NOTE

Wellness at Work: Reconciling the Affordable Care Act with the Americans with Disabilities Act

*Michelle R. Seares**

ABSTRACT

In an effort to encourage employers to institute employee wellness programs, the Patient Protection and Affordable Care Act ("ACA") increases the permissible financial incentives employers may offer their employees in exchange for participation in such programs. The Americans with Disabilities Act ("ADA"), however, prohibits employers from subjecting employees to disability-related medical inquiries and exams unless such inquiries and exams are voluntary. If the financial incentive tied to the participation in a wellness program is so coercive as to render participation involuntary, such an incentive structure violates the ADA.

This Note examines the statutory conflict between the ACA and the ADA with regard to incentive-based employee wellness programs. Drawing on statutory and regulatory language, legislative history, and wellness programs in practice, this Note explains the likely discriminatory effects of wellness programs with large financial inducements. This Note concludes that the Equal Employment Opportunity Commission must promulgate new regulations that limit the permissible incentives for participatory wellness programs and explicitly address the ADA's applicability to incentive-based wellness-program provisions so that both employers and employees may determine their rights under the law.

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Introduction

In May 2009, Wendy Schobert was fired from her employment with Orion Energy Systems, Inc. ("Orion") after she refused to participate in the corporation's employee wellness program.[1] Orion's wellness program required Orion employees to complete a health risk assessment, including a self-disclosure of medical histories, blood work, and a physical fitness test.[2] If Ms. Schobert had submitted to the required medical exams, Orion would have covered all of her healthcare costs.[3] Ms. Schobert's decision not to participate, however, caused Orion to shift the entirety of the premium cost to Ms. Schobert and charge her a fifty-dollar monthly penalty for failure to participate

1 *See* Complaint at 5, EEOC v. Orion Energy Sys., Inc., No. 1:14–cv–1019 (E.D. Wis. Aug. 20, 2014) [hereinafter Orion Complaint].

2 *See id.* at 3–4.

3 *See id.* at 4.

in the fitness component, and led to her subsequent termination.[4] In August 2014, the Equal Employment Opportunity Commission ("EEOC")[5] filed a complaint under Title I of the Americans with Disabilities Act of 1990 ("ADA")[6] in the U.S. District Court for the Eastern District of Wisconsin on Ms. Schobert's behalf.[7] The complaint alleged that Orion violated Ms. Schobert's federally protected right to not be subjected to unlawful disability-related medical inquiries and exams.[8] Although Orion's wellness program is likely permissible under the Patient Protection and Affordable Care Act ("ACA"),[9] this case and other similar lawsuits recently filed by the EEOC emphasize the tension between the ACA and the ADA with regard to incentive-based wellness programs and the need for clarity in the law.

The *Orion* case exemplifies the problems facing both employers and employees due to the conflicting nature of the statutory schemes implemented by Congress with regard to incentive-based wellness programs. The ACA was enacted to redesign the healthcare system by increasing access to affordable health insurance and reducing the overall cost of healthcare.[10] One of the ACA's cost containment measures is the increase in incentives employers may offer as part of employee wellness programs—initiatives that encourage healthy lifestyles among employees, monitor employee health, and sometimes provide rewards for participation or achievement of certain health

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4 *See id.* at 4–5.

5 The Equal Employment Opportunity Commission ("EEOC") is charged with the administration, interpretation, and enforcement of the Americans with Disabilities Act. *See* 42 U.S.C. § 12205a (2012).

6 Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified in scattered sections of 42 U.S.C.), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

7 The EEOC is authorized to bring civil actions on behalf of aggrieved persons under the ADA pursuant to section 107(a) of the ADA, 42 U.S.C. § 12117(a), which incorporates by reference section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1), (3).

8 *See* Orion Complaint, *supra* note 1, at 1.

9 Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.). Although the conduct at issue occurred in 2009 and the ACA wellness-program provisions did not come into effect until 2014, the conduct at issue in the *Orion* case would be permissible under the law. *See id.* § 2705, 124 Stat. at 156–60 (codified at 42 U.S.C. § 300gg-4); *infra* Part II.A.

10 *See* Heather Baird, Note, *Healthy Compromise: Reconciling Wellness Program Financial Incentives with Health Reform*, 97 MINN. L. REV. 1474, 1474 (2013); *see also* E. Pierce Blue, *Wellness Programs, the ADA, and GINA: Framing the Conflict*, 31 HOFSTRA LAB. & EMP. L.J. 367, 367 (2014) ("Perhaps the most important goal [of the ACA], however, is a reduction in the overall cost of healthcare—also known as 'bending the cost curve.'").

outcomes.[11] The ADA, enacted in 1990[12] and amended in 2008,[13] "prohibits discrimination on the basis of disability and requires employers to offer reasonable accommodations to disabled" employees.[14] In passing the ADA, Congress sought to prohibit discrimination and eliminate stereotypes against the disabled or those "regarded as" disabled.[15] By requiring employees to submit to medical exams, incentive-based wellness programs have the potential of alerting employers to certain disabilities that may not be apparent without a medical exam or blood test.[16] Such medical examinations and inquiries increase the risk of workplace discrimination because regardless of whether employers actually see the information collected through wellness programs, employees may choose not to participate for fear of being discriminated against, and the high level of permissible incentives under the ACA potentially allows employers to penalize those who do not participate.[17] Without new regulations that (1) limit the permissible incentive for participatory wellness programs, and (2) explicitly address the ADA's applicability to incentive-based wellness-program provisions, employers and employees have no way to determine their rights under the law. Uncertainty in the law has the potential not only to increase workplace discrimination, but also to lead to

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11 *See* 42 U.S.C. § 300gg-4(j)(2); Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 78 Fed. Reg. 33,158, 33,158–59 (June 3, 2013) [hereinafter ACA Final Rule] (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 146, 45 C.F.R. pt. 147); Blue, *supra* note 10, at 367.

12 *See* Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified in scattered sections of 42 U.S.C.), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

13 *See* Pub. L. No. 110-325, 122 Stat. 3553.

14 MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, WORK LAW: CASES AND MATERIALS 563 (2d ed. 2010).

15 *See id.* at 657 (discussing the public policies supporting the passage of the ADA); *see also* Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 936 (2000) ("A perceived disability is defined by an employer's mistaken belief, not by any physical or mental characteristic of the employee.").

16 For example, disclosure of a blood test may alert an employer that the employee is HIV-positive. Individuals who are HIV-positive, but who do not yet have AIDs, are defined as disabled for purposes of the ADA. *See* CRAIN, KIM & SELMI, *supra* note 14, at 660 (citing Bragdon v. Abbott, 524 U.S. 624, 631 (1998)).

17 *See generally* Shannon Pettypiece, *Wellness Programs at Work May Not Be as Private as You Think*, BLOOMBERGBUSINESS (Dec. 16, 2014), http://www.bloomberg.com/news/articles/2014-12-16/your-wellness-program-at-work-may-not-be-as-private-as-you-think (discussing the possibility that employees may choose not to participate in wellness programs because they fear their health data will not be kept confidential).

the underuse of wellness programs and higher healthcare costs for employees—results that would undermine the purpose of the ACA.

In order to provide employers, employees, and courts with comprehensive guidance concerning the intersection of the ACA and ADA with regard to incentive-based wellness programs, the EEOC must promulgate regulations that explicitly address whether and to what extent a reward amounts to a requirement to participate or whether the withholding of a reward from nonparticipants constitutes a penalty, and thus renders the program involuntary. Although the EEOC issued a notice of proposed rulemaking ("NPRM") on this issue in April 2015,[18] the NPRM does not sufficiently limit the permissible inducements for incentive-based wellness programs. Accordingly, additional regulations are necessary.

Part I of this Note discusses wellness programs, their place in the health insurance market, and their rapid growth in the United States. Part II describes the legal context of wellness programs, discussing the statutory and regulatory provisions of both the ACA and the ADA and the judicial treatment of the intersection between the ACA and ADA's wellness program requirements thus far. Part II further outlines the EEOC's pending litigation in three federal district courts. Part III explains the problems associated with incentive-based wellness programs and the need for new regulations regarding the ADA's applicability to incentive-based wellness programs. Part IV proposes that the EEOC promulgate regulations stating that a wellness program is voluntary if: (1) the inducement for a health-contingent program does not exceed the thirty percent statutory limit; and (2) the inducement for a participatory program does not exceed fifteen percent of the total cost of coverage, taking into account both the employer and employee premium contributions. Part IV then applies the proposed regulations to the pending EEOC litigation. Finally, Part V addresses potential counterarguments to the proposed regulations.

