Biometric Testing in Employer Wellness Programs and the Unanticipated Consequences of Healthcare Reform: Why Challenges Under the ADA Medical Examination Provision Reach the Merits After Seff v. Broward County.

By David Knoespel[*]

I. Employers Use Biometric Testing in Wellness Programs to Improve Participants' Health Status and Reduce Costs.

Employer-sponsored health insurance covers around 150 million Americans.[1] 63 percent of large companies[2] that offer health benefits also offer wellness programs.[3] The goal of wellness programs is to identify and measure risk factors associated with poor health and then ask participants to take steps to improve their health. Biometric testing is an important tool in the first part of the wellness program process.

Biometric tests are examinations designed to identify and measure health status factors like blood pressure, cholesterol, and glucose level. These health status factors can predict the existence or likelihood of chronic disease.[4] If abnormal health status factors are detected early, a person may improve his or her chances of managing and treating disease.[5] The Kaiser Family

* J.D. Candidate, Washington and Lee University School of Law, 2014; B.A., University of North Carolina at Chapel Hill, 2010. I would like to thank my family for their support and Professor Timothy Jost and Professor Charles Woody for their guidance on this topic.

1 Health Enhancement Research Organization, *Guidance for a Reasonably Designed, Employer-Sponsored Wellness Program Using Outcomes-Based Incentives,* 54(7) J. OCCUPATIONAL ENVTL. MED. 889, 889 (2012).

2 *See* KAISER FAMILY FOUNDATION, *Employer Health Benefits 2012 Annual Survey*, http://ehbs.kff.org/ at 178 (last visited Feb. 15, 2013) (defining large companies as those with two hundred or more employees).

3 *Id.*

4 *See id.* (discussing how biometric measures can foster better long-term health).

5 *See id.* (highlighting the benefits of disease prevention).

Foundation reports that among the large companies offering health benefits, 48 percent conduct biometric testing of employees.[6]

Wellness programs recognize that an individual may be able to prevent many health care conditions by making healthy life choices, such as regular exercise, proper diet, and not using tobacco.[7] The Center for Disease Control ("CDC") has noted that "[f]our modifiable health risk behaviors—lack of physical activity, poor nutrition, tobacco use, and excessive alcohol consumption—are responsible for much of the illness, suffering, and early death related to chronic diseases" in the United States.[8] The CDC estimates that individuals with chronic conditions account for up to 75 percent of health care expenditures in the United States.[9] As a major financial stakeholder, employers that offer health insurance stand to lose a lot of money in the fight against chronic disease.

To combat increasing health care expenditures, employers shift costs to employees.[10] While employer costs have increased 36 percent in the past five years, employee costs have

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6 *Id.* at 183.

7 *See* Jennifer S. Bard, *When Public Health and Genetic Privacy Collide: Positive and Normative Theories Explaining how ACA's Expansion of Corporate Wellness Programs Conflicts with GINA's Privacy Rules*, 39(3) J.L. MED. & ETHICS 469, 471-72 (2011) (emphasizing that exercise, eating habits, and smoking are important factors that affect employee health).

8 CENTERS FOR DISEASE CONTROL AND PREVENTION, *Chronic Disease Prevention and Health Promotion*, http://www.cdc.gov/chronicdisease/overview/index.htm (last visited Sept. 19, 2013).

9 CENTERS FOR DISEASE CONTROL AND PREVENTION, *Chronic Diseases*, http://www.cdc.gov/chronicdisease/resources/publications/aag/chronic.htm (last visited Feb. 16, 2013).

10 *See* Health Enhancement Research Organization, *Guidance for a Reasonably Designed, Employer-Sponsored Wellness Program Using Outcomes-Based Incentives,* 54(7) J. OCCUPATIONAL ENVTL. MED. 889, 889 (2012) (offering guidance on wellness programs that use outcome-based incentives).

increased 46 percent over the same period of time.[11] Ideally, employers would seek to lower health care expenditures for employees across the board. Nonetheless, when this ideal proves unattainable, employers can still drastically reduce healthcare costs for the company if they target the small percentage of persons who incur the majority of overall health care costs.[12] Wellness programs allow for cost-shifting as well. Employers use incentives (i.e. rewards and penalties) to shift costs to employees who fail to comply with the terms of a wellness program.

II. The Affordable Care Act Regulates Wellness Program Incentives

Currently, a significant number of employers use incentives and penalties in wellness programs.[13] Data suggests that number will grow. In 2012, 35 percent of employers used incentives in tobacco cessation programs but surveys predict that number will increase to 52 percent in 2013.[14] While only 10 percent of companies make use of incentives in weight-management or cholesterol level programs, 33 percent of companies plan to use such incentives in 2013.[15]

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[11] *Id.*

[12] *See* CENTERS FOR DISEASE CONTROL AND PREVENTION *Chronic Diseases*, http://www.cdc.gov/chronicdisease/resources/publications/aag/chronic.htm (last visited Feb. 16, 2013) (explaining that those with chronic conditions account for the majority of spending).

