Excerpt from a draft of *The Dubious Empirical and Legal Foundations of Workplace Wellness Programs*, by Adrianna McIntyre, Nicholas Bagley, Aaron Carroll, and Austin Frakt

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V: WELLNESS PROGRAMS AND DISCRIMINATION

Setting aside their questionable efficacy, wellness programs are difficult to reconcile with a number of federal laws that aim to restrict employers' ability to discriminate among their employees in the provision of health insurance. After all, the point of wellness programs is to discriminate. Those employees who adhere to the wellness program—whether by filling out a detailed health assessment, taking a blood test, or attending smoking-cessation courses—pay less for their health coverage. Those who don't pay more.

HIPAA is the most prominent of the laws that discourage employers from discriminating among employees. Because it prohibits employers from crafting eligibility rules or adjusting a worker's premiums based on "health status-related factors,"[1] Congress had to exempt health-contingent wellness programs from HIPAA in order to enable their adoption.[2] But Congress has created no such exemption for a number of other laws—including Title VII, the Genetic Information Nondiscrimination Act (GINA), and the Americans with Disabilities Act (ADA)—that also discourage discriminating among employees. Congress's apparent enthusiasm for wellness programs is thus in tension with its longstanding commitment to equal treatment in the workplace. That tension has created challenges for employers and for the Equal Employment Opportunity Commission (EEOC), which has primary responsibility for implementing the antidiscrimination laws.

Health assessments have been a recurring source of confusion. Such assessments are often quite detailed and touch on sensitive subjects. At the same time, employers often bring financial pressure to bear on employees to fill them out. Penn State, for example, tried to impose a one-hundred dollar monthly insurance surcharge for failing to fill out a health assessment that asked, among other things, "whether employees have recently had problems with a supervisor, a separation or a divorce, their finances or a fear of job loss; another question asks female employees whether they plan to become pregnant over the next year."[3] At a raucous faculty meeting, covered in the New York Times, employees rebelled against requests to share that information.[4]

Although Penn State beat a hasty retreat, the episode brought to light the tension between wellness programs and antidiscrimination law. Can health assessments be squared with laws that

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[1] 29 U.S.C. 1182(a)(1), (b)(1).
[2] 29 U.S.C. 1182(b)(2)(B).
[3] Natasha Singer, *On Campus, a Faculty Uprising Over Personal Data*, N.Y. TIMES, Sept. 14, 2013.
[4] *Id.*; *see also* Austin Frakt & Aaron Carroll, *The Feel-Good Promise of Wellness Programs*, BLOOMBERG, Sept. 16, 2013 (criticizing Penn State's program).

aim to protect workers from discriminatory practices? Is it legal for employers to probe so deeply into their employees' medical histories?

The Pregnancy Discrimination Act.

In the main, offering incentives for employees to take health assessments does not violate Title VII, which prohibits discrimination on the basis of race, religion, national origin, age, or gender.[5] Incentives are questionable, however, for health assessments that ask about pregnancy or family planning. The Pregnancy Discrimination Act was enacted in 1978 to clarify that Title VII's prohibition on sex discrimination in the workplace also extends to pregnancy-related discrimination.[6]

By its terms, Title VII does not forbid employers from asking about an employee's pregnancy plans.[7] To be liable, an employer would also have to fire the employee or otherwise take an adverse employment action against her on account of her pregnancy status.[8] Nonetheless, because the fact that an employer has asked about pregnancy "may indicate a possible intent to discriminate based on pregnancy," the EEOC "recommend[s] that employers avoid these types of questions."[9] Many wellness programs are bucking that advice, perhaps because they generally do not share identifiable data with employers that might enable pregnancy discrimination.[10] Time will tell if legal exposure or employee blowback leads wellness programs to drop pregnancy-related questions from their health assessments.

Genetic Information Nondiscrimination Act.

In contrast to Title VII, GINA explicitly restricts what sorts of information employers can solicit from their employees. Under GINA, an employer may not "request, require, or purchase genetic information for underwriting purposes."[11] The EEOC has interpreted this provision to mean that a refusal to disclose genetic information cannot affect how much an employee pays for health coverage.[12] Because adherence to a wellness program affects the cost of employer-sponsored coverage, employers cannot offer a financial incentive for employees to complete a health assessment requesting the disclosure of genetic information.

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[5] 42 U.S.C. 2000e-2(a).
[6] Pregnancy Discrimination Act of 1978, Pub. L. No. 95-955.
[7] See 42 U.S.C. 2000e-2(a) (prohibiting employers from taking employment actions against an employee on the basis of sex, including pregnancy).
[8] See Burlington Industries v. Ellerth, 524 U.S. 742, 747 (1998) (requiring an "adverse, tangible job consequence" before imposing liability).
[9] Equal Employment Opportunity Commission, Pregnancy Discrimination—FAQs, https://www.eeoc.gov/youth/pregnancy2.html#Q10.
[10] Julia Appleby, *Pregnancy—A Touchy Subject in Employee Health Assessments*, KAISER HEALTH NEWS, Aug. 4, 2015.
[11] 29 U.S.C. §1182(d)(1).
[12] *See* 80 Fed. Reg. 66857 n.20.

