Saint Louis University Journal of Health Law & Policy

Volume 11
Issue 1 *Coping with Health Care Market Concentration*

Article 11

2017

Working Well(ness): The Impact of the ADA Final Rule on Wellness Program Regulation and a Proposal for a Zero-Incentive Rule

Stefanie Brody
stefanie.brody@slu.edu

WORKING WELL(NESS): THE IMPACT OF THE ADA FINAL RULE ON WELLNESS PROGRAM REGULATION AND A PROPOSAL FOR A ZERO-INCENTIVE RULE

ABSTRACT

The Equal Employment Opportunity Commission (EEOC) recently amended wellness program regulation under 29 C.F.R. § 1630.14 of the Americans with Disabilities Act (ADA). Amidst criticism of the new rule, this article proposes the EEOC return to a zero-incentive policy for voluntary wellness programs that include disability-related inquiries or medical examinations. First, it reviews existing literature on wellness programs and the ADA, highlighting the legal and ethical challenges facing American workers with disabilities. Then, it explores the latest case law, illustrating the effects of the new rule compared to the proposal. By eliminating the thirty percent incentive limit and redefining "voluntary" to disallow all financial incentives and penalties, the EEOC would best realize the ADA's goal to protect workers from harmful cost shifting and from being compelled to give employers disability-related information that could lead to workplace discrimination.

I. INTRODUCTION

In May 2016, the Equal Employment Opportunity Commission (EEOC) issued a final rule, which took effect January 2017, regulating employee wellness programs under Title I of the Americans with Disabilities Act (ADA).[1] The rule responds to conflicting legal and policy regulations regarding wellness programs.[2] The final rule reflects the EEOC's intention to harmonize ADA regulations with the Health Insurance Portability and Accountability Act (HIPAA) and the Patient Protection and Affordable Care Act (ACA).[3] The rule defines "voluntary wellness programs," identifies permissible incentives, and provides interpretive guidance for structuring non-discriminatory wellness programs.[4] Yet its attempt to resolve some regulative issues has sparked new issues of contention among wellness program proponents and critics alike.

In this paper, I propose the EEOC return to a zero-incentive policy for voluntary wellness programs that includes disability-related inquiries or medical examinations. I argue that despite their popularity, wellness programs have not produced results warranting abridgment of longstanding ADA protections, nor should those protections be sacrificed for the supposed benefit of other laws, including the politically jeopardized ACA. The ADA stands on its own, and its rules should be in the best interests of its own legislative aims.

Section II contextualizes wellness programs by summarizing recent trends among programs in the United States. Section II also considers the known merits of wellness programs and the relationship between the legal and policy goals of promoting wellness programs. Section II continues with an introduction to the existing literature on the interaction between wellness programs and the ADA—discussing ongoing ethical and legal conflicts, including the clash between the narrative of personal responsibility and the reality of disability discrimination in the workplace. This section also examines comments the EEOC received on the proposed final rule in its preliminary stages. Turning to litigation, I direct the reader to several key cases illustrating the development of judicial interpretation of how wellness programs function under the ADA, focusing primarily on the definition of "voluntary" and the insurance safe harbor provision in *EEOC v. Flambeau, Inc*. and *EEOC v. Orion Energy Systems, Inc*.

Section III discusses recent litigation to illustrate the ways in which the final rule does and does not address previously identified concerns about the legal

1. Regulations Under the Americans with Disabilities Act, 81 Fed. Reg. 31,126, 31,126 (May 17, 2016) (to be codified at 29 C.F.R. pt. 1630).

2. *Id*.

3. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *EEOC Issues Final Rules on Employer Wellness Programs* (May 16, 2016), https://www.eeoc.gov/eeoc/newsroom/release/5-16-16.cfm (last visited July 31, 2017).

4. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.14(d)(2)–(3) (2016).

conflicts between wellness program promotion and the ADA, analyzing the repercussions of both the final rule and the proposed zero-incentive rule in *Flambeau*, *Orion*, and *AARP v. EEOC*. The final rule has injected a new legal problem for voluntariness under the ADA on which courts have yet to reach consensus, though these cases show that courts are giving deference to the EEOC's compromise-driven explanation for the digression from its previous interpretation. The recommendation put forth in this paper is for the EEOC to amend 29 C.F.R. § 1630.14(d)(2)–(3) by removing the thirty percent incentive limit and redefining "voluntary" health programs involving disability-related inquiries or medical examinations as programs in which an employer may neither require participation nor penalize employees who do not participate. A zero-incentive rule best encapsulates the legislative intent to protect workers from discrimination based on disability.

II. BACKGROUND

A. A Brief Introduction to Wellness Programs

Wellness programs are a booming industry among large employers, and today most programs are tied to employer-sponsored health insurance plans.[5] Employers offer a wide range of wellness programs—from gift card raffles for weight loss and incentives for wearing FitBits to smoking cessation programs and reduced insurance premiums.[6] The two main types of programs are participatory and health-contingent, the latter of which requires employees to hit certain health benchmarks to earn rewards (or accrue penalties if benchmarks are not reached).[7] Both programs, but particularly health-contingent programs, may require employees to divulge medical information by completing health risk assessments (HRAs)—for which employees answer questions about their health, including "medical history, health status, and lifestyle"—as well as undergoing biometric screenings—for which employees are examined by a health care professional and data is collected from blood work and other medical

5. *See* Wendy K. Mariner, *The Affordable Care Act and Health Promotion: The Role of Insurance in Defining Responsibility for Health Risks and Costs*, 50 DUQ. L. REV. 271, 299–300 (2012).

6. KAISER FAM. FOUND. & HEALTH, RESEARCH & EDU. TR., *Employer Health Benefits Survey 2016 Summary of Findings* 8 (2016), https://kaiserfamilyfoundation.files.wordpress.com/2016/09/employer-health-benefits-2016-summary-of-findings.pdf [hereinafter KFF & HRET] (presenting data for employer-sponsored health benefits in 2016 as collected by the Kaiser Family Foundation and the Health Research & Educational Trust in their annual survey of employer-sponsored health benefits among private and nonfederal public employers with three or more workers).

7. Emily Koruda, Note, *More Carrot, Less Stick: Workplace Wellness Programs & the Discriminatory Impact of Financial and Health-Based Incentives*, 36 B.C. J.L. & SOC. JUST. 131, 138 (2016).

tests on their risk factors, such as "body weight, cholesterol, blood pressure, stress, and nutrition."[8] This data is then used to evaluate a given employee's health risks.[9] Among employers offering some form of a wellness program in 2016, over half of large firms (employing 200 or more workers) incorporate HRAs and biometric screenings.[10] Because large firms comprise over half of U.S. employment, the programs selected by those firms may affect large numbers of workers.[11] Once the data is obtained, employees may have to meet certain health benchmarks—such as quitting smoking or improving cholesterol levels—as part of their participation in the wellness program.[12]

The number of wellness programs in the United States has risen dramatically in the twenty-first century.[13] While wellness programs are making headlines, such as with the proliferation of wearable fitness trackers,[14] the 2016 Kaiser Family Foundation's (KFF's) eighteenth annual Employer Health Benefits Survey indicates the upward trend may be ebbing.[15] Since 1979, the federal government has encouraged employers to promote wellness at work.[16] By the late 1990s, approximately half of employees reported being offered wellness programs.[17] Jumping forward with the KFF annual survey, the number of large employers offering wellness programs surged to eighty-two percent in 2008 and peaked at ninety-nine percent in 2013.[18] The spike in the number of wellness programs was "likely due to expectations that they would improve employee health and productivity and reduce health care costs."[19] Indeed, employers generally implement wellness programs for two broad purposes: (1) cost savings

8. KFF & HRET, *supra* note 6, at 7.

9. Kristin Madison, *Employer Wellness Incentives, the ACA, and the ADA: Reconciling Policy Objectives*, 51 WILLAMETTE L. REV. 407, 413 (2015).

10. KFF & HRET, *supra* note 6, at 7 ex. J.

11. Madison, *supra* note 9, at 413.

12. Koruda, *supra* note 7, at 138–39.

13. E. Pierce Blue, *Wellness Programs, the ADA, and GINA: Framing the Conflict*, 31 HOFSTRA LAB. & EMP. L.J. 367, 369 (2014).

