planning benefits, including egg freezing, surrogacy, in vitro fertilization (IVF), and adoption.[65]

It makes sense that to support an employee with an intimate process like IVF, Maven would need to collect some information from a worker and perhaps share it with external parties to facilitate services (i.e., find them a fertility clinic nearby and schedule an appointment). However, there is not sufficient transparency to clarify who might have access to an employee's information. Maven's privacy policy states:

> [W]e will share certain Personal Data with your employer including your subscriber id, amount spent on applicable services, and satisfaction survey results. In certain circumstances your employer or group health plan may ask that we share certain Personal Data with a third party designated provider to use for their own purposes.[66]

Maven does not specify the circumstances that would trigger this type of data sharing or any preconditions or specifications that must be met for Maven to share identifying information with an employer or health plan. Furthermore, Maven offers no indication of what types of "purposes" or ends the shared personal data would be used to meet.

Navigating the navigators

The complexity of the benefit ecosystem is exactly how some third parties justify their services as mediators. These are benefit navigators—benefits dedicated to helping employees navigate their other benefits. These platforms market themselves as a one-stop shop for all benefits information. In practice, this often means employees are sent directly to the benefits navigator when they are looking for a particular resource or have benefits questions. One such benefits navigator is *Accolade,*whose existence makes clear just how reliant the employee wellness industry is on the transportability of collected worker data in claiming computationally produced cost savings.

Marketing itself as a single point of entry for workers, Accolade provides a platform and team that employees can contact to access all their benefits information. Accolade employs health assistants who answer calls, field benefit questions, and connect employees to other benefits. As a selling point, Accolade promotes its proactive approach to employee engagement; health assistants reach out to employees to nudge them toward certain health or wellness goals. Consistent with the win-win narrative, Accolade claims these proactive nudges encourage employees to take control of their health, and in doing so, save the employer money. Accolade boasts of a 3% decrease in healthcare spending after implementing Accolade.[67]

The decision of when and how to nudge a worker is made by a predictive algorithm. According to Accolade, its predictive analysis is informed by claims data, past employee interactions, and ecosystem data (data from other benefit vendors). All of this data is allegedly used to train an ML model. This suggests that Accolade stores employee data and feeds it back into their system. Explaining how employee interactions inform its product, an Accolade strategist said that when someone takes an action by responding to a nudge this "feeds back into our system, and we keep learning and optimizing for our member and every engagement we have with our member makes the next one more effective."[68] While Accolade notes its many data streams are used to "predict the behavior of our members and to outreach to them to make sure we step in," the company does not provide much additional public information about the details of their predictive analysis, such as what specific data points are input and how they are weighted.[69]

When it comes to data sharing, the employer offering Accolade as a benefit has access to utilization reports, which detail employee engagement. These reports include, among other information, how many employees are engaging with Accolade and the nature of their requests.[70] According to the demo, employers receive aggregated, de-identified information about employees. For example, an employer would know that a worker has cancer, but they would not be given the name of this employee. This nevertheless raises concerns about de-identification, as data scientists have demonstrated that data can be de-anonymized.[71] The sheer existence of benefits navigators—services dedicated to helping workers utilize their benefits—illustrates the breadth of the benefits maze, and the ease with which a worker's data might become lost in it.

Another consequence of the growing benefits industry is that, in a crowded marketplace, vendors are stretching employers' and society's idea of what counts as a health and wellness service. Today, a benefit justified in the name of wellbeing may be met with few reservations (who can object to a healthier workforce?). These services may indeed improve the lives of workers who have access to them, but they also enroll workers in shrouded systems of data collection and surveillance where there is insufficient regulatory protection and oversight.