What is genetic information? In general, it is defined narrowly enough to exclude conventional medical histories or screenings, which do not inquire into the genetic basis for diseases.[13] Significantly, however, genetic information includes the "manifestation of a disease or disorder *in family members of an individual*."[14] The reason is simple: a family member's illness may suggest a genetic propensity in the individual employee. So asking an employee whether she has ever had breast cancer does not violate GINA, but asking whether her sister or mother has ever had breast cancer does.[15] Yet, until recently, such questions were apparently common in health assessments.[16]

What about spouses? Because an employee's spouse does not share a genetic background with the employee, the spouse's disease history is unlikely to enable discrimination against the employee on the basis of her genetic information. Plus, employers that offer family coverage have a genuine financial interest in the health of their employees' spouses. Some employers, for example, have adopted wellness programs imposing a substantial "tobacco surcharge" on employees with a spouse who smokes.[17]

Seeing no reason to prohibit the practice, the EEOC finalized a rule in May 2016 "clarifying" that employers can offer substantial penalties—thirty percent of the price of self-only coverage—in exchange for information relating to a spouse's manifestation of a disease or disorder.[18] Because the average price of self-only coverage was $6,251 in 2014,[19] an average employee could face a penalty of up to $1,875. These financial inducements cannot be used to solicit any information about the diseases or disorders of an employee's children, since those may signal something about the employee's own genetic information,[20] but information about a spouse's aliments is fair game.

The only problem is that the EEOC's rule appears to contravene GINA. The statute uses absolute language to prohibit employers from requesting genetic information that will affect the rates that employees pay for health coverage.[21] And the statute could not be clearer that genetic information includes the "manifestation of a disease or disorder *in family members of an individual*," spouses included.[22] The EEOC cannot add an exception to the statute because it

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[13] 42 U.S.C. §2000ff(4)(A).
[14] 42 U.S.C. §2000ff(4)(A)(iii) (emphasis added).
[15] *See* 80 Fed. Reg. 66857 n.20.
[16] Kara Brandeisky, *The Surprisingly Personal Health Questions Your Employer Can Ask You*, TIME.COM, Nov. 19, 2014.
[17] Petition for a Temporary Restraining Order and Preliminary Injunction, *EEOC v. Honeywell*, 14-4517 (D. Minn. Nov. 27, 2014).
[18] 81 Fed. Reg. 31144 (May 17, 2016).
[19] Kaiser Family Foundation, *supra*, note 10.
[20] 81 Fed. Reg. 31144 (May 17, 2016).
[21] 29 U.S.C. §1182(d)(1) ("A group health plan, and a health insurance issuer offering health insurance coverage in connection with a group health plan, shall not request, require, or purchase genetic information for underwriting purposes.").
[22] 42 U.S.C. §2000ff(3)(b). GINA's definition of "family member" includes the "dependent[s]" of an individual, with the word "dependent" defined to track its use in a provision of the U.S.

believes it would be sensible to do so. It is not even clear that the EEOC is correct that a spouse's medical history raises "minimal" risk of genetic discrimination against the employee.[23] That history, for example, might suggest that the employee's children, who may be covered on her health plan, have a genetic predisposition to certain diseases. That predisposition might tempt employers to discriminate against the employee. Congress is free to guard against that risk, and it has done so in GINA. The EEOC's rule therefore appears vulnerable to legal challenge from an employee who suffers a penalty for refusing to share her spouse's medical information.

Americans with Disabilities Act.

The debate over asking about a spouse's health status is a minor issue when compared to the difficulties that the Americans with Disabilities Act (ADA) poses for health assessments. To avoid the risk of disability discrimination, the ADA prohibits employers from conducing medical examinations of their employees, including medical histories, unless they are "voluntary."[24] Most health assessments include detailed questions about employees' medical histories; as such, the ADA requires those assessments to be offered on a voluntary basis.

That presents a conundrum. Can a health assessment be "voluntary" if an employee faces a financial penalty for refusing to take it? In its 2016 rulemaking, the EEOC said yes, concluding that ACA-compliant wellness programs do not violate the ADA.[25] Employers are therefore free, under the rule, to offer inducements of up to thirty percent of the cost of the employee's coverage to encourage the completion of health assessments.[26]

Once again, however, the EEOC's rule appears untenable. The agency defends its interpretation with reference to the claim that the agency's job is "to provide as much consistency as possible" between the ADA and the ACA.[27] In this, the EEOC could have in mind two different legal arguments. Neither is compelling.

