

**THE INTERSECTION OF EMPLOYEE RIGHTS GUARANTEED BY THE
AMERICANS WITH DISABILITIES ACT AND EMPLOYER BENEFITS PROMISED
BY HEALTH INCENTIVES: CORPORATE WELLNESS PROGRAMS AT A
CROSSROADS AND COMPANIES IN THE CROSS HAIRS**

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Abstract

For the first time in its history, the Equal Employment Opportunity Commission (EEOC) recently challenged several corporate wellness programs and alleged violations of the Americans with Disabilities Act (ADA). Following these unprecedented cases, the EEOC promulgated proposed regulations to clarify existing issues pertaining to employer wellness programs. While somewhat instructive, these actions only serve to highlight a much more persuasive problem in the wellness context—the tension between the existing regulatory schemes that guarantees employees certain protections yet promises employers incentives at odds with such protections. This article will explain the legislative and judicial landscape giving rise to the EEOC’s action, analyze the cases brought by the EEOC, examine other federal employment legislation implicated by well-intentioned corporate health programs, and suggest areas for additional clarification.

Keywords: Wellness programs, ADA, discrimination, incentives, employment regulations

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INTRODUCTION

Corporate wellness programs—employer-funded initiatives designed to prevent disease and improve employee health—have exploded in popularity over the past few years. According to a 2014 study by the Kaiser Family Foundation, the vast majority of employers in the United States now offer some type of wellness program.¹ The recent growth of wellness programs is not surprising given the escalating cost of health care,² the documented benefits of improving employee health,³ and the financial incentives offered by federal legislation.⁴ What is surprising, however, is the directionless and inconsistent regulatory context in which companies are expected to implement effective and lawful wellness programs. A significant tension exists in the context of corporate wellness programs between protection of an employee's legal rights and fulfillment of an employer's financial goals.

This tension appears to have reached a crucial tipping point, as demonstrated by the Equal Employment Opportunity Commission's (EEOC) recent actions. In 2014, the EEOC filed—for the first time in history—three challenges to employer wellness programs (the cases will be referred to herein as the EEOC Cases) under the Americans with Disabilities Act (ADA).

Shortly thereafter, the EEOC issued a 2015 notice of proposed rulemaking regarding amendments to the ADA regulations (NPRM) (the EEOC Cases and the NPRM collectively are referred to as the EEOC Actions). The EEOC's Actions, while helpful in rectifying some of the ambiguity regarding the interaction of the ADA and wellness programs, illustrate a much more comprehensive problem: corporate wellness programs in the absence of critical guidance can unknowingly implicate a broad range of federal and state laws. Reconciliation of the conflicting rules is necessary if wellness programs are going to achieve the intended benefits without running afoul of the law. Accordingly, this article will: (1) outline the legal background of the ADA leading up to the EEOC Actions; (2) describe the current posture of the EEOC Actions; (3) postulate on other federal employment laws implicated by the EEOC Actions; and (4) analyze the legal implications of the EEOC Actions.

I. Legal Framework of the ADA Pertaining to Wellness Programs

To appreciate the ADA's current status, and therefore the context in which the EEOC Actions took place, it is useful to examine relevant portions of the ADA's legislative and judicial history. This background will provide the necessary starting point for discussing existing tensions between employee rights and employer incentives.

¹ Kaiser Family Foundation, *Employer Health Benefits 2014 Annual Survey*, available at <http://ehbs.kff.org> (last visited on May 30, 2015) (98 percent of large companies with over 200 workers and 73% of smaller companies with 3 to 199 workers offer some form of wellness program).

² *Id.* (70% increase in total health insurance premiums from 2004 to 2014 and 81% increase in worker contributions to health insurance premiums during same period).

³ The Center for Disease Control and Prevention, *Benefits of Health Promotion*, available at <http://www.cdc.gov/workplacehealthpromotion/businesscase/benefits> (Oct. 23, 2013).

⁴ See, e.g., The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Stat. 119 (2010), the Health Care Education Reconciliation Act, Stat. 1029 (2010) (codified at multiple parts of the United States Code) (collectively known as the Affordable Care Act). The Affordable Care Act (ACA) encourages the development and expansion of corporate wellness programs by allowing employers to offer employees health-contingent incentives up to 30% for wellness programs and up to 50% for tobacco use cessation or reduction programs. A further discussion of the ACA and its implications for wellness programs is beyond the scope of this article.

A. Legislative History: The Early Years (1990-1999)

1. Precursor to the ADA

Prior to the enactment of the ADA, Congress passed the Rehabilitation Act of 1973 (Rehabilitation Act or Act) to ensure that individuals with disabilities enjoyed certain rights and protections.⁵ The Act prohibits discrimination on the basis of disability by the federal government, federal contractors, and recipients of federal financial assistance.⁶ The Rehabilitation Act provides an important framework for the ADA. Indeed, lawmakers modeled aspects of the ADA after the Rehabilitation Act when they sought to expand protections for people with disabilities.

2. ADA Enactment

In 1990, Congress enacted the ADA.⁷ The ADA's purpose is to make society more accessible to people with disabilities. To achieve this purpose, the ADA prohibits discrimination against people with disabilities in employment, public services, public accommodations, and telecommunications.

The amended ADA is divided into five sub-chapters. The employment provisions are contained in the first sub-chapter.⁸ Title I⁹ requires employers to (1) provide reasonable accommodations for applicants and employees with disabilities and (2) refrain from discrimination on the basis of disability in all aspects of employment.¹⁰ Title I also addresses an employer's obligations regarding medical examinations and inquiries.¹¹

3. ADA Employment Provisions

To comprehend the ADA's breadth, one must understand the terms "covered entity," "disability," and "employment relationship." First, the term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee¹², and applies to entities with 15 or more employees.¹³ Second, the ADA defines the term "disability" as a physical or mental impairment that substantially limits one or more major life activities.¹⁴ The phrase "major life activities" includes virtually any significant human action or critical bodily function.¹⁵ Finally, the term "employment relationship" includes hiring, firing, pay, job

⁵ The Rehabilitation Act of 1973, as amended, Pub. L. No. 93-112, 87 Stat. 355 (codified in part at 29 U.S.C. § 701).

⁶ 29 U.S.C. § 794 (2013).

⁷ The Americans with Disabilities Act of 1990, as amended, Pub. L. No. 101-336, 104 Stat. 327 (codified in part at 42 U.S.C. § 12101).

⁸ 42 U.S.C. §§ 12111-12117 (2013).

⁹ In this article, the employment provisions of sub-chapter I are referred to as "Title I" because this is the term in the original legislation and, therefore, the one most commonly used by courts and commentators.

¹⁰ 42 U.S.C. § 12112.

¹¹ *Id.* § 12112(d).

¹² *Id.* § 12111.

¹³ *Id.*

¹⁴ *Id.* § 12102.