[13] *See* Health Enhancement Research Organization, *supra* note 14, at 890-92 (providing employer wellness program trends).

[14] Health Enhancement Research Organization, *Guidance for a Reasonably Designed, Employer-Sponsored Wellness Program Using Outcomes-Based Incentives,* 54(7) J. OCCUPATIONAL ENVTL. MED. 889, 890 (2012).

[15] *Id.*

Under the Affordable Care Act, employers may offer rewards or penalties in two different ways.[16] The first allows an employer to offer an incentive based on participation in a wellness program rather than outcome. The legislation defines these "[p]articipatory wellness programs" as those "programs that . . . do not provide a reward or do not include any conditions for obtaining a reward that are based on an individual satisfying a standard that is related to a health factor."[17] The second group of wellness program rewards or penalizes an individual based on satisfying a health related standard (i.e. attaining or progressing towards a goal) related to a health status factor. The Affordable Care Act refers to these programs as "health-contingent programs."[18] Wellness programs that offer rewards or penalties to a participant to lower blood pressure, cholesterol, glucose level, or body mass are all examples of health-contingent programs.[19]

The Affordable Care Act regulates the level of incentive or penalty, allowing health-contingent wellness programs to vary premiums, issue surcharges, and provide cash or other gifts to those who comply successfully with the program.[20] In the recently proposed wellness program regulations, the government suggested raising the maximum allowable incentives for health-

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[16] *See* 42 U.S.C. § 300gg-4 (2010) (regulating participation based programs and health-contingent wellness programs).

[17] Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 77(227) Fed. Reg. 70622 (proposed Nov. 26, 2012) (to be codified at 45 C.F.R. pt. 146, 147).

[18] *Id.*

[19] *See id* (explaining wellness program activities are health-contingent).

[20] *See* Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 77(227) Fed. Reg. 70622 (proposed Nov. 26, 2012) (to be codified at 45 C.F.R. pt. 146, 147) (outlining the proposed changes to wellness program rules).

contingent wellness programs that use biometric testing.[21] The government's proposed regulations will increase the maximum allowable incentives for these programs from 20 percent to 30 percent of the employee's cost of coverage.[22] This means that a person who does not achieve a certain measurement of cholesterol, blood pressure, body mass, or glucose level may face a 30 percent increase in the amount he or she pays for health insurance.[23] Failing to meet requirements can directly affect the amount an insured pays for health coverage, even where attributable to a person's medical condition, unless the insured meets an exception or complies within a "reasonable alternative standard" put in place by the insurer.[24] While the Affordable Care Act provides extensive regulation, wellness programs must conform to applicable mandates of other relevant legislation,[25] including the ADA.[26]

III. The ADA Generally Prohibits Health Status Discrimination but Provides an Exception for Insurance Underwriting.

Even though the Affordable Care Act is a more recent statute, it does not nullify the requirements of the ADA. Importantly, Congress rejected an amendment to the Affordable Care

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21 *See id.* (proposing an increase in the maximum allowable level of incentives in wellness programs).

22 *Id.*

23 42 U.S.C. § 300gg-4 (2010).

24 *See id.* (explaining how program rewards and penalties can be applied to participants); *see also* Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 77(227) Fed. Reg. 70622 (proposed Nov. 26, 2012) (to be codified at 45 C.F.R. pt. 146, 147).

25 *See* **FURROW ET AL.**, *Health Care Reform Supplementary Materials* 159-60 (2012) (stating that wellness programs must comply with the Health Insurance Portability and Accountability Act ("HIPPA"), Genetic Information Nondiscrimination Act ("GINA"), and other supplementary legislation).

26 *See id.* (discussing ADA compliance issues in the wellness program context).

Act that would have made the Affordable Care Act supersede the ADA.[27] Commenting on this fact, the EEOC "decline[d] to speculate on how Congress anticipated the statutes would interact . . . because there is nothing in the [Affordable Care Act] that indicates . . . how Congress intended to harmonize . . . [the Affordable Care Act] with the ADA."[28] Also, although not addressed in a formal rulemaking, the Department of Labor and Department of Health and Human Services take the position that the ADA and the Affordable Care Act apply concurrently in the wellness program context.[29] Thus, employers and employees must design wellness programs to comply with both statutes.

