Original Investigation

Participatory Workplace Wellness Programs: Reward, Penalty, and Regulatory Conflict

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Policy Points:

- Workplace wellness programs that provide incentives for completing a health risk assessment are a form of participatory programs.
- There are legal and ethical concerns when employers assess penalties for not completing a health risk assessment, raising questions about the voluntariness of such a program.
- The Departments of Treasury, Labor, and Health and Human Services' 2013 regulations for participatory programs and employers' current practices conflict with the Equal Employment Opportunity Commission's prevailing interpretation of the Americans with Disabilities Act of 1990.

Context: In keeping with the Patient Protection and Affordable Care Act, Congress revised the law related to workplace wellness programs. In June 2013, the Departments of Treasury, Labor, and Health and Human Services passed the final regulations, updating their 2006 regulatory framework. Participatory programs that reward the completion of a health risk assessment are now the most common type of wellness program in the United States. However, legal and ethical concerns emerge when employers utilize incentives that raise questions about the voluntariness of such programs. At issue is that under the Americans with Disabilities Act (ADA) of 1990, employers cannot require health-related inquiries and exams.

Methods: To analyze the current interpretation of the ADA, I conducted research on both LexisNexis and federal agency websites. The resulting article evaluates the differences in the language of Congress's enabling legislation and the federal departments' regulations and how they may conflict with the ADA.

The Milbank Quarterly, Vol. 93, No. 2, 2015 (pp. 301-318)

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It also reviews the federal government's authority to address both the legal conflict and ethical concerns related to nonvoluntary participatory programs.

Findings: Employers' practices and the federal departments' regulations conflict with the current interpretation of the ADA by permitting employers to penalize employees who do not complete a health risk assessment. The departments' regulations may be interpreted as conflicting with Congress's legislation, which mentions penalties only for health-contingent wellness programs. Furthermore, the regulatory protections for employees applicable to health-contingent wellness programs do not apply to participatory programs.

Conclusions: Either Congress or the federal agencies should address the conflict among employers' practices, the wellness regulations, and the ADA and also consider additional protections for employees. Employers can avoid ethical and legal complications by offering voluntary programs with positive incentives.

Keywords: workplace wellness programs, health law, ethics, health information.

IN 2010, CONGRESS PASSED THE PATIENT PROTECTION AND Affordable Care Act, comprehensively reforming the insurance market and providing grants and incentives for service improvements. Among its reforms, Congress revised the law related to workplace wellness programs, defined as programs "offered by an employer" that are "designed to promote health or prevent disease."¹ Congress directed the Departments of Treasury, Labor, and Health and Human Services (later referred to collectively as "the Departments") to pass regulations to carry out the intent of this legislation.¹ After a notice and comment period, the Departments issued their final regulations in June 2013, which updated their 2006 regulations on the same topic.² These apply to employer wellness programs operated by group health plans and health insurance issuers that provide health insurance coverage in connection with group health plans.²

The regulations, like the legislation, divide workplace wellness programs into 2 categories: health-contingent and participatory programs. However, the Departments' regulations define "reward" the same for both types of programs.³ This regulatory definition includes "providing a reward," such as a discount, rebate, waiver of cost sharing, additional benefit, and any financial or other incentive—and also "imposing a penalty," such as a "surcharge or other financial or nonfinancial disincentives."³ Thus the revised regulations expressly give employers

the ability to impose penalties on employees who do not fulfill the requirements of a participatory program. Significantly, this includes the completion of a health risk assessment, which is a screening tool that identifies health risks. This allowance, however, conflicts with the Equal Employment Opportunity Commission's (EEOC) prevailing interpretation of the Americans with Disabilities Act (ADA) of 1990, which states that employers shall not require a medical examination or inquire into an employee's medical history. Furthermore, it is unclear that this is what Congress intended. The enabling legislation seems to make a distinction between what is permitted to qualify as a "reward" for each type of program. This article analyzes these legal conflicts in order to determine the best strategies for both employers and the federal government to address the issues resulting from the contradiction.

First I review the regulatory framework for health risk assessments, participatory wellness programs, and the current interpretation of the ADA. Next I analyze the Departments' regulatory language and explore the extent to which it is in conflict with the enabling legislation and the current interpretation of the ADA. I then identify the ethical concerns and outstanding legal issues that must be resolved to reduce potential liability for employers and burdens for employees. My conclusion is that Congress should intervene or the responsible administrative agencies should revise the regulations.

