WORKPLACE WELLNESS PROGRAMS: EMPIRICAL DOUBT, LEGAL AMBIGUITY, AND CONCEPTUAL CONFUSION

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ABSTRACT

Federal laws that protect workers from insurance discrimination and infringement of health privacy include exceptions for wellness programs that are "voluntary" and "reasonably designed" to improve health. Initially, these exceptions were intended to give employers the flexibility to create innovative wellness programs that would appeal to workers, increase productivity, and protect the workforce from preventable health conditions.

Yet a detailed look at the scientific literature reveals that wellness program efficacy is quite disputed, and even highly touted examples of program success have been shown to be unreliable. Meanwhile, the latest administrative regulations on wellness programs were vacated by a district court in January 2019, leaving the legal scope of wellness programs in flux. The U.S. District Court of Connecticut now has a case before it that could start a national overhaul of these programs.

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In this Article, we give a scientific and legal overview of wellness programs and explain why wellness programs are a source of ethical controversy. Given the unsteady evidence on wellness programs' benefits and their real potential risks, we argue that more should be done to regulate their scope and design. A robust interpretation of the relevant statutes would help protect workers in the face of indecisive evidence. To this end, we conclude with an attempt to resolve the widespread disagreement over the terms "voluntary" and "reasonable design" with the goal of providing courts and regulators with a more workable framework to apply.

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INTRODUCTION

Sustained growth in healthcare spending has prompted employers to seek options for reducing their overall medical costs.[1] One widespread approach has been to invest in workplace wellness programs, which incentivize workers to identify health issues and take steps to improve their well-being.[2] The underlying logic of these programs is that employers can mitigate total insurance costs by promoting employee health.[3] As such, wellness programs typically encourage workers to stop smoking, join a gym, lose weight, or get preventive health screenings in order to make them healthier and more productive.[4] These programs are now available to over sixty million U.S. employees, and the revenue of the wellness industry has more than quadrupled to eight billion dollars since 2011.[5] A handful of states have also started expanding wellness programs into Medicaid.[6] In short, the programs are a highly complex and entrenched feature of U.S. employment.

Policymakers have frequently assumed that the benefits of such programs are self-evident; intuitively, investing in employee health seems good for employees.[7] However, a thorough look at the

1. Alden J. Bianchi, *The Emerging Contours of the Rules Governing Wellness Programs*, PRAC. LAW., Aug. 2017, at 43; *see also* Damon Jones et al., *What Do Workplace Wellness Programs Do? Evidence from the Illinois Workplace Wellness Study*, 134 Q.J. ECON. 1747, 1748 (2019).

2. Bianchi, *supra* note 1, at 43.

3. *See* E. Pierce Blue, *Wellness Programs, the ADA, and GINA: Framing the Conflict*, 31 HOFSTRA LAB. & EMP. L.J. 367, 367-68 (2014).

4. *See id.* at 369.

5. KAREN POLLITZ & MATTHEW RAE, KAISER FAMILY FOUND., WORKPLACE WELLNESS PROGRAMS CHARACTERISTICS AND REQUIREMENTS 5-7 (2016), http://files.kff.org/attachment/Issue-Brief-Workplace-Wellness-Programs-Characteristics-and-Requirements [https://perma.cc/AG3B-JJVW].

6. *See* Karen J. Blumenthal et al., *Medicaid Incentive Programs to Encourage Healthy Behavior Show Mixed Results to Date and Should Be Studied and Improved*, 32 HEALTH AFF. 497, 497, 500-01 (2013) (describing ten states' existing Medicaid incentive programs that were funded by a $85 million grant through the Affordable Care Act); *see also* Natoshia M. Askelson et al., *Iowa's Medicaid Expansion Promoted Healthy Behaviors but Was Challenging to Implement and Attracted Few Participants*, 36 HEALTH AFF. 799, 799-800 (2017) (evaluating Iowa's Healthy Behaviors Program which incentivized members to complete healthy activities in return for waiving monthly premiums).

7. *See, e.g.*, Alexandra Black, *Five Reasons Employee Wellness Is Worth the Investment*, HEALTH.GOV (May 17, 2017), https://health.gov/news/blog/2017/05/five-reasons-employee-

scientific literature on wellness programs supports a more skeptical view. Specifically, the presumption that programs benefit health or influence costs is far from substantiated by the literature.[8] Meanwhile, these programs have come under scrutiny, and some have raised doubts about whether the programs harm participants.[9] Given the lack of conclusive data on wellness programs' benefits and harms, one would expect such programs to be subject to significant regulatory oversight in order to protect program participants.

Yet the laws governing wellness programs are currently precarious. Typically, federal statutes prohibit employers from soliciting employees' health information or varying their insurance benefits based on health status.[10] However, these statutes make exceptions for wellness programs that are "voluntary" for participants and "reasonably designed" to improve health, and what these regulatory standards mean in practice remains unclear.[11] Administrative agencies have issued conflicting guidance, and district courts have disagreed about what features make a program voluntary.[12] Effective January 2019, a D.C. federal judge struck down the latest regulatory attempt at defining what constitutes a voluntary program, and no new regulations have been proposed.[13] As a result, the legal scope of wellness programs is in flux, signaling a need for better guidance.

Now the U.S. District Court of Connecticut has a case before it that could start dismantling these programs. In July 2019, Yale employees filed a complaint stating that the university's wellness program is not voluntary.[14] The outcome of this case could set an important precedent for how wellness programs will be implemented

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wellness-is-worth-the-investment/ [https://perma.cc/X4RY-DH74].

8. *See infra* Part I.B.

9. *See, e.g.*, Lena Solow, *The Scourge of Worker Wellness Programs*, NEW REPUBLIC (Sept. 2, 2019), https://newrepublic.com/article/154890/scourge-worker-wellness-programs [https://perma.cc/3P4Y-E2R8].

10. *See* Ronen Avraham et al., *Understanding Insurance Antidiscrimination Laws*, 87 S. CAL. L. REV. 195, 198-99 (2014).

11. 42 U.S.C. § 300gg-4 (2012); *see* Katie Keith, *HHS Proposes New Wellness Demonstration Projects*, HEALTH AFF. BLOG (Oct. 1, 2019), https://www.healthaffairs.org/do/10.1377/hblog20191001.231439/full/ [https://perma.cc/WW5W-MLXV].

12. *See infra* Parts III.A.3, III.B.

13. *See* AARP v. EEOC, 292 F. Supp. 3d 238, 245 (D.D.C. 2017).

14. Complaint at 3, Kwesell v. Yale Univ., No. 3:19-cv-1098 (D. Conn. July 16, 2019).

in the future as well as affect how voluntariness will be conceptualized in the law more broadly.

This Article synthesizes the empirical, legal, and policy literatures on workplace wellness programs. In Parts I and II, we will provide an extended analysis of programs' potential benefits and risks, arguing that wellness programs do not necessarily have a favorable effect. A detailed view of the scientific literature on wellness programs indicates that program efficacy is quite disputed. We will argue that it is no longer appropriate to assume that individual programs are "reasonably designed" to positively affect health, suggesting that employers should have to meet a higher evidentiary burden to establish the programs' effectiveness. Our goal in these Parts is to push back against the original policy approach that crafted easily satisfied regulatory requirements because programs appeared to be clearly beneficial. Given our argument that the regulatory approach is inadequate, we then turn in Part III to the statutes, regulations, and judicial decisions relevant to the regulation of wellness programs in order to assess whether there is an opportunity to pivot towards more rigorous oversight. We argue that voluntariness and reasonable design are frequently interpreted loosely and applied inconsistently, but that these standards can be strengthened. To that end, Part IV provides a conceptual analysis of the factors that would render a program voluntary and reasonably designed. Our analysis is framed to help guide the implementation of wellness programs while avoiding some of their potential pitfalls.

I. THE DUBIOUS EVIDENCE ON PROGRAM BENEFITS

A. Early Enthusiasm

Broad initial support for wellness programs was based on empirical literature that pointed to wellness as a promising avenue for influencing health and healthcare costs. Several well-publicized case studies of Johnson & Johnson (1986), Bank of America (1993), the California Public Employees Retirement System (1994), and Citibank Health Management Program (1999) demonstrated sizable

healthcare savings by implementing programs.[15] In 2009, Safeway reported that its program had saved the company approximately 40 percent in medical expenses.[16] A high-profile meta-analysis published in 2010 found that for every dollar spent on a program, medical costs fell by about $3.27 and absenteeism costs fell by about $2.73.[17] These findings and others occasioned sustained interest in wellness programs.[18]

In addition to empirical and anecdotal support, encouraging such programs had extensive, bipartisan political appeal. President Obama, for example, highlighted wellness as a central tenet of the Affordable Care Act (ACA):

> Our federal government also has to step up its efforts to advance the cause of healthy living. Five of the costliest illnesses and conditions—cancer, cardiovascular disease, diabetes, lung disease, and strokes—can be prevented. And yet only a fraction of every health care dollar goes to prevention or public health. That is starting to change with an investment we are making in prevention and wellness programs that can help us avoid diseases that harm our health and the health of our economy.[19]

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15. *See* Janet L. Bly et al., *Impact of Worksite Health Promotion on Health Care Costs and Utilization*, 256 J. AM. MED. ASS'N 3235, 3237-40 (1986); James F. Fries et al., *Randomized Controlled Trial of Cost Reductions from a Health Education Program: The California Public Employees' Retirement System (PERS) Study*, 8 AM. J. HEALTH PROMOTION 216, 217, 222 (1994); James F. Fries et al., *Two-Year Results of a Randomized Controlled Trial of a Health Promotion Program in a Retiree Population: The Bank of America Study*, 94 AM. J. MED. 455, 455, 460-61 (1993); Ronald J. Ozminkowski et al., *A Return on Investment Evaluation of the Citibank, N.A., Health Management Program*, 14 AM. J. HEALTH PROMOTION 31, 32-39 (1999).