A. <u>The ADA Medical Examination Provision Shields Employees from Medical Tests that an Employer Could Use for Discriminatory Purposes.</u>

From an employee's perspective, medical examinations come with attached stigmas. Some employees might consider employer-mandated biometric testing an invasion of privacy.[30]

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[27] *See* Consortium for Citizens with Disabilities, *Notice of Proposed Rulemaking of Department of Labor Employee Benefits Security Administration, RIN 1210-AB55, Department of Treasury Internal Revenue Service, RIN 1545-BL07, and Department of Health & Human Services Centers for Medicare & Medicaid Services, RIN 0938-AR48, concerning Incentives for Nondiscriminatory Wellness Programs in Group Health Plans* (January 25, 2013), http://www.bazelon.org/LinkClick.aspx?fileticket=621YX_YP6Xw%3D&tabid=349 (discussing that Congress failed to include an express preemption provision).

[28] *See* EEOC Staff for the American Bar Association's Joint Committee of Employee Benefits Technical Session (May 10, 2012), *available at* http://www.americanbar.org/content/dam/aba/events/employee_benefits/2012_eeoc_final.authcheckdam.pdf (declining to determine congressional intent on wellness program incentives).

[29] *See* Soeren Mattke et al., Rand Health, "A Review of the U.S. Workplace Wellness Market," at 7, *available at* http://www.dol.gov/ebsa/pdf/workplacewellnessmarketreview2012.pdf. ("The Affordable Care Act does not, however, supersede other federal requirements relating to the provision of incentives by group health plans, including requirements of . . . the Americans with Disabilities Act (ADA).") (emphasis added).

[30] *See* Eddie Young, *Employee Wellness Programs: Improving Access to Healthcare or Legal Landmine?*, 20 ANNALS HEALTH L. 97, 101 (providing a discussion of current problems in wellness programs from an employee's perspective).

Others may worry that those gathering information through biometric testing will share it with the employer, leading to adverse treatment (i.e. health status and disability discrimination).[31] Likely, both of these concerns ground the logic behind the ADA's medical examination rule.

Under the ADA and subsequent amendments, an employer may "not require a medical examination . . . unless such examination . . . is shown to be job-related and consistent with business necessity."[32] While many provisions of the ADA apply to and protect only those persons with disabilities, the ADA medical examination provision applies to all past, present, and future employees at all stages of the employment process.[33]

As interpreted by the EEOC, the ADA construes broadly what constitutes a medical examination. The agency defines "medical examination" as "a **procedure or test that seeks information about an individual's physical or mental impairments or health**."[34] The EEOC's *Guidance on Preemployment Questions and Medical Examinations* lists factors that the agency considers when determining if a test or procedure is a medical examination.[35] The EEOC weighs aspects such as whether "a health care professional" administers "the test" or interprets

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31 *See id.* (providing an overview of current problems in wellness programs).

32 42 U.S.C. § 12112 (2009).

33 *See* Jennifer S. Bard, *When Public Health and Genetic Privacy Collide: Positive and Normative Theories Explaining how ACA's Expansion of Corporate Wellness Programs Conflicts with GINA's Privacy Rules*, 39(3) J.L. MED. & ETHICS 469, 478 (citing the EEOC's Enforcement Guidelines on Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act, available at www.eeoc.org/policy/docs/guidance-inquiries.html#N_12).

34 EEOC, Enforcement Guidance on Disability-Related Inquiries and Medical Examinations http://www.eeoc.gov/policy/docs/guidance-inquiries.html#N_29_ (last visited Feb. 16, 2013).

35 *See id.* (discussing factors that the EEOC considers when determining if a procedure is a medical examination).

"the test," and whether "the test" took place in a "medical setting." [36] Additionally, the agency considers the "invasive" nature of the test, the "medical equipment" used, and whether the test reveals a "physical or mental health" impairment.[37]

Many biometric tests used in wellness programs fit the EEOC's definition. Tests designed to measure cholesterol, blood pressure, glucose level, and other health factors constitute ADA medical examinations. Moreover, the EEOC has explicitly deemed "blood pressure screening and cholesterol test[s]" to be per se medical examinations.[38]

Additionally, the "required" portion of the ADA medical examination provision deserves scrutiny. Pursuant to the ADA, an employer may not "require" a medical examination unless a "business" reason necessitates otherwise.[39] The EEOC considers workplace safety and reducing

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[36] *Id.*

[37] *Id.*

[38] EEOC, Enforcement Guidance on Disability-Related Inquiries and Medical Examinations http://www.eeoc.gov/policy/docs/guidance-inquiries.html#N_31_ (last visited Feb. 16, 2013) (emphasis added).