Health Risk Assessments

Employees are typically introduced to their workplace wellness programs with a request to complete a health risk assessment.^{4,5} This assessment generally consists of biometric or clinical measures, such as weight, blood pressure, or blood lipid levels, as well as health-risk questionnaires, which seek information about risk factors and behaviors like the employee's level of physical activity and smoking status.⁴ In compliance with several federal laws—the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the ADA, and the Genetic Information Nondiscrimination Act of 2008 (GINA)—the information obtained from a health risk assessment must be treated as confidential and separate from personnel records.^{6,7} Employers may run their own wellness programs or hire wellness program operators to run the

program, though there is little data about the percentage of each type of administrative control used throughout the country.

Employers may make completing a health risk assessment purely voluntary or use incentives to promote employee participation. Given expectations of self-selection bias for voluntary enrollment, employers often couple the health risk assessment with an incentive.⁵ When employers incentivize employees with rewards or penalties for completing or not completing the health risk assessment, this is a form of participatory wellness program.³

Although the subject of this article is issues related to the conflict among the ADA, employers' use of penalties to incent completion of a health risk assessment, and the wellness program laws, a related issue involves the GINA, which similarly prohibits employers from requiring employees to provide genetic information or penalizing such nondisclosure, and also permits voluntary requests. The regulations clearly state that a wellness program may not condition the receipt of an incentive on an employee's providing genetic information, particularly his or her family medical history.^{8,9} Therefore, in the context of the GINA, the term "voluntary" means that if a program provides rewards for completing a health risk assessment, it must clearly state that the provision of genetic information is optional and that the employee can qualify for the reward regardless of whether he or she provides such information.^{8,9} The legal counsel for the EEOC explained that the agency considers the GINA to be clear, unlike the ADA.⁹ The GINA's antidiscrimination protections^{10,11} and its relationship to the ADA¹² have been discussed elsewhere, although little has been said about the conflict between the workplace wellness program regulations and the ADA discussed in this article.

The Unique Nature of Participatory Wellness Programs

The distinction between health-contingent and participatory wellness programs is significant for the protections afforded to participants. Health-contingent wellness programs require an individual to satisfy a health-related standard, such as completing an activity (eg, a walking program) or attaining a specific health outcome (eg, a healthy BMI), in order to obtain a reward.³ The regulations require these

programs to fulfill 5 conditions aimed at protecting participants from discriminatory programs.³ Specifically, the government exempts wellness programs that condition a reward or penalty on the achievement of health outcomes from HIPAA's nondiscrimination provisions as long as: (1) eligible individuals have the opportunity to qualify for the reward at least once per year; (2) the reward does not exceed 30% of the total cost of employee-only coverage under the plan, or 50% for programs designed to prevent or reduce tobacco use; (3) the program is reasonably designed to promote health or prevent disease; (4) the full reward is available to all similarly situated individuals; and (5) plan materials disclose the terms of the program, including the availability of a reasonable alternative standard to qualify for the reward or the possibility of a waiver.³ The third condition also requires that the program "must have a reasonable chance of improving the health of, or preventing disease in, participating individuals, and not be overly burdensome, not be subterfuge for discrimination based on a health factor, and not be highly suspect in the method chosen."³

In contrast, participatory wellness programs either are not associated with a reward or do not require an individual to satisfy a health-related standard in order to qualify for a reward.² These make up the majority of wellness programs.² Examples include programs that reimburse employees for gym membership fees, reward them for attending a monthly health education seminar at no cost, or reward them for participating in a diagnostic test irrespective of the outcome.³ Participatory programs do not need to satisfy the 5 requirements for health-contingent programs,² most notably, the prohibition on overly burdensome programs or choosing suspect methods to promote health or prevent disease.

The incentive program most commonly used by employers is based on the completion of a health risk assessment.² A health risk assessment can be a stand-alone participatory program or coupled with a health education component or other intervention structured to respond to the needs of the employer's particular workforce.² During the notice and comment phase of the proposed regulations, the American Public Health Association requested that the Departments specify that such programs were "truly voluntary" and that employees had the right to opt out of the program altogether, without incurring a penalty for refusing the health risk assessment.¹³ The final regulations, however, do not confine participatory programs in this manner.