The Risks of Wellness Capitalism for Workers

At its heart, wellness capitalism facilitates concerning shifts in public health, including the role of nonmedical professionals (particularly through third-party vendors) in healthcare, employers' active involvement in the circulation of health, wellness, and behavioral data, reliance on algorithmic decision-making, and intensified data collection. This section focuses on how these trends may negatively impact workers. Here, we consider three major risks: the lack of privacy protections, penalties for non-participation, and surveillance and criminalization.

Lack of privacy protections

For workers, personal data, including any information related to health, is of extreme importance. Not only is it a matter of personal privacy, but of power. Worker data can be harnessed for employment and wage discrimination, healthcare discrimination, and management control.[72] These are not unfounded concerns. In 2021, the period and fertility-tracking platform Flo Health settled with the US Federal Trade Commission (FTC) after it engaged in inappropriate data sharing of its 100 million users.[73] Relatedly, in 2019 it was revealed that another pregnancy-tracking app, Ovia, was improperly sharing data with employers.[74] No wonder Ifeoma Ajunwa, Kate Crawford, and Joel S. Ford conclude, "in the age of Big Data, joining a wellness program is less akin to a confidential visit to your family doctor than it is joining public social media, precisely because of the potential for porous flow of information through those programs."[75]

> Crucially, employers are not considered covered entities under HIPAA

The primary protection for health data in the United States is the 1996 Health Insurance Portability and Accountability Act (HIPAA). HIPAA establishes the rights people have over their health information, including the right to obtain copies of health information, receive notice of how it has been shared and with whom, and request that a specific entity restrict access to it.[76]

While HIPAA was intended to impose limitations on parties with access to health information, the act only applies to "covered entities."[77] *Crucially, employers are not considered covered entities under HIPAA*.[78] This means that typically employers are not subject to what is known as "the privacy rule," which addresses "the use and disclosure of individuals' health information—called 'protected health information' by organizations."[79]

There are certain cases in which HIPAA may apply to a third-party benefit vendor, most notably when they work or contract with a separate "covered entity," such as a health plan, healthcare provider, or healthcare clearinghouse.[80] A benefit provider is considered a "business associate" if it provides services to or on behalf of a covered entity and thus would also be subject to HIPAA.[81] For example, if a health or wellness benefit is offered as part of a group health plan, the health information collected would be protected by HIPAA.[82] And "the Privacy Rule does control the conditions under which the group health plan can share protected health information with the employer or plan sponsor…"[83]

While HIPAA was passed in part because "advances in electronic technology" could "erode the privacy of health information," a significant part of the digital ecosystem—health and wellness benefits that don't contract with covered entities—may be overlooked by this act.[84] As the previous section detailed, a worker navigating the benefits maze can interact with numerous non-covered entities—including the employer. This means health and wellness data can move in multiple directions and across several platforms and tools. What the focus on covered entities suggests is that the applicability of HIPAA is not always stable. Simply put, just because data is "health data"' doesn't mean it is automatically considered protected health information. Rather, the applicability of privacy protections depends on who collects the data, the purpose of data sharing, and in which direction the data flows.

Many companies comprising the benefits maze address their awareness of HIPAA and even use it as a selling point for the trustworthiness of their products. Yet HIPAA does not apply to all digital benefits. Indeed, the FTC recognizes as much, as indicated in its recent statement regarding breaches by "health apps and other connected devices." Issued in recognition "of the proliferation of apps and connected devices that capture sensitive health data," the FTC's Health Breach Notification Rule seeks to ensure entities not covered by HIPAA "nevertheless face accountability when consumers' sensitive health information is compromised."[85] Basically, the FTC recognizes that technology collecting "sensitive health data" is not always subject to HIPAA. Earlier this year, the FTC, for the first time, took enforcement action on its Health Breach Notification Rule. The target was GoodRx, "for failing to notify consumers and others of its unauthorized disclosures of consumers' personal health information to Facebook, Google, and other companies."[86]

What all this suggests is that HIPAA is losing some of its relevance in a digitized world as health, wellness, and medical care are administered without the involvement of those historically considered covered entities, such as healthcare providers. Privacy loopholes are part of HIPAA's design, as who and what are considered covered entities is fairly limited. With the use of so many third-party vendors to administer benefits, it is difficult to assess the flows of data collected from workers. This can affect whether an employee is even aware that their health and wellness data is considered, per HIPAA, protected health information and when as it circulates among the benefits maze. All this may make it difficult for a worker to determine if and when a HIPAA violation occurs.