¹⁵ A major life activity includes, but is not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." *Id.* § 12102(2)(A). Major life activity also includes "the operation of a major bodily

assignments, promotions, layoff, training, fringe benefits, and other terms and conditions of employment.¹⁶

Moreover, the ADA's prohibition on disability discrimination applies to applicants and employees in various categories. Specifically, employers may not discriminate against: (1) an individual with an *actual* disability; (2) an individual with a *history* of a disability (e.g., cancer in remission); (3) an individual with a *perceived* disability (i.e., even when an individual is not in fact disabled under the ADA); or (4) an individual due to his or her *association* (e.g., marriage) with a disabled person.¹⁷

If a qualified employee falls within the ADA's coverage, an employer must engage in an interactive process with the employee to determine if a reasonable accommodation exists.¹⁸ A reasonable accommodation is any modification or adjustment to a job or work environment that will enable a qualified individual to participate in the application process or to perform essential job functions.¹⁹ The reasonable accommodation requirement ensures that qualified individuals with disabilities have the same employment rights and privileges as employees without disabilities. If a provision of the reasonable accommodation presents an undue hardship—meaning it involves significant difficulty or expense for the employer—then the employer is not required to provide it.²⁰ However, this does not necessarily end the inquiry. The employer must continue with interactive discussions to determine if there is an alternative accommodation that is reasonable, allows the employee to perform his or her job, and does not cause an undue hardship.²¹ If there is no such alternative, only then is the employer relieved of its ADA obligations and only with respect to the particular employee in the specific job.

Generally, the ADA prohibits employers from requiring medical examinations, making inquiries as to whether an employee has a disability, or asking about the nature or severity of a disability, unless such inquiries are job-related and consistent with business necessity.²² There are two exceptions to this general prohibition. First, the ADA contains a safe harbor provision that exempts certain insurance plans.²³ The safe harbor provision permits employers to establish or sponsor “terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.”²⁴ Second, the ADA provides an exception for voluntary examinations and activities that are part of employer wellness programs.

B. Legislative History: The Middle Years (2000-2007)

function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” *Id.* § 12102(2)(B).

¹⁶ 29 C.F.R. pt. 1630.4 (2011).

¹⁷ 42 U.S.C. § 12102(1)(A-C); *see also id.* § 12112(b)(4).

¹⁸ 29 C.F.R. pt. 1630, App. (2013)

¹⁹ 42 U.S.C. § 12111(9).

²⁰ *Id.* § 12111(10)(A).

²¹ 29 C.F.R. § 1630.2(p).

²² 42 U.S.C. § 12112(d)(4)(A).

²³ In a case celebrated by employers, the 11th Circuit held the ADA's safe harbor provision exempted a county's plan from any ADA compliance. *Seff v. Broward County, Florida*, 691 F.3d 1221 (11th Cir. 2012). The program requested employees to take a finger prick test and complete a questionnaire; enrollees in the group health plan who refused to participate in the disease evaluation were charged a bimonthly penalty. *Id.* at 1222. The company then used the medical information to identify employees with certain diseases for follow-up disease management programs and eligibility for certain co-pay waivers. *Id.* at 1222, 1224.

²⁴ 42. U.S.C. § 12201(c)(2).

At the turn of the millennium, the EEOC issued guidance on medical examinations and disability-related inquiries within the context of corporate wellness programs.²⁵ Citing the ADA's legislative history, the EEOC clarified that employers may conduct voluntary medical examinations and inquiries as part of an employee health program—without having to show such actions are job-related or consistent with business necessity—provided such medical records are kept confidential and separate from personnel records.²⁶ The EEOC took the position that a wellness program is “voluntary” if it neither requires nor penalizes employees for non-participation.²⁷ The guidance failed to explain the conditions under which a reward or a penalty could render a program involuntary. In fact, inexplicably, the EEOC stated in a January 2013 discussion letter, “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.”²⁸ It is unclear what the EEOC is waiting for given the justifiable confusion and the fact that almost 25 years has passed since the ADA’s passage.

C. Judicial History: The Early and Middle Years (1990-2007)

After the ADA’s passage, employees sought protection from employment discrimination under the ADA. In 1998, the American Bar Association did a comprehensive examination of 1,200 ADA cases.²⁹ The study reported dismal results for employees seeking ADA protection—employers prevailed in 92 percent of the cases.³⁰ Many believe the results were due, in part, to the Supreme Court’s narrow interpretation of the term “disability.” In one of several seminal cases on the issue, *Sutton v. United Air Lines, Inc.*,³¹ the Court ruled that whether an individual is disabled should be determined by considering whether corrective measures mitigate the individual’s impairment.³² The case involved two job applicants with severe nearsightedness (*i.e.*, uncorrected visual acuity ranging from 20/200 to 20/400) who claimed the airline’s minimum vision requirements violated the ADA.³³ The Court ruled the applicants were not disabled under the ADA because their condition could be sufficiently corrected with medicine, eyeglasses, or other measures.³⁴

Similarly, in *Toyota Motor Mfg., Kentucky Inc. v. Williams*,³⁵ the Court held that the terms “substantially” and “major” in the definition of disability “need to be interpreted strictly to

²⁵ EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA) at Q&A22 (July 27, 2000), available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ ADA: Voluntary Wellness Programs & Reasonable Accommodation Obligations, EEOC Informal Discussion Letter (January 11, 2013), available at http://www.eeoc.gov/eeoc/foia/letters/2013/ada_wellness_programs.html.

²⁹ See American Bar Association, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 Mental & Physical Disability L. Rep. 403 (1998).

³⁰ *Id.* One year later, a subsequent study found employers prevailed in 94 percent of the cases. See John W. Parry, *Employment Decisions under ADA Title I B Survey Update*, 23 Mental & Physical Disability L. Rep. 290, 294 (1999).

³¹ 527 U.S. 471 (1999).

³² *Id.* at 471.

³³ *Id.* at 472.

³⁴ *Id.* at 471.

³⁵ 534 U.S. 184 (2002).

create a demanding standard for qualifying as disabled” under the ADA.³⁶ The Court went on to explain that to be substantially limited in performing a major life activity under the ADA, “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.”³⁷ Based on these and other rulings, some commentators disputed whether the Supreme Court had construed the term “disability” in a manner consistent with Congress’s original intention.³⁸

As a result of these Supreme Court decisions, lower courts often ruled against individuals with serious impairments.³⁹ The courts reasoned the individuals were not substantially limited in a major life activity when mitigating measures were taken into account. Thus, lower courts often never reached the question of whether discrimination had occurred because individuals outside the ADA’s coverage could not sue for any discrimination.

D. Legislative History: The Later Years (2008-2013)

1. ADA Amendments Act of 2008

In 2008, Congress amended the ADA by passing the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) and directed the EEOC to issue revised regulations.⁴⁰ One of the primary purposes of the ADAAA was to clarify the definition of disability, which Congress felt the courts had misconstrued. This clarification is discussed in the next section.

2. EEOC 2011 Regulations

In 2011, the EEOC issued amended regulations to implement the ADAAA. The regulations expanded the meaning of the terms “major life activities” and “substantially limits” contained in the definition of disability, thereby expanding the individuals arguably covered under the ADA. Further, the regulations expressly rejected the Supreme Court’s decisions in *Sutton* and *Toyota*, explaining that mitigating measures other than ordinary eyeglasses or contact lenses must not be considered in assessing whether an individual is covered by the ADA. Further, the regulations advised courts to interpret the ADA’s coverage broadly, with the primary focus being whether the employer discriminated against the employee rather than whether the employee was disabled.