16. Steven A. Burd, *How Safeway Is Cutting Health-Care Costs*, WALL ST. J., June 12, 2009, at A15.

17. Katherine Baicker et al., *Workplace Wellness Programs Can Generate Savings*, 29 HEALTH AFF. 304, 308 (2010).

18. *See, e.g.*, Leonard L. Berry et al., *What's the Hard Return on Employee Wellness Programs?*, 88 HARV. BUS. REV. 104, 105 (2010) (citing Johnson & Johnson's program to conclude "U.S. companies can use wellness programs to chip away at their enormous health care costs").

19. Barack Obama, U.S. President, Address to the American Medical Association on Health Care Reform (June 15, 2009), https://www.nytimes.com/2009/06/15/health/policy/15obama.text.html [https://perma.cc/3T5X-6TCR]; *see* Howard K. Koh & Kathleen G. Sebelius, *Promoting Prevention Through the Affordable Care Act*, 363 NEW ENG. J. MED. 1296, 1297 (2010).

Similarly, excitement about Safeway's wellness program motivated public comment from Mitch McConnell and John McCain. In a speech on the Senate floor, Mitch McConnell stated, "The Safeway program has proven so successful that the company wants to increase its incentives for rewarding healthy behavior. Unfortunately, current laws restrict it from doing so."[20] A substantive result was the passage of the ACA's "Safeway Amendment," an homage to Safeway's program that eased regulatory barriers and authorized grants for wellness programs.[21] In short, the early evidence showed promise for wellness programs' ability to achieve health goals, which prompted policymakers to support their expansion.

B. Reassessing the Evidence

However, the weakness of the evidence supporting wellness programs has increasingly been recognized, calling into question the foundation on which these programs are based. In this Section, we outline the state of understanding about the benefits of these programs. We show that common problems have been noted throughout the wellness literature, including self-selection, attrition, small sample sizes, short measurement periods, inexact case-control matching, overutilization of self-report measures, and lack of valid measures, among others. Altogether, these shortcomings call into doubt the quality of the existing evidence, suggesting a more circumspect estimation of wellness programs' benefits.

A close read of the early literature undercuts policymakers' early enthusiasm for wellness programs. For example, a 1996 review summarizing the literature on the health effects of 316 programs calls attention to several methodological issues that permeate the wellness literature, namely design, sampling, and instrumentation.[22] The majority of programs used study designs that did not include a comparison group or randomly assign subjects, raising

20. David S. Hilzenrath, *Misleading Claims About Safeway Wellness Incentives Shape Health-Care Bill*, WASH. POST, Jan. 17, 2010, at G01.

21. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10408, 124 Stat. 977-78 (2010) (codified at 42 U.S.C. § 280l (2012)).

22. Mark G. Wilson et al., *A Comprehensive Review of the Effects of Worksite Health Promotion on Health-Related Outcomes*, 10 AM. J. HEALTH PROMOTION 429, 434 (1996).

"concerns about the validity of the findings."[23] In particular, the studies had high levels of selection bias; the wellness program participants differed systematically from nonparticipants, meaning that the data in the literature probably overstated the programs' effect.[24] Another design issue is that the average duration of the studies was short, offering little information about the long-term impact of wellness programs.[25] Consequently, how long any program's benefits lasted and whether the benefits increased or attenuated over time was unknown. The short time horizons captured in the data could have undersold program effects if health improvements took several years to accrue or, alternatively, could have oversold their effects if transient health gains lapsed in the long-term. The authors also observed that many studies used a convenience sample and described high attrition, which limited the conclusions that could be generalized to other groups.[26] Finally, almost no studies documented the reliability or validity of the instruments used to measure the variables of interest, except for those studies relying on biomedical outcomes such as cholesterol.[27]

Reviews of the literature on the cost effects of wellness programs point to many of the same limitations.[28] For example, a 2001 review indicated that of the thirty-two studies that had examined healthcare costs, eleven used comparison groups that were not randomized, and seventeen did not use a comparison group at all.[29] In addition, the authors of a 2008 meta-analysis calculated a mean effect size and confidence interval across studies focusing on absenteeism; these figures represented the average magnitude of program effect and the accuracy of that average.[30] The effect size

23. *Id.*

24. *See id.*

25. *See id.*

26. *Id.*; *see, e.g.*, John Cawley & Joshua A. Price, *A Case Study of a Workplace Wellness Program that Offers Financial Incentives for Weight Loss*, 32 J. HEALTH ECON. 794, 801 (2013) (documenting extremely high attrition and low weight loss).

27. *See* Wilson et al., *supra* note 22, at 434.

28. *See* Baicker et al., *supra* note 17, at 309-10.

29. Steven G. Aldana, Literature Review, *Financial Impact of Health Promotion Programs: A Comprehensive Review of the Literature*, 15 AM. J. HEALTH PROMOTION 296, 316 (2001).

30. Kizzy M. Parks & Lisa A. Steelman, *Organizational Wellness Programs: A Meta-Analysis*, 13 J. OCCUPATIONAL HEALTH PSYCHOL. 58, 66 (2008).

was low to moderate and the confidence interval was wide, cautioning that practitioners should be more conservative in their expectation of program benefit.[31] Overall, these reviews tempered the high estimates of wellness program impact reflected in individual studies.

In short, the early evidence regarding wellness program effectiveness was fragmentary, poorly operationalized, and often observational, suggesting a surprisingly weak state of the science on program benefit. While there was some research indicating that programs may influence health, this relationship was not supported by a strong, consistent research base.[32] As such, initial wellness program policy was established in an environment of undue confidence about program benefit.

A number of influential cases reinforce this observation that policymakers got ahead of the science.[33] For example, though Safeway's spending slowdown was initially ascribed to a wellness program, it has since become clear that the observed reduction in medical spending was precipitated instead by changes to Safeway's benefit design in 2006.[34] This misreading of empirical data had an outsized effect on public policy, providing the impetus for the Safeway Amendment.[35]

Similarly, the wellness paper with the most direct and lasting policy influence has been interpreted in misleading ways. From a sample of twenty-two publications, a 2010 review calculated "the medical costs f[e]ll about $3.27 for every dollar spent on wellness programs and that absenteeism costs f[e]ll by about $2.73 for every dollar spent."[36] However, there were important limitations to this review.[37] In general, conducting a credible return on investment analysis is difficult because of factors such as self-selection, attrition, changes in employee demographics, benefit plan modifications, lack of statistical power, and nonnormal distributions of

31. *See id.*
32. *See id.*
33. *See* Hilzenrath, *supra* note 20, at G01.
34. *See id.*
35. *See id.*
36. Baicker et al., *supra* note 17, at 304, 307.
37. *See id.* at 309.

data.[38] Therefore, such studies might attribute spending reductions to wellness programs when they are actually driven by other factors, threatening internal validity. Nevertheless, the review authors did not weigh sample sizes or adjust their analysis based on the methodological quality of the studies.[39] In addition, there were concerns about short study duration, self-selection, and positive result publication bias.[40] Finally, studies have since demonstrated that return on investment analyses for wellness programs have a propensity to change in relation to methodological quality, whereby the lowest quality studies estimate the biggest financial returns and the randomized, controlled trial designs show negative returns.[41] Given this context, interpretations of the review's findings should have been highly restrained. Yet references to the paper still feature prominently on wellness program vendor websites, and it has been cited in the academic literature over 600 times.[42] These cases demonstrate that most of our wellness policies were set with an unnuanced understanding of the relevant literature and without adequate scientific justification.

Newer studies further undermine the assumptions that policymakers drew from the earlier data. In recent years, a handful of appropriately designed studies have offered more direct evidence that these programs have no appreciable effect.[43] For example, a widely publicized 2019 paper found no significant program impact.[44] The authors implemented a large-scale randomized, controlled trial, where eligibility for their program was randomly assigned at the individual level for 4834 participants.[45] The results indicated strong

38. *See* Ron Z. Goetzel et al., *Do Workplace Health Promotion (Wellness) Programs Work?*, 56 J. OCCUPATIONAL ENVTL. MED. 927, 929 (2014).

39. *See* Baicker et al., *supra* note 17, at 308-09.

40. *See id.* at 309.

41. Siyan Baxter et al., *The Relationship Between Return on Investment and Quality of Study Methodology in Workplace Health Promotion Programs*, 28 AM. J. HEALTH PROMOTION 347, 359 (2014).

42. Al Lewis, *The Outcomes, Economics, and Ethics of the Workplace Wellness Industry*, 27 HEALTH MATRIX: J.L.-MED. 1, 9 (2017).

43. *See, e.g.*, Baxter et al., *supra* note 41, at 359; *see also* Jones et al., *supra* note 1, at 1748; Soeren Mattke et al., *Workplace Wellness Programs Study: Final Report*, 3 RAND HEALTH Q., Summer 2013, at 63 (finding the impact of wellness programs on healthcare cost and utilization is not statistically significant and impact on health is modest).

44. Jones et al., *supra* note 1, at 1750.

45. *See id.* at 1749.

patterns of self-selection into the program; during the year prior to program implementation, program participants spent an average of $1658 less on healthcare and exhibited healthier behaviors than nonparticipants.[46] After program implementation, there was no causal effect of the program on medical expenditures, health behaviors, employee productivity, or self-reported health status.[47] The authors' confidence intervals ruled out 84 percent of the findings from 112 prior studies, as well as the results from the 2010 review.[48] This gives credence to the idea that the results of the early literature were a function of improper design and statistical control, cautioning that programs may not achieve their intended effect.

The analysis we provide above is not meant to be exhaustive; many other studies match the overall trends we describe.[49] After four decades of research, the scientific base favoring wellness programs is dubious. Complicating the matter further, wellness programs may be less effective outside of the research environment, given the heterogeneity of programs that employers call a workplace wellness program. Though individual wellness programs could still be well-formulated or evidence-based, policymakers should have a much more modest expectation of overall benefit from wellness programs when crafting a regulatory regime.