[39] 42 U.S.C. § 12112 (2009).

employee absenteeism legitimate business justifications.[40] Importantly, reducing health care costs for the employer does not appear to fit this stringent requirement.[41]

For wellness program compliance purposes, an employer must fundamentally understand how the agency characterizes "require[d]" and its converse, "voluntary."[42] The EEOC defines a "voluntary" wellness program as one that does "not require participation or penalize individuals who do not participate."[43] Consequently, the EEOC takes "no position as to whether a financial incentive provided as part of a wellness program that makes disability-related inquiries and/or requires medical examinations . . . would render the program involuntary."[44] This leaves open

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[40] EEOC, Enforcement Guidance on Disability-Related Inquiries and Medical Examinations http://www.eeoc.gov/policy/docs/guidance-inquiries.html#N_31_ (last visited Feb. 16, 2013). ("Generally, a disability-related inquiry or medical examination of an employee may be 'job-related and consistent with business necessity' when an employer 'has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.' Disability-related inquiries and medical examinations that follow up on a request for reasonable accommodation when the disability or need for accommodation is not known or obvious also may be job-related and consistent with business necessity. In addition, periodic medical examinations and other monitoring under specific circumstances may be job-related and consistent with business necessity").

[41] *See* Russell Chapman, *11th Circuit turns back ADA Challenge to Employer's Wellness Program* (Aug. 24, 2012), http://www.littler.com/publication-press/publication/new-life-eleventh-circuit-turns-back-ada-challenge-employers-wellness- (last visited Feb. 17, 2013). ("The EEOC has taken the informal position that the safe harbor is extremely narrow and will only apply when the plan has significant data showing that the offending provision is necessary as a cost saving tool, and that the plan would need to curtail benefits – or risk insolvency – if the provision were not included.").

[42] 42 U.S.C. § 12112 (2009).

[43] QUESTIONS FOR THE EEOC STAFF FOR THE 2012 JOINT COMMITTEE OF EMPLOYEE BENEFITS TECHNICAL SESSION MAY 10, 2012, http://americanbenefitscouncil.org/documents2012/wellness_eeoc-qanda100312.pdf (last visited Feb. 15, 2013).

[44] *Id.*

the possibility that any incentive[45] where biometric testing is involved, no matter how small, defies the ADA.[46] Crucially, the EEOC deems that penalizing[47] an individual for non-compliance or refusal to participate in a wellness program that contains biometric testing violates the ADA.[48] Considering the EEOC's inconsistency regarding incentives and that federal agencies desire to defer to congress, employers should exercise caution unless congress gives appropriate guidance to fix the tension between the ADA insurance safe harbor clause and the Affordable Care Act. In light of the ADA's language and the EEOC's released materials, many employer wellness programs that use biometric testing may violate the ADA. The story would end here had Congress not provided a statutory escape hatch for employers.

B. Congress Exempted Insurance Underwriting from the ADA Medical Examination Provision

[45] *See* EEOC Opinion Letter, ADA: Health Risk Assessments Health Risk Assessments (Aug. 10, 2009), http://www.eeoc.gov/eeoc/foia/letters/2009/ada_health_risk_assessment.html ("[Our prior position indicated that a] wellness program would be considered voluntary and . . . would not violate the ADA, as long as the inducement to participate in the program did not exceed twenty percent of the . . . plan. [Nevertheless], [b]ecause [the prior letter to the EEOC] did not raise the question of what level of inducement to participate in a wellness program would be permitted under the ADA, we are rescinding the portion of the January 6, 2009 letter that discusses this issue.").

[46] *See id.* (affirming its earlier position on incentives and penalties in Wellness Programs).

[47] Logically, one should think of a penalty and forgoing an incentive as two sides of the same coin. Penalties, however, foster submission more than incentives. Penalties require an employee to sacrifice an existing entitlement while rewards can seem intangible because they are outside of current possession.

[48] *See* QUESTIONS FOR THE EEOC STAFF FOR THE 2012 JOINT COMMITTEE OF EMPLOYEE BENEFITS TECHNICAL SESSION MAY 10, 2012, http://americanbenefitscouncil.org/documents2012/wellness_eeoc-qanda100312.pdf (last visited Feb. 15, 2013) (affirming its earlier position on incentives and penalties in wellness programs).

In its effort to eliminate disability discrimination, the ADA regulates employment relationships and other important transactions. [49] Despite this ambitious policy, Congress recognized health insurance and coverage exclusions for sick or disabled individuals would produce an obvious violation of the ADA.[50] Congress protected insurance companies.

Through the ADA insurance safe harbor provision, Congress allowed health insurance companies to continue underwriting and denying coverage/enrollment based on pre-existing conditions (e.g. disabilities and chronic illness).[51] Congress understood that various provisions in the ADA could send contradictory messages as applied to insurance practices.[52] Congress recognized that health status underwriting is contrary to the ADA's core purpose of eliminating discrimination against disabled persons.[53] Despite this tension, the insurance industry prevailed.