14. FITBIT, *FitBit Group Health*, www.fitbit.com/group-health (last visited July 9, 2017).

15. KFF & HRET, *supra* note 6, at 7 (reporting that eighty-three percent of large employers in 2016 offered at least one wellness program); KAISER FAM. FOUND. & HEALTH RESEARCH & TR., *Employer Health Benefits Annual Survey 2014* 200 ex. 12.2 (2014), https://kaiserfamily foundation.files.wordpress.com/2014/09/8625-employer-health-benefits-2014-annual-survey6.pdf [hereinafter KFF & HRET, *Survey* 2014] (reporting that ninety-eight percent of large employers in 2014 offered at least one wellness program); KAISER FAM. FOUND. & HEALTH RESEARCH & TR., *Employer Health Benefits Annual Survey 2013* 184 ex. 12.2 (2013), files.kff.org/attachment/full-report-ehbs-2013-abstract [hereinafter KFF & HRET, *Survey* 2013] (reporting that ninety-nine percent of large employers in 2013 offered at least one wellness program).

16. Madison, *supra* note 9, at 412.

17. Blue, *supra* note 13, at 370.

18. *Id.*

19. Haijing Huang et al., *Incentives, Program Configuration, and Employee Uptake of Workplace Wellness Programs*, 58 J. OCCUPATIONAL & ENV. MED. 30, 30 (2016).

and (2) improved employee health.[20] The rationale for focusing on employee health is to reduce health care insurance costs for the employer as well as reduce employee absenteeism and increase productivity.[21] The saturated market for wellness programs in 2013 tapered off slightly to ninety-eight percent in 2014, and the most recent 2016 data reports only eighty-three percent of large employers have wellness programs.[22] Wellness programs are certainly not going to disappear in the next decade, but it is possible that unsuccessful cost saving—both in research studies and in practice—has contributed to the slight decline in the last two years.

B. The Effectiveness of Wellness Programs at Saving Money and Improving Health

In order to recommend a rule that would make certain wellness programs unlawful, it is useful to consider the existing research on the effectiveness of such programs on the two goals mentioned above: saving money and improving health. If a policy of bargaining away core protections of the ADA is to be supportable, then wellness programs' cost savings and health improvement ought to be measurable and provable. While the industry marketers of wellness programs promise results,[23] there is a lack of credible scholarship on wellness program performance—and those studies performed do not find that wellness programs are having the desired impact on either of the two goals of cost savings or health improvement.[24]

One problem with measuring savings from wellness programs is the manner in which premiums are counted.[25] Insurance companies continue to charge higher and higher premiums, and, as a result, employers adopt health plans that cost-shift to employees.[26] For wellness programs tied to insurance plans, an employer may think it has achieved overall cost savings when its own premium costs to the insurance company are reduced; often, however, the insurance company actually raises the total premiums and cost-shifts the difference to the employees.[27] Other ways an employer may misperceive total savings when adopting a wellness program are by reducing benefits or increasing deductibles, both of which allow the employer to reduce its out-of-pocket premium costs to

20. Mariner, *supra* note 5, at 300.

21. *Id.*

22. KFF & HRET, *supra* note 6, at 8; KFF & HRET, *Survey* 2014, *supra* note 15, at 200 ex. 12.2; KFF & HRET, *Survey* 2013, *supra* note 15, at 184 ex. 12.2.

23. Madison, *supra* note 9, at 413.

24. E. Pierce Blue, Attorney-Advisor to EEOC Commissioner Chai Feldblum, Invited Speaker at Saint Louis University School of Law: Employee Wellness Plans and the ADA: How Does the ADA Apply? (Oct. 25, 2016) (on file with Saint Louis University School of Law).

25. Mariner, *supra* note 5, at 309.

26. Koruda, *supra* note 7, at 139.

27. Madison, *supra* note 9, at 414.

the detriment of the employee.[28] The main issue is that the employer pays less in premiums than it did before the wellness program, the employees who participate in the program may pay the same as before or slightly less depending on the incentive, and the insurance company receives higher premiums. Such a scenario is not a reduction in total health care costs, which is what wellness programs are often marketed to accomplish and which skirts close to the kind of program the EEOC specifically denounces in § 1630.14(d)(1): to meet the requirement of "reasonably designed," a wellness program must have "a reasonable chance of improving the health of, or preventing disease in participating employees," and "[a] program also is not reasonably designed if it exists mainly to shift costs from the covered entity to targeted employees based on their health."[29] Wellness program leaders tell employers that wellness programs bring savings—both to the employer and to the employees.[30] Despite numerous "examples in the literature of companies that say they saved money in wellness . . . the results are never plausibility-tested."[31] Moreover, the ones most burdened are those employees who do not want to share their health information and thus opt out of the wellness programs, ultimately paying large financial penalties. Individuals with disabilities or chronic illnesses, "who are more vulnerable to health disparities . . . [and are] already wracked with medical expenses, can feel coerced to participate in wellness programs . . . [and] are less able to attain employer-designated health benchmarks because of inherent health disparities."[32]

A 2015 Research and Development (RAND) Corporation study about employee uptake in wellness programs contributed to the growing body of research showing a lack of cost savings achieved by wellness programs.[33] Such studies are important background for legal policy decisions, especially given that "the heated debate is carried out with little empirical evidence on whether incentives are actually effective in increasing employee participation, let alone

28. *See id.*; *see also* Barry Hall, *Health Incentives: The Science and Art of Motivating Healthy Behaviors*, BENEFITS Q., 2nd Quarter 2008, at 20–21 (rationalizing the disparate cost shifting by conceiving of health promotion itself as the employees' quantifiable gain).

29. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.14(d)(1) (2016).

30. Madison, *supra* note 9, at 413.

31. AL LEWIS, WHY NOBODY BELIEVES THE NUMBERS: DISTINGUISHING FACT FROM FICTION IN POPULATION HEALTH MANAGEMENT 128 (2012).

32. Koruda, *supra* note 7, at 139.

33. Kandice A. Kapinos et al., *Does Targeting Higher Health Risk Employees or Increasing Intervention Intensity Yield Savings in a Workplace Wellness Program?* 57 J. OCCUPATIONAL & ENV. MED. 1257, 1261 (2015) (finding that data from a preventive-oriented wellness program collected between 2003 and 2011 showed no cost savings for those employees targeted for chronic risks while active lifestyle management participation showed a modest twenty dollar savings based on less expensive outpatient visits).

improving health outcomes and reducing cost."[34] The 2015 employee uptake study involved employers seeking to increase employee participation rates in wellness programs, which is highly relevant to the EEOC's argument that wellness programs can only be effective if they actually acquire all the employees' data.[35] Scholars note that "[e]mployers appear to be more enthusiastic about health promotion than employees."[36] Without the employees incentivized to provide their data, the programs cannot accurately target areas in need of risk management among the pool of employees.[37] Thus, it is not surprising that increased financial incentives showed a twenty-three percent increase in employee participation in the wellness program.[38]

When measuring the success of a wellness program, researchers should look beyond economic and health indicators: "Successful implementation can be difficult and should be weighed against the actual return on investment, considered along with not only the legal costs but also the potential effects for discrimination."[39] That is, even if a wellness program provably cuts costs and improves health, it would still be undesirable if it results in potential discrimination.[40] It is not an acceptable trade to exchange protections against discrimination with monetary gains and "wellness," a term that the next section explains carries normative connotations in the context of discrimination on the basis of a disability.

C. The History of Wellness Programs and the ADA: Identifying Ethical and Legal Conflicts

The ADA regulates employers' access to employee medical information in order to protect workers from being discriminated against on the basis of a disability.[41] The ADA limits the extent to which employers may use incentives to encourage employees to participate in wellness programs that ask them to respond to disability-related inquiries or undergo medical examinations:

34. Huang, *supra* note 19, at 30.

35. Blue, *supra* note 13, at 382.

36. Mariner, *supra* note 5, at 300.

37. Blue, *supra* note 13, at 382.

38. Huang, *supra* note 19, at 33.

39. Carrie Griffin Basas, *What's Bad About Wellness? What the Disability Rights Perspective Offers About the Limitations of Wellness*, 39 J. HEALTH POL. POL'Y & L. 1035, 1045 (2014).