I. What is a Wellness Program?

The term "wellness program" encompasses a wide array of employer and insurer initiatives that seek to improve the health of employees and policy users, thereby reducing insurance costs.[19] Financial incentives utilized by wellness programs discount the price of health

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18 Amendments to Regulations Under the Americans with Disabilities Act, 80 Fed. Reg. 21,659 (proposed Apr. 20, 2015) [hereinafter EEOC NPRM] (to be codified at 29 C.F.R. pt. 1630).

19 *See* Lindsay F. Wiley, *Access to Health Care as an Incentive for Healthy Behavior? An*

insurance by using differential premiums, copayments, and deductibles.[20] A premium is the amount that a policyholder must pay for an insurer to assume the risk of the policyholder's healthcare expenses.[21] A copayment is a fixed amount the policyholder is required to pay at the time he or she receives health services.[22] A deductible is "the total amount that a policyholder must pay out-of-pocket before" coverage can begin.[23]

Private health insurance can either be offered on an individual basis or as part of a group plan.[24] Group plans are provided by employers and pool risk among all members of the plan, meaning that everyone in the group pays the same premium, calculated through an estimate of the average cost of all members of the group.[25] Group plans allow employees to choose between single coverage and family coverage.[26] Under the ACA, single coverage offered by an employer is referred to as "employee-only coverage," and denotes the total premium cost for one employee.[27] Employers typically require that employees make contributions towards the total premium cost.[28] Covered employees contribute, on average, eighteen percent of the premium for single coverage and twenty-nine percent of the premium for family coverage.[29]

Wellness programs reduce employers' overall healthcare costs by conditioning the terms of coverage on compliance with recommended "health[y] behaviors."[30] Such programs range from offering a discounted gym membership to providing premium contribution reductions for participation in a medical assessment, weight loss, or

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Assessment of the Affordable Care Act's Personal Responsibility for Wellness Reforms, 11 IND. HEALTH L. REV. 635, 645–47 (2014).

20 *See* Janet L. Dolgin & Katherine R. Dieterich, *Weighing Status: Obesity, Class, and Health Reform*, 89 OR. L. REV. 1113, 1133 (2011).

21 Baird, *supra* note 10, at 1477.

22 *Id.*

23 *Id.*

24 *Id.* at 1478.

25 *Id.*

26 *See* Wiley, *supra* note 19, at 650 (distinguishing between costs for family coverage and single coverage); *see generally* KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, EMPLOYER HEALTH BENEFITS: 2014 ANNUAL SURVEY (2014) [hereinafter KAISER 2014 ANNUAL SURVEY], http://files.kff.org/attachment/2014-employer-health-benefits-survey-full-report (providing information on employer-sponsored health benefits for both single and family coverage).

27 *See* 42 U.S.C. § 300gg-4(j)(3) (2012); ACA Final Rule, *supra* note 11, at 33,159.

28 *See* KAISER 2014 ANNUAL SURVEY, *supra* note 26, at 1.

29 *See id.*

30 Wiley, *supra* note 19, at 638.

smoking cessation program.[31] Although it is unclear how effective such programs are, they are rapidly growing in the United States.[32]

According to a 2013 RAND Corporation report, about eighty percent of large employers currently conduct wellness programs that ask employees to submit to a detailed health risk assessment.[33] About two-thirds of these companies provide financial incentives to participating employees and "many employers are putting much greater amounts at stake."[34] For example, Johnson & Johnson's wellness program, which surveys employees about their mood and stress levels, exercise habits, and other medical data, provides a $500 discount on health insurance to participating employees, whereas nonparticipating employees are ineligible for such a discount.[35] Similarly, CVS charges employees who do not undergo a wellness exam $600 more per year in insurance costs than employees who choose to undergo the exam.[36] Thus, although workplace wellness programs are, in theory, meant to prevent the onset of diseases or to diagnose and treat diseases at an early stage,[37] such programs potentially have the effect of requiring employees to undergo disability-related medical inquiries and exams that are not work-related or, alternatively, raising the cost of healthcare for employees who choose not to participate in such programs.

II. The Legal Framework Governing Incentive-Based Wellness Programs

Incentive-based wellness programs implicate four statutes: the ACA, the Health Insurance Portability and Accountability Act ("HIPAA"),[38] the ADA, and the Genetic Information Nondiscrimination Act ("GINA").[39] The ACA and HIPAA determine the scope of

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31 *See* ACA Final Rule, *supra* note 11, at 33,159.

32 *See* Blue, *supra* note 10, at 369; *see also* Wiley, *supra* note 19, at 655 (noting that about half of U.S. employers with fifty or more employees claim to offer wellness programs).

33 RAND Corp., Workplace Wellness Programs Study 27 (2013) [hereinafter RAND Wellness Report], http://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR254/RAND_RR254.pdf.

34 Towers Watson & Nat'l Bus. Grp. on Health, The New Health Care Imperative: Driving Performance, Connecting to Value 4 (2014), http://www.towerswatson.com/en-US/Insights/IC-Types/Survey-Research-Results/2014/05/full-report-towers-watson-nbgh-2013-2014-employer-survey-on-purchasing-value-in-health-care.

35 *See* Pettypiece, *supra* note 17.

36 *Id.*

37 *See* ACA Final Rule, *supra* note 11, at 33,159–60.

38 Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 42 U.S.C.).

39 Genetic Information Nondiscrimination Act (GINA) of 2008, Pub. L. No. 110-223, 122 Stat. 881 (codified in scattered sections of 29 U.S.C. and 42 U.S.C.).

incentives that group health plans and insurers may offer while remaining in compliance with the prohibition on discrimination based on health factors.[40] In contrast, the ADA and GINA govern how and when employers may request medical information from their employees.[41] For this Note's purposes, however, the statutory focus is the ACA and the ADA. HIPAA and GINA regulate the data collected through wellness programs.[42] Despite the fact that employers may not actually see the information collected, this Note focuses on the possibility that employees will choose not to participate in wellness programs out of fear of discrimination based on their medical information, and that they will be penalized for that choice.[43]

Additionally, only wellness programs that conduct a medical inquiry or exam are implicated by the ADA.[44] Despite this statutory limitation, the majority of wellness programs do require employees to undergo a medical inquiry or exam.[45] The following sections detail the statutory and regulatory provisions of the ACA and the ADA and the administrative guidance and judicial applications that accompany them.

A. Permissible Wellness Programs Under the ACA

In an effort to curb soaring healthcare expenditures and plummeting insurance coverage, Congress and President Barack Obama enacted the ACA in 2010 to redesign the healthcare system to increase access to affordable health insurance and care.[46] A lesser-known way the ACA proposes to control costs is by encouraging employers to institute employee wellness programs—initiatives that encourage healthy lifestyles among employees, monitor health, and

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40 *See* ACA Final Rule, *supra* note 11, at 33,158–59; Blue, *supra* note 10, at 371.

41 *See* Mark A. Rothstein, *GINA, the ADA, and Genetic Discrimination in Employment*, 36 J.L. MED. & ETHICS 837, 837–38 (2008).

42 *See* Blue, *supra* note 10, at 371–74.

43 Thus, the ways in which HIPAA and GINA regulate the information collected through wellness programs is outside the scope of this Note, although the legislative intent and regulatory actions with regard to both HIPAA and GINA may be instructive and, therefore, tangentially related. *See infra* Part IV.

44 *See Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (July 27, 2000) [hereinafter EEOC Enforcement Guidance], http://www.eeoc.gov/policy/docs/guidance-inquiries.html ("If a program simply promotes a healthier life style but does not ask any disability-related questions or require medical examinations . . . it is not subject to the ADA's requirements concerning disability-related inquiries and medical examinations."); *infra* Part II.B.

45 *See* RAND WELLNESS REPORT, *supra* note 33, at 26.

46 Baird, *supra* note 10, at 1474.

sometimes provide financial incentives for participation or the achievement of certain health outcomes.[47] The ACA's wellness-program provisions were first introduced as an exception to the antidiscrimination provisions of HIPAA.[48] HIPAA and the ACA generally prohibit group health plans and insurers from discriminating on the basis of health factors, such as a disability or medical condition.[49] Wellness programs that meet the requirements specified in the ACA, however, do not have to comply with the antidiscrimination provisions.[50]

The ACA defines a wellness program as "a program offered by an employer that is designed to promote health or prevent disease."[51] The ACA divides wellness programs into two categories: participatory programs and health-contingent programs.[52] Participatory wellness programs either do not provide a reward or do not condition obtaining a reward on the satisfaction of a standard related to a health factor.[53] Examples of participatory wellness programs include programs that reimburse the cost of a gym membership or that provide a reward for participation in a diagnostic testing program.[54] Participatory programs are permissible under the ACA so long as they are made available to all similarly situated individuals.[55] Despite comments requesting the imposition of additional requirements with respect to participatory wellness programs, such as accounting for an individual's income or other personal circumstances when determining whether a participatory wellness program is available to all similarly situated individuals, the Departments of Health and Human Services, Labor, and of the Treasury determined that additional requirements were unnecessary.[56] The Departments explained that "[a]vailability regardless of health status ensures that the general pro-

47 *Id.* at 1474–75; *see* 42 U.S.C. § 300gg-4 (2012).