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46. *Id.* at 1772.

47. *See id.* at 1747, 1776.

48. *Id.* at 1782.

49. *See* Debra Lerner et al., *A Systematic Review of the Evidence Concerning the Economic Impact of Employee-Focused Health Promotion and Wellness Programs*, 55 J. OCCUPATIONAL & ENVTL. MED. 209, 210 (2013) (concluding that evidence regarding economic impact is limited and inconsistent); Soeren Mattke et al., *A Review of the U.S. Workplace Wellness Market*, 2 RAND HEALTH Q., Winter 2013, at 7 (arguing positive results in studies should be interpreted with caution); Adrianna McIntyre et al., *The Dubious Empirical and Legal Foundations of Workplace Wellness Programs*, 27 HEALTH MATRIX: J.L.-MED. 59, 68-70 (2017); Karen Chan Osilla et al., *Systematic Review of the Impact of Worksite Wellness Programs*, 18 AM. J. MANAGED CARE e68, e68 (2012) (showing mixed results regarding health impact and insufficient evidence regarding absenteeism, suggesting the validity of findings is reduced by lack of rigorous evaluation designs, and concluding "the body of publications is in stark contrast to the widespread use of such programs"); Zirui Song & Katherine Baicker, *Effect of a Workplace Wellness Program on Employee Health and Economic Outcomes: A Randomized Clinical Trial*, 321 J. AM. MED. ASS'N 1491, 1491 (2019) (finding that employees exposed to a wellness program showed statistically significant changes in two self-reported health behaviors compared to employees who were not exposed, but the wellness program had no significant effect on twenty-seven self-reported outcomes, ten clinical measures of health, thirty-eight healthcare spending and utilization measures, or three employment outcomes, after eighteen months).

II. INTENSIFYING CONCERNS ABOUT PROGRAM RISKS

As the previous Part established, policymakers should have been more tentative in anticipating benefit from wellness programs. At the same time, worries about program risk have intensified. In general, an intervention's risks should be justified by its value. As such, wellness programs must be reasonably expected to improve health or well-being at a sufficient level to justify any potential harms. Since questions persist about the probability and magnitude of wellness programs' benefits, it may be warranted to reexamine the appropriate tolerance for potential risks. If it turns out that programs' expected benefits are, in fact, low or uncertain, then even indeterminate risks should give pause, suggesting a need to reduce the potential risk of harms to participating employees through policy changes. In this Part, we will show that an emergent literature implies that the cumulative risks of many programs are not proportional to their level of benefit. Though this research is still sparse, it raises some important concerns. Together with the previously discussed questions about evidence for benefit, these concerns make a very strong case for a more conservative policy approach.

A. Risks of Health Screenings

Programs with health screenings have raised worries about data ownership, security, privacy, and confidentiality.[50] The most common wellness program component is health screenings that identify medical conditions, evaluate health risks, and measure indicators such as body mass index. Sixty-two percent of large firms administer health risk assessments that collect medical history and health status, 50 percent administer biometric screenings that collect health data through a physical exam, 21 percent aggregate information from wearable devices such as Apple Watch, and an additional unknown percentage offer genetic testing.[51] Wellness programs also

50. *See* Elizabeth A. Brown, *Workplace Wellness: Social Injustice*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 191, 216-17 (2017).

51. GARY CLAXTON ET AL., KAISER FAMILY FOUND., EMPLOYER HEALTH BENEFITS: 2018

sometimes access employee claims data or medical records data from health plans.[52]

In this context, consumer groups have voiced concern about the confidentiality of electronically stored program records, the re-identification of anonymized health data, and the use of health information for commercial purposes outside of the program.[53] Scholars have also speculated that program screenings are used to surface health issues that are expensive or inconsistent with quality work performance.[54] For example, wellness surveys may ask about mental illness, problems at work, divorce, and future pregnancy plans.[55] This kind of data may help employers understand their overall health plan costs but be disconnected from specific wellness interventions. In addition, commentators note that programs often seek "passive authorization from participants" to acquire their health information.[56] For example, some programs hide waivers of privacy rights in obscure links, and authorization forms may include incomplete information about data use and sharing with third-party vendors.[57] In this context, the worry is that employees might complete screenings or disclose health information without sufficient understanding of how the data could be used.[58]

B. Risks of Financial Incentives

Programs that offer financial incentives (i.e., financial penalties and rewards) invoke a separate constellation of risks. Most wellness programs bolster uptake through the use of positive or negative incentives, which can include discounts on insurance premiums,

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ANNUAL SURVEY 193-200 (2018), http://files.kff.org/attachment/Report-Employer-Health-Benefits-Annual-Survey-2018 [https://perma.cc/5CGU-LY4H].

52. *See* POLLITZ & RAE, *supra* note 5, at 3.

53. *See, e.g.*, Brown, *supra* note 50, at 206-07.

54. *See, e.g.*, Ifeoma Ajunwa et al., *Limitless Worker Surveillance*, 105 CALIF. L. REV. 735, 763-72 (2017).

55. *See* Kathy L. Hudson & Karen Pollitz, *Undermining Genetic Privacy? Employee Wellness Programs and the Law*, 377 NEW ENG. J. MED. 1, 2 (2017); McIntyre et al., *supra* note 49, at 73.

56. Hudson & Pollitz, *supra* note 55, at 2.

57. Genetic Information Nondiscrimination Act, 81 Fed. Reg. 31,143, 31,155 (May 11, 2016) (codified at 29 C.F.R. pt. 1635).

58. *See* Hudson & Pollitz, *supra* note 55, at 2.

waivers of cost-sharing requirements, and surcharges.[59] Incentives are most frequently connected to employee participation and are dubbed "participatory,"[60] though roughly 8 percent of large firms disperse incentives based on employee health outcomes such as body mass index.[61] For 19 percent of these "health contingent" programs, financial penalties and rewards have values exceeding $1000 per year, mostly in the form of lower premiums or cost sharing.[62] Commentators suggest that rather than improve health, these programs might only shift healthcare costs to the sick in a way that undermines federal protections against health insurance discrimination.[63] They warn that employers may implement programs to evade prohibitions on cost shifting under federal law or to discourage sick workers from participating in their insurance plans.[64] Employees who cannot meet wellness goals may be motivated to seek less expensive health coverage outside of employment.[65] Also, commentators worry that programs could be used to screen for employees with low medical spending.[66] Workers may be more likely to join or remain at firms that reward them for their healthy habits,

59. *See* Mattke et al., *supra* note 43, at 71-72.

60. *See id.* at 2.

61. CLAXTON ET AL., *supra* note 51, at 15; KAREN POLLITZ & MATTHEW RAE, KAISER FAMILY FOUND., CHANGING RULES FOR WORKPLACE WELLNESS PROGRAMS: IMPLICATIONS FOR SENSITIVE HEALTH CONDITIONS 2 (2017), http://files.kff.org/attachment/Issue-Brief-Changing-Rules-for-Workplace-Wellness-Programs [https://perma.cc/L336-XFHM].

62. CLAXTON ET AL., *supra* note 51, at 193.

63. *See, e.g.*, Jill R. Horwitz et al., *Wellness Incentives in the Workplace: Cost Savings Through Cost Shifting to Unhealthy Workers*, 32 HEALTH AFF. J. 468, 474 (2013); *see also* John Cawley, *The Affordable Care Act Permits Greater Financial Rewards for Weight Loss: A Good Idea in Principle, but Many Practical Concerns Remain*, 33 J. POL'Y ANALYSIS & MGMT. 810, 810 (2014); Heather Baird, Note, *Healthy Compromise: Reconciling Wellness Program Financial Incentives with Health Reform*, 97 MINN. L. REV. 1474, 1484-86 (2013); Stefanie Brody, Comment, *Working Well(ness): The Impact of the ADA Final Rule on Wellness Program Regulation and a Proposal for a Zero-Incentive Rule*, 11 ST. LOUIS U. J. HEALTH L. & POL'Y 209, 234 (2017) (recommending a zero-incentive rule to prevent cost shifting and disability discrimination).

64. *See* JULIA JAMES, HEALTH AFF., HEALTH POLICY BRIEF: WORKPLACE WELLNESS PROGRAMS 5 (2012), https://www.healthaffairs.org/do/10.1377/hpb20121204.853334/full/healthpolicybrief_81.pdf [https://perma.cc/U43W-6LMH]; *see also, e.g.*, Emily Koruda, Note, *More Carrot, Less Stick: Workplace Wellness Programs & the Discriminatory Impact of Financial and Health-Based Incentives*, 36 B.C. J.L. & SOC. JUST. 131, 140-41 (2016).

65. *See* JAMES, *supra* note 64, at 5.

66. *See* Julie Appleby, *How Well Do Workplace Wellness Programs Work?*, NPR (Apr. 16, 2019, 11:31 AM), https://www.npr.org/sections/health-shots/2019/04/16/713902890/how-well-do-workplace-wellness-programs-work [https://perma.cc/B8TS-44H9].

and as a result, wellness programs may encourage recruitment or retention of healthy workers. In short, commentators caution that wellness initiatives may help employers with the stability of their health plans at the expense of certain employees.[67]

Relatedly, commentators also point out that tying financial penalties to health status may disproportionately burden people with disabilities, low-income individuals, and racial minorities, because these groups are more likely to be affected by the health conditions that wellness programs target.[68] On this line of reasoning, wellness programs are manifestly unfair, given that such conditions result from a complex set of factors that are not always under an individual's control.[69] The assumption that incentive programs will lead to health is not always accurate, and it may undercut social equity by perpetuating existing financial disparities.[70] It may also provoke stigma or animus toward unhealthy individuals.[71] Wellness programs may engage in a form of "healthism" by situating the management of health issues at the individual level and implying that individuals are culpable for their own poor health.[72]

Other commentators believe that a system of incentives can make programs functionally involuntary.[73] They hold that incentives may

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67. *See, e.g.*, JAMES, *supra* note 64, at 5.