40. *See* SOEREN MATTKE ET AL., WORKPLACE WELLNESS PROGRAMS STUDY: FINAL REPORT 98 (2013) (explaining that "[a]dditionally, reasonable accommodations for persons with disabilities (e.g., offering classes at accessible, ADA-compliant sites and providing informational material in plain language and alternate formats, such as large print) are important to ensure accessibility; however, case study employers did not discuss tailoring wellness programs to the needs of people with disabilities").

41. Americans with Disabilities Act, 42 U.S.C. § 12112(a), (d)(1) (2012); Blue, *supra* note 13, at 374.

> A covered entity shall not require a medical examination and shall not make medical inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.[42]

The ADA permits three exceptions to when an employer can acquire medical information from its employees: (1) when inquiries are job-related and consistent with business necessity, (2) when inquiries pertain to the employee's ability to perform job-related functions, and (3) when inquiries are a voluntary component of an employer-sponsored wellness program.[43] Thus, wellness programs are expressly provided for by the ADA. However, the legal definition of "voluntary" under the ADA has become extremely contentious in its new form in the final rule.[44]

Another key aspect of wellness programs covered by the ADA is reasonable accommodation. If a person with a disability cannot participate in an activity or attain a certain benchmark, the program must offer an alternate activity or standard the individual is able to meet.[45] For example, if a wellness program offers a reward for walking a certain amount, an individual who cannot walk must be given the opportunity to do an alternate fitness activity; similarly, if a wellness program penalizes employees who fail to achieve a goal of a specific low cholesterol level, and an individual is unable to do so due to a chronic medical condition or other disability, then some alternative goal must be set that is reasonably tailored to that individual's needs.[46] "Reasonable alternative standards do not need to be anticipated or crafted in advance; they can be created as the need arises, taking into consideration the facts and circumstances of the employee's limitations and the 'reasonable design' of the program itself."[47] The legislative intent is "to ensure equal access to benefits."[48]

The entitlement to reasonable accommodation under the ADA is challenging in the arena of wellness programs, where health is framed as a personal responsibility with financial consequences for failure to meet certain norms in the workplace. The very idea that wellness is attainable through quantitative biometrics or pure autonomous effort "construct[s] an image that further marginalizes people with disabilities."[49] Courts also tend to define wellness under the same framework of personal and economic responsibility "based on a theory that 'encouraging employees to get involved in their own healthcare leads

42. 42 U.S.C. § 12112(d)(4)(A).
43. Blue, *supra* note 13, at 376.
44. *See id.*
45. *Id.* at 377; 42 U.S.C. § 12101(b)(5)(A).
46. Blue, *supra* note 13, at 377.
47. Basas, *supra* note 39, at 1042 (internal citations omitted).
48. Blue, *supra* note 13, at 377.
49. Basas, *supra* note 39, at 1062.

to a more healthy population that costs less to insure.'"[50] From an ethical standpoint, scholars—including Wendy Mariner, Carrie Griffin Basas, and Peter Conrad—have cautioned against viewing health status as a personal failing for which to be financially and socially penalized.[51] Rather, it has been espoused that "[d]isability rights recognizes that some people will, in fact, never be healthy or vigorous and that the best efforts are spent not on trying to change the impossible but in removing the social and economic barriers that stigmatize illness."[52] Mariner commented that "[d]iscrimination on the basis of health factors may be as irrational as discrimination on the basis of disability."[53] There is a fear that introducing risk classification to employee wellness can harm Americans with disabilities by creating a social norm of health such that any deviancy is an individual failing.[54] This notion "reflect[s] increasing levels of *deservedness* for health or illness…fram[ing] disability as the problem or the undesirable difference, rather than see[ing] it as a neutral state of being,"[55] which can lead to discrimination. Furthermore, framing health as a personal responsibility is incorporated into the ACA, "which is inconsistent with [the ACA's] overall goal of universal access to health care."[56] If the ACA aimed to remove classifications such that everyone could get access to health care, it is contradictory to simultaneously invite employers to pay and penalize employees based on health risk classifications.[57] In this way, support of corporate participatory wellness programs by the Tri-Agency—comprised of the departments of Health and Human Services, Labor, and Treasury—is "incompatible with" the ADA, which banned employers from requiring employees to provide health information before wellness programs were adopted into the statutory language as an exception.[58] Wellness program promotion thus "reinforces the pre-ADA fear that employees with disabilities place ever-expanding burdens on the budget because of accommodation and health care costs."[59]

50. *Id.* at 1038 (quoting Seff v. Broward Cty., 778 F. Supp. 2d 1370, 1374 (S.D. Fla. 2011), *aff'd sub nom.* Seff v. Broward Cty., Fla., 691 F.3d 1221 (11th Cir. 2012)).

51. Mariner, *supra* note 5, at 330–31; Basas, *supra* note 39, at 1054–55; Peter Conrad, *Wellness in the Work Place: Potentials and Pitfalls of Work-Site Health Promotion*, 65 MILBANK Q. 255, 267–68 (1987).

52. Basas, *supra* note 39, at 1054.

53. Mariner, *supra* note 5, at 324.

54. *See id.*

55. Basas, *supra* note 39, at 1051 (emphasis added).

56. Mariner, *supra* note 5, at 330.

57. *See id.* at 328.

58. Jennifer Pomeranz, *Participatory Workplace Wellness Programs: Reward, Penalty, and Regulatory Conflict*, 93 MILBANK Q. 301, 302–03 (2015) (arguing pre-final rule that new federal law is needed to protect the ADA).

59. Basas, *supra* note 39, at 1057.

D. Comments to the EEOC's Proposed Final Rule

Shifting from a review of the scholarly literature to recent organization-based approaches, the EEOC received over 300 comments to its proposed rule on the government regulations website and 2750 comments overall from a wide range of organizations and individuals: some offering support and others raising concerns.[60] The Consortium for Citizens with Disabilities (CCD) and the Disability Rights Education & Defense Fund (DREDF) criticized the proposed rule for not placing sufficient limits on wellness program medical inquiries to protect workers with disabilities.[61] The proposed rule adopted a version of the thirty percent financial penalty limit found in HIPAA and the ACA.[62] As an alternative to limiting insurance premium penalties, the CCD and DREDF suggested waiving penalties as reasonable accommodation under the ADA.[63] Rather than financially penalizing individuals with disabilities who opt not to complete HRAs or biometric screenings, the EEOC would direct employers to waive the penalty so workers with disabilities would not be denied equal opportunities for incentives.

The EEOC's allowance for penalties also led the CCD and DREDF to disagree with the EEOC's definition of "voluntary."[64] For fifteen years prior to the proposed rule, the EEOC defined "voluntary" under the ADA "to mean that an employer may neither require participation nor penalize employees who do not participate."[65] The transition to permitting penalties for non-participation was the EEOC's concession to the penalty limits in the ACA. The CCD and DREDF urge that the ADA and the ACA may coexist and that the ADA does not need to loosen protections for workers with disabilities by "importing" ACA penalties.[66] Rather, the EEOC should retain the original "voluntary"

60. *Regulations under the Americans with Disabilities Act; Amendments*, REGULATIONS.GOV (Jun. 19, 2015), https://www.regulations.gov/document?D=EEOC-2015-0006-0001 (last visited July 9, 2017); Regulations Under the Americans with Disabilities Act, 81 Fed. Reg. 31,126, 31,129 (proposed May 17, 2016) (to be codified at 29 C.F.R. pt. 1630).

61. Consortium for Citizens with Disabilities, Comments on Proposed Rule, Amendments to Regulations Under the Americans with Disabilities Act, RIN 3046-AB01 1 (June 19, 2015), https://www.regulations.gov/document?D=EEOC-2015-0006-0303 (last visited July 9, 2017); Disability Rights Education & Defense Fund, Comments on Proposed Rule, Amendments to Regulations Under the Americans with Disabilities Act, RIN 3046–AB01 18 (June 19, 2016), https://www.regulations.gov/document?D=EEOC-2015-0006-0318 (last visited July 9, 2017).

62. Amendments to Regulations Under the Americans with Disabilities Act, 80 Fed. Reg. 21,659, 21,662 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 1630).

63. Consortium for Citizens with Disabilities, *supra* note 61, at 16; Disability Rights Education & Defense Fund, *supra* note 61, at 18.