48 Baird, *supra* note 10, at 1481.

49 *See* 42 U.S.C. § 300gg-4(a); Baird, *supra* note 10, at 1484; *see also* Blue, *supra* note 10, at 372 ("Essentially, a covered entity cannot require person A to pay a higher premium then [sic] similarly situated person B simply because person A has a disability or medical condition.").

50 *See* ACA Final Rule, *supra* note 11, at 33,159; s*ee also* Blue, *supra* note 10, at 372 ("[T]he nondiscrimination provisions are not to be read to 'prevent a group health plan from establishing premium discounts or rebates or modifying otherwise applicable copayments or deductibles in return for adherence to [wellness] programs . . . .'" (quoting 26 U.S.C. § 9802(b)(2)(B) (2012)).

51 42 U.S.C. § 300gg-4(j)(1)(A).

52 ACA Final Rule, *supra* note 11, at 33,160–61; *see* 42 U.S.C. § 300gg-4(j)(2), (3).

53 42 U.S.C. § 300gg-4(j)(2); ACA Final Rule, *supra* note 11, at 33,160.

54 ACA Final Rule, *supra* note 11, at 33,161.

55 42 U.S.C. § 300gg-4(j)(2); ACA Final Rule, *supra* note 11, at 33,161.

56 *See* ACA Final Rule, *supra* note 11, at 33,161.

hibition against discrimination based on a health factor is not implicated."[57] The Departments left open the possibility, however, that more may be required of employers implementing participatory wellness programs by stating that "compliance with the [ACA wellness-program provisions] is not determinative of compliance with any other applicable Federal or State law, which may impose additional accessibility standards for wellness programs."[58] Thus, an employer may condition obtaining a reward, no matter the amount, on the participation in its wellness program so long as the program is available and accessible to all similarly situated individuals.

In contrast, health-contingent wellness programs require an individual to satisfy a standard related to a health factor in order to obtain a reward, such as requiring an employee to perform or complete an activity relating to a health factor, or requiring an employee to attain or maintain a specific health outcome.[59] Health-contingent programs may require the employee to submit to a medical test or screening as an initial standard and then require targeted individuals who do not meet the initial standard to participate in wellness activities.[60] Health-contingent programs must comply with five requirements[61]: (1) such programs must provide eligible individuals the opportunity to qualify for the reward at least once per year, (2) the size of the reward must not exceed thirty percent of the cost of employee-only coverage under the plan,[62] (3) the program must be reasonably designed to promote health or prevent disease,[63] (4) the full reward must be available to all similarly situated individuals, and (5) the plan materials must inform participants of alternative means of achieving the reward.[64]

The ACA treats rewards and penalties as interchangeable.[65] This likely flows from the illusory nature of the distinction between re-

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57 *Id.*

58 *Id.*

59 42 U.S.C. § 300gg-4(j)(3); ACA Final Rule, *supra* note 11, at 33,161.

60 *See* ACA Final Rule, *supra* note 11, at 33,161.

61 42 U.S.C. § 300gg-4(j)(3); ACA Final Rule, *supra* note 11, at 33,162.

62 The available reward for health-contingent wellness programs may be increased to fifty percent of the employee contribution if the Secretaries of Health and Human Services, Labor, and the Treasury determine that such an increase in appropriate. 42 U.S.C. § 300gg-4(j)(3)(A).

63 A program is "reasonably designed" if the program "has a reasonable chance of improving the health of, or preventing disease in, participating individuals and it is not overly burdensome, is not a subterfuge for discriminating based on a health status factor, and is not highly suspect in the method chosen to promote health or prevent disease." *Id.* § 300gg-4(j)(3)(B). Whether a program is reasonably designed must be evaluated "based on all the relevant facts and circumstances." ACA Final Rule, *supra* note 11, at 33,162.

64 42 U.S.C. § 300gg-4(j)(3); ACA Final Rule, *supra* note 11, at 33,162–67.

65 *See* ACA Final Rule, *supra* note 11, at 33,160. The final rule states:

wards and penalties: a wellness program reward can have the same exact financial effect on employees as a penalty.[66] For example, if an employer seeks to vary employees' premium contributions based on whether they participate in a health risk assessment, the employer can do so by offering either a reward or a penalty.[67] Consider the following two scenarios. An employer may set all premium contributions at $100 and require employees who choose not to participate to pay a fifty-dollar monthly surcharge. Alternatively, the employer may set all premium contributions at $150 and provide a fifty-dollar monthly discount for all workers who participate. In both scenarios, employees who do not participate in the wellness program pay $150 per month for their premium contribution, which is $50 more than employees who do participate. Thus, either way, employees who choose not to participate are required to pay a higher contribution rate.[68]

Under the ACA, rewards for health-contingent programs may not exceed thirty percent of the cost of employee-only coverage under the plan,[69] including both the employee and employer premium contributions.[70] Thus, the financial incentive for health-contingent programs may not exceed thirty percent of an employee's total premium cost. For example, if the total premium cost is $5,000, the reward for a health-contingent program may not exceed $1,500. Additionally, the ACA permits an increase of the limit to fifty percent if the enforcing agencies determine such an increase is necessary.[71] The enforcing agencies have stated that, for now, the maximum differential will remain at thirty percent except in the case of smoking cessation programs.[72]

> References . . . to an individual obtaining a reward include both obtaining a reward (such as a discount or rebate of a premium or contribution, a waiver of all or part of a cost-sharing mechanism (such as a deductible, copayment, or coinsurance), an additional benefit, or any financial or other incentive) and avoiding a penalty (such as the absence of a surcharge or other financial or nonfinancial disincentives). References . . . to a plan providing a reward include both providing a reward (such as a discount or rebate of a premium or contribution, a waiver of all or part of a cost-sharing mechanism, an additional benefit, or any financial or other incentive) and imposing a penalty (such as a surcharge or other financial or nonfinancial disincentive).

Id.

66 *See* Wiley, *supra* note 19, at 656 n.84.

67 *See id.*

68 *See id.*

69 42 U.S.C. § 300gg-4(j)(3)(A).

70 ACA Final Rule, *supra* note 11, at 33,178.

71 42 U.S.C. § 300gg-4(j)(3)(A).

72 ACA Final Rule, *supra* note 11, at 33,168.

In contrast, there is no limit on the reward an employer may offer for participatory programs.[73] Thus, an employer may condition an employee's entire premium cost on participation in a wellness program so long as the program is available to all similarly situated employees.[74] In such situations, the difference between what a participating employee pays versus a nonparticipating employee may far exceed the fifty dollars described in the above scenarios, as the average total premium for a single coverage plan as of 2014 is about $5,800.[75] Accordingly, for both participatory and health-contingent programs, employers may choose to offer a significant financial incentive—whether a differential in premiums, copayments, or deductibles—either as a penalty for employees who fail to participate or meet a wellness objective, or as a discount to those who do.[76] Regardless of how the financial incentive is formulated by the employer, the effect is that employees who are unable or unwilling to achieve the standards will pay more for health insurance.[77]

B. ADA Provisions Related to Incentive-Based Wellness Programs

In an effort to "level the playing field" for disabled individuals, Congress enacted the ADA to protect both individuals with disabilities and nondisabled individuals who are mistakenly "regarded as" disabled from workplace discrimination.[78] Provisions of the ADA that are relevant to the discussion of incentive-based wellness programs are the inclusion of both individuals with substantially limiting impairments and those mistakenly "regarded as" disabled,[79] the prohibition

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73 42 U.S.C. § 300gg-4(j)(2). The only requirement for participatory wellness programs is that they be made available to "all similarly situated individuals." *Id.*

74 This and similar programs are what gave rise to current EEOC litigation. *See, e.g.*, EEOC v. Honeywell Int'l, Inc., No. 14-4517, 2014 WL 5795481, at *1 (D. Minn. Nov. 6, 2014) (conditioning a $500 surcharge on participation in wellness program); Complaint at 4, EEOC v. Flambeau, Inc., No. 3:14-cv-00638 (W.D. Wis. Sept. 30, 2014) [hereinafter Flambeau Complaint] (conditioning three quarters of the premium cost on participation in wellness program); Orion Complaint, *supra* note 1, at 4–5 (conditioning the entire monthly premium cost of $413.43 on participation in wellness program and $50 on participation in a fitness component of the program).