HIPAA health information privacy and security complaints are submitted to the Office for Civil Rights (OCR) of the US Department of Health and Human Services, which is responsible for enforcing HIPAA's privacy rule. Yet there are two conditions required for OCR to take enforcement actions that might not be easily determined by workers. The first is that a person's rights were violated by a covered entity or business associate. The second is that the complaint was filed with the OCR within 180 days of the alleged HIPAA violation.[87] The result is that decades-long assumptions about workplace privacy protections are undone by a system that is as circuitous to regulators as it is to workers.

Despite the existence of HIPAA and the FTC's efforts to rein in digital tools that collect and transmit sensitive health information, employee wellness data is highly vulnerable to exploitation. Many entities within the benefits maze are collecting, analyzing, and acting upon worker health and wellness data within the purview of HIPAA and without being subject to a comprehensive federal privacy law. Currently the United States "doesn't have a singular law that covers the privacy of all types of data. Instead, it has a mix of laws…designed to target only specific types of data in special (often outdated) circumstances."[88] In an effort to fill this void, congressional leaders introduced, in 2022, the draft bill "American Data Privacy and Protection Act" (ADPPA), which was "not only the latest attempt by Congress to introduce a federal comprehensive data privacy legislation…but also the closest it has gotten to this goal."[89] While the ADPPA "would not apply to data covered by HIPAA," it would, according to the bill, cover "any information that describes or reveals the past, present, or future physical health, mental health, disability, diagnosis, or healthcare treatment of an individual."[90] In the absence of a national privacy law, some states have passed consumer protection laws that address data privacy. However, some of these state laws "exempt a wide range of health data outside the HIPAA bubble (which may be the majority of health-related data), much of which is subject to no data security requirement."[91]

Incentives and penalties for nonparticipation

> *We structured it as a carrot, but I would quickly tell you that the carrot is nothing more than the mirror image of a stick, and vice versa.*
>
> *—Former Safeway CEO Steven Burd, at the Senate Health Committee*[92]

Workers are commonly offered incentives to participate in health and wellness benefits, which public policies like the ACA encourage.[93] The ACA makes a distinction between "participatory wellness programs" and "health-contingent wellness programs." The former are usually available to employees regardless of health status and may include benefits like gym memberships or prizes for completing a class or activity. In other words, these wellness programs are considered "participatory" because they don't base rewards or penalties on health status.[94] Health-contingent wellness programs, by contrast, reward employees for meeting a particular health standard. Here, the reward is tied to specific metrics such as achieving a specific cholesterol level or weight goal.[95] By offering selective rewards to those deemed healthier, health-contingent wellness programs "sort employees and charge them different rates for health coverage based on their achievement of certain health goals."[96] One recent employer benefits survey found that among large companies that offer a health risk assessment, 50% use incentives or penalties to encourage workers to complete it.[97]

Despite the technical legality of these programs, scholars and activists express concern that incentives are not compliant with the 1990 Americans with Disabilities Act (ADA).[98] In particular, critiques have been raised about employers conducting medical examinations associated with a wellness program or initiating disability-related inquiries.[99] Incentives or pressures imposed on workers to participate in health and wellness benefits call into question whether participation is truly a voluntary act.[100] As companies decide to shape incentives as sticks rather than carrots, refusal to participate becomes a more pressing workers' rights issue.[101]

We must consider, then, how refusing to participate or resisting the incentivization structure of employee wellness might impact how people are perceived as workers, even if they are performing their jobs adequately.