64. Consortium for Citizens with Disabilities, *supra* note 61, at 3–4; Disability Rights Education & Defense Fund, *supra* note 61, at 3.

65. Disability Rights Education & Defense Fund, *supra* note 61, at 3–4.

66. Consortium for Citizens with Disabilities, *supra* note 61, at 9; Disability Rights Education & Defense Fund, *supra* note 61, at 7–8.

interpretation in which non-job-related medical examinations and inquiries cannot require participation or impose penalties for non-participation.[67] The CCD and DREDF argue the proposed rule's definition of "voluntary" presents a "Hobson's choice" in which workers seeking to protect themselves under the ADA must choose between burdensome financial penalties and relinquishing "a core protection of the ADA" to be free from disability-related medical inquiries in the workplace.[68] If the penalties are too high, the choice becomes coercive and effectively *not* a choice. Considering the numbers in perspective, the KFF 2016 Employer Health Benefits Survey found the average annual individual insurance premium was $6435, and thirty percent of that is over $1900 in potential penalties each year for not completing a required HRA or biometric screening.[69] The CCD notes there is essentially a double penalty because in addition to the thousands of dollars in penalties a worker may owe, the same worker would also be denied savings from employer contributions, which are as high as twenty to thirty percent of the costs for workers participating in the wellness program as part of the employer benefits plan for eighty-five percent of employers.[70] This shifts a non-nominal burden onto those who need the most financial assistance: low-income workers with disabilities. Indeed, the Senate Committee on Health, Education, Labor, and Pensions reports that in 2014 American workers with disabilities comprised a large percentage of workers in poverty.[71] The principal author of the 2013 federal government RAND study on employer wellness programs wrote, "We should not penalize vulnerable employees reluctant to join marginally effective programs."[72] Thus, while it is laudable for the EEOC to aim for a system of rewards and penalties large enough to incentivize but not so large as to render employer-provided health plans unaffordable, the CCD and DREDF calculate the proposed rule would not serve that goal, because it would result in penalties and lost incentives to those least able to shoulder the burden.[73] A fairer system, the organizations argue, would be (1) to prohibit financial penalties and (2) to ensure financial incentives are offered to all workers regardless of whether they provide answers to medical

67. Disability Rights Education & Defense Fund, *supra* note 61, at 11–12.

68. *Id.* at 4, 12; Consortium for Citizens with Disabilities, *supra* note 61, at 3, 10.

69. KFF & HRET, *supra* note 6, at 1–2 (noting workers on average contribute eighteen percent of the premium for single coverage).

70. Consortium for Citizens with Disabilities, *supra* note 61, at 5.

71. S. COMM. ON HEALTH, EDUC., LABOR & PENSIONS, 113TH CONG., FULFILLING THE PROMISE: OVERCOMING THE PERSISTENT BARRIERS TO ECON. SELF-SUFFICIENCY FOR PEOPLE WITH DISABILITIES 2 (2014)*; see also* BERNADETTE D. PROCTOR ET AL., U.S. DEP'T OF COMMERCE, INCOME & POVERTY IN THE UNITED STATES: 2015 13 tbl. 3, 16 (2016), https://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf (finding in 2014 that over four million people with disabilities were in poverty, comprising 17.9% of all people in poverty between the ages of eighteen and sixty-four).

72. Consortium for Citizens with Disabilities, *supra* note 61, at 15–16.

73. *See id.* at 16; Disability Rights Education & Defense Fund, *supra* note 61, at 2.

inquiries.[74] In this way, workers with disabilities would not be denied incentives because of their disabilities.

In sum, wellness programs are not leaving the workplace just yet. There is bipartisan support for wellness programs: the personal responsibility for one's health appeals to conservative policies,[75] while the focus on preventive health models for the American worker appeals to liberal policies. Yet studies show that the cost savings and health benefits are not as viable as advertised by wellness plan promoters.[76] Shuffled money and disguised cost shifting leave vulnerable employees with disabilities unable to opt out and thus bearing the greatest cost when they are the least likely to benefit from the health metric requirements.

E. EEOC Litigation on the Safe Harbor Provision

Turning from public comments to the judicial arena, courts have interpreted wellness program compliance with the ADA in a way that is inconsistent with the final rule. To set the stage, the EEOC has litigated ADA and wellness program conflicts once in the Eleventh Circuit and twice in the Seventh Circuit with mixed results.[77] The conflicts arose with respect to whether the insurance safe harbor provision of 42 U.S.C. § 12201(c) applies to employer wellness programs.[78] Although "[w]ellness programs are not traditionally associated with basic risk underwriting," employers have nonetheless argued the insurance safe harbor provision insulates their programs that are tied to health insurance plans from discrimination claims.[79] The original reasoning for having a safe harbor was "to allow premium differences that are based on actuarial differences in claims costs," rather than on "some independent desire for a healthy workforce."[80] In the final rule, the EEOC asserts the safe harbor provision does not apply to wellness programs.[81] Before the final rule was issued, the courts

74. Disability Rights Education & Defense Fund, *supra* note 61, at 11–12.

75. *See A Better Way: Our Vision for a Confident America*, OFFICE OF THE SPEAKER OF THE HOUSE 2, abetterway.speaker.gov/_assets/pdf/ABetterWay-HealthCare-Snapshot.pdf ("Rather than tie up wellness programs in red tape, our plan makes sure employers are able to reward employees for making healthy choices. This will encourage personal responsibility, and save both businesses and workers valuable health care dollars.").

76. Kapinos, *supra* note 33, at 1261.

77. Seff v. Broward Cty., 691 F.3d 1221, 1221 (11th Cir. 2012); EEOC v. Flambeau, Inc., 846 F.3d 941, 941 (7th Cir. 2017); EEOC v. Orion Energy Sys., Inc., 208 F. Supp. 3d 989, 989 (E.D. Wis. 2016).

78. *Seff*, 691 F.3d at 1222; *Flambeau, Inc.*, 846 F.3d at 944; *Orion Energy Sys., Inc.*, 208 F. Supp. 3d at 992.

79. Blue, *supra* note 13, at 379.

80. Mariner, *supra* note 5, at 319–20.

81. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.14(d)(6) (2016) ("The 'safe harbor' provisions in § 1630.16(f)

held otherwise in *Seff v. Broward County* and on summary judgment in *EEOC v. Flambeau, Inc*.[82]

In *Flambeau*, the district court held that requiring participation in a wellness plan was a condition precedent for being on the employer insurance plan, and that this constituted a "term" of the insurance plan; hence the safe harbor rule applied.[83] In that case, the employer's wellness program required an HRA and biometric screening as well as other health promotion activities like weight loss competitions and healthy vending machines.[84] The EEOC argued that 42 U.S.C. § 12112(d)(4)(A) prohibited a covered entity from requiring a medical examination unless shown to be job-related and consistent with business necessity.[85] The EEOC also argued that applying the insurance safe harbor to employer wellness plans would render its rules for wellness programs ineffective.[86] The court, however, held the safe harbor applied because use of the HRA results to make decisions "fundamental . . . [to] developing and administering an insurance plan," comprised a "term" under the benefit plan.[87] The court believed this would not render the EEOC rule ineffective because not all wellness programs are tied to insurance plans.[88] This district court case was decided before the EEOC issued its final rule.

In the wake of the unfavorable rulings in *Seff* and *Flambeau*, the EEOC took a strong stance on the inapplicability of the safe harbor provision to wellness programs in the interpretive guidance section of the final rule.[89] Overly expansive applications of the provision, the EEOC cautioned, would justify any medical inquiry posed to a worker as part of a health plan "if there is some possibility—real or theoretical—that the information might be used to reduce risks."[90] Alluding to possible reduced health risks in wellness programs is "one step removed" from insurance underwriting, which involves actuarial models and setting premiums based on calculations of health risk.[91] The EEOC

of this part applicable to health insurance, life insurance, and other benefit plans do not apply to wellness programs, even if such plans are part of a covered entity's health plan.").

82. *Seff*, 691 F.3d at 1222; *Flambeau, Inc.*, 846 F.3d at 944; *Orion Energy Sys., Inc.*, 208 F. Supp. 3d at 992.

83. EEOC v. Flambeau Inc., 131 F. Supp. 3d 849, 855 (W.D. Wis. 2015), *aff'd*, 846 F.3d 941, 941 (7th Cir. 2017).

84. *Id.* at 852.