75 *See Average Single Premium per Enrolled Employee for Employer-Based Health Insurance*, KAISER FAMILY FOUND., http://kff.org/other/state-indicator/single-coverage/ (last visited Jan. 15, 2016).

76 *See* Baird, *supra* note 10, at 1482–83.

77 *Id.* at 1483.

78 Travis, *supra* note 15, at 902–03.

79 42 U.S.C. § 12102(1)(A), (C) (2012).

against disability-related medical inquiries and exams that are not job-related,[80] and the insurance safe harbor provision.[81]

The ADA prohibits employers from discriminating against persons with disabilities in regards to the "terms, conditions, and privileges of employment"[82] and requires employers to offer reasonable accommodations to disabled individuals.[83] To establish that an employee is disabled, the employee must prove that: (1) he is physically or mentally impaired such that he is substantially limited in "one or more major life activities,"[84] (2) he has "a record of such an impairment,"[85] or (3) that he is "regarded as having such an impairment."[86] A person is regarded as disabled if "the individual establishes that he or she has been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[87] Thus, if an employer perceives, albeit incorrectly, that an employee is disabled, the employer may not discriminate against the employee on the basis of that perceived disability.

Additionally, Title I of the ADA strictly limits when an employer may make disability-related inquiries of employees or subject employees to medical examinations.[88] As section 102(d) of the ADA mandates, a covered entity may not subject employees to disability-related medical inquiries or exams that are not job-related or consistent with business necessity unless it meets one of the statutory exceptions.[89]

The EEOC defines "disability-related inquiry" broadly to include "a question (or series of questions) that is likely to elicit information about a disability,"[90] and "medical examination" as "a procedure or test that seeks information about an individual's physical or mental impairments or health."[91] Further, the EEOC and the majority of the federal circuit courts that have considered this issue have determined this provision applies to all employees, not just to employees with dis-

80 *Id.* § 12112(d)(4)(A); 29 C.F.R. § 1630.13(b) (2014).

81 29 C.F.R. § 1630.16(f).

82 42 U.S.C. § 12112(a).

83 *Id.* § 12112(b)(5)(A).

84 *Id.* § 12102(1)(A).

85 *Id.* § 12102(1)(B).

86 *Id.* § 12102(1)(C).

87 *Id.* § 12102(3)(A).

88 *Id.* § 12112(d)(4).

89 *Id.* § 12112(d)(4)(A); 29 C.F.R. § 1630.13(b) (2014).

90 EEOC Enforcement Guidance, *supra* note 44 (Q&A #1 Response).

91 *Id.* (Q&A #2 Response).

abilities.[92] Thus, entities covered by the ADA are prohibited from obtaining medical information from their employees unless the request meets one of the limited exceptions provided in the statute and its implementing regulations.[93]

The ADA contains three exceptions to the prohibition on disability-related medical inquiries and exams. First, it permits medical exams and inquiries that are "job-related and consistent with business necessity."[94] In order to take advantage of this exception, an employer must have "a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition or (2) an employee will pose a direct threat due to a medical condition."[95] Second, the ADA allows inquiries "into the ability of an employee to perform job-related functions."[96]

Third, and most importantly for the purpose of this Note, the ADA permits covered entities to "conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site."[97] Thus, the ADA allows the collection of medical information from employees as part of a voluntary wellness program.[98] EEOC guidance states that "[a] wellness program is 'voluntary' as long as an employer neither requires participation nor penalizes employees who do not

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92 *See id.*; Fredenburg v. Contra Costa Cty. Dep't of Health Servs., 172 F.3d 1176, 1182 (9th Cir. 1999) (holding that person without a disability can bring a claim under § 102(d)(4) of the ADA); Griffin v. Steeltek, Inc. 160 F.3d 591, 595 (10th Cir. 1998) (holding that job applicant without a disability can sue under the ADA regarding medical history questions); *see also* Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1229 (10th Cir. 1997) ("It makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability.").

93 42 U.S.C. § 12112(d)(4); 29 C.F.R. § 1630.14(c), (d).

94 42 U.S.C. § 12112(d)(4)(A); 29 C.F.R. § 1630.14(c).

95 EEOC Enforcement Guidance, *supra* note 44, at Q&A 5 (footnote omitted).

96 42 U.S.C. § 12112(d)(4)(B); 29 C.F.R. § 1630.14(c).

97 42 U.S.C. § 12112(d)(4)(B); *see* 29 C.F.R. § 1630.14(d).

98 *See* EEOC NPRM, *supra* note 18, at 21,660 (explaining that "health programs" include workplace wellness programs); EEOC Enforcement Guidance, *supra* note 44 (Q&A #22 Response); *see also* Blue, *supra* note 10, at 376 ("[B]oth [the ADA and GINA] permit the collection of medical information for 'employee health programs' and services offered 'as part of a wellness program' as long as certain conditions are met."). It is important to note that the ADA only implicates wellness programs that make disability-related inquiries and require medical examinations. *See* EEOC Enforcement Guidance, *supra* note 44 ("If a program simply promotes a healthier life style but does not ask any disability-related questions or require medical examinations . . . it is not subject to the ADA's requirements concerning disability-related inquiries and medical examinations.").

participate."[99] This EEOC guidance regarding wellness programs was promulgated in 2000, long before the enactment of the ACA,[100] and until recently, the EEOC had not taken a position as to whether and to what extent a reward or the withholding of a reward may be so coercive as to render a program involuntary.[101]

In April 2015, the EEOC released an NPRM addressing "the extent to which employers may use incentives to encourage employees to participate in wellness programs that include disability-related inquiries and/or medical examinations."[102] The proposed rulemaking purports to address the issue in four principal ways. First, the proposed rule defines "voluntary" to mean that "a covered entity [ ] (1) [d]oes not require employees to participate; (2) does not deny coverage . . . for non-participation . . . (except pursuant to allowed incentives); and (3) does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees within the meaning" of the ADA.[103] Second, the proposed rule permits employers to offer financial incentives up to thirty percent of the total cost of employee-only coverage, for both participatory and health-contingent programs.[104] Third, the rule requires that all employers offering wellness programs provide a notice to employees, clearly explaining "what medical information will be obtained, who will receive the medical information, how the medical information will be used, the restrictions on its disclosure, and the methods the [employer] will employ to prevent improper disclosure . . . ."[105] Lastly, the NPRM limits disclosure of the medical information obtained through the wellness program to aggregate form only, to prevent employers from potentially obtaining confidential information about individual employees.[106] The NPRM marks the first time the EEOC has definitively addressed the statutory conflict between the ACA and ADA with regard to workplace wellness pro-

99 EEOC Enforcement Guidance, *supra* note 44 (Q&A #22 Response).

100 *See id.*

101 U.S. Equal Emp't Opportunity Comm'n, Opinion Letter on the ADA: Voluntary Wellness Programs & Reasonable Accommodation Obligations (Jan. 18, 2013), http://www.eeoc.gov/eeoc/foia/letters/2013/ada_wellness_programs.html ("The EEOC has not taken a position on whether and to what extent a reward amounts to a requirement to participate, or whether withholding of the reward from non-participants constitutes a penalty, thus rendering the program involuntary.").

102 EEOC NPRM, *supra* note 18, at 21,662.

103 *Id.* at 21,662.

104 *See id.*

105 *Id.* at 21,662–63.

106 *Id.* at 21,663.

grams. Although many of the suggestions in the NPRM are helpful in addressing this issue, the NPRM fails to sufficiently limit the permissible incentives for wellness programs because it does not differentiate between participatory and health-contingent programs.

The final ADA provision relevant to incentive-based wellness programs is its insurance safe-harbor. The ADA safe-harbor provision is a "limited exemption that is only applicable to those who establish, sponsor, observe or administer benefit plans, such as health and life insurance plans."[107] The purpose of the provision is to "permit the development and administration of benefit plans in accordance with accepted principles of risk assessment."[108] Thus, an entity falling under this exception may classify risks even if such classification results in limitations on individuals with disabilities.[109] Activities covered by the safe-harbor provision, however, may not be used as a "subterfuge to evade the purposes of [the ADA]."[110]

The safe-harbor provision was enacted to protect the business operations of insurance companies, with particular focus on underwriting and classifying risks.[111] Underwriting is the process insurance companies use to determine the premiums that they will charge entities or individuals purchasing insurance coverage.[112] Wellness programs are "one step removed from basic underwriting."[113] When an employer implements a wellness program, the insurance company has already determined the appropriate insurance premiums, and the wellness program serves to further reduce its overall healthcare costs.[114] Despite this characterization, the only court to address the ADA's application to incentive-based wellness programs held that the program at issue was covered by the safe-harbor provision, suggesting that wellness programs were actually part of the underwriting process.[115]

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107 29 C.F.R. pt. 1630, app. § 1630.16(f) (2014).