68. *See, e.g.*, Jennifer Dianne Thomas, Comment, *Mandatory Wellness Programs: A Plan to Reduce Health Care Costs or a Subterfuge to Discriminate Against Overweight Employees?*, 53 HOW. L.J. 513, 515 (2010).

69. *See, e.g.*, Jessica L. Roberts & Leah R. Fowler, *How Assuming Autonomy May Undermine Wellness Programs*, 27 HEALTH MATRIX: J.L.-MED. 101, 101 (2017); *see also* Carrie Griffin Basas, *What's Bad About Wellness? What the Disability Rights Perspective Offers About the Limitations of Wellness*, 39 J. HEALTH POL., POL'Y & L. 1035, 1035 (2014); Peter Conrad, *Wellness in the Work Place: Potentials and Pitfalls of Work-Site Health Promotion*, 65 MILBANK Q. 255, 265 (1987); Steven C. Sizemore, Comment, *A Fatter Butt Equals a Skinnier Wallet: Why Workplace Wellness Programs Discriminate Against the Obese and Violate Federal Employment Law*, 11 WYO. L. REV. 639, 641, 643-44 (2011).

70. *See, e.g.*, Harald Schmidt et al., *Carrots, Sticks, and Health Care Reform—Problems with Wellness Incentives*, 362 NEW ENG. J. MED. e3(1), e3(1)-e3(3) (2010).

71. *See* Wendy K. Mariner, *The Affordable Care Act and Health Promotion: The Role of Insurance in Defining Responsibility for Health Risks and Costs*, 50 DUQ. L. REV. 271, 315-16 (2012).

72. *See* Kristin M. Madison, *The Risks of Using Workplace Wellness Programs to Foster a Culture of Health*, 35 HEALTH AFF. 2068, 2069 (2016); *see also* Mariner, *supra* note 71, at 315-16.

73. *See, e.g.*, Michelle R. Seares, Note, *Wellness at Work: Reconciling the Affordable Care Act with the Americans with Disabilities Act*, 84 GEO. WASH. L. REV. 218, 238 (2016) (arguing

render not participating in a program unaffordable, giving workers no real choice but to participate.[74] Also, other factors, such as retaliation or pressure from supervisors, might make employees feel that programs are compulsory. As a result, employees might be stymied from fulfilling a preference to decline health screenings or evade program risks.[75] We discuss this issue in more detail below.

C. Additional Risks

Finally, commentators propose that wellness programs potentially cross a line with respect to employers' relationships toward their workers.[76] They imply that wellness programs consist of employers policing workers' health, perhaps contributing to the creation of an inappropriate work environment.[77] Roughly 41 percent of programs include disease management services that issue treatment plans and educational materials for employees with chronic illnesses.[78] A subset of these also offer positive or negative incentives based on adherence to medical advice and prescribed medications.[79] As such, there is a worry that wellness programs involve some of the risks inherent in routine clinical interventions, and that penalties for medication adherence may run counter to patients' rights to refuse any medical treatment.[80] Commentators also suggest that some programs use unreliable measures of health,

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financial incentives push the boundary between voluntary and coercive); *see also* Julia Wolfe, Note, *Coerced into Health: Workplace Wellness Programs and Their Threat to Genetic Privacy*, 103 MINN. L. REV. 1089, 1092 (2018) ("[F]inancial incentives at any level amount to impermissible coercion because of the unique nature of genetics and intangible risks related to genetic privacy.").

74. *See* Wolfe, *supra* note 73, at 1113.

75. *See* Koruda, *supra* note 64, at 134, 147-48.

76. *See, e.g.*, Samuel R. Bagenstos, *The EEOC, the ADA, and Workplace Wellness Programs*, 27 HEALTH MATRIX: J.L.-MED. 81, 82 (2017).

77. *See id.*

78. GARY CLAXTON ET AL., KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TR., EMPLOYER HEALTH BENEFITS: 2017 ANNUAL SURVEY 198 (2017), https://www.eesipeo.com/media/24-Report-Employer-Health-Benefits-Annual-Survey-2017.pdf [https://perma.cc/5PC6-XJGD].

79. *Id.*

80. *See* Matt Lamkin, *Health Care Reform, Wellness Programs and the Erosion of Informed Consent*, 101 KY. L.J. 435, 448 (2012); Steven D. Pearson & Sarah R. Lieber, *Financial Penalties for the Unhealthy? Ethical Guidelines for Holding Employees Responsible for Their Health*, 28 HEALTH AFF. 845, 846 (2009).

such as Fitbit devices, to inform their interventions, and that these programs might expose employees to unproven techniques and personal risk for no purpose.[81]

D. Balancing Risks and Benefits

Policymakers should understand that a number of these potential risks are theoretical.[82] It is important to note the uncertainty regarding the actual magnitude of the potential harms and the reservation that programs usually lack sufficient sophistication to apply health information in controversial ways.[83] For example, it is unknown to what extent data confidentiality has been violated after enrollment in programs, or whether such violations have caused tangible harms that were felt by workers.[84]

Nevertheless, in order to weigh programs appropriately, policymakers should take these potential harms into account. This is because even minor risks could transform wellness programs' overall risk/benefit profile.[85] Serious scientific doubts remain about wellness programs' effectiveness, and their likelihood of generating any benefit for participants is not at all clear.[86] Assuming a lower benefit profile, any realization of programs' potential risks could be significant. A full, realistic evaluation of the risks and benefits might reveal that wellness programs do not offer a net benefit to individual participants.

Policymakers should hesitate to assume that wellness programs incontrovertibly promote health and reduce medical costs, and they should focus on implementing safeguards to preempt the possibility of harm and to secure a greater chance of benefit for participants. Having guardrails on these programs would help to prevent outcomes that conflict with policymakers' intent in other policy areas,

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81. *See, e.g.*, Ajunwa et al., *supra* note 54, at 766; Brown, *supra* note 50, at 214-15; Erica Che, Note, *Workplace Wellness Programs and the Interplay Between the ADA's Prohibition on Disability-Related Inquiries and Insurance Safe Harbor*, 2017 COLUM. BUS. L. REV. 280, 292-93.

82. *See, e.g.*, McIntyre et al., *supra* note 49, at 79.

83. *See id.* at 64-65, 70 (noting the "methodological shortcomings" of studies assessing the risks and benefits of wellness programs).

84. *See* Hudson & Pollitz, *supra* note 55, at 2.

85. *See* Madison, *supra* note 72, at 2073.

86. *See* Koruda, *supra* note 64, at 144; McIntyre et al., *supra* note 49, at 64-65, 79-80.

such as laws designed to protect against health insurance discrimination.[87]

Yet as mentioned previously, current laws were passed in a period when wellness program risks and benefits were understood differently.[88] Policymakers wanted to give employers the flexibility to create different programs, hoping that innovations in wellness would appeal to employees, increase productivity, and protect the workforce from preventable health conditions.[89] As a result, extant laws are mainly intended to encourage experimentation in diverse ways of promoting well-being,[90] and they currently offer little in the way of proscriptions to regulate a program's scope and design.[91] As we discuss in the next Parts, the legal status quo is suboptimal, but an opportunity exists to improve the regulation of wellness programs.

III. A LACK OF SUBSTANTIVE DIRECTION FROM THE LAW

A number of federal laws currently protect employees from discrimination and infringement of privacy under group health plans.[92] However, these laws have exceptions for wellness programs that are "voluntary" and "reasonably designed" to improve health.[93] To complicate the matter, the U.S. District Court for the District of Columbia has recently vacated administrative regulations that provide guidance on what makes a program voluntary, and, as of January 2019, wellness practitioners lack meaningful direction for how to structure legal wellness programs.[94] In the following Part, we survey key statutes, regulations, and court cases on wellness programs, which together signal ambiguity in the law. In Part IV, we propose a path forward.

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87. *See, e.g.*, 42 U.S.C. § 300gg-4 (2012).

88. *See supra* notes 15-17 and accompanying text.

89. *See supra* notes 19-21 and accompanying text.

90. Nondiscrimination and Wellness Programs in Health Coverage in the Group Market, 71 Fed. Reg. 75,014, 75,018 (Dec. 13, 2006) (codified at 45 C.F.R. § 146.121 (2018)).

91. *See* 29 U.S.C. § 1182 (2012); 42 U.S.C. §§ 300gg-4, 300gg-53, 12112.

92. *See, e.g.*, 29 U.S.C. §§ 1182; 42 U.S.C. §§ 300gg-4, 300gg-53, 12112.

93. *See* 42 U.S.C. §§ 300gg-4, 2000ff-1, 12112; Nondiscrimination and Wellness in Health Coverage in the Group Market, 71 Fed. Reg. at 75,018.

94. AARP v. EEOC, 292 F. Supp. 3d 238, 245 (D.D.C. 2017).

A. Federal Statutes and Regulations

There are a number of relevant statutes that regulate the health insurance and employment contexts, but they carve out exceptions for "voluntary" and "reasonably designed" wellness programs.[95] It is worth noting that, in theory, these two criteria should help forestall the use of programs for evading statutory goals. For example, truly "voluntary" programs would not coerce employees into disclosing protected health information for use in insurance eligibility or occupational advancement. Similarly, programs that must be reasonably designed to fulfill their purpose would not serve merely to reduce health benefits based on health status. Yet, as we will illustrate, in practice, these criteria are underdefined.

1. HIPAA and ACA: The Reasonable Design Criterion

The Health Insurance Portability and Accountability Act (HIPAA) prevents plans from soliciting genetic tests and prohibits discrimination in eligibility, benefits, or premiums based on a health factor.[96] Pursuant to the statute, a health factor includes one's health status, claims experience, medical history, genetic information, and evidence of insurability.[97] Similarly, the ACA includes several consumer protections that enjoin health plans from discrimination based on a medical condition.[98] Though these laws preclude group health plans from modifying insurance coverage based on health status, both make exceptions. HIPAA allows health plans to vary premiums and cost sharing in return for adherence to wellness programs.[99] Under HIPAA final regulations, programs that tie incentives to the achievement of health targets can vary incentives by up to 20 percent of the cost of single coverage.[100] The ACA later increased the incentive limit for these health-contingent

95. *See, e.g.*, 42 U.S.C. §§ 300gg-4, 2000ff-1, 12112; Nondiscrimination and Wellness in Health Coverage in the Group Market, 71 Fed. Reg. at 75,018.