The Departments' definition of reward specifically allows employers to assess penalties for nonparticipation,² and these programs are now being utilized.^{5,14} In a 2012 survey of 1,800 employers, 70% imposed penalties for not completing a health risk questionnaire, and 53% imposed penalties for not participating in a biometric screening.¹⁵ The issue that I address here is whether the use of penalties to encourage completing a health risk assessment transforms it from a voluntary tool to one that becomes unavoidable and therefore akin to a requirement, thereby violating the ADA.^{6,16}

The ADA's Definitions and the EEOC's Position

The ADA protects against discrimination on the basis of mental and physical disability. Under the ADA, a "covered entity" is permitted to "conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program."¹⁶ But the ADA also states that covered entities "shall not require" medical examinations or inquiries unless they are for employment-related reasons, consistent with business necessity.¹⁶ Wellness programs do not qualify for these business-related exceptions,¹⁷ and the protection applies to all employees, not just those previously identified as disabled.¹⁸ Several terms based on these requirements are in need of examination.

A "covered entity" includes an "employer"¹⁹ and "any agent of such person."²⁰ The ADA unambiguously applies to employers that operate their own wellness programs. The Departments' wellness program regulations apply to wellness programs operated by group health plans and health insurance issuers providing health insurance coverage in connection with group health plans.² The EEOC has not issued any formal or informal guidance on whether wellness program operators would be considered "covered entities," and it did not address this point during a 2013 hearing it held on the topic of federal employment laws and wellness programs.²¹

Although no case law directly addresses this point, some courts have found that third-party administrators may be considered an employer or an "agent" of an employer in related circumstances.²² In one case, the Court of Appeals for the First Circuit found that a health plan and its administering trust could be considered covered entities in 2 ways.²³

First, they would be considered “employers” if they existed solely for the purpose of enabling employers to delegate their responsibility of providing health insurance to their employees, including the authority to determine the level of benefits, and sharing in the administrative responsibilities.²³ In this scenario, the court found that the health plan operators and the employer would be “so intertwined as to be acting together as an ‘employer’ with respect to health care benefits” for purposes of the ADA.²³ The court alternatively found that if the health administrators did not share in administrative responsibilities or determine benefits levels, they could be considered “agents” of the employer “who act on behalf of the [covered] entity in the matter of providing and administering employee health benefits.”²³ The court explained that employers cannot delegate responsibility for a discriminatory employee benefits plan in order to insulate it from attack under the ADA.

The underlying rationale is equally applicable to wellness program operators; otherwise, employers could insulate themselves from ADA liability by delegating the administration of discriminatory wellness programs to these entities. Accordingly, in this article I refer to employers broadly to encompass both the employers and their agents—the program operators who run wellness programs—because both may be considered covered entities under the ADA.

As used in the ADA, Congress did not define the terms “voluntary” or “required.” Although the EEOC provided guidance on the definitions of these terms, it did not issue regulations carrying out its intent. Guidance documents are not analogous to regulations, so if challenged, courts would consider them persuasive rather than binding.²⁴ An EEOC Enforcement Guidance document from 2000 stated that a “wellness program is ‘voluntary’ as long as an employer neither requires participation nor penalizes employees who do not participate.”¹⁸ In a 2009 informal discussion letter, the EEOC explained that if an employer’s health risk assessment was part of a wellness program, it would not be considered voluntary if “it penalizes any employee who does not complete the questionnaire by making him or her ineligible to receive reimbursement for health expenses.”²⁵ The EEOC’s position seemed to be that financially penalizing employees for nonparticipation, at least in the context of health expenses, renders the health risk assessment nonvoluntary.

In May 2013, the EEOC held a hearing at which both EEOC members and invited experts testified on the unresolved issues between the nonvoluntary nature of certain wellness programs and the ADA’s protections.²¹ The following year, the EEOC announced that it was going to propose

a rule “to address whether, and to what extent,” the ADA “allows employers to offer financial inducements and/or impose financial penalties as part of wellness programs offered through their health plans,” among other items.²⁶ The EEOC has not issued such regulations to date; however, its recent cases reflect its position.