108 *Id.*

109 *Id.*

110 *Id.*

111 *See* Blue, *supra* note 10, at 378.

112 *Id.* at 379.

113 *Id.*

114 *Id.*

115 Seff v. Broward Cty., 778 F. Supp. 2d 1370, 1374 (S.D. Fla. 2011) ("The wellness program falls under the safe harbor provision because it is designed to develop and administer present and future benefits plans using accepted principles of risk assessment."), *aff'd*, 691 F.3d 1221 (11th Cir. 2012).

C. Seff v. Broward County's *Ruling on the ADA Safe-Harbor Provision*

The first, and presently only, case addressing the intersection between the ACA and ADA wellness-program provisions is *Seff v. Broward County*.[116] In *Seff*, an employee filed a claim against Broward County, Florida, alleging that the County's wellness program violated the ADA by requiring employees to undergo biometric testing and submit to a health risk assessment, and by penalizing employees who refused to participate by charging a twenty-dollar surcharge per pay period.[117] The County successfully argued that its wellness program was protected under the ADA safe-harbor provision.[118] Relying on two district court cases—*Barnes v. Benham Group, Inc.*[119] and *Zamora-Quezada v. HealthTexas Medical Group of San Antonio*[120]—the U.S. District Court for the Southern District of Florida ruled that the wellness program was a "term" of a bona fide benefit plan and thus fell under the safe-harbor provision.[121]

In *Barnes*, an employee who was terminated after refusing to complete a health questionnaire attached to an application for health benefits filed a complaint alleging that the questionnaire constituted an unlawful medical inquiry under the ADA.[122] The *Barnes* Court held that the questionnaire fell within the ADA's safe-harbor provision because the inquiry was "solely for the purpose of underwriting, classifying, and administering risks."[123] The district court in *Seff* also relied on *Zamora-Quezada* to define underwriting as "the application of the various risk factors or risk classes to a particular individual or group for the purposes of determining whether to provide coverage"[124] and risk classification as "the identification of risk factors and the groupings of those factors which pose similar risks."[125]

Relying on these two cases, the district court in *Seff* found the wellness program to be within the scope of the safe-harbor provision due to the program's basis in "underwriting, classifying, and adminis-

116 Seff v. Broward Cty., 778 F. Supp. 2d 1370 (S.D. Fla. 2011), *aff'd*, 691 F.3d 1221 (11th Cir. 2012).

117 Seff v. Broward Cty., 691 F.3d 1221, 1222 (11th Cir. 2012).

118 *See Seff*, 778 F. Supp. 2d at 1372.

119 Barnes v. Benham Grp., Inc., 22 F. Supp. 2d 1013 (D. Minn. 1998).

120 Zamora-Quezada v. HealthTexas Med. Grp. of San Antonio, 34 F. Supp. 2d 433 (W.D. Tex. 1998).

121 *Seff*, 778 F. Supp. 2d at 1373–74.

122 *Barnes*, 22 F. Supp. 2d at 1017–18.

123 *Id.* at 1020.

124 *Seff*, 778 F. Supp. 2d at 1373 (quoting *Zamora-Quezada*, 34 F. Supp. 2d at 443).

125 *Id.* (quoting *Zamora-Quezada*, 34 F. Supp. 2d at 443).

tering risks because its ultimate goal is to sponsor insurance plans that maintain or lower its participant's premiums."[126] Thus, the district court in *Seff* read "underwriting and classifying risks" as going "beyond the usual process of setting premiums based on actuarial data" to include all programs that determine premium rates.[127]

On appeal, the U.S. Court of Appeals for the Eleventh Circuit only addressed the district court's alleged failure to consider the testimony of the County's benefits manager that the wellness program was not a term of the health plan.[128] The Eleventh Circuit affirmed, refusing to disturb the district court's finding that the wellness program was a term of the County's health plan.[129] The three-judge panel, however, did not address the district court's analysis regarding the scope of underwriting or the application of the ADA safe-harbor provision.[130]

As *Seff* is the only case addressing this issue, it is difficult to determine *Seff*'s impact and the uncertainty in the law remains. If the district court's safe-harbor analysis is accepted, then the ADA will have no impact on wellness programs. The EEOC, however, has explicitly rejected the approach taken in *Seff*, stating that it "does not believe that the ADA's 'safe harbor' provision applicable to insurance . . . is the proper basis for finding wellness program incentives permissible."[131] Rather, the EEOC explained that, because the ADA permits an employer to conduct voluntary medical examinations,[132] "[r]eading the insurance safe harbor as exempting these programs from coverage would render the 'voluntary' provision superfluous."[133] Accordingly, if the EEOC's rejection of *Seff* is incorporated into the final regulation, it is unlikely *Seff*'s reasoning will be widely accepted.

D. Pending EEOC Litigation

Although *Seff* is the only final decision on this issue, three currently pending cases may be instructive on whether the Florida district court's reasoning was correct. In the District of Minnesota, the Eastern District of Wisconsin, and the Western District of Wisconsin, the EEOC has sued three corporations, alleging that each has violated the

126 *Id.* at 1374.

127 Blue, *supra* note 10, at 380.

128 Seff v. Broward Cty., 691 F.3d 1221, 1223–24 (11th Cir. 2012).

129 *Id.* at 1224.

130 *See id.* at 1223–24.

131 EEOC NPRM, *supra* note 18, at 21,662 n.24.

132 42 U.S.C. § 12112(d)(4)(B) (2012).

133 EEOC NPRM, *supra* note 18, at 21,662 n.24.

ADA because its wellness program constitutes involuntary disability-related medical inquiries and exams that are not job related.[134] In all three cases, the pleadings suggest the corporations' wellness programs comply with the ACA's incentive-based wellness-program provisions. Accordingly, the lawsuits highlight the tension and uncertainty that persists in regards to how the ACA and ADA are intended to interact. Further, the cases represent a strong statement by the EEOC that in order to avoid the prospect of litigation, employers must comply with both statutes.

In each case, the wellness program at issue required employees to undergo biometric testing and provided participating employees with some sort of financial incentive whereas nonparticipating employees were subject to financial surcharges and in some cases fired.[135] In *EEOC v. Honeywell International, Inc.*,[136] employees who underwent the testing became eligible for a health savings account to which Honeywell would contribute between $250 and $1500 annually.[137] Employees who chose not to participate could not qualify for a health savings account and were charged an annual $500 surcharge.[138] Additionally, nonparticipating employees were "presumed to be tobacco users" and were charged an additional $1000 surcharge unless they participated in a tobacco cessation program, submitted to a biomedical screening report from their physician that shows that they do not use tobacco, or worked with a Health Advocate to establish that they are nicotine free.[139] In *EEOC v. Orion Energy Systems, Inc.*,[140] Orion would have covered all of a participating employee's healthcare costs.[141] Employees who declined to participate were required to pay their entire premium cost and were charged an additional $50 per month for failure to complete a fitness component of the company's wellness program.[142] In *EEOC v. Flambeau, Inc.*,[143] Flambeau would have covered 75% of the premium for participating employees,

134 *See* EEOC v. Honeywell Int'l, Inc., No. 14-4517, 2014 WL 5795481 (D. Minn. Nov. 6, 2014) (denying motion for preliminary injunction); Flambeau Complaint, *supra* note 74, at 4; Orion Complaint, *supra* note 1, at 5.

135 *See Honeywell*, 2014 WL 5795481, at *1; Flambeau Complaint, *supra* note 74, at 3–4; Orion Complaint, *supra* note 1, at 3–5.

136 EEOC v. Honeywell Int'l, Inc., No. 14-4517, 2014 WL 5795481 (D. Minn. Nov. 6, 2014).

137 *Id.* at *1.

138 *Id.*

139 *Id.* at *2.

140 EEOC v. Orion Energy Sys., Inc., No. 1:14-cv-1019 (E.D. Wis. filed Aug. 20, 2014).

141 *See* Orion Complaint, *supra* note 1, at 4.

142 *See id.* at 4–5.