96. 29 U.S.C. § 1182 (2012).

97. *Id.* § 1182(a)(1).

98. 42 U.S.C. § 300gg-4(a).

99. 29 U.S.C. § 1182(b)(2).

100. Nondiscrimination and Wellness Programs in Health Coverage in the Group Market, 71 Fed. Reg. at 75,017.

programs to 30 percent of the cost of single coverage.[101] ACA regulations allow for up to 50 percent variance if programs are designed to mitigate tobacco use.[102] Meanwhile, HIPAA and the ACA do not restrict incentives for participatory programs.[103]

It is worth noting that neither HIPAA nor the ACA additionally require programs to be voluntary. Instead, they require that health-contingent programs be "reasonably designed to promote health or prevent disease."[104] This standard is broad, such that a health-contingent program is reasonably designed if it has a legitimate chance of improving health and is not highly suspect in the methods chosen.[105] The HIPPA regulations state that "[t]here does not need to be a scientific record that the method promotes wellness."[106] In part, the regulations adopt this position because they were crafted "not [to] impair such beneficial programs" that "deliver benefits well in excess of their costs," an assumption that we have argued should now be treated much more skeptically.[107]

2. ADA and GINA: The Voluntariness Criterion

The Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) permit exceptions only for "voluntary" programs.[108] The ADA provides the most comprehensive legal protection for employees with disabilities, and it generally restricts employers from conducting medical examinations or making health inquiries.[109] Meanwhile, GINA forbids both employers and health plans from requesting or disclosing genetic information, and

101. 42 U.S.C. § 300gg-4(j)(3).

102. Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 78 Fed. Reg. 33,158, 33,159 (June 3, 2013) (codified at 45 C.F.R. § 146.121 (2018)).

103. *See* JAMES, *supra* note 64, at 3.

104. 42 U.S.C. § 300gg-4(j)(3)(B); Nondiscrimination and Wellness Programs in Health Coverage in the Group Market, 71 Fed. Reg. at 75,018.

105. 42 U.S.C. § 300gg-4(j)(3)(B); Nondiscrimination and Wellness Programs in Health Coverage in the Group Market, 71 Fed. Reg. at 75,018.

106. Nondiscrimination and Wellness Programs in Health Coverage in the Group Market, 71 Fed. Reg. at 75,018.

107. *Id.* at 75,027.

108. 42 U.S.C. §§ 2000ff-1(b), 12112(d)(4)(B).

109. *Id.* § 12112(d).

it bars the use of genetic information in insurance underwriting or employment decisions.[110]

GINA defines genetic information as involving family medical histories and the genetic tests of individuals and family members.[111] Broadly, then, these statutes preserve the privacy of genetic and health information.[112] However, Title I of the ADA allows employers to conduct voluntary medical examinations and inquiries as part of a wellness program.[113] In 2000, the Equal Employment Opportunity Commission (EEOC) clarified that a wellness program is voluntary if the "employer neither requires participation nor penalizes employees who do not participate."[114] Likewise, GINA authorizes programs to collect genetic information if employees express "prior, knowing, voluntary, and written authorization."[115] Other GINA standards establish that the genetic information may not be disclosed to employers except in "aggregate terms," and the exempt programs must dispense "health or genetic services."[116] In 2010, the EEOC echoed ADA regulations by defining voluntary as neither requiring that employees provide genetic information nor penalizing those who do not provide it.[117]

3. Regulatory Confusion

The ADA and GINA create a "voluntary" criterion for programs with health screenings, whereas HIPAA and the ACA create incentive caps and a "reasonably designed" criterion for health-contingent programs.[118] As a first point, it is important to note that in setting different criteria, these statutes create uneven coverage across the

110. *Id.* §§ 300gg-53(e), 2000ff-1(b).

111. *Id.* § 2000ff(4) (2012).

112. *See id.* §§ 300gg-53, 2000ff-1(b), 12112.

113. *Id.* § 12112(4)(B).

114. *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, EEOC (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html [https://perma.cc/SZE2-ZAP9].

115. 42 U.S.C. § 2000ff-1(b)(2)(B), (5)(B).

116. *Id.* § 2000ff-1(b)(2)(A), (5)(E).

117. Regulations Under the Genetic Information Nondiscrimination Act of 2008, 75 Fed. Reg. 68,912, 68,935 (Nov. 9, 2010) (codified at 29 C.F.R. § 1635.8 (2018)).

118. 42 U.S.C. §§ 300gg-4(j)(3)(B), 2000ff-1(b), 12112(d)(4)(B); Nondiscrimination and Wellness in Health Coverage in the Group Market, 71 Fed. Reg. 75,014, 75,018 (Dec. 13, 2006).

heterogeneity of programs.[119] In this context, wellness practitioners have faced uncertainty about how to bridge the provisions into a single intelligible wellness policy.

In particular, they have expressed conceptual confusion about the voluntariness mandate.[120] This is unsurprising given that the federal laws and regulations governing wellness programs are complex and underdeveloped. In 2016, the EEOC amended its ADA and GINA regulations to revisit the meaning of voluntary.[121] Before then, wellness programs with health screenings could not financially penalize employees.[122] However, the new regulations extended the ACA's 30 percent incentive limit and "reasonably designed" criterion to all programs with health screenings.[123] As such, employees could now be penalized by up to 30 percent of the cost of single coverage for declining medical examinations. The EEOC had revised its definition of voluntary, arguing that incentives or penalties within the 30 percent threshold would not be "so substantial as to be coercive."[124] Yet in 2017 the U.S. District Court for the District of Columbia vacated this 30 percent threshold, reasoning it may not be sufficiently voluntary.[125] The EEOC subsequently declined to issue new guidance, while the challenged portion of the old

119. *See* Brown, *supra* note 50, at 229.

120. They have also doubted whether the ADA covers all wellness programs. *See* Brown, *supra* note 50, at 207-08. In pertinent part, Title V of the ADA states that an insurance provider may underwrite, classify, or administer health risks, allowing insurers to evade other components of the ADA. *See* 42 U.S.C. § 12201(c). Critically, a program falling within Title V is unmoored from the ADA's voluntary mandate. *See* Grant P.H. Shuman, *Escaping the Purpose of the ADA: The "Safe Harbor" Provision and Disability-Based Distinctions in Insurance Policies and Programs*, 36 GONZ. L. REV. 549, 562-67 (2001). Though a number of courts have examined this issue with mixed results, the EEOC has maintained that Title V does not apply to wellness programs. *See* EEOC v. Flambeau, Inc., 131 F. Supp. 3d 849, 855 (W.D. Wis. 2015); EEOC v. Honeywell Int'l, CIV 14-4517 ADM/TNL, 2014 WL 5795481, at *5 (D. Minn. Nov. 6, 2014); Seff v. Broward County, 778 F. Supp. 2d 1370, 1373-75 (S.D. Fla. 2011), *aff'd*, 691 F.3d 1221 (11th Cir. 2012). Since the EEOC's interpretation has held up so far, we do not discuss Title V extensively in this paper.

121. Genetic Information Nondiscrimination Act, 81 Fed. Reg. 31,143, 31,158-59 (May 17, 2016) (codified at 29 C.F.R. §§ 1635.9, 1630.14 (2018)).

122. *See* Regulations Under the Americans with Disabilities Act, 81 Fed. Reg. at 31,130.

123. 29 C.F.R. § 1630.14.

124. Regulations Under the Americans with Disabilities Act, 81 Fed. Reg. at 31,133.

125. *See* AARP v. EEOC, 292 F. Supp. 3d 238, 244-45 (D.D.C. 2017).

guidance lapsed in January 2019.[126] For now, wellness practitioners have been left without a clear definition of a voluntary program.

At present, reasonably designed wellness programs can vary incentives on the basis of health outcomes by 30 percent of the cost of single coverage.[127] Wellness programs can also receive genetic and health information, provided the programs are voluntary (although what voluntariness means in this context remains a mystery).[128] Though administrative agencies and courts have been called on to clarify these standards, the law remains vague.

B. Judicial Treatment

Currently, an animating legal issue centers on the definition of voluntariness under the ADA and GINA. In this Section, we review judicial opinions that analyze the elements necessary to render a wellness program voluntary.[129] To date, only two courts have dealt with this issue directly. As a result, there is no broad judicial consensus about how best to characterize a voluntary wellness program.

The Wisconsin case *EEOC v. Orion Energy Systems, Inc.* presents the strictest definition of voluntariness in the body of wellness law.[130] In 2009, Orion initiated a wellness program with three components.[131] First, nonsmoking employees avoided an eighty dollar surcharge per month.[132] Second, employees who exercised on Orion's motion machines avoided a fifty dollar surcharge per month.[133] Third, employees who completed a health screen paid no insurance premium.[134] The screen consisted of a health history

126. *See* Jonathan E. O'Connell, *EEOC Wellness Regulations Vacated Effective Jan. 1, 2019*, SOC'Y FOR HUM. RESOURCE MGMT. (Jan. 16, 2018), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/court-report-eeoc-wellness-regulations-vacated.aspx [https://perma.cc/NS9G-WDA4].

127. *See supra* notes 122-25 and accompanying text.

128. *See supra* notes 124-26 and accompanying text.

129. The wellness litigation has largely focused on Title V of the ADA and on the voluntary mandate.

130. 208 F. Supp. 3d 989, 1000-01 (E.D. Wis. 2016).

131. *Id.* at 992.