3. Congress Calls for Agency Action

In September 2013, Pennsylvania State University announced it would suspend its \$100 monthly non-compliance fee that was to be levied on employees who declined to fill out an

³⁶ *Id.* at 196.

³⁷ *Id.* at 197.

³⁸ See, e.g., National Council on Disability, *Supreme Court Decisions Interpreting the Americans with Disabilities Act* (Sept. 17, 2002), available at <http://www.ncd.gov/publications/2002/Sept172002>.

³⁹ See, e.g., *Carlson v. Liberty Mut. Ins. Co.*, 2007 WL 1632267 (11th Cir. 2007) (epilepsy); *Berry v. T-Mobile USA, Inc.*, 490 F.3d 1211 (10th Cir. 2007) (multiple sclerosis).

⁴⁰ The Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325 (amending various sections of the ADA and section 705 of the Rehabilitation Act; and enacting and redesignating several sections of the ADA).

online health questionnaire.⁴¹ The form, administered by an outside health management company, required employees to answer questions regarding workplace stress, marital problems, and pregnancy plans.⁴² The faculty objected to the intimate questions as an invasion of privacy and viewed the financial punishment for failing to answer such questions as a “strong-arm tactic” by the University.⁴³

Days after Pennsylvania State University’s health penalty suspension, Representative Louise M. Slaughter—Democrat of New York—called on the EEOC to investigate employer wellness programs that seek intimate health information from employees and to issue guidelines preventing employers from using such information to discriminate against employees.⁴⁴ Representative Slaughter’s appeal highlights some of the unexpected legal and ethical issues that can arise with employer sponsored wellness programs. Rather than respond to this plea for guidance given the lack of meaningful direction, the EEOC decided to strike first by challenging employer wellness programs and provide answers later—roughly one and a half years later. To compound this unexpected assault, and as discussed more fully below, the EEOC’s answers (in the form of a NPRM), are somewhat inconsequential and unenlightened recitations of existing legal standards.

4. Pending Bill on Wellness Programs

Growing wary on the precarious regulatory landscape, members of Congress from both houses co-sponsored legislation to address this growing concern over how corporate wellness programs should balance competing regulatory incentives and employee rights.⁴⁵ Most notably, the bill attempts to clarify that: (1) employers may offer rewards for employee participation in wellness programs; (2) the ADA’s safe harbor provisions remain intact; and (3) certain medical information requested by employers as part of a wellness programs is permissible. While an admirable effort, one has to wonder if the way to resolve conflicting legislation and an unwieldy network of massive regulation is to enact additional legislation.⁴⁶

II. Current EEOC Actions Regarding Wellness Programs

A. 2014 EEOC Cases Filed Against Employers

In 2014, the EEOC filed three cases against employers alleging their wellness programs violated the ADA. These cases sent shock waves through the legal community for several reasons. First, these were the first cases in the EEOC’s history to directly challenge a wellness

⁴¹ Natasha Singer, *Health Plan Penalty Ends at Penn State*, N.Y. Times, Sept. 18, 2013, available at http://www.nytimes.com/2013/09/19/business/after-uproar-penn-state-suspends-penalty-fee-in-wellness-plan.html?_r=0.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Natasha Singer, *Rules Sought for Workplace Wellness Questionnaires*, N.Y. Times, Sept. 24, 2013, available at <http://www.nytimes.com/2013/09/25/business/rules-sought-for-workplace-wellness-questionnaires.html>.

⁴⁵ Preserving Employee Wellness Programs Act, H.R. 1189, S. 620, 114th Congress (2015-2016).

⁴⁶ Such behavior is reminiscent of the National Rifle Association’s call for more guns in the face of school shootings. Eric Lichtblau & Motoko Rich, *N.R.A. Envisions ‘a Good Guy With a Gun’ in Every School*, N.Y. Times, Dec. 21, 2012, available at <http://www.nytimes.com/2012/12/22/us/nra-calls-for-armed-guards-at-schools.html>. Sometimes more is not always better.

program under the ADA. Second, the cases were filed in rapid succession over a mere three-month period. This left many employers feeling like their well-intentioned health programs were under attack. Finally, all three cases were initiated by the EEOC's Chicago regional office, leaving speculation as to whether the actions reflected a priority of a particular office or a sign of a more comprehensive EEOC strategy.

1. EEOC v. Orion (August 2014)

The EEOC filed its first challenge to corporate wellness programs against Orion Energy Systems (Orion), a Wisconsin-based company that provides energy retrofit solutions and services.⁴⁷ The EEOC claimed Orion's wellness program violated the ADA because it mandated that employees submit to medical examinations and inquiries that were not job-related and consistent with business necessity.⁴⁸ The federal agency also asserted that the company violated the ADA when it fired an employee who objected to the program.⁴⁹

As part of Orion's wellness program, employees were asked to complete a health risk assessment.⁵⁰ The health risk assessment required that employees self-disclose their medical history and complete blood work.⁵¹ Orion paid 100 percent of an employee's health insurance premium if the employee participated in the wellness program, but charged an employee the full amount of the health insurance premium if the employee refused to participate in the wellness program.⁵²

One Orion employee, Wendy Schobert, questioned whether the assessment was voluntary and whether her information from the assessment would be confidential.⁵³ Following her refusal to participate in the wellness program, Orion required Schobert to pay her entire health insurance premium and, less than two months later, fired her.⁵⁴ Schobert was the only employee who declined to participate in the health risk assessment.⁵⁵

The EEOC asserts Orion's wellness program is unlawful under Title I of the ADA because it subjects Schobert to medical examinations and disability-related inquiries that are not part of a voluntary wellness program.⁵⁶ Similarly, the EEOC contends Orion's action in firing Schobert is unlawful under Title I of the ADA because Orion retaliated against her for good-faith objections to the wellness program.⁵⁷ According to the EEOC, "Having to choose between responding to medical exams and inquiries—which are not job-related—in a wellness program, on the one hand, or being fired, on the other hand, is no choice at all."⁵⁸

2. EEOC v. Flambeau (September 2014)

⁴⁷ *EEOC v. Orion Energy Sys., Inc.*, No. 1:14-cv-1019 (E.D. Wis. filed Aug. 20, 2014) (Orion Action).

⁴⁸ Complaint ¶¶ 23-28, Orion Action, *supra*.

⁴⁹ *Id.* ¶¶ 29-32.

⁵⁰ *Id.* ¶ 10.

⁵¹ *Id.* ¶ 11.

⁵² *Id.* ¶¶ 16-17. The cost of insurance premiums ranged from approximately \$400 to \$1,100 per month depending on each employee's coverage. *Id.* ¶¶ 17-18.

⁵³ *Id.* ¶ 13.

⁵⁴ *Id.* ¶¶ 17, 20.

⁵⁵ *Id.* ¶ 19.