143 EEOC v. Flambeau, Inc., No. 3:14-cv-00638 (W.D. Wis. filed Sept. 30, 2014).

whereas nonparticipating employees were charged a penalty and forced to cover their entire premium costs.[144]

All three of these companies' programs are participatory wellness programs such that each program conditions obtaining a reward on participation rather than satisfaction of a health standard. These programs appear to comply with the ACA as there is no statutory limit on the financial incentive a participatory wellness program may provide.[145] In all three cases, the EEOC alleges that the wellness programs violate the ADA because the programs constitute involuntary medical examinations that are not job-related.[146] The EEOC argues the use of financial incentives causes employees to "lose the right to decide without coercion whether to participate" in the corporation's wellness program.[147] In response, each defendant raises the same two arguments. First, relying on *Seff*, each corporate defendant argues that the wellness programs are covered by the ADA safe-harbor provision.[148] Second, the defendants argue that the programs comply with the ADA voluntary requirement because financial incentives allow employees to make "an informed economic choice" about whether to participate in the wellness programs.[149]

The *Honeywell* defendants raised an additional argument—that the EEOC enforcement guidelines are not entitled to deference "in light of Congresses' [sic] express approval of surcharges used in conjunction with wellness programs, as expressed in the [ACA]."[150] In that case, the Minnesota District Court denied the EEOC's motion for a preliminary injunction against Honeywell on the ground that the EEOC could not establish a threat of irreparable harm.[151] The court's decision was grounded in the EEOC's ability to continue to investigate the lawfulness of Honeywell's wellness program without the injunction, and a recognition that none of the employees who filed a complaint with the EEOC were in danger of actual harm as they had

144 *See* Flambeau Complaint, *supra* note 74, at 4.

145 *See* 42 U.S.C. § 300gg-4(j)(2) (2012); *supra* Part II.A.

146 *See supra* note 134 and accompanying text.

147 EEOC v. Honeywell Int'l, Inc., No. 14-4517, 2014 WL 5795481, at *2 (D. Minn. Nov. 6, 2014).

148 *See id.* at *4; Answer and Affirmative Defenses at 5, EEOC v. Flambeau, Inc., No. 3:14-cv-00638 (W.D. Wis. Nov. 24, 2014) [hereinafter Flambeau Answer]; Answer and Affirmative Defenses at 5, EEOC v. Orion Energy Sys., Inc., No. 2:14-cv-1019 (E.D. Wis. Oct. 16, 2014) [hereinafter Orion Answer].

149 *Honeywell*, 2014 WL 5795481, at *3; *see* Flambeau Answer, *supra* note 148, at 5; Orion Answer, *supra* note 148, at 5.

150 *Honeywell*, 2014 WL 5795481, at *5.

151 *Id.* at *4.

already submitted to biometric testing.[152] Citing both the *Orion* and *Flambeau* cases, however, the court in *Honeywell* suggested that "[s]hould this matter proceed on the merits, the Court will have the opportunity to consider both parties' arguments after the benefit of discovery in order to determine whether [the] wellness program violates the ADA."[153]

III. The Problem with Incentive-Based Wellness Programs

Incentive-based wellness programs with large financial inducements potentially subject employees to disability-related medical inquiries and exams that are not job related, in violation of the ADA. Congress's decision to increase permissible incentives under the ACA suggests that Congress intended to allow employers to institute wellness programs with some degree of financial inducement. By doing so, however, Congress could not have intended to overrule the ADA.[154] The absence of clear guidance on the intersection between the ACA and ADA with regard to employee wellness programs has led to erroneous results in the courts[155] that potentially provide a basis for employers to argue wellness programs that utilize coercive financial inducements are permissible.[156]

A. Incentive-Based Wellness Programs May Increase Workplace Discrimination

Incentive-based wellness programs have the potential to increase workplace discrimination because "[w]ellness programs with aggressive financial incentives push the boundary between voluntary and coercive."[157] As explained above, the ADA requires that wellness programs subjecting employees to disability-related medical inquiries or exams be voluntary.[158] The purpose of the voluntary requirement is to prevent employers from learning which employees have disabilities that are not apparent from observation.[159] Accordingly, a program

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152 *See id.* at *3.

153 *Id.* at *5.

154 *See infra* Part III.A.

155 *See* Seff v. Broward Cty., 778 F. Supp. 2d 1370, 1374 (S.D. Fla. 2011) (holding that wellness program fell within ADA's insurance safe harbor), *aff'd*, 691 F.3d 1221 (11th Cir. 2012).

156 *See supra* note 148 and accompanying text.

157 Baird, *supra* note 10, at 1490.

158 *See supra* Part II.B.

159 *See* S. Rep. No. 101-116, at 36 (1989). Expanding on the purpose of the requirement, the House Report stated:

> An inquiry or medical examination that is not job-related serves no legitimate employer purpose, but simply serves to stigmatize the person with a disability. For

that requires employees to undergo medical inquiries or exams that may reveal a disability places the employee at an increased risk of discrimination. For example, a blood test may alert an employer that the employee is HIV-positive, something that the employer would not necessarily have known without the blood test. Individuals who are HIV-positive, but who do not yet have AIDs, are defined as disabled for purposes of the ADA.[160] Thus, the employee who does not want the employer to know that she is HIV-positive may be afraid to participate in a program that would reveal such information. A desire to maintain the confidential nature of a disability, however, may force the employee to pay a higher rate for health insurance than other employees.[161]

The permissible financial incentives that an employer may offer in order to induce an employee to participate in wellness program under the ACA are broad for health-contingent programs and virtually unlimited for participatory programs. Accordingly, "[i]t is not difficult to imagine that a court could find that a wellness program with significant financial incentives, although ostensibly voluntary, in reality functions as a mandatory wellness program, and thereby runs afoul of the ADA."[162]

One could argue that Congress intended the resulting tension between the ACA and the ADA[163] and that "Congress' express endorsement of surcharges in the ACA irrefutably demonstrates that Congress does not view such surcharges as a violation of the ADA."[164] The ACA's implementing regulations, however, specifically state that "compliance with [the ACA] . . . is not determinative of compliance

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> example, if an employee starts to lose a significant amount of hair, the employer should not be able to require the person to be tested for cancer unless such testing is job-related. . . . While the employer might argue that it does not intend to penalize the individual, the individual with cancer may object merely to being identified, independent of the consequences . . . . [because] being identified as disabled often carries both blatant and subtle stigma.

H.R. REP. NO. 101-485, pt. 2, at 75 (1990).

160 *See* Bragdon v. Abbott, 524 U.S. 624, 631 (1998).

161 *See* Pettypiece, *supra* note 17.

162 Baird, *supra* note 10, at 1490.

163 *See* Blue, *supra* note 10, at 384 ("The second option is to accept the tension as a result intended by Congress."). *Contra* EEOC v. Honeywell Int'l, Inc., No. 14-4517, 2014 WL 5795481, at *5 (D. Minn. Nov. 6, 2014) ("Honeywell contends that 'Congress would not expressly endorse in one federal statute what is illegal under another pre-existing federal statute.'" (quoting Memorandum of Law in Opposition to Plaintiff's Motion for Temporary Restraining Order and Expedited Preliminary Injunction at 30, *Honeywell*, 2014 WL 5795481)).

164 Memorandum of Law in Opposition to Plaintiff's Motion for Temporary Restraining Order and Expedited Preliminary Injunction, *supra* note 163, at 30.

with . . . any other State or Federal law, including the ADA."[165] The regulations' references to the ADA and caution that employers and service providers "should consider the applicability of" the ADA[166] suggests that Congress did not intend to supersede the ADA's limitation on disability-related medical inquiries and exams with the increase in incentives for employer wellness programs. Further, the ACA's regulations note some of the differences between the ACA's reasonable alternative standard and the ADA's reasonable accommodation requirement,[167] suggesting that Congress foresaw employers having to comply with both statutes.

B. Wellness Programs Do Not Fall Under the ADA Safe-Harbor Provision

Seff held that wellness programs fall under the ADA safe-harbor provision, and thus are not subject to the ADA's prohibition against disability-related medical inquiries and exams.[168] The court based its decision on its analysis that the "wellness program [is] a term of the [defendant] County's group health plan."[169] Although it is true that most wellness programs are part of a comprehensive benefit program and use principles of risk assessment to control risk and costs,[170] this broad reading of underwriting is inconsistent with the EEOC's interpretation of the regulations implementing the safe-harbor provision. The EEOC describes the safe-harbor provision as a "limited exception" and "only applicable to those who establish, sponsor, observe or administer benefit plans";[171] namely, insurance companies rather than employers.

Additionally, the only factors the court in *Seff* considered were whether the wellness program was a term in a benefit program and whether it was based on accepted risk principles.[172] The court's analysis, however, excluded any consideration of voluntariness. The lan-

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165 ACA Final Rule, *supra* note 11, at 33,168.

166 *Id.*

167 *See id.* at 33,160 n.11 ("The 'reasonable alternative standard' is separate and distinct from the standard for 'reasonable accommodations' under the Americans with Disabilities Act . . . .").