85. *Id.* at 853.

86. *Id.* at 853–54.

87. *Id.* at 856.

88. *Flambeau Inc.*, 131 F. Supp. 3d at 856.

89. Regulations Under the Americans with Disabilities Act, 81 Fed. Reg. 31,126, 31,131 (proposed May 17, 2016) (to be codified at 29 C.F.R. pt. 1630).

90. *Id.*

91. Blue, *supra* note 13, at 379.

considered itself free to clarify its interpretive guidance on the issue because neither *Seff* nor *Flambeau* held the statutory language ambiguous.[92]

The next court battleground was in the Seventh Circuit and was the first case on the ADA and wellness programs to be decided at the district level after the EEOC issued the final rule. In September 2016, summary judgment was denied to an employer seeking to shield its wellness program from the ADA under the safe harbor provision in *EEOC v. Orion Energy Systems, Inc*.[93] The court's rationale, however, was not wholly aligned with that of the EEOC. Thus, questions remain regarding future litigation on the issue. In the case, the voluntary wellness program presented the worker with the choice to undergo the HRA and have the employer fully cover her premium, or to not undergo the HRA and pay 100% of her premium.[94] In contrast to the criticism of this kind of "voluntary" wellness program by the CCD and DREDF in their comments to the proposed rule, the court held this choice to be voluntary—even if it was "a hard choice."[95] The court nonetheless applied the EEOC's clarification in the final rule regarding the inapplicability of the safe harbor provision.[96] The court provided the rationale that because the health plan was available separately from the wellness program, it was not a term of that plan.[97] The plan was available whether or not the worker opted out of the HRA, albeit at full cost.[98] Therefore, the court reasoned the wellness program was not used in such a way that the insurance safe harbor would apply.[99] Notably, the court did not set its ruling contrary to the decision in *Flambeau*.[100] The court distinguished *Orion* from *Flambeau*, where the wellness program was a condition precedent for the worker to be on the employer insurance plan.[101] By distinguishing rather than ruling differently based on the EEOC's newly issued final rule, the court left the door open to future legal disagreement on insurance plan terms and the applicability of the insurance safe harbor to employer wellness plans.

III. ANALYSIS

A. Proposal for a Zero-Incentive Rule

The previous section provided a background of research, public commentary, and judicial perspectives on wellness programs and ADA

92. Regulations Under the Americans with Disabilities Act, 81 Fed. Reg. at 31,131.
93. EEOC v. Orion Energy Sys., Inc., 208 F. Supp. 3d 989, 992 (E.D. Wis. 2016).
94. *Id.*
95. *Id.* at 1001.
96. *Id.* at 997.
97. *Id.* at 999.
98. *Orion Energy Sys., Inc.*, 208 F. Supp. 3d at 999.
99. *Id.* at 1000.
100. *Id.*
101. *Id.* at 999.

compliance. This section recommends the EEOC amend its definition of "voluntary" in 29 C.F.R. § 1630.14(d)(2)–(3) to implement a zero-incentive rule for wellness programs that require disability-related inquiries or medical examinations. For those types of wellness programs, under this rule, the EEOC should remove the problematic thirty percent incentive limit in favor of disallowing any financial incentives or penalties. This straightforward approach recaptures the EEOC's well-defined, pre-final rule policy on what constitutes a "voluntary" program, does not produce significantly inconsistent results with the ACA and HIPAA for the vast majority of programs, and demonstrates the agency's accountability to the ADA's goal of protecting individuals from discrimination on the basis of disability.

B. Application of the Final Rule and Proposed Zero-Incentive Rule in Litigation

Even before adopting the thirty percent limit, the EEOC has pursued litigation of employer wellness programs having incentives or penalties significantly higher than thirty percent, such as complete coverage or denial of coverage. In 2014, however, the Chicago EEOC office departed from that trend by filing a case against an employer for a program that presented a closer issue.[102] In that case, *EEOC v. Honeywell International Inc*., the employer's wellness program offered employees a participatory incentive of a $1500 employer contribution to employees' health savings accounts as well as imposed non-participatory penalties of $500 and $1000 for health plan and tobacco surcharges, respectively.[103] The Chicago EEOC argued that Honeywell's incentives and penalties were too large for the wellness program to be considered voluntary under the ADA.[104] Although the local EEOC offices independently pursue litigation matters, the EEOC as a whole received a great deal of attention for the *Honeywell* suit, much of it negative from employers, and pressure was placed on the EEOC to clarify its position on incentive-based wellness programs.[105] The *Honeywell* court likewise noted, "Recent lawsuits filed by the EEOC highlight the tension between the ACA and the ADA and signal the necessity for clarity in the law so that corporations are able to design lawful wellness programs and also to ensure that employees are aware of their rights under the law."[106]

102. Madison, *supra* note 9, at 428.

103. *Id.*

104. EEOC v. Honeywell Int'l Inc., Civil No. 14-4517 ADM/TNL, 2014 WL 5795481, at *5 (D. Minn. 2014).

105. Blue, *supra* note 24.

106. *Honeywell Int'l Inc.*, 2014 WL 5795481, at *5.

1. *EEOC v. Flambeau, Inc.*

Applying the EEOC final rule to the facts in *EEOC v. Flambeau, Inc.*, where participation in the wellness program was required in order to be on the employer's health plan and the incentive was as high as seventy-five percent,[107] the district court case was wrongly decided. Flambeau's wellness program did not meet either the old or revised criteria for voluntary wellness programs to qualify as an exception to the ADA's prohibition against a covered entity from requiring a medical examination unless shown to be job-related and consistent with "business necessity" under § 102(d)(4)(A), 42 U.S.C. § 12112(d)(4)(A).[108]

Under the final rule, the program cannot be voluntary if participation is required in order to be on the employer's health plan.[109] When required for enrollment, a wellness program cannot be considered voluntary "even if [employees] could get [a health plan] elsewhere," such as in the federal health care Marketplace.[110] In this case, employees were required to complete an HRA and biometric screenings in order to enroll in the employer's health plan.[111] Therefore, the wellness program was a condition precedent for the employee to be on the employer's insurance plan.[112] Because the court wrongly applied the safe harbor provision, the court did not analyze whether the HRA and biometric testing were "actually 'required' in the manner prohibited by § 12112(d)(4)(A)."[113] The facts, however, showed that enrollment in the employer's health plan was denied to employees who did not participate in the wellness program; the plan of the employee, in this case, was in fact canceled when he was unable to complete the HRA and biometric screenings demanded by the wellness program.[114] The employee could only reinstate coverage through The Consolidated Omnibus Budget Reconciliation Act (COBRA), paying the entire premium cost and more.[115] This suggests the plain meaning of "required" applies when failure to meet the requirement results in the employee being dropped from the employer's health plan. Furthermore, the clarification in the

107. Complaint at 1, Equal Employment Opportunity Comm'n v. Flambeau, Inc., 131 F. Supp. 3d 849 (W.D. Wis. 2015) (No. 3:14-cv-00638), *aff'd*, 846 F.3d 941 (7th Cir. 2017).

108. *Id.*

109. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.14(d)(2)(ii) (2016) (a voluntary program "[d]oes not deny coverage under any of its group health plans or particular benefits packages within a group health plan for non-participation").

110. Oral Argument at 12:08, EEOC v. Flambeau, Inc., 846 F.3d 941 (7th Cir. 2016) (No. 16-1402), www.courtlistener.com/audio/24860/eeoc-v-flambeau-incorporated/ (last visited July 10, 2017).

111. EEOC v. Flambeau, Inc., 131 F. Supp. 3d 849, 852 (W.D. Wis. 2015), *aff'd*, 846 F.3d 941 (7th Cir. 2017).

112. *Id.*

113. *Id.* at 851.

114. Complaint, *supra* note 107, at 4.

115. *Id.*

final rule about the definition of "voluntary" bolsters this interpretation for why the wellness program violated § 102(d)(4)(A) of the ADA.