⁵⁶ *Id.* ¶¶ 23-28.

⁵⁷ *Id.* ¶¶ 29-32.

⁵⁸ EEOC Press Release, *EEOC Lawsuit Challenges Orion Energy Wellness Program and Related Firing of Employee* (Aug. 20, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/8-20-14.cfm>.

The EEOC filed its second lawsuit against Flambeau, Inc. (Flambeau), a Wisconsin-based plastics manufacturing company.⁵⁹ The EEOC declared Flambeau's wellness program violated the ADA because it imposed severe consequences on employees who did not submit to medical tests as part of its corporate wellness program. Specifically, the agency's complaint alleged Flambeau's wellness program required new employees and existing employees to submit to biometric testing and complete health risk questionnaires regarding their medical histories.⁶⁰ Flambeau refused to provide health insurance to new employees unless they complied with these requirements. Similarly, existing employees who failed to comply with these requirements faced cancellation of medical insurance and were required to pay their full medical premium to remain insured under the Consolidated Omnibus Budget Reconciliation Act.⁶¹

When Flambeau employee Dale Arnold was unable to complete the biometric testing and health risk assessment on the appointed day, Flambeau cancelled his medical insurance and shifted responsibility for paying the entire premium to him.⁶² By comparison, employees who agreed to biometric testing and completed health risk assessments retained their medical insurance coverage and were required to pay only 25 percent of their insurance premium expenses.⁶³

As in the *Orion* Action, the EEOC disputes the voluntary nature of Flambeau's wellness program due to the severe consequences employees incur for not completing the testing or assessment.⁶⁴ In line with his previous comments, John Hendrickson—regional attorney for EEOC's Chicago district—contends, “Having to choose between ‘voluntarily’ complying with Flambeau’s medical exams and inquiries, on the one hand, or being penalized with cancellation or a penalty, on the other hand, is not voluntary and not a choice at all.”⁶⁵

3. EEOC v. Honeywell (October 2014)

Shortly thereafter, the EEOC filed its third action challenging a corporate wellness program.⁶⁶ In this case, the federal agency sought a temporary restraining order and preliminary injunction to prevent Honeywell International Inc. (Honeywell) from imposing penalties on employees who refused to submit to biometric testing as part of its wellness program.⁶⁷ The EEOC claimed the testing violated Title I of the ADA and Title II of the Genetic Information Nondiscrimination Act (GINA).⁶⁸

As part of its 2015 health benefit plan, Honeywell asked employees and their spouses to undergo biometric screening—including a blood draw—to test blood pressure, cholesterol levels,

⁵⁹ *EEOC v. Flambeau, Inc.*, No. 3:14-cv-00638 (W.D. Wis. filed Sept. 30, 2014) (Flambeau Action).

⁶⁰ Complaint ¶¶ 10-11 & 18, Flambeau Action, *supra*.

⁶¹ *Id.* ¶ 18.

⁶² *Id.* ¶¶ 13-16.

⁶³ *Id.* ¶ 16.

⁶⁴ *Id.* ¶ 18.

⁶⁵ EEOC Press Release, *EEOC Lawsuit Challenges Flambeau Over Wellness Program* (Oct. 1, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/10-1-14b.cfm>.

⁶⁶ *EEOC v. Honeywell International, Inc.*, No. 14-cv-4517 (D. Minn. filed Oct. 27, 2014) (Honeywell Action) (involving a petition for a temporary restraining order and preliminary injunction).

⁶⁷ Pet. for TRO & Prelim. Inj. ¶ 42 and Prayer for Relief, Honeywell Action, *supra*.

⁶⁸ The EEOC's claim regarding Honeywell's alleged ADA violation is addressed in this section. The EEOC's claim regarding Honeywell's alleged GINA violation is addressed *infra*.

and body mass index.⁶⁹ The biometric screening also tested for nicotine and “cotinine [sic].”⁷⁰ The EEOC claims a non-participating employee (1) is assessed a \$500 surcharge on their 2015 medical plan costs, (2) can lose up to \$1,500 in company contributions to health savings accounts depending on base salary and coverage type, (3) can be assessed a \$1,000 tobacco surcharge, and (4) can be charged an additional \$1,000 tobacco surcharge for a non-participating spouse.⁷¹ Further, the EEOC alleges Honeywell told employees it planned to use the results of the biometric tests to impose goals for employees to reduce their risk factors.⁷² Non-participants would lose their health savings account contributions.⁷³

On November 3, 2014, Judge Ann Montgomery of the U.S. District Court of Minnesota, denied the EEOC’s request for a temporary restraining order or preliminary injunction. While the order represents a victory for Honeywell, it did not provide any indication on how the court may decide the claims in the future. Indeed, unless the parties reach a settlement, which appears unlikely given Honeywell’s vehement defense of its program as lawful under federal statutes,⁷⁴ the decision is not the last word on the matter. The EEOC will likely file a complaint soon after the administrative complaint process expires. Perhaps tellingly, Judge Montgomery remarked to the lawyers at oral argument on the Honeywell matter, “There are a number of fascinating issues for debate at a later time.”⁷⁵

B. EEOC 2015 Notice of Proposed Rulemaking

The recent EEOC cases sparked a renewed outcry for advice on how employers institute legally compliant wellness programs. On April 20, 2015, the EEOC responded by issuing its NPRM, offering instruction on the interplay between Title I of the ADA and employer wellness programs.⁷⁶ Specifically, the NPRM proposes changes to the existing ADA regulations and interpretive guidance regarding the “extent to which the ADA permits employers to offer incentives to employees to promote participation in wellness programs.”⁷⁷ Following the public comment period, which ends on June 19, 2015, the EEOC will review all submissions and issue final rules for approval.⁷⁸ There is no set time period for such action. While not binding, employers are well advised to utilize the NPRM as a guide until the final rules are issued.

⁶⁹ Pet. for TRO & Prelim. Inj. ¶¶ 10-12, Honeywell Action.

⁷⁰ *Id.* ¶ 13. The word “cotinine” appears to be a typographical error in the EEOC’s complaint. Instead, the word should read “cotinine,” which is a product formed when the body metabolizes nicotine. See CDC Cotinine FactSheet, available at http://www.cdc.gov/biomonitoring/Cotinine_FactSheet.html (last visited on May 30, 2015).

⁷¹ Pet. for TRO & Prelim. Inj. ¶ 14, Honeywell Action.

⁷² *Id.* ¶ 16.

⁷³ *Id.*

⁷⁴ Robert C. Ferris, *Honeywell Responds to EEOC’s Frivolous Lawsuit To Stop Company’s Biometric Screening For Employees*, Honeywell Press Release, Oct. 29, 2014, available at <http://honeywell.com/News/Pages/Honeywell-Responds-to-EEOCs-Frivolous-Lawsuit-To-Stop-Companys-Biometric-Screening-for-Employees.aspx>.

⁷⁵ Andrew Harris, *Honeywell Fends Off EEOC Bid to Bar Wellness Penalty*, Bloomberg Business, Nov. 3, 2014, available at <http://www.bloomberg.com/news/articles/2014-11-03/honeywell-fends-off-eoc-bid-to-bar-wellness-penalty>.