132. *Id.*

133. *Id.*

134. *Id.*

questionnaire, blood pressure check, weight and body circumference measure, and blood draw.[135] Employees who did not contribute this data paid the entire monthly premium, which was $413.43 for single coverage and $1130.83 for family coverage.[136] In response, the EEOC filed suit, alleging that the program was involuntary under the ADA.[137] The agency felt that the premium cost exceeded the level of a mere incentive.[138] Orion, on the other hand, maintained that employees had a choice regarding whether to participate.[139]

Critically, certain aspects of the 2016 regulations were not retroactive, meaning the 30 percent incentive restriction did not yet apply to Orion.[140] As a result, the district court had to devise its own interpretation of the ADA's voluntariness criterion.

Ultimately, it held that "even a strong incentive is still no more than an incentive; it is not compulsion. Orion's wellness initiative is voluntary in the sense that it is optional."[141] According to the court, an employee under Orion's program could still make voluntary choices, despite having to balance other considerations: such a "choice may [be] difficult, but [it] is a choice nonetheless."[142] Essentially, the court reasoned, "[A] hard choice is not the same as no choice."[143] The court thus favored a narrow reading of the ADA's voluntariness mandate, which was held not to forestall sizable incentives.

The court in *AARP v. EEOC* took a different approach.[144] In 2016, AARP filed suit challenging the EEOC's new regulations.[145] AARP's principal complaint was that a 30 percent incentive level is coercive and therefore discordant with the ADA and GINA.[146] In its decision, the D.C. District Court adopted a wider reading of the voluntariness

135. *Id.*
136. *Id.*
137. *Id.* at 991.
138. *Id.* at 992.
139. *Id.*
140. *Id.* at 1000-01.
141. *Id.* at 1001.
142. *Id.*
143. *Id.* (quoting United States v. Martinez-Salazar, 528 U.S. 304, 315 (2000) (internal quotations omitted)).
144. 292 F. Supp. 3d 238 (D.D.C. 2017).
145. *Id.* at 240.
146. *See id.*

mandate. The court argued that the EEOC had neglected to supply any concrete data, studies, or analysis marking the 30 percent value as the threshold of voluntariness, and that the agency had been unresponsive to statutory and other concerns with the regulations.[147] As a result, the court reasoned that employees "could be pressured by their employers to give up private medical data as long as the current Rules remain in place."[148] In other words, the court's position was that an incentive can make wellness programs involuntary, and that the EEOC must therefore affirmatively defend the voluntariness of its particular incentive level. As mentioned above, the D.C. District Court ultimately vacated the disputed component of the regulations.[149]

In short, the EEOC and district courts disagree with respect to the meaning of voluntary. The EEOC has stated that limitations on incentives are necessary to ensure voluntariness.[150] Initially, the agency suggested that a voluntary program could not financially penalize employees for nonparticipation.[151] Later, it claimed that a 30 percent incentive level was the threshold beyond which a program is coercive.[152] Whereas the D.C. District Court has doubted whether this 30 percent value is adequately voluntary,[153] a Wisconsin district court has held that even stronger financial incentives still qualify.[154] As a result, wellness practitioners lack judicial and regulatory guidance on whether any particular wellness program design is appropriate. More robust definitions of the reasonable design and voluntariness criteria are needed.

The most likely candidate to next offer an interpretation of voluntariness is the U.S. District Court of Connecticut. On July 16, 2019, "[t]he AARP Foundation and a New Haven law firm ... filed a class action lawsuit against Yale University" on behalf of "about 5,000 clerical, technical, cafeteria, maintenance and service union

147. *Id.* at 243.
148. *Id.* at 244.
149. *Id.* at 245.
150. *See* Regulations Under the Americans with Disabilities Act, 81 Fed. Reg. 31,126, 31,132 (May 17, 2016) (codified at 29 C.F.R. § 1630.14 (2018)).
151. *See id.*
152. *See id.* at 31,133.
153. *AARP*, 292 F. Supp. 3d at 244.
154. EEOC v. Orion Energy Sys., Inc., 208 F. Supp. 3d 989, 1001 (E.D. Wis. 2016).

workers" challenging "how the college implements its wellness program."[155] According to the filed complaint, Yale's wellness program collects insurance claims data and requires participants to complete preventative health screenings and medical tests such as "mammograms, colonoscopies, and blood testing"; employees who opt out of the wellness program have an annual total of $1300 deducted from their paychecks in $25 increments, which is "equivalent to nearly five and a half weeks' worth of food, four months of utility costs, nearly a month's worth of housing, or a month's worth of childcare" for the employees.[156] Named plaintiff Lisa Kwesell earns approximately $25,600 per year and is participating in the program to avoid the fee.[157] Another employee made a statement that he would prefer not to participate but "can't throw away twenty-five dollars [per week] to keep [his] information private."[158] The main remedy that the employees are seeking is an end to the program, as well as compensatory and noncompensatory damages.[159] This case will portend what type of judicial interpretation of voluntariness is likely to endure, between the narrow interpretation adopted in Wisconsin and the broad interpretation adopted in D.C.

With this in mind, we now turn to the question of how to define voluntariness and reasonable design.

IV. A CONCEPTUAL PATH FORWARD

The courts have provided no workable principle to identify which incentives are voluntary, though some commentators have offered examples of incentives that might clearly be involuntary.[160] There is also no clear basis on which to establish a threshold for reasonable design, as the courts have neglected this issue entirely. In this Part, we aim to provide an analysis of these concepts. Rather than

155. Nicole Leonard, *Union Workers File Civil Action Lawsuit Against Yale Over Employee Wellness Program*, WNPR (July 18, 2019), https://www.wnpr.org/post/union-workers-file-civil-action-lawsuit-against-yale-over-employee-wellness-program [https://perma.cc/U9RQ-R8M9].

156. Complaint at 2, 10, Kwesell v. Yale Univ., No. 3:19-cv-01098 (D. Conn. July 16, 2019).

157. *Id.* at 3, 19.

158. *Id.* at 3.

159. *Id.* at 28-29.

160. Others have advocated for a zero-incentive rule. *See, e.g.*, Brody, *supra* note 63, at 225-26; *see also* Wolfe, *supra* note 73, at 1109-10; *infra* Part IV.A.2.a.

provide specific regulatory recommendations, our goal is to develop a practical framework for the courts and regulators to apply. The legal landscape has been unsatisfyingly nebulous thus far, but we believe the philosophical literature can ground a more principled discussion that can inform policymakers in crafting useful regulatory definitions of voluntariness and reasonable design.

A. Voluntariness

The voluntariness requirement reflects a concern for individual autonomy and for the authority of individuals to consent to otherwise illegitimate actions. At the outset, then, it will be helpful to explain what we mean by the terms "autonomy" and "consent."

People have autonomy rights (i.e., rights for self-governance) that correlate with the duties of others not to interfere.[161] By giving consent, a person can permit actions that would otherwise violate her autonomy rights, "such as allowing a dentist to pull an infected tooth or authorizing a broker to sell [some] shares."[162] Consent is therefore morally and legally transformative—the permissibility of certain actions hinges on whether consent has been proffered.

The moral and legal significance of voluntariness is that it bears on consent. The general consensus is that consent to an action that is given involuntarily is not a valid form of consent and, therefore, that actions proceeding from such consent violate a person's rights.[163] However, the exact meaning and scope of voluntariness in this context is mysterious.

In the philosophical literature on consent, the term "voluntariness" is frequently defined in opposition to coercion, duress, and control. Paul Appelbaum and his collaborators state, for instance, that "a decision is presumed ... voluntary if no evidence exists that someone else has unduly influenced it or coerced the person deciding," whereas a decision is involuntary "only if it is subject to a particular *type* of influence that is external, intentional, illegitimate,

161. Joseph Millum & Danielle Bromwich, *Understanding, Communication, and Consent*, 5 ERGO 45, 46 (2018).

162. *Id.*

163. *See, e.g.*, *id.*

and causally linked to the choice of the research subject."[164] Similarly, the Nuremberg Code states that a decision is voluntary when individuals are "so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion."[165]

This would explain why bioethicists customarily think that voluntariness is necessary but not sufficient for a person to consent to an action—the person must also be competent to consent to the action, details about the action must be disclosed to the person, and the disclosure must be understood by the person.[166] Each of these conditions (i.e., voluntariness, competence, disclosure, and understanding) are independently important to the validity of the person's consent. A proponent of this view might think that voluntary decisions and informed decisions, however conceived, can come apart: for example, that a person can make a voluntary decision that is poorly informed, as in the case of a patient who neglects to read her consent form; and a person can be well informed about an action but be deprived of making a voluntary decision about it, as in the case of a patient who is involuntarily committed to a hospital for psychiatric evaluation.

However, some philosophers take voluntary decisions and informed decisions as going hand in hand. Joel Feinberg, for instance, defined voluntariness "in terms of the absence of psychological compulsion, the presence of adequate knowledge, and the absence of external constraints."[167] John Hyman states that "an act is voluntary if it is due to choice as opposed to ignorance or compulsion," on the presumption that voluntariness is a normative concept and ignorance and compulsion are both "exculpations, [or] factors which excuse someone from blame."[168] According to these scholars,

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164. Paul S. Appelbaum et al., *Voluntariness of Consent to Research: A Conceptual Model*, 39 HASTINGS CTR. REP. 30, 32-33 (2009).

165. 2 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER COUNCIL LAW NO. 10, 181 (1949).

166. *See* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 79 (5th ed. 2001).

167. RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 257 (1986).

168. JOHN HYMAN, ACTION, KNOWLEDGE, AND WILL 5, 7 (2015).

informed decisions are derivative of voluntary decisions. As a result, a person cannot actually make a voluntary decision that is poorly informed.