The legislative history of the ADA speaks for itself.[54] The legislative history instructs that Congress recognized that without the insurance safe harbor provision, "this [ADA]

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[49] *See* Timothy Frey, *Your Insurance Does Not Cover that: Disability-Based Discrimination Where It Hurts the Most*, 78 GEO. WASH. L. REV. 636, 639-40 (2010) (discussing the goals of the ADA that Congress hoped to achieve through the legislative process).

[50] *See id.* (describing functions of the ADA insurance safe harbor provision).

[51] *See id.* at 640-42 (stating that the ADA insurance safe harbor provision is meant to protect insurance company practices that would otherwise subject them to litigation under the ADA).

[52] *See* Leonard F. v. Israel Disc. Bank of New York, 199 F.3d 99, 106 (2d Cir. 1999) ("[O]ne of the key Committee Reports on which Plaintiff relies, S.Rep. No. 101–116 (1989) [ADA legislative history], Blue 33–34, states in part that 'the Committee added Section 501(c) to make it clear that this legislation will not disrupt the current nature of insurance underwriting or the current regulatory structure for self-insured employers or of the insurance industry in sales, underwriting, pricing, administrative and other services, claims and similar insurance activities based on classification of risks as regulated by the States.'").

[53] *See id.* (analyzing legislative intent of the ADA).

[54] *See* H.R. Rep. No. 101-485, pt. 3, at 70 (1990) (outlining the intent of the legislation).

legislation could arguably find violative of its provisions any action taken by an insurer or employer which treats disabled persons differently under an insurance or benefit plan because they represent an increased hazard of death or illness."[55] Congress included the safe harbor provision "to make it clear that this legislation [ADA] will not disrupt the current nature of [health status] insurance underwriting or the current regulatory structure for self-insured employers or of the insurance industry in sales, underwriting, [and] pricing."[56] The safe harbor permits insurers to continue using "preexisting condition clauses" despite their adverse impact on disabled persons.[57] Also, "benefit plans (whether insured or not) need to be able to continue business practices in the way they underwrite, classify, and administer risks, so long as they carry out those functions in accordance with *accepted* principles of insurance risk classification."[58]

Courts have extended the ADA insurance safe harbor clause to wellness programs, providing protection for insurers and employers. Inducing compliance through incentives in employer wellness programs using biometric testing appears to violate the ADA medical examination provision but the ADA safe harbor makes that claim legally unchallengeable.[59] The recent Florida case *Seff v. Broward County*,[60] discussed below in detail, illustrates this situation.

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55 *Id.* at 86.

56 S. Rep. No. 101-116, at 84-85 (1989).

57 *Id.* at 59.

58 H.R. REP. 101-485, at 138 (*emphasis added*).

59 *See* Seff v. Broward County, 778 F. Supp. 2d 1370 (S.D. Fla. 2011) (determining that the employer qualified for the safe harbor provision so the court never reached the merits).

60 *Id.*

Nevertheless, employers must now reexamine congressional intent of the ADA safe harbor and how it impacts the health status underwriting justification for wellness programs. The congressional intent seems clear. As long as society accepts health status underwriting as a legal business practice, those entities engaged in underwriting gain exemption from complying with the ADA.[61] Circumstances, however, have changed with the advent of the Affordable Care Act.

IV. The Affordable Care Act Eliminates Health Status Underwriting, Ending the ADA's Exception for Insurance Underwriting.

Before the Affordable Care Act, access to desirable insurance benefits at reasonable cost seemed illusive for persons with certain health status conditions.[62] Many insurance companies excluded individuals based on pre-existing conditions.[63] These pre-existing condition exclusions ensured that many sick and disabled persons went without proper medical care due to a lack of health insurance coverage.[64] Where insurance coverage was available, insurance companies would frequently offer only greatly diminished benefits to these individuals.[65] In other cases, the cost of adequate coverage was so high that persons of normal financial means could not afford the premiums to secure basic insurance benefits.[66]

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[61] *See* H.R. REP. 101-485, at 138 (determining the scope of the safe harbor clause).

[62] *See* Michael Saks, *Affordable Care Act Helps Improve Access to High Quality, Coordinated Care*, **THE WHITE HOUSE BLOG**, http://www.whitehouse.gov/blog/2012/06/20/affordable-care-act-helps-improve-access-high-quality-coordinated-care (June 20, 2012, 10:33 AM) (describing how the Affordable Care Act improves access to vital health care services).

[63] *See Overview: Proposed Rule for Health Insurance Market Reforms*, http://www.healthcare.gov/news/factsheets/2012/11/market-reforms11202012a.html (explaining how the Affordable Care Act protects consumers).

[64] *See id.* (discussing the guaranteed issue provision).