In August 2014, the EEOC filed its first complaint in this context in federal district court against an employer, Orion Energy Systems, Inc., for taking action against an employee who declined to participate in the company’s wellness program, which included a health risk questionnaire and blood work.²⁷ Specifically, Orion assessed a \$50-a-month penalty and required the employee, Shobert, to pay the entire premium cost to cover her health benefits, which was \$413.43 a month.²⁷ At some point after Shobert refused to participate, Orion fired her. In its complaint, the EEOC stated that the wellness program was “not voluntary” and thus violated the ADA, “because Shobert was subjected to a financial penalty and subsequently fired for not participating in the program.”²⁷

Because Shobert was terminated, the Orion case is also directly in line with Congress’s original intent for passing the protection against an employer requiring medical examinations and histories.¹⁶ Congress enacted the section of the ADA prohibiting required medical inquiries in response to a legal case in which an employer discharged an employee for refusing to disclose the results of an HIV test.²⁸ Based on this history, the EEOC concluded that all tests that reveal health information must be voluntary. Congress may have intended that the prohibition apply only to termination for such a refusal and not to excessive financial penalties. The result of this interpretation, however, begs the question of what amount of financial hardship an employee is expected to endure before it would support a claim for constructive discharge, which occurs when working conditions become so unbearable that an employee is forced to quit.

Two subsequent cases made it clear that the EEOC is pursuing this line of cases whether or not an employee is discharged. First, the EEOC charged an employer, Flambeau, Inc., with violating the ADA for canceling the medical insurance of an employee who did not complete a health risk assessment and requiring the employee to pay 100% of the premium (instead of the 25% required of other employees) in order to stay covered.²⁹ The EEOC argued that this was “not a choice” and thus was “not voluntary.”²⁹ Both the Flambeau and Orion cases reflect the EEOC’s determination in its 2009 informal letter that a wellness

program that penalizes employees by making them “ineligible to receive reimbursement for health expenses” would be involuntary.²⁵

In a third case filed in October 2014, the EEOC alleged that Honeywell International, Inc., penalized employees up to \$4,000 in surcharges and lost contributions to a health savings account if the employees and their spouses did not undergo a biometric screening, including a blood draw.³⁰ The EEOC argued that the \$4,000 in “penalties” rendered the program “not voluntary” and thus violated the ADA (and, in this case, the GINA).

In all 3 cases, the employer imposed financial penalties in the form of surcharges or negative inducements when employees refused to partake in participatory wellness programs that included health risk assessments. The EEOC’s position is clearly that the imposition of significant financial penalties renders a wellness program not voluntary under the ADA. The EEOC’s prevailing interpretation of the ADA also clearly conflicts with the current wellness program practices of employers who operate their own programs. The EEOC’s interpretation of the ADA also conflicts with the Departments’ workplace wellness regulations’ express allowance for third-party group program operators who are considered covered entities to impose penalties for not completing a health risk assessment.

Legislative and Regulatory Conflicts

Because the Departments’ workplace wellness regulations and the EEOC’s interpretation of the ADA are in conflict, it is important to consider Congress’s intent. When Congress amended the requirements for the group health insurance market in order to facilitate wellness programs, it distinguished between participatory and health-contingent wellness programs by using a separate clause for each in its legislation.³¹ In its introductory language, Congress generally mentioned “a premium discount or rebate or other reward” in reference to both types of programs.³² In the clause dedicated to participatory wellness programs, Congress repeated the phrase “premium discount or rebate or other reward,” and provided 5 examples that correspond with its positive definition of reward, such as a program that reimburses gym membership costs or provides rewards for attending a health education seminar.³³ Congress also required that the reward must be “made available to all

similarly situated individuals.”³³ The wording of the requirement signifies that the reward is a right or a benefit conferred, because it must be “made available” to all similarly situated persons,³⁴ rather than a penalty assessed, which would more likely use the term “imposed.”³

Conversely, in the clause dedicated to health-contingent wellness programs, Congress added another explanation of what could qualify as a reward:

A reward may be in the form of a discount or rebate of a premium or contribution, a waiver of all or part of a cost-sharing mechanism (such as deductibles, copayments, or coinsurance), the absence of a surcharge, or the value of a benefit that would otherwise not be provided under the plan.³⁵

This definition of reward includes the penalizing perspective of an “absence of a surcharge.” Thus, one interpretation is that Congress expressly stated a different or additional allowance for permissible rewards for health-contingent wellness programs than for participatory programs. A rationale for the broader allowance for health-contingent wellness programs might be that Congress additionally provided the 5 protections for employees participating in health-contingent programs but not for those in participatory programs,³¹ as discussed earlier. Whatever the reason, the Departments did not make this same distinction.