A refusal to participate in employee wellness may be interpreted negatively by employers, particularly in terms of perceived cost to the company through health insurance pricing. We must consider, then, how refusing to participate or resisting the incentivization structure of employee wellness might impact how people are perceived as workers, even if they are performing their jobs adequately. Can employees' refusal to participate in these benefits be read as insubordination or diminish their perceived value to the company? Given that benefits may include tools that encourage workers to share their activities among their coworkers, like those offered by MoveSpring, how might a refusal to participate be read as poor teamwork—regardless of how people perform the jobs they were hired for?

In recent years workers have challenged the use of incentives, particularly when it comes to penalties for non-participation. Yale employees and their spouses, represented by AARP, filed a class action lawsuit against the university for making some 6,000 union workers and their partners pay an opt-out fee of $25 a week to avoid participating in the university's EWP.[102] In a similar case, AARP filed a bias complaint with the US Equal Employment Opportunity Commission against the construction firm Austin Industrial, claiming that the $2,400 per year penalty for not participating in the EWP violates the ADA.[103] These examples make clear that the foundation of employee wellness as a means to employer profit hollows out the claim that these services are primarily for the workers' benefit.

Surveillance and criminalization

Critics of employee wellness argue it can result in lifestyle discrimination, which, broadly understood, penalizes employees or potential employees for how they behave outside of work. EWPs encourage and incentivize the adoption of certain behaviors and lifestyles, including diet, exercise, and weight loss.[104] Others focus on measuring specific health metrics like cholesterol, glucose levels, and blood pressure. With data collection playing a crucial role in benefit implementation and management, it is becoming easier for employers to surveil employees and identify behaviors outside of the worksite. Although lifestyle discrimination can take many forms, the American Civil Liberties Union puts it succinctly: "the most common victims of this type of discrimination are smokers and fat people."

Along with increased surveillance, the monitoring of workers' bodies, health, and wellness activities might make them vulnerable to criminalization.

Along with increased surveillance, the monitoring of workers' bodies, health, and wellness activities might make them vulnerable to criminalization. People have been and are criminalized for activities and behaviors associated with medical or biological circumstances. Suffering from drug addictions, not disclosing one's HIV-positive status to sex partners, and being suspected of using drugs while pregnant are all legally punishable.[105] And as Dorothy E. Roberts shows, when it comes to criminalizing people for presumably engaging in activities associated with having negative medical or biological consequences, Black women are particularly targeted by the state.[106] Regarding HIV criminalization, Black men are disproportionately charged.[107] Given this history and continued policing and punishment, more attention should be given to how employee health and wellness programs expose workers to increased data collection, often without their knowledge, and how this could be used against them legally.

For instance, we can consider how, in the United States, the current wave of criminalizing abortions and pregnancies that do not result in births could make some workers more vulnerable to law enforcement simply because they used digital fertility or family planning applications.[108] This scenario underscores how—regardless of the specific health issue—health and wellness data could be turned into legal fodder for prosecution. There are thus legal considerations for workers navigating the porous benefits maze, and this increased data collection must be understood against the backdrop of crime control measures used to enforce laws regarding reproductive rights and healthcare.

Conclusion: Wellness Capitalism and the Future of Public Health

Wellness capitalism is gaining speed. Unlike the "welfare capitalism" of the Progressive Era, which was localized and managed by occupational social workers, today's health and wellness benefits are plentiful, digital, and often give employers a detailed view into workers' behaviors outside of work. Today, the state promotes employee wellness as part of a public health strategy and, in the process, authorizes employers—through public policies, regulations, and the permitting of incentives—to undertake a significant role in national health. Employers, as well as a growing employee wellness industry, are involved in the collection of vast amounts of health and personal information from workers. "Vendors," as Gordon Hull and Frank Pasquale point out, "publicly bill these programs as a way to develop a healthier, happier workforce, and privately market them as a route to reduced insurance costs."[109] Yet the returns on employee wellness are mixed.[110]