[65] *See id.* (describing minimum benefit coverage now in place).

[66] *See id.* (providing a description of cost control mechanisms in the Affordable Care Act).

Anecdotal stories of persons with pre-existing conditions denied health insurance coverage under the most egregious circumstances were routine. An insurance company denies coverage to a victim of domestic violence for *having* a preexisting condition.[67] The parents of a child with cancer cannot afford the coverage needed to obtain treatment for the child.[68] Needless to say, underwriting polled poorly among the public.[69] While needed to safeguard insurance profit, underwriting produced results that the American public and the political establishment deemed undesirable.

Politicians understood that health care reform needed to address the effects of underwriting on those individuals vulnerable because of health status. Congress needed to accomplish this goal without bankrupting the health insurance industry. Although politically controversial, the Affordable Care Act accomplished this goal through four provisions. Three provisions aid consumers and one provision assists primarily the insurance industry.

First, Congress created the guaranteed issue provision to permit access to health insurance regardless of health status.[70] Guaranteed issue forces insurance companies to enroll

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[67] *See* Elizabeth A. Hoskins, *South Carolina Women Are Not Preexisting Conditions*, 63 **S.C. L. REV**. 949, 952 (2012) (analyzing various procedural insurance mechanisms that excluded victims of domestic violence from insurance coverage) (emphasis added).

[68] *See* Anne C. Kirchhoff et al., *Employer-sponsored health insurance coverage limitations: results from the Childhood Cancer Survivor Study*, 21 Support Care Cancer 377, 380 (2013) (discussing issues of insurance facing adult and children cancer survivors).

[69] *See* Michael Saks, *What Do Polls Really Tell Us About The Public's View of the Affordable Care Act?*, **HEALTH AFFAIRS BLOG**, http://healthaffairs.org/blog/2012/09/21/what-do-polls-really-tell-us-about-the-publics-view-of-the-affordable-care-act/ (Sept. 21, 2012) (analyzing public support for various provisions of the Affordable Care Act).

[70] *See* 42 U.S.C. § 300gg-1 (2010) ("[E]ach health insurance issuer that offers health insurance coverage in the individual or group market in a State must accept every employer and individual in the State that applies for such coverage.").

every individual who applies.[71] Also, the Affordable Care Act forbids insurance companies from rescinding coverage because a person develops a health condition.[72] This stops denials and rescissions for those persons suffering from disease, disability, or other medical conditions who want health insurance coverage.[73] This change took immediate effect when the legislation passed.[74] Unfortunately, theoretical access to health insurance means nothing unless beneficiaries can obtain medically necessary services in practice. Thus, Congress took another step.

Second, to guarantee access to popular and medically important services, Congress requires that health insurance policies meet certain benchmark requirements in the health benefits they offer.[75] These required benefits are known as the "essential health benefits."[76] As of January 2014, insurance companies must offer coverage for "[a]mbulatory patient services, [e]mergency services, [h]ospitalization, [m]aternity and newborn care, [m]ental health, and substance use disorder services."[77] Also, health insurers must cover "[p]rescription drugs, [r]ehabilitative and habilitative services . . . , [l]aboratory services, [p]reventive and wellness

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71 *See* § 300gg-1 (preventing denials of coverage).

72 *See* 42 U.S.C. § 300gg-2 (2010) ("[I]f a health insurance issuer offers health insurance coverage in the individual or group market, the issuer must renew or continue in force such coverage at the option of the plan sponsor or the individual.").

73 *See* § 300gg-1-2 (compelling insurance companies to offer and renew coverage at the election of the beneficiary).

74 *See id.* (implementing the substance of § 300gg-1 and § 300gg-2 immediately).

75 *See* 42 U.S.C. § 18022 (2009) (recognizing that insurance policies must cover "essential" insurance benefits).

76 *See id.* (listing the "essential" insurance benefits that insurers must cover).

77 *Id.*

services . . . [,] chronic disease management, [and] [p]ediatric services, including oral and vision care."[78] Furthermore, the Department of Health and Human Services possesses authority to add other services to the list.[79] At its core, the essential benefits provision forbids bare bones policies that refuse to cover medically necessary services due simply to high cost. This provision of the legislation extends access to important health care services regardless of health status.

Third, the Affordable Care Act includes a provision that permits health insurance premiums (the amount an insured individual pays for insurance coverage) to vary among individuals[80] *only* on the basis of age, tobacco use, geographic area and family size.[81] These premium guidelines outlaw insurance companies from charging higher premiums to persons simply because of their health status.[82] As applied, this provision protects from higher premiums the roughly one in two Americans who suffer from a pre-existing health condition, including but not limited to heart disease, diabetes, cancer, or asthma.[83]

Importantly, not one of the provisions just discussed here helps the insurance industry stay profitable or controls costs for insureds. If only these three provisions existed, then insurance companies would significantly raise prices to offset the costs of the new medical

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78 *Id.*

79 *See id.* (granting HHS discretion to include other health services).