168 Seff v. Broward Cty., 778 F. Supp. 2d 1370, 1374 (S.D. Fla. 2011), *aff'd*, 691 F.3d 1221 (11th Cir. 2012).

169 *Id.* at 1373.

170 *See* Baird, *supra* note 10, at 1491.

171 29 C.F.R. pt. 1630, app. § 1630.16(f) (2014); *see* Blue, *supra* note 10, at 381 (arguing that district court's analysis in *Seff* goes "well beyond" EEOC guidance on the safe-harbor provision's applicability).

172 *See Seff*, 778 F. Supp. 2d at 1373–74.

guage of the ADA clearly contemplates the use of wellness programs in its exception for voluntary medical inquiries and exams in response to employee health programs.[173] If all wellness programs fell within the safe-harbor provision, the voluntary wellness exception would be superfluous.[174]

Further, the wellness program at issue in *Seff* is distinct from the more aggressive programs described in *Orion*, *Flambeau*, and *Honeywell*. In *Seff*, the wellness program imposed a nominal penalty of twenty dollars per pay period,[175] in contrast to an entire annual premium cost,[176] which can be thousands of dollars.[177] To address the persisting uncertainty in the law and ensure that other courts do not adopt *Seff*'s safe-harbor analysis, the EEOC must explicitly address the interplay between the ACA and ADA with regard to incentive-based wellness programs that offer more than a mere *de minimis* reward or penalty.

IV. The EEOC Must Amend the ADA's Implementing Regulations to Address Incentive-Based Wellness Programs

In order to provide employers, employees, and courts with comprehensive guidance regarding the ADA's applicability to incentive-based wellness programs, the EEOC must promulgate regulations that explicitly address what amount of financial inducement is permissible under the ADA. Specifically, the EEOC should promulgate new regulations that a wellness program is voluntary if: (1) the inducement for a health-contingent program does not exceed the thirty-percent statutory limit; and (2) the inducement for a participatory program does not exceed fifteen percent of the total cost of employee-only coverage. New regulations are necessary to allow employers to design lawful wellness programs and to ensure that employees are aware of their

173 42 U.S.C. § 12112(d)(4)(B) (2012) ("A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an *employee health program* available to employees at that work site." (emphasis added)).

174 Blue, *supra* note 10, at 381 ("To the extent that a 'safe harbor' is needed, the [ADA] provides one with its exception for voluntary medical inquiries in response to employee health programs. The *Seff* reading of the insurance safe harbor would seem to read that provision out of the statute." (footnote omitted)); *see supra* text accompanying notes 131–133.

175 *Seff*, 778 F. Supp. 2d at 1371–72.

176 *See* Orion Complaint, *supra* note 1, at 4.

177 In 2014, the total average single premium per enrolled employee for employer-based health insurance was $5,832, with an average employee contribution of $1,234 and an average employer contribution of $4,598. *Average Single Premium per Enrolled Employee for Employer-Based Health Insurance*, *supra* note 75.

rights under the law. To provide both employers and employees with appropriate notice, the EEOC must identify the line between voluntary and involuntary financial inducements. Further, without the promulgation of regulations addressing this issue, employees and the EEOC must rely on nonstatutory enforcement guidance that is not entitled to judicial deference.[178] With these concerns in mind, the EEOC should issue new regulations that are tailored to the statutory conflict at issue.

A. Proposed Regulations

The EEOC should issue regulations that specify at what level a financial inducement to participate in an employee wellness program becomes involuntary. At the outset, the EEOC should specify that the regulations address all financial inducements—whether or not the employer frames the inducement as a reward or penalty.

First, the EEOC should define *health-contingent* wellness programs as voluntary so long as the financial inducement does not exceed the thirty percent limit under the ACA.[179] The ACA increased the maximum reward for health-contingent wellness programs from twenty percent to thirty percent of the total cost of employee-only coverage under the health plan and authorized the enforcing government agencies to increase the maximum reward to as much as fifty percent "if the Departments determine that such an increase is appropriate."[180] So far, such an increase has only been determined necessary for tobacco cessation programs.[181] As "few health-contingent wellness programs today come close to meeting the 20 percent limit,"[182] the ACA's choice to increase the twenty percent limit to thirty percent is unlikely to result in an explosion of health-contingent programs based on high-percentage inducements.

Further, "[h]ealth-contingent incentive programs appear to be among the least common [wellness] incentive schemes" currently used

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178 *See* Christensen v. Harris Cty., 529 U.S. 576, 587 (2000) (stating that agency "policy statements, agency manuals, and enforcement guidelines" are not entitled to deference and "lack the force of law"); *see also* EEOC v. C.R. England, Inc., 644 F.3d 1028, 1047 n.16 (10th Cir. 2011) (refusing to give deference to EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA because the "EEOC's interpretations are not controlling").

179 42 U.S.C. § 300gg-4(j)(3)(A) (2012).

180 ACA Final Rule, *supra* note 11, at 33,169.

181 *Id.* at 33,168.

182 *Id.* at 33, 168 & n. 32 (noting that "the maximum premium differential offered in a survey . . . was 16 percent").

by employers.[183] Of the relatively small number of health-contingent programs, smoking cessation programs are the most common.[184] As smoking cessation programs generally do not subject employees to medical exams or inquiries, the majority of health-contingent schemes are not likely to implicate the antidiscrimination provisions of the ADA. A higher cap on health-contingent incentives thus has a lesser likelihood of increasing workplace discrimination. Further, retaining the thirty-percent cap avoids the need for the implementing departments to amend the ACA's implementing regulations—it incorporates the new and increased maximum permissible inducement of thirty percent for health-contingent programs.

Second, the EEOC should define *participatory* wellness programs as voluntary so long as the financial inducement for participation in the program does not exceed fifteen percent of the total cost of employee-only coverage, taking into account both employer and employee contributions toward the cost of coverage for the benefit package under which the employee is receiving coverage. This would require the same calculation as health-contingent programs but with a lower cap. By ensuring that the percentage is determined based on both the employee and employer contributions to the plan, employers are prevented from setting employee contributions very high as a way to evade the requirement.

A cap of fifteen percent for participatory programs is advisable because it is half of the proposed cap for health-contingent programs. The EEOC did, at one point, suggest that a wellness program would be considered voluntary if the financial incentive did not exceed the twenty percent limit under HIPAA.[185] This guidance, however, was subsequently withdrawn, suggesting that the EEOC believed twenty percent to be too high.[186] The EEOC has since changed its tune, proposing that employers should be permitted to offer up to thirty percent of the total cost of employee-only coverage for all wellness

183 *Id.* at 33,171.

184 TOWERS WATSON & NAT'L BUS. GRP. ON HEALTH, RAISING THE BAR ON HEALTH CARE: MOVING BEYOND INCREMENTAL CHANGE 12 (2010), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCAQFjAA&url=https%3A%2F%2Fwww.towerswatson.com%2FDownloadMedia.aspx%3Fmedia%3D%257B4A024110-2738-42EE-8F14-7EF06F4B839D%257D&ei=mcLGVPDXL8THsQSFqoGoCg&usg=AFQjCNFM_NVanQVVeKefyNAY848YcVBvzg&bvm=bv.84349003,d.cWc (indicating that twenty-five percent of employers offer financial incentives for employees to become tobacco-free, whereas only four percent offered financial incentives for maintaining a specific BMI, and only three percent offered incentives for maintaining a certain cholesterol or blood pressure level).

185 Baird, *supra* note 10, at 1490.

186 *See id.*

programs.[187] The problem with the EEOC's proposal is that it fails to differentiate between participatory and health-contingent programs. Under the ACA, participatory programs are not required to meet the five requirements that apply to health-contingent programs and thus the size of the inducement is not limited in any way.[188] The ACA regulations suggest that the "reasonable alternative" requirement is sufficient to ensure that such programs would not amount to a subterfuge for discrimination.[189] The ability of employers to condition an unlimited amount on participation in wellness programs, however, has created high costs for individuals who choose not to participate and violates employees' rights to be free from disability-related medical inquiries and exams that are not job-related by coercing participation or penalizing those who do not.[190]

Further, studies suggest that the use of financial inducements is more common in participatory wellness programs. For example, incentives for completion of health risk assessments, a type of participatory program used by eighty percent of large employers,[191] are offered by thirty percent of employers with a wellness program.[192] Thus, more so than health-contingent programs, participatory program incentives must be closely regulated in order to ensure compliance with the ADA and protect employees' rights. Accordingly, the EEOC proposal of capping the permissible inducement at thirty percent of the total cost of employee-only coverage for all wellness programs fails to sufficiently limit the acceptable incentive for participatory programs. A regulatory scheme that differentiates between health-contingent and participatory wellness programs is necessary to account for the reality that participatory programs are used by more employers and thus affect a greater number of employees. A fifteen percent cap will appropriately limit the incentives for participatory programs by accounting for their wide-spread use by employers.