⁷⁶ Amendments to Regulations Under the Americans With Disabilities Act, 80 Fed. Reg. 21659 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 1630).

⁷⁷ *Id.* at 21660.

⁷⁸ Questions and Answers about EEOC’s Notice of Proposed Rulemaking on Employer Wellness Programs, Q&A 9, available at http://www.eeoc.gov/laws/regulations/qanda_nprm_wellness.cfm (last visited on May 29, 2015).

The NPRM addresses three principal issues pertaining to corporate wellness programs. First, and by far the most substantive portion, the NPRM sets out the parameters for what constitutes a voluntary wellness program. To meet the “voluntary” standard, a wellness program must: (1) be reasonably designed to promote health or prevent disease; (2) have a reasonable chance of improving the health of, or preventing disease in, participating employees; and (3) not be overly burdensome, a subterfuge for violating the ADA, or highly suspect in the method chosen to promote health or prevent disease.⁷⁹ By contrast, a corporate wellness program is *not* voluntary if the employer: (1) requires employees to participate; (2) denies or limits coverage under any of its health plans for non-participation; or (3) takes adverse employment action, retaliates against, interferes with, or threatens employees regarding for non-participation.⁸⁰

It is clear that employers may offer employees incentives as part of a wellness program.⁸¹ Such incentives—whether termed rewards for participation or penalties for non-participation—must not exceed 30 percent of the total cost of employee-only coverage.⁸² For example, if an employee’s total annual insurance premium is \$5,000 (regardless of how much is paid by the employee or the employer), the maximum incentive the employee may offer for its wellness program is \$1,500. The 30 percent limitation applies regardless of the incentive’s form, meaning it includes monetary (e.g., premium discounts or gift cards) and in-kind awards (e.g., time off).⁸³

Second, to ensure employee participation is in fact voluntary, employers must provide notice to employees about any medical information they request as part of a wellness program. The NPRM states the notice⁸⁴ must clearly explain: (1) what medical information will be obtained; (2) who will receive the medical information; (3) how the medical information will be used; (4) the restrictions on its disclosure; and (5) the methods the employer will use to prevent any improper disclosure.⁸⁵

Finally, the NPRM delineates the confidentiality requirements employers must adhere to regarding use of medical information obtained as part of a wellness program. Specifically, the NPRM provides that medical information gathered in connection with an employee health program may only be provided to an employer in aggregate form.⁸⁶ The aggregate form may not disclose, or be reasonably likely to disclose, the identity of specific individuals, except as needed to administer the health plan.⁸⁷

III. Federal Laws Referenced by the EEOC Actions

The ADA’s collision course with corporate health programs is symbolic of compliance problems wellness programs encounter in the larger regulatory landscape. Indeed, the NPRM acknowledges particular laws with which wellness programs must comply. Specifically, the NPRM states corporate wellness programs must comply with federal employment laws that

⁷⁹ 29 C.F.R. pt. 1630 at 21660.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 21662.

⁸³ *Id.* at 21664.

⁸⁴The NPRM does not explicitly state whether the notice must be in writing. Arguably, verbal notice that provides the required information would suffice, however, employers should know verbal notice is more difficult to prove and more likely to be misconstrued by an employee.

⁸⁵ 29 C.F.R. pt. 1630 at 21662-21663.

⁸⁶ *Id.* at 21662.

⁸⁷ *Id.*

prohibit discrimination based on race, color, sex (including pregnancy), national origin, religion, compensation, age, or genetic information.⁸⁸ In addition, the NPRM addresses the nondiscrimination provisions of Health Insurance Portability and Accountability Act (HIPAA). This section will address how wellness programs could violate these anti-discrimination laws. Likewise, laws not expressly referenced by the NPRM that also could implicate well-intentioned health programs are referenced to underscore the comprehensive nature of the problem.

A. Anti-Discrimination Laws

1. Title VII

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination on the basis of race, color, religion, sex (including pregnancy), or national origin.⁸⁹ Under Title VII it is illegal to, *inter alia*, employ practices that, even though not intentional, have the effect of discriminating against individuals because of their race, color, religion, sex, or national origin.⁹⁰ As with the ADA, to be subject to liability under Title VII, employers generally must have 15 or more employees.

There are at least four ways wellness programs can implicate Title VII and, thereby, subject companies to liability. First, if a corporate wellness program includes a health standard or fitness goal, the employer must ensure the standard does not discriminate against a class of individuals protected by Title VII. For instance, some wellness programs require employees to be a certain weight to receive discounted health premiums.⁹¹ If the weight requirements are different for females and males of the same age and height, they may violate Title VII. Such a scenario is analogous to an issue the aviation industry encountered when it held female flight attendants and male flight attendants to different weight standards.⁹² Courts found different standards based on gender violated Title VII.

Second, wellness programs can violate Title VII if a neutral requirement has a disparate impact on a protected class of employees. Thus, even a company's best intentions do not insulate it from Title VII liability. The following examples demonstrate how seemingly innocuous aspects of corporate wellness programs can violate anti-discrimination provisions.

If an employer conducts a smoking cessation class on a Saturday, so as not to conflict with its employees' workweek, it could violate Title VII if it conflicts with a particular group's religious worship. The argument is if an employee's religion conducts services on Saturday, and as a result the employee cannot attend the program and receive the incentive, the program had a disparate impact on an employee due to his or her religion. Similarly, a mandatory vaccination program aimed at protecting the workforce (e.g., H1N1) could conflict with a protected class's

⁸⁸ *Id.* at 21660.

⁸⁹ The Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, as amended, codified at 42 U.S.C. § 2000e.

⁹⁰ *Id.*

⁹¹ On a related note, it may be unadvisable or undesirable for a female employee to lose weight if she is trying to get pregnant or a male employee struggles with an eating disorder. This places the employee in the untenable position of revealing personal information or foregoing discounted health premiums. One can imagine an endless number of such scenarios. Employees are not the only ones facing Hobson's choice—employers may unwittingly be exchanging one set of financial burdens (e.g., health care) for another (e.g., lawsuits).

⁹² See, e.g., *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000) (United's policy requiring female flight attendants to weigh between 14 and 25 pounds less than their male colleagues of the same height and age was discriminatory because it resulted in gender discrimination).

view on medical treatment. An employer may even unknowingly create a health standard that has a disparate impact on a particular race or ethnic group. For example, a 2007 study found males of Pacific Island descent have a higher BMI than individuals of other ethnic groups.⁹³ Similarly, a 2006 study found Native Americans have a higher rate of type 2 diabetes.⁹⁴ Notably, Honeywell's wellness program, discussed *supra*, possibly violates Title VII. One of the chemicals tested for in Honeywell's biometric program is cotinine. At least one study suggests this biomarker for nicotine exposure registers "higher in African American smokers than in white smokers."⁹⁵ Perhaps the EEOC will amend its complaint to include such a claim.

Third, employees may assert hostile work environment claims based on wellness program conditions. A hostile work environment is present when conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Offensive conduct may include, but is not limited to, offensive jokes, name calling, physical assaults or threats, intimidation, ridicule or mockery, insults, or interference with work performance.