The financial incentive and penalty structure of Flambeau's wellness program was not voluntary under the final rule. Under the final rule, employers may not set incentives or penalties exceeding thirty percent of self-only coverage for wellness program participation.[116] As an incentive, Flambeau offered to pay seventy-five percent of an employee's health insurance premium in exchange for participation in the wellness program, which had mandatory HRAs and biometric screenings.[117] Thus, the EEOC explained, "If [the employee] had been able to complete Flambeau's so-called 'voluntary' biometric testing and health risk assessment, Flambeau would have covered roughly three fourths of [his] health insurance premiums."[118] Because seventy-five percent exceeds the thirty-percent limit, the program would not be voluntary under the final rule. The EEOC further argued that an employee resorting to paying full premiums through COBRA as a direct result of failing to complete the wellness program requirements constituted a penalty.[119] Arguably, even if the incentive had been thirty percent, the program structure would still not have satisfied the final rule because it imposed a penalty of 100% of the total cost of self-only coverage, given that the final rule specifically applies to incentives "whether in the form of a reward or penalty,"[120] since those are really "two sides of the same coin."[121] An acceptable penalty under the final rule, hypothetically, may have been asking employees not participating in the wellness program to pay up to seventy percent of their premiums, which on the flipside provides a thirty percent incentive to those choosing to participate in the wellness program. On the other hand, that would still depend on allowing employees to enroll at a higher price rather than denying them enrollment in the plan at all, as was the case here where the employee turned to COBRA to cover the gap in coverage. During oral argument in the Seventh Circuit Court of Appeals, EEOC attorney Anne Noel Occhialino explained, taking into account the final rule, "I don't think that this case raises . . . [the issue of] whether that thirty percent limit is permissible or not permissible, because Flambeau's wellness plan flunks the voluntary test even

116. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.14(d)(3)(i) (2016) ("The use of incentives . . . whether in the form of a reward or penalty . . . [may] not exceed [t]hirty percent of the total cost of self-only coverage . . . .").

117. Complaint, *supra* note 107, at 4.

118. *Id.*

119. *Id.*

120. 29 C.F.R. § 1630.14(d)(3); Michelle R. Seares, Note, *Wellness at Work: Reconciling the Affordable Care Act with the Americans with Disabilities Act*, 84 GEO. WASH. L. REV. 218, 236–37 (2016) ("Flambeau would have covered 75% of the premium for participating employees, whereas nonparticipating employees were charged a penalty and forced to cover their entire premium costs.").

121. Mariner, *supra* note 5, at 328.

without that."[122] Putting together Flambeau's wellness program's seventy-five percent incentive, 100% penalty, and involuntary participation requirement for plan enrollment, its wellness program violated the ADA under the final rule.

Likewise, under the proposed zero-incentive rule, the wellness program was not voluntary because it offered a seventy-five percent incentive. Under the particular facts of this case, even if the incentive was revised to the final rule limit of thirty percent, there would be no conflict between the outcomes of the final rule and the zero-incentive rule. Flambeau's wellness program was a condition precedent for accessing the employer-sponsored health plan, which rendered it involuntary under both the final rule and the zero-incentive rule.

Applying the final rule, the insurance safe harbor provision did not apply to Flambeau's wellness program such that it would be permitted to violate § 102(d)(4)(A) of the ADA. The final rule explicitly states that the safe harbor provision does not apply to wellness programs, even those that are tied to a health plan.[123] While the district court applied the safe harbor provision, noting the final rule had not yet been issued,[124] at oral argument on appeal, the EEOC referred to the recently promulgated final rule and asserted Flambeau was not "engaging in underwriting risk, classifying risk, or administering risk[;]" therefore the wellness program was not a valid application of the safe harbor provision.[125] Giving deference to the unambiguous language of the ADA and the EEOC's final rule, a court should not apply the safe harbor provision to Flambeau's wellness program.

The Seventh Circuit did not ultimately reach the merits of the appeal on whether the program was voluntary or whether the safe harbor applied, because jurisdictional standing problems were raised during oral argument with respect to the wellness program being discontinued and the potential lack of damages given that the employee regained coverage.[126] Although Judge David Hamilton described the case as "much ado about ancient history,"[127] the EEOC argued that, absent a declaratory judgment, Flambeau could reinstitute the wellness program.[128] The court rejected this argument, finding Flambeau had discontinued the mandatory biometric testing and HRA for its wellness program

122. Oral Argument, *supra* note 110, at 10:40.

123. 29 C.F.R. § 1630.14(d)(6) ("The 'safe harbor' provisions in § 1630.16(f) of this part applicable to health insurance, life insurance, and other benefit plans do not apply to wellness programs, even if such plans are part of a covered entity's health plan.").

124. EEOC v. Flambeau Inc., 131 F. Supp. 3d 849, 854, 856 (W.D. Wis. 2015), *aff'd*, 846 F.3d 941, 941 (7th Cir. 2017).

125. Oral Argument, *supra* note 110, at 13:16.

126. *Id.* at 4:22–5:07.

127. *Id*. at 6:09.

128. EEOC v. Flambeau, Inc., 846 F.3d 941, 949 (7th Cir. 2017) (arguing that the "voluntary cessation exception to mootness" should apply).

because it was not cost effective, a rationale outside the lawsuit, rendering the EEOC's claim for injunctive relief moot.[129]

Although jurisdictional issues stymied this case, losing the chance to set a judicial precedent for the EEOC's wellness program guidelines, an important lesson nonetheless emerges from the fact that the employer ultimately terminated the wellness program. Other employers can take heed of the facts of this case and the EEOC's concerns for designing better, ADA-compliant programs.

2. *EEOC v. Orion Energy Systems, Inc.*

A review under the final rule would reverse the holding that the wellness program was "voluntary" under the ADA in *EEOC v. Orion Energy Systems, Inc.*[130] The Seventh Circuit decision from September 2016 denied summary judgment to an employer, ruling favorably for the EEOC that the safe harbor provision did not apply but ruling favorably for the employer on the issue of whether the program was "voluntary" under § 12112(d)(4)(B).[131] In Orion's wellness program, Orion provided an incentive of 100% coverage of participating employees' premiums, while "[e]mployees 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."[132] The employee in the case who did not participate in the wellness program paid the full premium of $413.43 per month plus a penalty of $50 per month, totaling to $463.43 per month.[133] The potential penalties were threefold, with the third being an $80 penalty for smoking.[134] Thus, an employee opting out of the wellness program "exercising her right to be free from disability-related medical inquiries and examinations"[135] could potentially be responsible for $5561.16 annually in health plan costs compared to an opt-in employee paying $0 for the same coverage. Even though the two add-on penalties of $130 per month almost make the threshold cut of thirty percent ($124 per month of the $413.43 monthly premium), the combination of the penalties with the choice between zero employee contribution and complete employee contribution does not satisfy the EEOC's definition of voluntary. As

129. *Id*.

130. EEOC v. Orion Energy Sys., Inc., 208 F. Supp. 3d 989, 995 (E.D. Wis. 2016).

131. *Id.* at 995, 1002.

132. Seares, *supra* note 120, at 236.

133. Complaint at 4–5, EEOC v. Orion Energy Sys., Inc., 208 F. Supp. 3d 989 (E.D. Wis. 2016) (No. 1:14-cv-1019).

134. *Orion Energy Sys., Inc.*, 208 F. Supp. 3d at 992.

135. Seares, *supra* note 120, at 246.

in *Flambeau* and *Honeywell*, such "aggressive programs"[136] exceeding the thirty percent incentive limits are outside the scope of "voluntary" in the final rule.[137]

Under the proposed zero-incentive rule, just as for the final rule, the 100% incentive would make the wellness program in *Orion* involuntary and therefore impermissible. Even if the incentive was reduced to the thirty percent limit allowed for in the final rule, the additional financial penalties—$50 per month for failure to perform the fitness component and $80 per month for failure to quit smoking—would violate the zero-incentive rule.

Furthermore, even if the monthly penalties were reduced to $124 per month (that is, thirty percent of the monthly premium of $413.43), an employee who chose not to participate would still potentially owe $1488 in penalties annually. For the facts in *Orion*, an annual penalty of $1488 would be permissible under the final rule because it does not exceed the limit of thirty percent of the total cost of self-only coverage. Contrastingly, under the proposed zero-incentive rule, an employer would not be able to charge an employee $1488 annually for declining to participate in a "voluntary" program requiring a medical examination and disability-related inquiries.