In other treatments, voluntariness is defined still more broadly as "an individual's ability to act in accordance with one's authentic sense of what is good, right, and best in light of one's situation, values, and prior history," in which case "[d]eliberateness, purposefulness of intent, clarity, genuineness, and coherence with one's prior life decisions" are all implicit requirements of voluntary actions.[169] A proponent of this view might think that a person who has a "habit-induced desire to smoke," but who simultaneously has a higher-order desire not to smoke, does not ultimately smoke voluntarily.[170] Were we to adopt this analysis, voluntariness would be both necessary and sufficient for a person to provide consent to an action.

Thus, the challenge to define voluntariness becomes that of setting its scope—if voluntary decisions are just decisions that are not controlled or coerced, then consent given voluntarily would be a shallow form of consent. Much would remain in order for a person's decisions to conform to her actual will, like that she not be completely ignorant of what she is agreeing to. If, however, voluntary decisions must satisfy additional criteria (e.g., the person received disclosure, has understanding, acts with intentionality and authenticity), then this prompts the question of what precise legal duties are specified by a voluntariness requirement. Presumably, the law would not require a person to understand everything about what she is agreeing to, as it is normally impossible to know *all* the true facts about a proposed action. And it would be overly demanding for the law to require that a person faithfully heed her higher-order reflective preferences.

So what we need is a legal rule that is broad enough to protect individual autonomy, which is the function and moral justification of the voluntariness requirement, but also narrow enough to allow the courts to hold people responsible for decisions for which they should be held responsible. To this end, we propose a two-part test

169. Laura Weiss Roberts, *Informed Consent and the Capacity for Voluntarism*, 159 AM. J. PSYCHIATRY 705, 705, 707 (2002).

170. FADEN & BEAUCHAMP, *supra* note 167, at 264.

for voluntariness: (1) the employee has received adequate information, and (2) the employee is free from coercive influences by his or her employer(s). Before we apply this test to wellness programs, it is important to note that this test does not exhaust the elements of voluntariness. For example, we assume that the employee must also be competent to make her own decisions. However, we set these other elements aside because most employees already satisfy them, and because the goal of this test is to delimit the substantive duties of employers to their employees.

1. Adequate Information

There are additional, independently plausible grounds for assuming that the voluntariness requirement involves some element of information disclosure. For example, GINA's construction of the voluntariness requirement explicitly states that employees must provide prior, knowing, and written permission to participate in a wellness program.[171] And ADA regulations state that for a wellness program to be deemed voluntary, employers must provide a notice "in language reasonably likely to be understood by the employee[s] ... that clearly explains what medical information will be obtained, how the medical information will be used, who will receive the medical information, the restrictions on its disclosure, and the methods [the employer will use] to prevent improper disclosure."[172] Moreover, requiring information disclosure is consistent with other areas of the law. In contract law, for example, a contract cannot be formed if misrepresentation or nondisclosure induces a party to neither know nor have a reasonable opportunity to know the essential terms of the proposed contract.[173] And the contract is voidable if the misrepresentation or nondisclosure is material, meaning that it would likely induce a reasonable person to manifest her assent to the contract.[174] This creates a legal obligation of disclosure. Thus, we presume, the voluntariness requirement confers a duty on employers

171. 42 U.S.C. § 2000ff-1(b)(2)(B) (2012).

172. Regulations Under the Americans with Disabilities Act, 81 Fed. Reg. 31,126, 31,134 (May 17, 2016).

173. *See* RESTATEMENT (SECOND) OF CONTRACTS § 163 (AM. LAW INST. 1981).

174. *See id.*

to disclose adequate information to employees about a wellness program in order to ensure that employees are able to exercise meaningful choice regarding whether to participate.

According to our interpretation of the voluntariness requirement, therefore, being informed about a wellness program is hashed out in terms of employers' disclosure instead of employees' understanding. We adopt this approach for a number of reasons. First, this approach is reflected in the legal doctrine of contracts, consumer protection, and consent to medical treatment, where understanding requirements are minimal.[175] Second, this approach avoids the need to find a reliable means of assessing understanding. And third, applying a disclosure test rather than an understanding test to wellness programs would be attractive for lawsuits seeking injunctive relief rather than individual damages, which we anticipate will be the major remedy sought.[176] As a result, once the employer has disclosed the relevant information in terms that are conspicuous, readily understandable, and designed to call attention to the significance of the information disclosed, we assume that the first part of our test has been satisfied.

With respect to the content and scope of what is disclosed to employees, we favor a reasonable person standard,[177] which entails the disclosure of information that would be material to a *reasonable* person's deliberation about whether or not to participate in a

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175. In *Canterbury v. Spence*, for example, the D.C. Court of Appeals argued with respect to medical treatment that:

> In duty-to-disclose cases, the focus of attention is more properly upon the nature and content of the physician's divulgence than the patient's understanding or consent.... [T]he physician discharges the duty when he makes a reasonable effort to convey sufficient information although the patient, without fault of the physician, may not fully grasp it.

464 F.2d 772, 780 (D.C. Cir. 1972); *see also* Thomas A. Durkin & Gregory Elliehausen, *Disclosure as a Consumer Protection*, *in* THE IMPACT OF PUBLIC POLICY ON CONSUMER CREDIT 109, 109 (Thomas A. Durkin & Michael E. Staten eds., 2002) (arguing that the main thrust of consumer protection laws is the mandatory disclosure of information to consumers in specified formats at required times).

176. Whereas a lawsuit seeking injunctive relief would have to show only that the employer did not disclose relevant information, a lawsuit seeking individual damages would have to show both that the employer did not disclose relevant information *and that the information would have been material to the plaintiff's decision regarding whether to participate in the wellness program*, which could require some assessment of the plaintiff's individual level of understanding.

177. Also known as an "objective" standard.

wellness program.[178] A subjective standard, by contrast, requires the disclosure of information that would be material to a *particular* person's deliberation. We oppose a subjective standard because it would impose "an unfair legal burden on [employers] to intuit the idiosyncratic ... interests of [each employee], and then leaves [them] at the mercy of their [employees'] self-serving hindsight in court."[179] Presumably, a reasonable person standard would entail the disclosure of a wellness program's specific aims, methods, anticipated risks, benefits, and the supporting evidence; the use and sharing of program data; and the rights of employees under federal law, including their right to bring action against unlawful wellness programs. It is additionally reasonable to require that employees' assent be recorded through a signature on the disclosure, either electronically or in paper form, in order to ensure that employers have made a reasonable effort to present the disclosure in a conspicuous and direct manner. This would preclude the current practice of burying important details about wellness programs on a website.

2. Noncoercion

Recall from above that coercion, duress, and control are usually thought inimical to voluntariness. In fact, for legal purposes, a decision is often presumed to be voluntary unless there is explicit evidence that it has been coerced, as is reflected in contract and criminal law (e.g., presumptive acceptance of the legitimacy of confessions).[180] It seems uncontroversial, then, to suggest that the

178. This approach is consistent with the legal doctrine of informed consent, in which physicians have a duty to reasonably inform ailing patients about the available treatment alternatives and the risks incidental to them. In *Nixdorf v. Hicken*, the Utah Supreme Court argued that physicians have a duty to disclose any material information concerning the patient's condition, where materiality is defined as the following: "If a reasonable person in the position of the plaintiff would consider the information important in choosing a course of treatment then the information is material and disclosure required." 612 P.2d 348, 354 (Utah 1980). Other appellate decisions have established a reasonable person standard for medical treatment, including *Canterbury v. Spence* in Washington D.C., *Cobbs v. Grant* in California, and *Wilkinson v. Vesey* in Rhode Island. *See Canterbury*, 464 F.2d at 787; Cobbs v. Grant, 502 P.2d 1, 10-11 (Cal. 1972); Wilkinson v. Vesey, 295 A.2d 676, 689 (R.I. 1972).

179. FADEN & BEAUCHAMP, *supra* note 167, at 33.

180. *See* Appelbaum et al., *supra* note 164, at 32.

voluntariness requirement requires that a person must be substantially free from controlling influences by his or her employer(s). However, this leaves questions about the nature of controlling influences and about the degree of control that must be exerted by an employer to render an employee's decision involuntary.

Before we continue, it will be helpful to distinguish between (1) internal reasoning deficiencies such as confusion, fear, or unreasonable hope and (2) external factors such as control, duress, and coercion.[181] Although both internal and external factors can compromise the validity of consent and the ability to act autonomously, cognitive errors and distorted reasoning undermine a person's competence to consent, whereas external constraints undermine the degree of control a person has over the choice to consent.[182] This distinction is exemplified in a U.S. Supreme Court decision that concluded that a defendant's hallucinations could not have coerced him into a confession because his mental condition was by itself and apart from any external coercive pressures.[183] In this Section, our purpose is to characterize these kinds of external factors. For analytical simplicity, we assume that employees are competent to consent to the program and have already received adequate information about the program.

It is generally accepted that an action that is controlled to a significant degree by another person is not voluntary.[184] To illustrate, consider the standard case of coercion. A gunman says to a pedestrian, "Your money or your life!" Typically, it is assumed that the pedestrian does not give up her wallet voluntarily, even though it is literally false that she has no choice in the matter.[185] Taken

181. *See* Alan Wertheimer, *Voluntary Consent: Why a Value-Neutral Concept Won't Work*, 37 J. MED. & PHIL. 226, 227 (2012).

182. *See* Appelbaum et al., *supra* note 164, at 33.

183. Colorado v. Connelly, 479 U.S. 157, 164 (1986); *see also* Appelbaum et al., *supra* note 164, at 33.

184. There are, however, some notable exceptions. Alan Wertheimer, for example, would deny that it is the *degree* of control exerted by another person that explains when an action is not voluntary. Instead, he maintains, voluntariness is explained in terms of the *moral legitimacy* of the control exerted by another person and the availability of reasonable alternative actions. On the whole, though, he would agree that actions that are controlled to a significant degree by others are often not voluntary. *See generally* Wertheimer, *supra* note 181. We discuss this view in more detail below.