In the 2006 regulations, the Departments did not define “reward,”³⁶ and in the preamble, which states the basis and purpose of the regulations, they refer to what a reward “can be” but this discussion did not explicitly contradict the distinction between participatory and health-contingent wellness programs.³⁶ In the 2013 regulations, however, the Departments did explicitly define “reward” and applied the definition to both participatory and health-contingent wellness programs.³ Again, the regulatory definition of “reward” includes “providing a reward,” such as a discount, rebate, waiver of cost sharing, additional benefit, any financial or other incentive, and also “imposing a penalty,” such as a “surcharge or other financial or nonfinancial disincentives.”³ Furthermore, unlike the interpretation of the enabling legislation, the regulations do not differentiate between participatory and health-contingent wellness programs. Therefore, under the workplace wellness regulations, employers may assess a surcharge for an employee’s refusal to engage in a participatory wellness program, which includes complying with a health risk assessment.

In summary, the Departments' definition of reward creates a conflict with the EEOC's generally accepted determination of what constitutes "voluntary" for purposes of the ADA. The EEOC considers an employer's assessment of a penalty for noncompliance with a health risk assessment to be akin to a requirement and thus a violation of the ADA.¹⁸

Additional Legal and Ethical Challenges

At present, employers who offer health risk assessments coupled with penalties for noncompletion are vulnerable to lawsuits in accordance with the ADA.²⁴ At the time of this writing, there is 1 employee-initiated case with a published decision on this topic. In *Seff v Broward County*, the county health insurer sponsored an employee wellness program as part of its contract with the county to provide employees with a group health plan.³⁷ In this case, the county employer itself assessed a \$20 charge on each biweekly paycheck issued to employees who were enrolled in the group health insurance plan and who refused to complete the health risk questionnaire and biometric screening offered through the wellness program.³⁷ An employee subsequently sued in federal district court, arguing that the employer's program was involuntary and therefore violated the ADA's prohibition on nonvoluntary medical examinations and disability-related inquiries.³⁷ But the district court found that a separate provision, the "safe harbor provision," of the ADA applied, which exempts the ADA's prohibitions on required medical inquiries and exams for "bona fide benefit plans."³⁷ The safe harbor provision provides that the ADA "shall not be construed to prohibit or restrict" a covered entity "from establishing, sponsoring, observing or administering the 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."³⁸ The court found that the close tie between the wellness program and the group health plan rendered the program a bona fide benefit plan for purposes of the ADA. In 2012, the Eleventh Circuit Court of Appeals affirmed the district court's finding that the wellness program in *Seff* was "a 'bona fide benefit plan' within the meaning of the safe harbor provision."³⁷ Neither court determined whether the program was considered voluntary or required.

To date, no cases have used or relied on the rationale in *Seff* to apply the safe harbor provision to wellness programs. Legal discussions related

to bona fide benefit plans and the safe harbor provision center on health insurance policies, disability benefit plans,³⁹ and self-insured plans.³⁸ Moreover, the EEOC's compliance manual does not apply the safe harbor provision to wellness programs.⁴⁰ During the EEOC's May 2013 hearing, legal counsel for the EEOC argued that *Seff* was incorrectly decided because the safe harbor provisions are not relevant to wellness plans because they are reserved for insurers obtaining insurance rates based on actuarial data.²¹ The counsel explained that no EEOC interpretation of the safe harbor provision and nothing in Congress's legislative history supported the courts' application of this provision to wellness programs in general, or to the plan in *Seff* in particular, because there was no evidence that actuarial data were used to support the structure of the employer's wellness program.^{9,21} Because *Seff* is not on firm footing, attorneys counseling businesses on employment law recommend that employers use positive incentives to avoid legal ramifications of a program that is not truly voluntary.⁴¹

It is unclear whether *Seff* will be an outlier for the proposition for which it stands, but it is clear that it conflicts with the EEOC's interpretation of the safe harbor provision. Even assuming that the Eleventh Circuit's interpretation of the safe harbor provision was correct in this case, it does not follow that this interpretation would apply to all participatory wellness programs. The wellness program as a whole would have to qualify as a bona fide benefit plan.