Whether such an amount in financial penalties is sufficiently burdensome as to justify calling a program involuntary has been questioned. For example, Madison considered the effect of a hypothetical $500 reward on employees who were asked to weigh the costs and benefits of participating in a program requiring disability-related inquiries and medical examinations.[138] She posited that it was unlikely $500 would blind employees to potential risks.[139] Madison concluded that neither the ACA regulation of thirty percent incentive limits nor a prohibition on incentives was a perfect fit, and instead she "stake[d] out a middle ground . . . [for] how to implement an incentive ceiling that would help to ensure . . . voluntariness."[140] However, the least ambiguous way to ensure that a financial incentive does not cause workers to subject themselves to potential discrimination is through a zero-incentive rule. One problem with trying to articulate a permissible incentive limit—aside from the fundamental disagreement over whether *any* incentive should be permitted—is that health insurance costs are not stagnant. As health insurance costs continue to rise—when considering not just premiums but increasingly high deductibles, without equitable gains in income—the amount of money represented by thirty percent of self-only coverage becomes larger and larger, thus becoming more and more burdensome. According to the KFF 2016 Employer Health Benefits Survey,

136. *Id.* at 241.

137. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.14(d)(3)(i)–(iv) (2016).

138. Madison, *supra* note 9, at 441.

139. *Id.*

140. *Id.* at 455–56.

workers earnings increased 2.5%, inflation increased 1.1%, and self-only premium costs showed no significant increase; however, deductibles ballooned for workers, increasing 12% since 2015 and nearly 50% since 2011.[141] As KFF President and Chief Executive Officer Drew Altman explained, the lower premiums reflect a tradeoff in rapidly rising deductible costs.[142] Given that deductibles continue to rise without matched gains in income, the dollar amount represented by a thirty percent incentive ceiling tied solely to premiums is an unreliable figure on which to base legislative policy. Perhaps thirty percent is reasonable this year,[143] but its reasonableness is less certain in five years, ten years, and beyond. A zero-incentive policy offers a solution that leaves no room for ambiguity when it comes to evaluating at what point an employee's choice becomes involuntary due to financial incentives or penalties. Moreover, like the final rule, the proposed zero-incentive rule is not a blanket prohibition against all financial incentives tied to wellness programs. Rather, like the final rule, it carves out a subset of programs—namely, those wellness programs that require disability-related inquiries or medical examinations.[144] This advantage of the zero-incentive rule compared to the thirty percent rule is further expanded on in the next section.

3. *AARP v. EEOC*

When evaluating the performance of the final rule at harmonizing the regulatory scheme and balancing the policy agendas of different individuals and national organizations, the fact that the EEOC was sued over the final rule speaks simply and sharply to its shortfalls. Three months before the final rule was to take effect, AARP sought a preliminary injunction and filed a complaint against the EEOC challenging the reworked definition of "voluntary."[145] While the

141. KAISER FAMILY FOUND., *Average Annual Workplace Family Health Premiums Rise Modest 3% to $18,142 in 2016; More Workers Enroll in High-Deductible Plans with Savings Option over Past Two Years*, KFF.ORG (Sept. 14, 2016), www.kff.org/health-costs/press-release/average-annual-workplace-family-health-premiums-rise-modest-3-to-18142-in-2016-more-workers-enroll-in-high-deductible-plans-with-savings-option-over-past-two-years/ (last visited July 10, 2017).

142. *Id.*

143. 81 Fed. Reg. 31,126, 31,133 (proposed May 17, 2016) (to be codified at 29 C.F.R. pt. 1630). Regulations Under the Americans with Disabilities Act, 81 Fed. Reg. (the EEOC finding that "although substantial, the Commission concludes that, given current insurance rates, offering an incentive of up to 30 percent of the total cost of self-only coverage does not, without more, render a wellness program coercive").

144. *Id.* at 31,141 (noting "programs that qualify as health-contingent programs (such as an activity-based program that requires employees to exercise or walk) and that are part of a group health plan are subject to HIPAA incentive limits" but not ADA limits set in § 1630.14(d)(3)).

145. Complaint at 22, AARP v. United States Equal Employment Opportunity Comm'n, 2016 WL 764635 (D.D.C. 2016) (No. 16-cv-2113) (also challenging the final rule for GINA on similar grounds).

court found AARP would be unlikely to succeed on the merits to strike down the final rule as unlawful,[146] the case demonstrates the high level of dissatisfaction with the EEOC's adjustments to the ADA protections for Americans with disabilities. The case "raises important questions about the complex interaction of the ADA, GINA, the ACA and HIPAA that implicate the public interest on all sides."[147]

AARP claimed that "permitting employers to penalize employees up to 30% of premiums for refusing to submit to medical inquiries and examinations is arbitrary, capricious, an abuse of discretion, and contrary to law."[148] AARP specified the final rule is "unlawful because it is not a reasonable construction of the statutory term in 42 U.S.C. § 12112(d)(4)."[149] The case is informative because it concretizes the specific harms anticipated by AARP members. AARP said its members would face increased premiums that they would be unable to afford, and they would be "forced to disclose confidential medical information that they would not otherwise choose to disclose."[150] In holding that AARP had standing to bring suit on the ADA claim, the court ruled that an increase in premiums would constitute injury.[151] Furthermore, the court agreed that the increase was sufficiently certain to occur because employers can and do push the limits, thus incentives would almost certainly be raised to the thirty percent because that is the new permissible maximum.[152] The court did not grant the preliminary injunction, however, because it concluded that the harms of increased premiums and disclosure of medical information were not *irreparable* harms resulting from the ADA final rule.[153] The court was "sympathetic to the fact that these new rules implicate important privacy interests" and agreed "disclosure of confidential information in the first instance could still constitute irreparable harm," but reasoned that the aggregated data reporting protections in the final rule adequately "guard against the discrimination the plaintiff fears" at least to the point of making harm from disclosure fall short of warranting a preliminary injunction.[154]

Although challenging the final rule's legality made a strong statement against the EEOC, it was unsurprising that the court determined AARP was not

146. AARP v. United States Equal Employment Opportunity Commission, 2016 WL 7646358, at *10 (D.D.C., 2016).

147. *Id.* at *12 (AARP suing the EEOC for the final rules of both the ADA and GINA).

148. Complaint, *supra* note 145, at 22.

149. *Id.*

150. *AARP*, 2016 WL 7646358, at *9.

151. *Id.* at *6.

152. *Id.* at *18 (noting that comments by employers and industry groups on the proposed rule "indicat[e] that many employers intend to take advantage of the increased incentive level").

153. *Id.* at *10.

154. *Id.* at *9–10.

likely to succeed on the merits—albeit on a limited record.[155] The court acknowledged that at this early stage it lacked access to the full administrative record and predicted further judicial analysis would be needed at later stages in the litigation.[156] The court denied the preliminary injunction AARP brought on both its claims: (1) that the final rule's interpretation of "voluntary" as permitting incentives is coercive and unlawful and (2) that the EEOC did not make the final rule through "reasoned decision-making."[157] On the first claim, the court echoed the *Orion* court's language that "a hard choice is not the same as no choice," which again should not be the legal conclusion under the final rule.[158] The court hinged part of its decision on a very narrow point, however, attending to the fact that AARP challenged the *specific* thirty percent incentive level rather than *any* level of incentive,[159] leaving it open whether AARP would consider a five percent or fifteen percent incentive just as coercive as thirty percent. The court reasoned that determining the precise level of permissible incentives "is exactly the kind of agency determination to which the Court owes some deference."[160] After all, as the court points out, the EEOC purposely chose thirty percent with the goal of harmonizing the ADA with the ACA.[161] The court, therefore, concluded that the EEOC is free to define "voluntary" however it wants, given that it was undefined in the original statute.[162]

More palatable is the court's holding on the second claim regarding whether AARP adequately explained its decision to change the "voluntary" guidelines. The court found that the "EEOC recognized that it was changing its position . . . but concluded that permitting the use of certain incentives . . . is 'the best way' to promote the ADA's and GINA's goal of preventing employment discrimination while at the same time effectuating the purpose of the wellness provisions."[163] The explanation may exist, but whether the explanation is *satisfying* is another matter. AARP's judicial challenge puts a spotlight on the final rule and previews potential future legal battles that will be fought against the EEOC's perceived shift from a maximum to a modicum of protections under the ADA.