80 *See* 42 U.S.C. § 300gg (2010) (explaining the legitimate, legal reasons insurers may vary premiums among insureds).

81 *Id.* (emphasis added); *see also* Patient Protection and Affordable Care Act; Health Insurance Market Rules; Rate Review, 45 C.F.R. § 147.102 (2013) (enumerating premium guidelines in the individual and small group market).

82 *See Overview: Proposed Rule for Health Insurance Market Reforms*, http://www.healthcare.gov/news/factsheets/2012/11/market-reforms11202012a.html (describing the practical impact of Section 2701: Fair Health Insurance Premiums).

83 *Id.*

services not offered previously (i.e. the essential benefits) and additional persons with pre-existing conditions needing expensive care. Otherwise, these changes could bankrupt for-profit health insurance companies.

Congress did address cost concerns in the Affordable Care Act. Congress chose to expand the customer base, increasing the supply of healthy persons in the health insurance market to combat increased costs. This tactic counterbalanced the financial price of improving consumer access through the three provisions discussed above. Consequently, the vast majority of Americans are now compelled to carry health insurance.[84] Many refer to this requirement as the individual mandate.[85] In essence, the individual mandate compels the majority of individuals not eligible for Medicaid or Medicare to carry insurance either through an employer or to purchase insurance on their own.[86] Those individuals that choose not to carry health insurance of a certain caliber must pay a tax to the Internal Revenue Service.[87] The amount of the tax will increase in the coming years as a further incentive for non-exempt persons to obtain health insurance.[88] The government predicts that this tax will sufficiently encourage those persons currently outside the health insurance market to join. The individual mandate created a political

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[84] *See* Kaiser Family Foundation, *The Requirement to Buy Coverage Under the Affordable Care Act*, http://healthreform.kff.org/the-basics/requirement-to-buy-coverage-flowchart.aspx (discussing the various methods that individuals may use to obtain health insurance coverage).

[85] *See id.* (describing the impact of the individual mandate).

[86] *See* 26 U.S.C. § 5000A (2010) (mandating that most people must be covered by health insurance or face a financial penalty).

[87] *See id* (exempting only select groups of persons from § 5000A).

[88] *See id* (vesting the power to withhold tax refunds for failure to pay the tax).

and legal firestorm[89] but ultimately the United States Supreme Court determined that the mandate does not violate the constitution.[90]

Through the political compromise known as the Affordable Care Act, Congress included the guaranteed issue provision, essential benefits provision, and premium guidelines to eliminate health status underwriting. Additionally, by creating the individual mandate, Congress made these changes practical and cost-effective for insurance companies and consumers. These drastic changes altered the legal landscape for those parties harmed by health status underwriting and those who engaged in the practice. As a result, the wellness program context must also change.

V. *Seff v. Broward County* Possesses No Precedential Authority Because It Did Not Consider the Affordable Care Act's Ban on Health Status Underwriting.

Because the Affordable Care Act no longer permits underwriting based on health status, courts should now apply the ADA safe harbor provision fundamentally differently than pre-Affordable Care Act. In the wellness program context, the new rules of health care should prevent insurers and employers from obtaining statutory safe harbor where an employee alleges a violation of the ADA medical examination provision. Therefore, employers should not view the outcome reached in *Seff v. Broward County*[91] as predictive of the outcome in a future case.

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[89] *See* David B. Rivkin, Jr., Lee A. Casey & Jack M. Balkin, *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. Pa. L. Rev. PENNumbra 93, 94-95 (2009) (describing the various legal and political challenges to attack the Affordable Care Act).

[90] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2594 (2012) (upholding the individual mandate as a tax for purposes of the constitution while rejecting the government's commerce clause rationale).

[91] *See* Seff v. Broward County, 778 F. Supp. 2d 1370 (S.D. Fla. 2011) (determining that the employer qualified under the ADA's insurance safe harbor provision); *see also Seff v. Broward County,* 691 F.3d 1221, 1224 (11th Cir. 2012) (upholding the district court's outcome and reasoning).

In *Seff v. Broward County*,[92] the employer (Broward County) created a wellness program that used biometric testing.[93] The biometric test was a finger-stick blood test designed to detect cholesterol and blood glucose levels.[94] Broward County hoped to bring down the costs of its health plan through this initiative.[95]

To ensure participation, Broward County instituted a nominal bi-weekly surcharge for any insured employee who failed to enroll and comply with the wellness program guidelines.[96] Employees charged the penalty asserted that the biometric test constituted a "medical examination" within the meaning of the ADA medical examination provision.[97] They contended that the wellness program violated the ADA provision against an employer requiring a medical examination because it was not "voluntary," as non-participation triggered a penalty.[98] This logic appears consistent with the EEOC's interpretation of the ADA medical examination provision.[99]

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92 *See Broward County*, 778 F. Supp. 2d at 1370 (involving an employee challenge to a biometric-measure based employer wellness program).