A hostile work environment may be more likely in companies with wellness programs because: (1) third parties such as vendors, health care providers, and fitness instructors—who are not employees—are more difficult to police and may be more likely to make inappropriate comments; (2) the setting—at a gym, outside the workplace, and outside work hours—lends itself to more casual conversation and interactions, which can lead to inappropriate comments; and (3) exercise tends to elicit comments unrelated to work, draw attention to people's bodies, and require individuals to wear more revealing clothing. Thus, hostile work environment claims may be more prevalent in companies with wellness programs. At a minimum, the presence of such programs may require employers to police additional people and multiple settings to minimize inappropriate behavior.

Finally, Title VII liability is not limited solely to situations in which an employer has a wellness program itself. As the following case illustrates, liability can arise even when an entity merely *helps* another entity establish a wellness program. In *Bradley v. City of Lynn*, a group of African-American firefighters and police officers filed a class action suit against the City of Lynn and the Human Resources Division of the Commonwealth of Massachusetts (HRD).⁹⁶

The suit alleged mandatory entrance examinations had a disparate impact on minorities.⁹⁷ Although the court and the defendants considered the City of Lynn to be the plaintiffs' employer, plaintiffs claimed HRD was *also* their employer for purposes of Title VII. The court agreed even though it acknowledged HRD neither exercised control over any aspects of the employment relationship with the plaintiffs nor maintained day-to-day supervisory control over the plaintiffs' tasks.⁹⁸ Thus, the mere fact that HRD determined health and physical fitness standards for the civil servants' wellness programs and funded the wellness programs once accepted by the City of Lynn was enough to make HRD an employer. In light of this expansive interpretation of

⁹³ Andrew E. Williams ET AL., Work, Weight, and Wellness: The 3W Program: A Worksite Obesity Prevention and Intervention Trial. *Obesity*, 15 (2007): 16S–26S, at 21S.

⁹⁴ Jeffrey J. Bachar ET AL., Cherokee Choices: a diabetes prevention program for American Indians. *Preventing Chronic Disease*. Vol. 3(3) (2006): A103.

⁹⁵ See Valeria B. Yerger, "Menthol's Potential Effects on Nicotine Dependence: A Tobacco Industry Perspective." *Tobacco Control* 20(Suppl_2): ii29-ii36 (2011), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3088468/>.

⁹⁶ *Bradley v. City of Lynn*, 403 F. Supp. 2d 161 (D. Mass. 2005).

⁹⁷ *Id.* at 162.

⁹⁸ *Id.* at 169.

Title VII's coverage, companies that assist other companies in implementing wellness programs may fall within Title VII's definition of "employer" and be subject to liability for discrimination.

2. Age Discrimination in Employment Act

The Age Discrimination in Employment Act of 1967 (ADEA) prohibits discrimination on the basis of age regarding individuals age 40 or older.⁹⁹ To be covered under the ADEA, an entity generally must have 20 or more employees. The ADEA applies to the same entities discussed above under Title VII.

To avoid ADEA violations, employers must ensure their wellness standards do not discriminate against, or have a disparate impact on, employees age 40 or older. Medical studies show that body mass index, cholesterol level, and blood pressure are often measures of genetics and aging rather than measures of health. Accordingly, outcome-based wellness programs that utilize such indices to determine entitlement to a wellness reward may be ripe for age claims, especially when such standards are linked to rewards or penalties. If a company pays an employee's monthly health insurance deductible provided he or she achieves a certain blood pressure, the wellness program may violate the ADEA if a disproportionate number of employees age 40 or older fail to qualify for the deductible. Given the population aging issue in the United States, ADEA violations seem like a substantial risk for many corporate wellness programs.¹⁰⁰

B. Laws Regarding Collection and Use of Medical Information

Another area employers must be aware of is how the collection and use of employee medical information during a wellness program can trigger corresponding legal obligations. Several recently enacted laws including GINA and HIPAA, contain detailed requirements regarding what health information an employer may collect, how an employer may use the information, and when an employer may disclose the information. Companies often elicit detailed medical information in an effort to maximize the program's benefits, such as return on investment and improved employee health. Nevertheless, this action may contravene medical information laws.

1. GINA

GINA restricts the use of genetic information in connection with health coverage and employment.¹⁰¹ More specifically, Title I of GINA governs the collection and use of genetic

⁹⁹ The Age Discrimination in Employment Act of 1967, Pub. L. 90-202, as amended, codified at 29 U.S.C. § 621.

¹⁰⁰ According to a 2010 United States Census report, the percentage of the population aged 65 and over increased from 4 percent in 1900 to 13 percent in 2010 and is projected to reach 21 percent by 2050. Loraine West ET AL., *65+ in the United States: 2010*, Current Population Reports, U.S. Dep't. of Commerce 1, 3 (June 2014). Further, labor force participation rates rose for both older men and older women in the first decade of the twenty-first century (22 percent and 14 percent, respectively). *Id.* By contrast, the labor force participation rates for the population aged 25 to 34 fell for both men and women during the same time period. *Id.*

¹⁰¹ The Genetic Information Nondiscrimination Act of 2008, Pub. L. 110-233, 122 Stat. 881, as amended, 42 U.S.C. § 2000ff.

information by health plans and insurers.¹⁰² Title II of GINA governs the collection and use of genetic information by employers and prohibits employers from using genetic information or family medical history to discriminate or retaliate against current and former employees, as well as job applicants.¹⁰³ The employment provisions apply to all employers with 15 or more employees.

Before exploring how wellness programs can implicate GINA, one must understand the vast information GINA protects. The statute defines the phrase “genetic information” expansively to include five categories of information: (1) an individual’s genetic tests; (2) genetic tests of an individual’s family members (defined as dependents and relatives up to and including fourth degree relatives); (3) genetic tests of an individual’s fetus or embryo; (4) manifestation of a disease or disorder in family members; and (5) any request for, or receipt of, genetic services including counseling of an individual or family member.¹⁰⁴ GINA defines a “request” for genetic information to include, among other things, asking about an individual’s current health status in a way to elicit genetic information.¹⁰⁵ One can easily see how GINA’s vast breadth and depth creates a minefield for employers who wish to utilize medical questionnaires as part of any wellness program.

For instance, employers can violate GINA if they condition monetary incentives, such as insurance discounts, on the completion of forms seeking medical information. Indeed, in *EEOC v. Honeywell*, the agency claims the company violated GINA by making financial inducements contingent upon an employee’s spouse providing genetic information.¹⁰⁶

In addition to the restrictions on requesting genetic information, GINA also contains restrictions on disclosing genetic information. It is a violation to reveal genetic information to someone other than a licensed health care professional. Similarly, disclosure of information that identifies a particular employee violates GINA. The EEOC’s NPRM allows disclosure of medical information under the ADA to “administer health plans,”¹⁰⁷ but fails to explain what the term “administer” means. As neither GINA nor the NPRM define the contours of permissible disclosure, employers are left with their own interpretation. Finally, inadvertently receiving medical information on an employment application (e.g., number of days absent due to illness), or placing medical information in an employee’s personnel file, could violate GINA.