Notwithstanding these legal conflicts, even for participatory wellness programs that are in agreement with the ADA, the regulations' definition of reward creates the potential for other burdens. For example, in March 2014 an employee sued the pharmacy chain CVS Caremark over the company's wellness program, which required a health risk assessment in lieu of a \$600 fine.⁴² There are no published opinions to date, so the validity of the plaintiff's claim is unclear. But news reports highlighted additional issues related to nonvoluntary programs, including the financial and temporal costs of complying with screenings, such as having to pay for the exam itself and for travel to an off-site physician.^{42,43}

There are ethical concerns as well, because unlike with health-contingent wellness programs, employers are not required to abide by the 5 protective requirements for health-contingent programs, including the prohibition on "overly burdensome" programs.³ Therefore, an employer can penalize all employees who do not participate in an off-site class on a topic of potential interest to the employer but of no relevance

to the employees' health status. For example, in their 2006 regulations, the Departments explicitly sanctioned a class on aromatherapy as a permissible wellness program,³⁶ even though this might be burdensome and is arguably a "highly suspect method to promote health or prevent disease."³ In this circumstance, the use of penalties could undermine worker morale and satisfaction for those involuntarily participating while at the same time not necessarily improving their health outcomes.

At the EEOC's May 2013 hearing, members confirmed the presence of a regulatory conflict, but some of the invited experts testified that there was no practical difference between a reward and a penalty, because whether it was considered a "carrot" or a "stick," the outcome would be the same.²¹ In practice, however, the outcome is not necessarily the same, as discussed earlier, depending on the severity of the financial penalty, the impact on health coverage, the income level of the participant, the additional costs and burdens associated with compliance (eg, time away from family obligations), and the impact on worker satisfaction.^{44,45} Moreover, the "stick" is particularly onerous to employees who wish to keep their medical history private in accordance with the ADA. Finally, there is a conflict between the agencies' regulations. If the Departments had confined permissible rewards for participatory programs to positive rewards in the workplace wellness regulations, this would have avoided the conflict with the ADA by making all participatory wellness programs voluntary, according to the EEOC's interpretation.

Government Resolution

Given the legal conflict and ethical concerns, Congress or the responsible agencies should intervene to clarify the law; there are several considerations relevant to each option. First, in accordance with the Congressional Review Act, when agencies issue final rules, they must submit the regulations to Congress.⁴⁶ For "major rules," the Government Accountability Office (GAO) must submit a report to Congress confirming that the regulations are consistent with applicable law "and that decisions made by one agency do not conflict with the policies or actions taken . . . by another agency."⁴⁷ The Act permits Congress to review and disapprove of the regulation, thereby nullifying it. But the workplace wellness regulations were considered "nonmajor" rules,⁴⁸ so even though the

agencies were required to submit the regulations to Congress, Congress and the GAO did not necessarily review them.

At this point, if Congress disapproves of the workplace wellness regulations, it should legislatively override them. The US Supreme Court has found that the failure to legislatively override a regulation is “persuasive evidence that Congress regarded that regulation as a correct implementation of its intent.”⁴⁹ The judicial imperative to override is not the same for guidance documents, so it is not necessarily the case that Congress explicitly agreed with the EEOC by not amending the ADA in response to the agency’s guidance document. Congress could, however, revise the ADA if it believes that the EEOC’s interpretation is incorrect.

To address the related ethical issues, Congress might determine that some, if not all, of the protective requirements for health-contingent programs should also apply to participatory wellness programs. Any ethical concerns may be diminished if participatory programs had limits on the financial incentives permitted and were not permitted to be overly burdensome or use suspect methods to promote health or prevent disease.

Among the federal regulatory agencies’ options to resolve the legal conflict, the EEOC’s limited option would be to issue a regulation defining “voluntary” as compatible with the wellness program regulations. This, however, would not maintain the protections afforded by the ADA and would contradict the EEOC’s interpretation of the legislative history.²⁸ Therefore, the EEOC would likely consider the act of defining “voluntary” to permit financial penalties to be contrary to congressional direction and thus not a viable strategy.

The Departments, however, could amend their definition of reward in the workplace wellness regulations to align the definition of reward with the enabling legislation’s description of reward in the clause on participatory programs (“premium discount or rebate or other reward”³³) and define “other reward” to include positive rewards only. This is the most straightforward remedy because it would directly resolve the legal conflict with the ADA and it would also address the identified ethical issues.

Employers currently use negative incentives for participatory programs for the dual purpose of increasing participation and recouping costs. If the Departments revised the regulatory definition of reward as suggested, it would render some existing programs noncompliant and might also decrease future participation in programs deemed voluntary.