Turning to the proposed zero-incentive rule, a weakness in AARP's argument that is not shared by the zero-incentive approach is the ineffectiveness of arguing against a specific limit rather than arguing against all incentives.[164]

155. *AARP*, 2016 WL 7646358, at *10.
156. *Id.* at *11.
157. *Id.* at *4, *12.
158. *Id.* at *11 (internal citations omitted).
159. *Id.*
160. *AARP*, 2016 WL 7646358, at *11.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*

The court explained that setting levels of incentives is "exactly" the type of agency decision to which a court gives deference,[165] leaving open the possibility that framing the EEOC's final rule criteria for "voluntary" as fundamentally wrong, rather than as a poorly chosen level, would be more likely to succeed in meeting the arbitrary and capricious standard. Regarding that deference to agency decisions, however, the court may have given the EEOC too much deference given its justification for the change being a compromise to create harmony with HIPAA and the ACA.[166]

Specifically, while deliberate joint-agency coordination may warrant judicial deference "as a signal to courts about how important an agency regards the issue, giving judges some confidence that decision makers have closely examined the evidence and relevant statutory factors,"[167] the thirty percent incentive limit for voluntariness in the final rule was not necessarily the result of a deliberate process of coordination among multiple agencies but rather a single agency yielding to other agencies.[168] An "extensive" and "unified" effort between agencies that "reflects a careful consideration of multiple agency perspectives," may be due deference for "a policy choice that harmonizes potential inconsistencies."[169] However, that deference should not incontrovertibly extend here where a unilateral decision for a thirty percent incentive was acceded to by the EEOC, without the EEOC necessarily conducting its own rigorous analysis within the framework of the ADA. AARP alleged in its complaint that "[t]he EEOC did not base the 30% penalty/incentive limit on any facts in the record, any economic analysis, or any other legal requirement."[170] The court acknowledged its decision was the product of an incomplete record, yet nonetheless deemed the EEOC's compromise explanation as "reasoned decision-making."[171] Merely adopting another agency's decision—one which reverses its previous policy—should not be sufficient to survive a challenge under the arbitrary and capricious standard. Indeed, "the mere achievement of consensus among agencies should [not] substitute for other evidence of a decision's reasonableness and the agencies'

165. *AARP*, 2016 WL 7646358, at *11.

166. *Id*.

167. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1203–04 (2012) (raising the issue of "whether coordination should be factored into arbitrary and capricious review of agency policy decisions and whether it should elicit greater *Chevron* for deference of agency interpretations of law").

168. *See* Oral Argument, *supra* note 110, at 10:15–10:39 (explaining in response to the question of how the EEOC arrived at that thirty percent figure that it came from the HIPAA and the ACA, and answering "yes, we tried to make it the same and not make it too confusing for employers" when asked if "you just adopted it?").

169. Freeman & Rossi, *supra* note 167, at 1205.

170. Complaint, *supra* note 145, at 23.

171. *AARP*, 2016 WL 7646358, at *12.

thoroughness in considering relevant information."[172] The *AARP* court did qualify its determination by noting there remained an open statutory question that depended on a review of the full record.[173]

If the EEOC, on the other hand, adopted a zero-incentive rule, reaffirming an existing policy approach to voluntariness based on a record of research showing its reasonableness as a means to maintain longstanding ADA protections, then that rule would likely be more easily upheld as reasoned decision making given the research presented here. Additionally, the EEOC would not be sued by AARP or the many other organizations that expressed dissatisfaction with the thirty percent limit in the final rule.

The EEOC's explanation has further weaknesses, which support undoing the change to the thirty percent incentive rule in favor of adopting a zero-incentive rule. These include compatibility with HIPAA and the ACA, as well as KFF survey data pointing towards early resolution of remaining harmony issues. As DREDF aptly explained, the wellness programs that require disability-related or medical examinations comprise only a subset of wellness programs regulated by HIPAA and the ACA, and thus may be regulated under the ADA in ways that are not reflected in the other laws.[174] A wellness program can comply with all three laws by complying with the incentive limits for the specific programs to which they apply. Moreover, the KFF 2016 survey demonstrated a decline in the number of wellness programs most likely to fall within the purview of the proposed zero-incentive rule.[175] One explanation for the decline provided by the studies on the effectiveness of wellness programs described in Section II may be the failure of wellness programs to fulfill the promises of the twin goals of cost savings and improved employee health.[176] For example, the *Flambeau* court deemed the case moot when the employer said it ended the required medical examination aspect of the program not because it was sued by the EEOC but rather because it simply was not cost effective.[177] Therefore, one possibility is that the very programs that may produce some inconsistencies between a zero-incentive rule and the thirty percent limits of the ACA and HIPAA may be phased out over time, thereby resolving the issue without the need to compromise ADA protections to conform with the Tri-Agencies' thirty percent incentive limits.

172. Freeman & Rossi, *supra* note 167, at 1205.

173. *AARP*, 2016 WL 7646358, at *12.

174. Disability Rights Education & Defense Fund, *supra* note 61, at 7.

175. KFF & HRET, *supra* note 6, at 7; KFF & HRET, *Survey* 2014, *supra* note 15, at 206; KFF & HRET, *Survey* 2013, *supra* note 15, at 200.

176. *See* LEWIS, *supra* note 31, at 139 (attributing to Linda Riddel on the *Employee Benefit News* blog the commentary that "[b]esides being cheaper, programs that channel 'intrinsic motivation' into actions will far outperform those relying on 'financial motivation' for results").

177. EEOC v. Flambeau, Inc., 846 F.3d 941, 945–46 (7th Cir. 2017).

IV. CONCLUSIONS

Wellness programs, since their inception, have posed legal and policy challenges to American workers with disabilities, and the ADA final rule does not alleviate the pressure towards achieving "wellness" and does not maintain a core protection previously upheld by the ADA—the protection against being compelled to give employers disability-related information that could lead to workplace discrimination. The cases discussed here were used as laboratories for understanding the final rule and the proposed zero-incentive rule, and they lay the groundwork for future courts to continue to wrestle with the changing health care regulatory scheme as it pertains to wellness programs. If the number of wellness programs have truly seen their heyday and are on the decline, as suggested by the KFF survey, then perhaps the studies showing a lack of effectiveness or cost savings are leading to less of the *aggressive* wellness programs that the EEOC has spent time litigating. Based on the types of cases the EEOC has pursued thus far, excluding the Chicago office's *Honeywell* case, the EEOC will likely continue to litigate cases with egregiously high incentives and penalties, particularly programs (where they still exist) at 100% or zero contribution for wellness program participation. Meanwhile, there will be challenges brought against the EEOC, as with AARP, concerning privacy and coercion. Further issues unexplored in this paper include aspects of those privacy concerns covered by the concurrently-issued final rule for GINA.[178]

This paper recommends a zero-incentive rule for voluntary wellness programs that include disability-related inquiries or medical examinations, replacing the thirty percent incentive limit described in § 1630.14(d)(2)–(3) of the final rule. By preventing employers from using financial incentives or penalties to elicit participation in voluntary wellness programs, the EEOC would set a clear, factually-supported standard for wellness programs to comply with the ADA's goal to shield employees from disability-based discrimination. Such a rule would not only preserve the integrity of the EEOC's past policy position but also set up workers for a future in which rising health care costs could not be cost-shifted through wellness program incentives or penalties to workers who would be the least benefited and most burdened.

STEFANIE BRODY*

178. Genetic Information Nondiscrimination Act of 2008, 29 C.F.R. § 1635 (2016). *See generally* Jennifer S. Bard, *When Public Health and Genetic Privacy Collide: Positive and Normative Theories Explaining How ACA's Expansion of Corporate Wellness Programs Conflicts with GINA's Privacy Rules*, 39 J.L. MED. & ETHICS 469 (2011) (analyzing the conflict between the ACA expansion of corporate wellness programs and the privacy rules under GINA).

* Bachelor of Arts in English and Linguistics, Northwestern University; Master of Arts in Linguistics, University of Pennsylvania; Juris Doctor, Saint Louis University School of Law (anticipated 2018). The author thanks her advisor, Professor Elizabeth Pendo, for her insight and encouragement throughout the writing of this Comment. She also expresses her appreciation for the generous support of everyone on journal as well as her friends and family.