2. Health Insurance Portability and Accountability Act

HIPAA¹⁰⁸ contains two provisions that relate to wellness programs. The first provision prohibits group health insurance plans from charging similarly situated individuals different premiums, deductibles, or co-payments, or offering rewards based on a health factor. The second provision contains privacy and confidentiality requirements for an individual’s private health information. HIPAA does not allow an employee to bring a private cause of action against his or her employer. Nonetheless, an employee can file a complaint with the Department of Health and Human Services, thereby prompting a government investigation or potential litigation.

¹⁰² See, generally, 42 U.S.C. §§ 2000ff *et seq.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Honeywell Action, Pet. for TRO & Prelim. Inj. ¶ 16.

¹⁰⁷ 42. U.S.C. § 12201(c)(2).

¹⁰⁸ Health Insurance Portability and Accountability Act of 1996, as amended, 29 U.S.C. § 1181 *et seq.* and 42 U.S.C. § 1321(d) *et seq.* (2013).

In the same ways described above under the ADA and GINA, employers can violate HIPAA if they intentionally or inadvertently possess private health information in any form (including verbal or electronic). To avoid this, companies should have third-party administrators input data anonymously or in aggregate form rather than by employee names. Further, employers must be careful not to take adverse employment actions against an employee (e.g., disciplining, failing to promote, or firing) due to an employee's health information or refusal to provide such information. The EEOC's Actions with respect to the ADA suggest such adverse employment actions for non-participation also would be unlawful under HIPAA.

It remains unclear, however, whether less egregious forms of potentially adverse employment actions (e.g., remarking about an employee's non-participation to his or her supervisor) will violate the law. And what about actions that do not directly relate to job performance, but nevertheless have an impact on one's work environment (e.g., informal lunch invitations)? Determining where the line should be drawn between voluntary and involuntary wellness programs is a daunting task.

C. Other Federal and State Laws Implicated by the EEOC Actions

The EEOC Actions address a relatively narrow set of issues about a single federal employment law—and even then, leave various questions unanswered. Far from tamping down anxiety regarding how to promulgate lawful wellness programs, the EEOC Actions opened Pandora's box by exposing the tension between wellness programs and the regulatory landscape.

The following non-exhaustive list serves to further punctuate the morass of laws implicated by wellness programs: the ACA;¹⁰⁹ the Fair Labor Standards Act (FLSA);¹¹⁰ the Employee Retirement Income Security Act (ERISA);¹¹¹ the Consolidated Omnibus Budget Reconciliation Act (COBRA);¹¹² the Family and Medical Leave Act (FMLA);¹¹³ the Occupational Safety and Health Act (OSH Act);¹¹⁴ the Mental Health Parity and Addiction

¹⁰⁹ The ACA requires that outcome-based wellness programs meet five criteria. One criterion is that the program is reasonably designed to promote health or prevent disease. The EEOC used this same language in its recent NPRM. Neither the ACA nor the ADA, however, provides any meaningful explanation regarding how to determine if a program is "reasonably designed" to promote health. It also fails to explain what evidence an employer should use to make such a determination.

¹¹⁰ If an employer's wellness program requires its employees to attend a health seminar, time spent at the seminar could constitute "work hours" for which non-exempt employees must be paid.

¹¹¹ Under ERISA, an employer cannot terminate an employee to prevent that employee from obtaining certain benefits. Thus, cancellation of an employee's insurance for non-participation in a wellness program, like in the *Orion Action*, could violate ERISA. See *Vaslavik v. Storage Tech. Corp.*, 183 F.R.D. 264 (D. Co. 1998) (viewed as a whole, the company's culture of viewing older employees as having higher health care costs, implementing wellness program to expose health issues, and trying to reduce health care costs was enough to allow employee to proceed with ERISA claim); *Gonzales v. Exxon Corp.*, 105 F.3d 655 (5th Cir. 1996) (summary judgment affirmed against wife who sued for husband's ERISA benefits due to his death while riding a bicycle for a corporate wellness program).

¹¹² COBRA may require employers to allow terminated employees to continue participation in wellness programs, if such programs provide relief for medical or health issues.

¹¹³ Employees may be entitled to leave under the FMLA if they suffer an injury during a corporate wellness program that qualifies as a serious health condition.

¹¹⁴ The OSH Act contains a general duty that requires all employers to furnish a place of employment which is free from recognized hazards likely to cause harm or serious physical harm. Workout facilities present hazardous if not supervised or maintained. In addition, the OSH Act's extensive protections from bloodborne pathogens may implicate vaccination and blood draw procedures. Both examples provide possible OSH Act issues.

Equity Act (MHPAEA);¹¹⁵ the National Labor Relations Act (NLRA);¹¹⁶ federal and state tax laws;¹¹⁷ the United States Constitution;¹¹⁸ state worker compensation laws;¹¹⁹ state negligence laws;¹²⁰ and state laws regarding off-duty conduct.¹²¹ In this regulatory environment, it seems unrealistic to pretend corporate wellness programs can operate without significant exposure absent further guidance.

IV. Legal Implications of EEOC Actions

Given the legal exposure due to this state of flux, how do companies move forward with their corporate wellness programs? This section will address the areas the EEOC Actions appear to clarify and the areas that remain unanswered.

A. Clarification Provided by EEOC Actions

The EEOC's actions provide some clarification on the interaction between the ADA and corporate wellness programs. First, and perhaps most obvious, the fact a company labels a wellness program as "voluntary" does not end the inquiry. As with other federal employment statutes, an employer's designation is irrelevant.¹²² This means employers should not take any comfort in a wellness program's terminology. Programs should be scrutinized to ensure what appears to be a voluntary program, test, or questionnaire does not create undue pressure that coerces employee enrollment.

Second, the EEOC Actions signal the agency's intolerance for health programs that subject employees to discipline, cause employees to lose their jobs, or saddle employees with

¹¹⁵ Wellness programs may be required to comply with the MHPAEA's parity requirements. For example, an employer who pays for medical screening, vaccinations, physical examinations, and other tests as part of a wellness program, also may have to pay for employees to obtain mental illness screening, examinations, and tests. Similarly, if employers pay for employees' prescription drugs for medical and surgical ailments (e.g., antibiotics) as part of a wellness program, perhaps they will also have to cover the same percentage of prescription costs for mental health drugs (e.g., Prozac).

¹¹⁶ Wellness programs could constitute "terms and conditions of employment," requiring employers to bargain with unions about any standards, additions, or changes.

¹¹⁷ Wellness program incentives (e.g., gift certificates, subsidized meals) if more than *de minimis* could be considered taxable benefits that trigger reporting requirements. Further, use of a building to operate a for profit wellness center could cause a not-for-profit medical center to lose its tax exempt status.

¹¹⁸ In *Anderson v. City of Taylor*, 2005 U.S. Dist. LEXIS 44706 (E.D. of Mich. 2005), the court held a city's attempt to obtain a FEMA grant and competitive rates by instituting a mandatory blood draw was an unconstitutional search that violated employee privacy rights under the Fourth Amendment.