The Departments therefore might consider providing a transition period and working with employers to convert their mandatory plans to voluntary programs. Employers could then use nonpenalizing strategies to increase employees' participation, including offering positive incentives.⁵⁰

In order to address costs, employers do have the option of raising premiums for the entire workforce and offering wellness program rewards to reduce these premiums.⁶ In this scenario, the difference between carrots and sticks would be minimized and could create a burden for the entire workforce. Although such a solution is a legally permissible method of addressing financial issues, it might also perpetuate the ethical issues just identified and negatively impact workers' morale.

Conclusion

Effective participatory wellness programs have the potential to improve worker health and reduce health care costs. However, there are legal and ethical concerns associated with requiring participation. The legal conflict between the workplace wellness regulations' definition of reward and the ADA's prohibition on requiring health risk assessments needs federal intervention. In order to address the legal conflict and ethical concerns, Congress or the Departments should confine the definition of reward to a positive feature for participatory wellness programs. Congress could also consider providing other protections for employees subject to participatory programs, such as prohibiting "overly burdensome" programs and restricting the amount of permissible rewards. These issues must be resolved in order to encourage the adoption of such programs and not undermine the intent of the Patient Protection and Affordable Care Act.

References

1. Patient Protection and Affordable Care Act. Public Law 111-148, §1201 (March 23, 2010).
2. 78 Federal Register 33158 (June 3, 2013).
3. 45 CFR 146.121(f).
4. Mattke S, Liu H, Caloyeras JP, et al. *Workplace Wellness Programs Study. Final Report*. Santa Monica, CA: RAND Corporation; 2013.

5. Baicker K, Cutler D, Song Z. Workplace wellness programs can generate savings. *Health Aff.* 2010;29(2):304-311.
6. Mello MM, Rosenthal MB. Wellness programs and lifestyle discrimination—the legal limits. *N Engl J Med.* 2008;359(2):192-199.
7. EEOC Informal Discussion Letter. ADA & GINA: incentives for workplace wellness programs. June 24, 2011. http://www.eeoc.gov/eeoc/foia/letters/2011/ada_gina_incentives.html. Accessed May 4, 2014.
8. 29 CFR 1635.8(b)(2).
9. Written testimony of Christopher Kuczynski, acting associate legal counsel. EEOC meeting of May 8, 2013: Wellness programs under federal equal employment opportunity laws. <http://www.eeoc.gov/eeoc/meetings/5-8-13/kuczynski.cfm>. Accessed May 1, 2014.
10. Feldman EA. The Genetic Information Nondiscrimination Act (GINA): public policy and medical practice in the age of personalized medicine. *J Gen Intern Med.* 2012;27(6):743-746.
11. Prince AE, Roche MI. Genetic information, non-discrimination, and privacy protections in genetic counseling practice. *J Genet Counseling.* July 2014 (Epub ahead of print).
12. Abiola S. Recent developments in health law. The Genetic Information Nondiscrimination Act of 2008: “First major civil rights bill of the century” bars misuse of genetic test results. *J Law Med Ethics.* 2008;36(4):856-860.
13. American Public Health Association. Comment re: EBSA-2012-0031-0001, Wellness programs: incentives for nondiscriminatory wellness programs in group health plans. Washington, DC: American Public Health Association; January 24, 2013.
14. RAND Corporation. *Workplace Wellness Programs Study. Case Studies Summary Report.* Santa Monica, CA: RAND Corporation; April 2013.
15. Aon Hewitt's 2012 Health Care Survey. http://www.aon.com/attachments/human-capital-consulting/2012_Health_Care_Survey_final.pdf. Accessed September 9, 2014.
16. 42 USC §12112(d)(4).
17. 9-154 Larson on Employment Discrimination §154.07.
18. EEOC enforcement guidance on disability-related inquiries and medical examinations of employees under the Americans with Disabilities Act (ADA). July 27, 2000. <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>. Accessed May 1, 2014.
19. 42 USC §12111(2).
20. 42 USC §12111(5) (A).