As a model of public health, wellness capitalism targets the worker in the name of improved national and fiscal health. The expectation is that, with the assistance of the employer, workers can better manage their health and wellbeing (or at least their performance of health and wellbeing). Instead of the state confronting the market logic of US healthcare and the dominance of the private health insurance industry, or truly addressing the structural factors—including labor conditions—that shape health patterns, workers are expected to strive for wellness.[111] Wellness capitalism is not only a model of public health, but a means to privatize the social welfare state and offer a less robust version of what should be social services and public goods.

The reality of wellness capitalism raises questions about the future of public health in the United States. While it is widely known that a significant portion of the population obtains health insurance through an employer, wellness capitalism involves the employer in the delivery of physical and mental health services.[112] Employers' encroachment into the sphere of public health, coupled with today's data-collecting digital benefits and insufficient privacy regulations, have created circumstances ripe for the further deterioration of worker rights, agency, and power.

What remains an open question is how workers feel about health and wellness benefits. Support for employee wellness benefits varies and different workforces may have competing perspectives. Research shows that workers want benefits packages and, in some cases, wish to participate in employee wellness programming.[113] During our interview with Jennifer Porcari, director of the Public Employees division of the American Federation of Teachers, we learned of teachers wanting trauma support—provided via an EAP—following school shootings.[114] For organized workforces, a large portion of collective bargaining is typically focused on benefits. Some unions, like the United Federation of Teachers in New York City, collaborate with city governments to promote workplace wellness among city employees, offering services like weight management tools.[115]

On the flip side, there are employees filing lawsuits or bias complaints over what they claim amounts to compulsory benefits programs, such as the thousands of workers at Yale.[116] In "Which Way to Wellness: A Workers' Guide to Labor and Workplace Strategies for Better Healthcare," an e-pamphlet published with the support of the National Union of Healthcare Workers, several contributors warn of the negative impact of employer-sponsored wellness, including the surveillance of workers and a lower quality of healthcare.[117] We shouldn't ignore the fact that healthcare workers themselves are sounding the alarm around employer-sponsored health and wellness benefits.

Another question that remains is whether there is a viable and ethical role for employers to play in public health that does not hinge on wellness capitalism. Currently, as authorized by the state and promoted by the win-win narrative, the employer plays a key role in public health by offering health and wellness benefits and incentivizing workers to use them. In this situation, the employer is often given a window into workers' (and at times, their families') behaviors and lifestyles. This raises concerns about privacy, discrimination (in terms of lifestyle, insurance, and employment), punishment for non-participation, and surveillance and criminalization, all topics of extreme importance to the US labor movement and workers in general.

Yet today's benefits maze leaves workers vulnerable to diffuse and prolonged harms and is animated by a vision of public health focused on cost-cutting instead of treating good health as a social right.

While this primer has underscored how wellness capitalism can harm workers, it is important to remember that part of the history of labor struggle in the United States involves workers demanding that their health and safety be a priority for employers and the state.[118] As revealed during the COVID pandemic, for many workers, health and safety can take precedence over privacy; numerous workforces demanded safeguards like contact tracing, masking requirements, and social distancing.[119] Yet today's benefits maze leaves workers vulnerable to diffuse and prolonged harms and is animated by a vision of public health focused on cost-cutting instead

of treating good health as a social right. In this scenario, the benefit may not be worth the risks. It's true that we spend a significant portion of our lives working, making the worksite an important focus of public health measures, such as those needed to contain a pandemic or maintain occupational health and safety standards.[120] But how do we achieve this without exposing workers to new and insidious forms of surveillance, discrimination, and criminalization? As wellness capitalism advances a limited and punitive vision of public health, sorting out what role employers should continue to play in worker and national health is a vital topic that deserves more attention among both the labor movement and critics of employee wellness.

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