¹¹⁹ Employers may have to pay worker compensation benefits for injuries employees sustain while participating in a corporate-sponsored wellness program. Failure to do so could be unlawful.

¹²⁰ In *Huffman v. SmithKline Beecham Clinical Lab. Inc.*, 111 F. Supp. 2d 921 (N.D. Ohio 2000), a widow defeated Whirlpool's motion for summary judgment when the court held that operation of a voluntary wellness program— involving annual physicals—conferred a responsibility on the company to ensure the tests were conducted properly and the results conveyed. The court allowed the widow to move forward with her case even though the physical and test results were conducted exclusively a third-party vendor and communicated directly to the deceased employee who elected not to act on the results.

¹²¹ Some states prohibit employers from disciplining employees for lawful off-duty conduct. In such jurisdictions, a wellness programs that penalizes smokers, for example, could be unlawful.

¹²² Cite FLSA job title and designation of employee as exempt/non-exempt, irrelevant. The employees job responsibilities matter. Same for employee v. independent contractor.

severe financial penalties (e.g., shifting the entire cost of premiums to employees).¹²³ At a minimum, the EEOC, and the Chicago regional office in particular, appears ready to challenge such programs. Although the precise line between voluntary and involuntary programs is still unknown, the substantial penalties at issue in the EEOC Cases seem likely to render a wellness program involuntary.

Third, the Honeywell case may provide additional insight into what the EEOC considers a group health plan, which in turn could allow wellness plans to qualify for the ADA's safe harbor protection.¹²⁴ In *EEOC v. Honeywell*, the EEOC claims Seff's analysis is wrong.¹²⁵ In explaining why it does not believe Seff's plan qualifies for the ADA's safe harbor provision, the EEOC necessarily sheds light on what it believes *will* qualify for protection. The EEOC's reasoning implies health benefit plans that engage in underwriting, actuarial studies, or legitimate classifications of insurance risks (e.g., physicals to set initial premiums for group health plans) will satisfy the safe harbor requirement.¹²⁶ Thus, structuring corporate wellness programs to be part of a health benefit plan in accordance with the above standards may shield an employer from ADA liability.

B. What the EEOC's Actions Fail to Address

The EEOC Actions may just raise as many questions as they answer. Further, some may suggest the NPRM is not illuminating because many of the restrictions and obligations imposed on employers therein are already in place under federal regulations implementing HIPAA, the ACA, and ERISA. The following areas exemplify some of the remaining concerns.

First, what types of discipline for an employee's non-participation will make a wellness program involuntary? For example, after Schobert questioned the wellness program, she was called into a meeting with Orion's personnel director and her immediate supervisor, and told not to express any opinions about the wellness program to her coworkers.¹²⁷ She was further told that the purpose of the meeting was to quash any potential "attitude" issue of hers relating to the wellness program.¹²⁸ It is unclear if this action alone could constitute unlawful "discipline" and whether "verbal" discipline without tangible action could convert a voluntary wellness program into an involuntary one.

Second, although the NPRM states employers must keep medical information in aggregate form so as not to identify individual employees, it does not explain how employers with wellness programs can avoid comingling or sharing medical information with administrative personnel when the company needs to take action based on medical information. As an example, what does an employer do if she is entitled to a premium reduction on her health insurance contribution, but the information cannot be shared with the payroll department? Similarly, what if an employee is entitled to a reasonable accommodation so he can participate in a company's wellness program, but apprising the employee's supervisor requires the information

¹²³ See, e.g., Orion Compl. ¶ 14.

¹²⁴ The qualification "may provide" insight acknowledges the uncertainty regarding whether the EEOC Cases represent solely the Chicago regional office's views or the EEOC's views a whole. The EEOC Commissioners did not issue a public statement on the *Seff* court's decision relating to the ADA safe harbor provision. Accordingly, the legal community is awaiting further indications of how the EEOC will proceed on this issue.

¹²⁵ See Mem. in Support of EEOC's Application for TRO and Expedited Prelim. Inj. (Oct. 27, 2014).

¹²⁶ *Id.* at 16-17.

¹²⁷ *Id.*

¹²⁸ *Id.*

to be placed in a personnel file? In either of these situations, routine administrative transfers of information could violate the law. This places the company in the precarious situation of deciding whether to hire an outside entity to manage the medical information, possibly erasing any monetary gains from the program, or risk legal exposure.

Third, the NPRM fails to reconcile the disconnect between an employer's incentive to administer financially beneficial corporate wellness programs and the ADA's prohibition on basing employment decisions, or health benefit decisions, on myths, fears, stereotypes, or false assumptions about disabilities. *Seff*, discussed *supra*, illustrates how this situation could arise. In *Seff*, the county's program—which by its express terms—sought to ferret out employees for follow-up programs based on their medical results. This strategy appears to be based, at least in part, on the company's assumption that people with certain conditions cost the company more money. One could argue, in an effort to reduce the company's insurance costs, the company is making an unlawful benefit or employment decision—based on the employer's assumptions about workers with potential disabilities.

Fourth, wellness program standards may compel an employee to disclose an otherwise hidden disability and, thereby, put the company on notice of a medical condition it would never have known about but for the program. If an executive later takes an adverse employment action against the employee who disclosed the disability, the employee may claim the executive's action was due to disability discrimination. Given that the company had notice of the disability from its wellness program, this argument could prevail. At a minimum, it might cause the company to expend time, money, and resources to defend its actions.

Finally, the NPRM does not address the incongruity how a company could legally request an employee's spouse or child to engage in wellness activities (as seen in *Honeywell*) without committing associational discrimination for non-participation. Similarly, it may violate the prohibition on associational discrimination to refuse to give an employee an insurance discount because the employee's spouse or child cannot meet the requirements due to a medical condition. Moreover, in this situation, would an employer have to provide a reasonable accommodation to the spouse or child to allow participation? This could be expensive and subject the employer to other types of liability.

In *Dewitt v. Proctor Hospital*, the 7th Circuit decided a comparable associational discrimination case.¹²⁹ An employee claimed her employer fired her to avoid having to pay for her husband's substantial medical costs. In allowing the jury to consider the employee's claim, the appellate court held firing an employee because her spouse has a disability that is costly to the employer could violate the ADA's associational discrimination section.¹³⁰ Although the employer prevailed on its second appeal, the case demonstrates the time and expense companies can incur for appearing to consider medical costs when making employment decisions.

CONCLUSION

Even with the marginal clarification one can deduce from the EEOC Actions, companies would be well-advised to proceed with caution until the federal government, its agencies, or the courts provide additional further substantive advice on corporate wellness program compliance. Wellness programs can produce significant benefits; they must, however, comply with relevant federal and state laws. Given the daunting regulatory landscape, the government should provide

¹²⁹ *Dewitt v. Proctor Hosp.*, 517 F.3d 944 (7th Cir. 2008).

¹³⁰ *Id.* at 947.

further direction on wellness programs so they can realize their full financial and medical benefits without encroaching on employee rights.