21. EEOC meeting of May 7-8, 2013: Wellness programs under federal equal employment opportunity laws. Transcript. <http://www1.eeoc.gov/eeoc/meetings/5-8-13/transcript.cfm?renderforprint=1>. Accessed May 1, 2014.
22. *Petty v El Dorado Eng'g*, 1996 US Dist LEXIS 5981 (ED LA 1996).
23. *Carparts Distrib Ctr v Auto Wholesaler's Ass'n*, 37 F3d 12, 16-18 (1st Cir 1994).
24. *EEOC v United States Steel Corp*, 2013 US Dist LEXIS 22748 (WD PA, February 20, 2013).
25. EEOC. Informal discussion letter, re: ADA: health risk assessments. August 10, 2009. http://www.eeoc.gov/eeoc/foia/letters/2009/ada_health_risk_assessment.html. Accessed May 1, 2014.
26. Equal Employment Opportunity Commission semiannual regulatory agenda. May 23, 2014. [http://op.bna.com/dlrcases.nsf/id/kmgn-9kj17y/\\$File/EEOCreg14.pdf](http://op.bna.com/dlrcases.nsf/id/kmgn-9kj17y/$File/EEOCreg14.pdf). Accessed September 8, 2014.
27. *Equal Employment Opportunity Commission v Orion Energy Systems*, Complaint, Civil Action no. 1:14-cv-1019 (ED WI August 20, 2014).
28. Written testimony of Commissioner Chai Feldblum. EEOC meeting of May 8, 2013: Wellness programs under federal equal employment opportunity laws. <http://www.eeoc.gov/eeoc/meetings/5-8-13/feldblum.cfm>. Accessed May 1, 2014.
29. EEOC. EEOC lawsuit challenges Flambeau over wellness program. October 1, 2014. <http://www.eeoc.gov/eeoc/newsroom/release/10-1-14b.cfm>. Accessed November 7, 2014.
30. *EEOC v Honeywell International*. Petition for a temporary restraining order and injunction. 0:14-cv-04517-ADM-TNL (D MN October 27, 2014).
31. 42 USC §300gg-4.
32. 42 USC §300gg-4(j)(1).
33. 42 USC §300gg-4(j)(2).
34. *Keyes v. School District*, 413 US 189, 225 (1973).
35. 42 USC §300gg-4(j)(3).
36. 71 Federal Register 75014 (2006).
37. *Seff v Broward County*, 691 F3d 1221(11th Cir 2012).
38. 42 USC §12201(c).
39. 9-155 Larson on Employment Discrimination §155.05 (2013).
40. EEOC compliance manual. October 3, 2000. <http://www.eeoc.gov/policy/docs/benefits.html#A.%20Bona%20fide%20plans%20%28ADA%29>. Accessed May 4, 2014.

41. Morgan Lewis. Wellness program falls within ADA safe harbor. <http://www.morganlewis.com/index.cfm/publicationID/7a2d92f8-bb88-4336-9965-79125ed375cf/fuseaction/publication.detail>. Accessed May 1, 2014.
42. Berman J, Stuart H. CVS sued over controversial wellness program. *Huffington Post*. March 20, 2014. http://www.huffingtonpost.com/2014/03/20/cvs-health-screening_n_4986861.html?view=print&comm_ref=false. Accessed May 1, 2014.
43. Johnson H. None of your business, worker tells CVS. *Courthouse News Service*. March 17, 2014. <http://www.courthousenews.com/2014/03/17/66188.htm>. Accessed May 1, 2014.
44. Schmidt H, Voigt K, Wikler D. Carrots, sticks, and health care reform—problems with wellness incentives. *N Engl J Med*. 2010;362(2):e1-e3.
45. Haisley E, Volpp KG, Pellathy T, Loewenstein G. The impact of alternative incentive schemes on completion of health risk assessments. *Am J Health Promotion*. 2012;26(3):184-188.
46. 5 USC §801.
47. Government Accountability Office. Congressional Review Act. FAQ. http://www.gao.gov/legal/congressact/cra_faq.html. Accessed May 4, 2014.
48. Government Accountability Office. Federal rules summary listing. Incentives for nondiscriminatory wellness programs in group health plans. CMS-9979-F. August 2, 2013. <http://www.gao.gov/fedrules/174675>. Accessed May 4, 2014.
49. *Boeing v United States*, 537 US 437 (2003).
50. Lowenstein D, Asch DA, Volpp KG. Behavioral economics holds potential to deliver better results for patients, insurers, and employers. *Health Aff*. 2013;32(7):1244-1250.

Funding/Support: Funding was provided by the Vitality Institute as part of its broader support for a Commission on the prevention of chronic diseases among working-aged Americans.

Conflict of Interest Disclosures: Pomeranz has completed and submitted the ICMJE Form for Disclosure of Potential Conflicts of Interest. No disclosures were reported.

Acknowledgments: The author wishes to thank Robin E. Shea for her thoughtful insight.

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