Code governing group health plans. *Id*. That provision, in turn, defines an individual's dependent to include "a dependent of the individual through marriage." 29 U.S.C. §1181(f)(2)(A). In November 2014, the EEOC's regional office in Minnesota unsuccessfully sought a preliminary injunction to stop a wellness program from seeking medical information from an employee's spouse. As the office argued, "[m]edical information relating to manifested conditions of spouses is family medical history—or genetic information—under GINA." Petition for a Temporary Restraining Order and Preliminary Injunction, *EEOC v. Honeywell*, 14-4517 (D. Minn. Nov. 27, 2014).

[23] 80 Fed. Reg. 66853, 66856 (Oct. 30, 2015).

[24] 42 U.S.C. §12112(d)(4)(B).

[25] 81 Fed. Reg. 31126 (May 17, 2006).

[26] 81 Fed. Reg. 31126 (May 17, 2006).

[27] EEOC, Questions and Answers about EEOC's Notice of Proposed Rulemaking on Employer Wellness Programs, at https://www.eeoc.gov/laws/regulations/qanda_nprm_wellness.cfm. One district court has ruled that no incentive, whatever its size, is enough to make a health assessment involuntary. *See* EEOC v. Orion Energy Systems, Inc., No. 14-1019, at 18 (Sept. 19, 2016) ("[E]ven a strong incentive is still no more than an incentive; it is not compulsion.:).

First, the EEOC might believe that the ACA implicitly created a safe harbor from the ADA for practices that the ACA explicitly authorizes. The intuition is that Congress would not have allowed employers to establish robust wellness programs if most of those programs would violate the ADA. Instead, Congress should be taken to have narrowed the scope of the ADA when it comes to asking about medical histories.

A well-established rule of interpretation, however, holds that Congress cannot be understood to repeal its prior handiwork by implication.[28] The rule exists for good reason. Courts and agencies cannot repeal laws; only Congress can do that. By the same token, courts and agencies cannot ignore a duly enacted law just because they suspect a later Congress would have preferred to do away with it. And who knows what Congress's attitude was toward the ADA? Congress may not have understood that wellness programs raise concerns about disability discrimination. Had it considered the matter, it is not at all clear how Congress would have resolved the tension between the ACA and the ADA.

Until Congress clarifies matters, the proper approach is to say that the ACA authorizes wellness programs only to the extent that they do not violate the ADA. The statutes are not in irreconcilable conflict. Wellness programs that discourage smoking, for example, will not run afoul of the ADA since nicotine addiction is probably not a disability within the meaning of the statute.[29] Similarly, wellness programs could drop their health assessments in order to comply with the ADA. If that inhibits certain types of wellness programs, it is up to Congress to come up with a fix, not the EEOC.

Second, the EEOC might believe that, because the word "voluntary" can be interpreted more or less restrictively, it is appropriate for the agency to select the interpretation that fits best with other statutes, including the ACA. That is true, as far as it goes: If at all possible, statutes enacted at different times should be interpreted to cohere with one another.[30] To put it in the language of administrative law, agencies can properly take into account later-enacted statutes at the second step of *Chevron*.[31]

But the EEOC's argument only works if the word "voluntary" is amenable to the construction that the agency has placed on it. If it is not, the EEOC cannot adopt that interpretation, even if doing so would harmonize the ADA with the ACA. In administrative law terms, such an interpretation would flunk *Chevron*'s first step.[32] The question thus boils down to whether the EEOC can reasonably say that a health assessment is still "voluntary" if there is a substantial financial penalty for refusing to take it. Notice that the ACA has no bearing on that inquiry. It is purely a question of the meaning of the ADA.

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[28] National Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2532 (2007).
[29] See Brashear v. Simms, 138 F. Supp. 2d 693, 695 (D. Md. 2001). But see
[30] FDA v. Brown & Williamson, 529 U.S. 120, 143 (2000).
[31] *See* PDK Labs. v. DEA, 438 F.3d 1182, 1192 (D.C. Cir. 2006).
[32] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

That is where the EEOC's argument falls apart. The average premium for a family plan in 2015 was $17,545; thirty percent of that is $5,263.[33] Under the EEOC's rule, then, an employer can dock an employee with family coverage's pay more than five thousand dollars if she refuses to undergo a health assessment. No reasonable person would view a health assessment as "voluntary" when backed by a draconian penalty. Indeed, until this latest rule, the EEOC viewed any penalty as problematic: in enforcement guidelines, the agency explained that an assessment was voluntary only "as long as an employer neither requires participation *nor penalizes employees* who do not participate."[34] The agency is free, in rulemaking, to adjust its understanding of what qualifies as voluntary. But it is not free to close its eyes to the coercive effect of exorbitant financial penalties.

The EEOC's rule is thus legally vulnerable. Whether and when it will be successfully challenged remains to be seen, but Congress may ultimately need to resolve the tension between its avid support for wellness programs and its efforts to stamp out disability discrimination.

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[33] Kaiser Family Foundation, *supra*, note 10.

[34] EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA Q&A 22, available at http://www.eeoc.gov/policy/docs/guidance-inquiries.html. (emphasis added).