The EEOC has recently promulgated regulations under GINA that suggest that some level of financial inducement would be permissible under the ADA. GINA's implementing regulations allow financial inducements to complete health risk assessments that include

187 *See* EEOC NPRM, *supra* note 18, at 21,662.

188 ACA Final Rule, *supra* note 11, at 33,162, 33,168; *see also supra* Part II.A.

189 *See* ACA Final Rule, *supra* note 11, at 33,160.

190 *See supra* Part II.D (discussion of Honeywell, Flambeau, and Orion cases).

191 *See* RAND WELLNESS REPORT, *supra* note 33, at 27.

192 *Id.* at 69.

genetic information questions, provided the employer makes clear that the inducement will be available whether or not the participant answers the specific questions regarding genetic information.[193] It thus follows from the GINA regulations that some level of financial inducement for participation in a wellness program is permissible. Indeed, the EEOC has recently stated "that allowing certain incentives related to wellness programs, while limiting them to prevent economic coercion that could render provision of medical information involuntary, is the best way to effectuate the purposes of the wellness program provisions of both laws."[194]

Exactly where the line should be drawn between permissible and impermissible incentives, however, remains the issue for administrative agencies and courts, and using one cap for two different kinds of wellness programs does not solve the issue. There is a significant difference between the prior twenty-percent limit under HIPAA and the new thirty-percent (and potentially fifty-percent) limit in the ACA for health-contingent programs, not to mention the potentially unlimited incentive for participatory programs.[195] The congressional intent of the medical-inquiry provision of the ADA—to prevent employees from being subjected to involuntary disability-related medical inquiries and exams that are not job-related—can only be realized by placing a limit on the potential incentive an employer may offer as a financial inducement.

B. Application of Proposed Regulations

If the proposed regulations had been in place when Orion had instituted its wellness plan, instead of shifting the entire premium cost to employees such as Ms. Schobert who chose not to participate, Orion would have only been permitted to levy a charge of fifteen percent of the total cost of employee-only coverage against her. For example, assume that the total premium cost for a single enrolled employee is $5,000, with an employee contribution of $1,000 and an

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193 The regulation states in relevant part:

> [A] covered entity may not offer a financial inducement for individuals to provide genetic information, but may offer financial inducements for completion of health risk assessments that include questions about family medical history or other genetic information, provided the covered entity makes clear, in language reasonably likely to be understood by those completing the health risk assessment, that the inducement will be made available whether or not the participant answers questions regarding genetic information.

29 C.F.R. § 1635.8(b)(2)(ii) (2014).

194 EEOC NPRM, *supra* note 18, at 21,662.

195 Baird, *supra* note 10, at 1491.

employer contribution of $4,000.[196] Under this hypothetical, the maximum financial inducement Orion could offer for participation in the wellness program would be fifteen percent of $5,000, or $750. Although this figure may seem high, it is much less than shifting the entire premium cost to the employee. Assuming the above employee and employer contributions, shifting the entire premium cost to Ms. Schobert would have forced her to pay an additional $4,250 for exercising her right to be free from disability-related medical inquiries and exams, a price that would likely coerce an employee to participate in the program. By placing a cap on the financial inducement, employees are "able to make an informed economic choice about whether"[197] to participate in the wellness program.

V. COUNTERARGUMENTS

In addition to the issues addressed in Part III, other counterarguments to consider are: (1) that the proposed regulations are impermissible because all incentive structures violate the ADA's voluntary requirement, (2) caps on the level of financial inducements will deter the use of wellness programs and thus undermine an important purpose of the ACA, and (3) a more viable solution would be for Congress to amend the ADA or draft a new law.

The proposed regulations, which allow wellness programs to use financial inducements to incentivize participation in medical inquiries and exams, do not violate the ADA. Although it may be argued that any incentive structure violates the ADA's requirement that disability-related medical inquiries and exams be voluntary,[198] capping the amount an employer may offer as a financial incentive ensures that such inducements are not so coercive so as to render the program involuntary. Furthermore, the EEOC has suggested that financial inducements may be permissible in certain circumstances, as evidenced by the GINA regulations and the EEOC's notice of proposed

196 The pleadings from the *Orion* case do not state what the total cost of single employee coverage was at the time the events in question occurred. The numbers used in the example herein are loosely based on data collected by the Kaiser Family Foundation. *See Average Single Premium per Enrolled Employee for Employer-Based Health Insurance*, *supra* note 75. For 2013, the total average single premium per enrolled employee for employer-based health insurance was $5,571, with an average employee contribution of $1,170 and an average employer contribution of $4,401. *Id.*

197 EEOC v. Honeywell Int'l, Inc., No. 14-4517, 2014 WL 5795481, at *3 (D. Minn. Nov. 6, 2014).

198 *See* Families USA, Comment Letter on Wellness Program Designs in Violation of HIPAA and Other Federal Non-Discrimination Laws 2 (Apr. 5, 2013), http://www.regulations.gov/#!documentDetail;D=EBSA-2012-0031-0408.

rulemaking.[199] Another argument that follows is that instead of capping the permissible level of financial inducements, all wellness programs should provide an alternative means to obtain the full reward that does not require an employee to volunteer any private health information to a third party or their employer.[200] However, the ACA already contemplates this suggestion through its requirement that awards be available to all similarly situated individuals, who may qualify by satisfying a "reasonable alternative standard."[201] Thus, the proposed regulations do not violate the ADA.

In addition, the proposed caps on financial inducements will not deter the use of wellness programs. To the contrary, the lack of a cap for financial incentives for participatory wellness may deter the use of such programs because the flood of recent EEOC lawsuits has signaled to employers that instituting such a program may put them at an increased risk of litigation. Furthermore, the lack of a cap undermines the purpose of the ACA, which is to reduce healthcare costs, by increasing such costs for employees who choose to exercise their rights under the ADA. Placing caps on the permissible level of financial incentives will ensure that the cost of employee healthcare does not soar to coercive levels and will clarify what types of programs employers may offer without fear of litigation.

Lastly, the suggestion that Congress should amend the ADA or draft a new law is not a viable option given today's political realities. Congress's approval rating has averaged less than twenty percent since 2010, with a near all-time low of fifteen percent in 2014.[202] Further, "the [last] Congress remain[ed] on pace to be one of the least legislatively productive in recent history."[203] Although there has been a congressional changeover, it is unlikely that the new Congress would be able to pass legislation in this area at this time. Thus, the proposed regulatory remedy is the best resolution of the interplay between the ACA and ADA with regard to incentive-based wellness programs.

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199 *See supra* notes 193–94 and accompanying text.

200 *See* Families USA, *supra* note 198, at 2–3.

201 ACA Final Rule, *supra* note 11, at 33,163.

202 *See* Rebecca Riffkin, *2014 U.S. Approval of Congress Remains Near All-Time Low*, GALLUP (Dec. 15, 2014), http://www.gallup.com/poll/180113/2014-approval-congress-remains-near-time-low.aspx.

203 Drew DeSilver, *Congress Still on Track to Be Among Least Productive in Recent History*, PEW RES. CTR. (Sept. 23, 2014), http://www.pewresearch.org/fact-tank/2014/09/23/congress-still-on-track-to-be-among-least-productive-in-recent-history/.

Conclusion

Incentive-based wellness programs with large financial inducements have the potential to subject employees to disability-related medical inquiries and exams that are not job-related, in violation of the ADA. Congress's decision to increase permissible incentives in the ACA, however, suggests that Congress intended to allow employers to institute wellness programs with some degree of financial inducement. Given the statutory conflict, the EEOC must promulgate regulations addressing the ADA's applicability to incentive-based wellness programs in order to provide employers, employees, and courts with clear guidance. Retaining the permissible financial inducement for health-contingent programs at the levels authorized by the ACA will effectuate Congress's specific intent to increase the permissible financial incentives for such programs. Capping the permissible inducement for participatory programs at a lower level than health-contingent programs ensures that employers cannot condition exorbitant amounts on an employee's participation to the point where participation would no longer be voluntary. Accordingly, in order to provide employers, employees, and courts with comprehensive guidance concerning the intersection of the ACA and ADA with regard to incentive-based wellness programs, the EEOC must promulgate regulations that explicitly address whether and to what extent a reward amounts to a requirement to participate or whether the withholding of a reward from nonparticipants constitutes a penalty rendering the program involuntary, and must do so by differentiating between participatory and health-contingent workplace wellness programs.