93 *See id.* at 1371-72 (describing the details of the biometric testing program employed by Broward County).

94 *See* Kenneth A. Mason, *Wellness Program Clears ADA Hurdle*, Benefits in Brief-Spencer Fane Britt & Browne (May 13, 2011) (discussing aspects of the biometric testing program).

95 *See Broward County*, 778 F. Supp. 2d at 1371-72 (explaining the cost-cutting rationale for Broward County's wellness program).

96 *See id.* at 1370-72 (describing the terms of Broward County's twenty dollar surcharge).

97 *See id.* at 1371-73 (responding to the employer's claims).

98 *Id.*

99 *See* EEOC Staff for the American Bar Association's Joint Committee of Employee Benefits Technical Session (May 10, 2012), *available at* http://www.americanbar.org/content/dam/aba/events/employee_benefits/2012_eeoc_final.authcheckdam.pdf (providing the EEOC's position on biometric-measure wellness programs).

The court never reached the voluntariness aspect of Broward County's penalty because it found that Broward County qualified under the ADA insurance safe harbor provision as an entity "administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks."[100] The court determined that Broward County engaged in health status underwriting as the wellness program was an "initiative designed to mitigate risks," "lead[ing] to a more healthy population that costs less to insure."[101] Accordingly, the court dismissed the case in favor of Broward County, never reaching the merits.[102] The Eleventh Circuit affirmed the decision of the federal district court.[103]

Because the Affordable Care Act outlaws health status underwriting, courts should no longer apply an underwriting rationale to exempt parties operating wellness programs from the ADA, as seen in *Broward County*. Considering that many employers use rewards and penalties in wellness programs that contain biometric testing, a substantial number of employer-based wellness programs may currently run afoul of the ADA.

Conclusion

When Congress passed the ADA insurance safe harbor provision to protect the insurance industry, health status underwriting existed as the main tool for the insurance industry to make profits. The Affordable Care Act makes this practice unlawful.

Based on the legislative history, the legislators that passed the ADA with an insurance safe harbor clause did not anticipate the day when health status underwriting would no longer

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[100] 42 U.S.C. § 12201 (2009).

[101] Seff v. Broward County, 778 F. Supp. 2d 1370, 1374 (S.D. Fla. 2011*), aff'd sub nom.* Seff v. Broward *County*, 691 F.3d 1221 (11th Cir. 2012).

[102] *See id.* (dismissing the employees' legal challenge).

[103] *See Broward County,* at 1224 (affirming the district court's dismissal of the case).

exist.[104] Because of the Affordable Care Act, that day has arrived. Accordingly, the ADA's statutory protection for health status underwriting should vanish.

Significant stakeholder consequences make another situation like *Broward County* inevitable. Employees denied a reward or forced to pay a penalty under their employer's wellness program will view the system as inequitable. On the other side, employers may lose the ability to shift ever-increasing healthcare costs to non-compliant employees. For large companies in particular, they stand to lose substantial health care savings (i.e. the Affordable Care Act's generous thirty to fifty percent incentive/penalty guidelines).[105]

Companies that employ biometric testing in wellness programs should exercise caution. Long before the Affordable Care Act, the EEOC considered biometric tests to constitute medical examinations within the meaning of the ADA. The exact incentives allowed by the Affordable Care Act could render biometric tests as "required" or "involuntary."

Absent clear guidance from Congress or a federal agency stating differently, employers should comply with the ADA as if the ADA insurance safe harbor provision never existed. Otherwise, an employer may not escape unscathed like Broward County. At least for now, employers will bear the costs of health reform's unanticipated consequences either through lost savings in wellness programs or litigation under the ADA medical examination provision.

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[104] *See* Leonard F. v. Israel Disc. Bank of New York, 199 F.3d 99, 106 (2d Cir. 1999) ("[O]ne of the key Committee . . . states in part that 'the Committee added Section 501(c) to make it clear that this legislation will not disrupt the current nature of insurance underwriting or the current regulatory structure for self-insured employers or of the insurance industry in sales, underwriting, pricing, administrative and other services.'").

[105] *See* JOHN STEINER, ROGER KING, AND THERESA DEAN, Health L. & Compliance Update, § 7.05 Wellness Programs (2012) (outlining a wide variety of issues that an employer must consider when implementing a wellness program).