185. *See* ALAN WERTHEIMER, COERCION 8-9 (1987).

literally, the pedestrian has been confronted with a set of unwanted alternatives, either turning over her wallet or getting shot, and she is able to make a rational decision between them; she decides that turning over her wallet is the most attractive option under the circumstances.[186] Yet it is a clear mistake to view her decision as voluntary in any relevant sense.

In this context, some philosophers have argued that voluntariness admits of degrees. As Edmund Wall puts it, "[v]oluntariness is the *degree* of control that an agent has over his behavior," ranging from total control to total *non*control.[187] On this type of view, a person's actions can be controlled by another person to a greater or lesser extent. For instance, many think that the threat of a financial penalty for not participating in a wellness program can compromise the voluntariness of an employee's consent. However, financial penalties rest on a continuum (e.g., $20,000 sanctions versus $2 sanctions), and, as a result, some financial penalties would be more controlling than others. The mere presence of a financial penalty is, therefore, not sufficient to ground a claim that an employee's decision is involuntary in a way that renders the decision invalid. Some financial penalties would have a trivial impact on the employee's decision and would be entirely compatible with valid consent.[188]

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186. *See id.* at 10.

187. Edmund Wall, *Voluntary Action*, 28 PHILOSOPHIA 127, 130 (2001) (emphasis added); *see also* Robert M. Nelson et al., *The Concept of Voluntary Consent*, 11 AM. J. BIOETHICS 6, 10-11 (2011).

188. Because an employee who has not met wellness program benchmarks could have compensation that is less than a similarly situated worker who has met the benchmarks, some might argue that wellness should be thought of as a job requirement. From this perspective, any wellness program with financial incentives would be involuntary. We believe this interpretation is deeply confused. The question is not whether the employee's choice situation was set up by the employee herself; it is obviously true that an employee who is presented with a choice between two alternatives will eventually have to experience the (potentially undesirable) consequences of one of the alternatives, whether she picked the menu of potential consequences or not. Voluntariness has nothing to do with whether an employee welcomes *that she must make a choice*. Rather, it has to do with whether an employee is able to *exercise meaningful choice between alternatives*, once presented. Can an employee meaningfully decide between earning $30,000 without the wellness program and earning $30,001 with the wellness program? What about $29,000 versus $31,000? Or $28,000 versus $32,000? Answering these questions is the task at hand. Against this backdrop, the claim that a wellness program is involuntary because of the mere presence of financial inducements is circular; no actual argument has been made to suggest that the financial

Thus, we must set a cutoff point for the degree of control an employer must exert over an employee to defeat the voluntariness of her choice. Robert Nelson and his colleagues correctly note that there is some ambiguity involved in establishing such a threshold.[189] For instance, one account might establish a low threshold for control, such that any external pressure on an employee would negate the voluntariness of her decision. However, this account would classify many decisions that are usually thought to be voluntary as involuntary, including, for example, the decision not to buy a soda because of a small soda tax. On the other hand, an account might establish a high threshold for control, thus classifying many decisions that are usually thought to be involuntary as voluntary, such as the decision not to get a divorce in response to a threat of severe financial deprivation. The challenge, in short, is to establish a threshold that will protect an employee's autonomy from wellness interventions to which she does not genuinely agree, without ruling out the possibility that she can genuinely agree to wellness interventions that offer mild financial incentives.

Of course, there are compelling policy reasons to set the threshold at a particular level. For example, the most conservative course of action would be to deny employers the opportunity to leverage financial incentives at all. This would no doubt protect employees from autonomy violations. And courts and regulators may wish to reduce litigation and so adopt a rule that is unambiguous and leaves little room for dispute. As discussed above, the evidence of the risks and benefits of wellness programs do not necessarily supply good reasons to allow financial incentives anyway; the evidence is thin and the overall risks are uncertain, failing to justify any significant support for incentives based on the protection of employee health.[190] From a policy perspective, this approach would be perfectly sensible and is one we would support. Nevertheless, we also think it is possible to establish a threshold that is more philosophically grounded, more concordant with other areas of law and that, if adopted, would not be overly burdensome to enforce.

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incentive, no matter how small, would transform an otherwise voluntary choice to participate in a wellness program into an involuntary one.

189. Robert M. Nelson et al., *supra* note 187, at 11.

190. *See supra* notes 43-49 and accompanying text; *supra* Part II.

In general, the law regards a particular type of controlling influence as defeating the voluntariness of a choice: coercion.[191] Other types of influences—including a person's preexisting preferences and values, her background circumstances, such as poverty or illness, the presence of broad social pressures and community norms, the use of persuasion and appeals to shared values, and even certain forms of inducements—do not negate voluntariness.[192] In fact, it is difficult to imagine a choice that would be wholly free from these types of controlling influences. People are constantly confronted with influences that are meant to change their behavior, such as store sales, salary bonuses, and scholarships; employers even make offers of payment for people to assume substantial risks of occupational injury, as in the case of "[p]olicemen, firemen, garbage collectors, construction workers, [and] miners."[193] Nevertheless, the law does not regard the choices that result as involuntary.[194] Instead, the dominant position in the law (and in philosophy) is that it is coercion, specifically, that compromises the voluntariness of a choice.[195] We therefore draw the line at coercion.[196]

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191. *See* Wertheimer, *supra* note 181, at 230.

192. *See id.* at 226-29.

193. Ezekiel J. Emanuel, *Undue Inducement: Nonsense on Stilts?*, 5 AM. J. BIOETHICS 9, 9-10 (2005). Jeffrie Murphy also argues that coercion negates voluntariness in a way that other pressures do not. He writes:

> The fact that I am driven to ask a friend for a loan by the threat of financial disaster ... does not free me from an obligation to keep my promise to repay the loan at a reasonable rate of interest. That the disaster is not my fault (was neither chosen by me nor resulted from any negligence on my part) does not seem the least bit relevant to the matter.... Family ties and cultural ties ... play a large part in my decision to send my children to a good college for an education. Does this fact in the slightest provide me with either an excuse or a justification for not paying a tuition bill that I have contracted to pay? Surely not.

Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices*, 67 VA. L. REV. 79, 83-84 (1981).

194. *See* Emanuel, *supra* note 193, at 9-11.

195. *See* Louis C. Charland, *Decision-Making Capacity*, STAN. ENCYCLOPEDIA PHIL. 3 (2015), https://plato.stanford.edu/archives/fall2015/entries/decision-capacity/ [https://perma.cc/L3L8-Y964].

196. The upshot is that even though situational constraints such as poverty and workplace culture can have a profound effect on an employee's decisions, none of these constraints necessarily means that her decisions are involuntary in a way that renders them invalid. However, situational constraints could make it easier for employers to engage in coercion and to cover it up. *See* Appelbaum et al., *supra* note 164, at 33.

What is coercion? There is no single account of coercion that is endorsed across the philosophical literature.[197] Historically, philosophers have generally understood coercion as occurring when one person exerts power for the purpose of gaining advantage over another person, dominating the will of the other person, and punishing their noncompliance with demands.[198] The Belmont Report, meanwhile, treats coercion as a general term for almost any kind of threat to make someone worse off: "Coercion occurs when an overt threat of harm is intentionally presented by one person to another to obtain compliance."[199] In ordinary language, coercion is often used in a broad sense to refer to any kind of intrinsically wrongful social pressure or "interpersonal infringement" of rights.[200] Loosely speaking, however, there are two types of philosophical views on coercion.[201]

The first maintains that coercion is fundamentally "moralized" (i.e., that coercion is connected to a moral judgment).[202] On this view, the claim that a wellness program is coercive would have to include reference to the moral legitimacy of the employer's actions. The second view maintains that coercion is fundamentally "value-neutral."[203] On this view, whether a wellness program is coercive has to do with empirical or value-neutral features of the employee's situation, and the moral legitimacy of the employer's actions is treated as a separate matter. Although both views of coercion have support in the philosophical literature, the moralized view has

197. *See* Scott Anderson, *Coercion*, STAN. ENCYCLOPEDIA PHIL. 1-2 (2017), https://plato.stanford.edu/archives/win2017/entries/coercion/ [https://perma.cc/BST3-8WW8].

198. *Id.* at 3.

199. NAT'L COMM'N FOR THE PROT. OF HUMAN SUBJECTS OF BIOMEDICAL & BEHAVIORAL RESEARCH, THE BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR PROTECTION OF HUMAN SUBJECTS OF RESEARCH 14 (1978).

200. Anderson, *supra* note 197, at 2.

201. *See* Wertheimer, *supra* note 181, at 229.

202. *See id.*

203. *See id.*

usually been reflected in the law.[204] In the following Subsection, then, we will start by exploring the moralized view of coercion.[205]

a. The Moralized Approach

On the moralized view of coercion, an employer coerces an employee in a way that undermines the voluntariness of her decisions if, and only if, (1) the employer proposes to violate the employee's rights or not to fulfill an obligation to the employee unless she complies with some demand, and (2) the employee has "no reasonable alternative but to accept [the employer's] proposal."[206] These two conditions are each necessary and are jointly sufficient.[207] Within the framework of this view, coercion is "moralized" because the baseline condition against which the employer's proposal is judged is the employee's preexisting rights.[208] In other words, we cannot determine whether an employee has been coerced without answering the following moral question: Does the employer have the right to make the proposal?

A consequence of this view is that coercion is morally and legally transformative. In a "your money or your life" situation, the gunman has coerced the pedestrian because the gunman's proposal to shoot her unless she hands over her wallet violates her rights and because she has no reasonable alternative but to comply.[209] The pedestrian's decision is treated as invalid.[210] On the other hand,

204. In fact, Alan Wertheimer developed his version of the moralized view by examining and then abstracting general philosophical principles from the adjudication of coercion in the law. *See* WERTHEIMER, *supra* note 185, at 10. Areas of law that have influenced the moralized view include contracts, wills, blackmail, criminal law (e.g., coerced confessions, duress and necessity as criminal defenses, consent to searches, plea bargaining), and torts (e.g., voluntary assumption of risk, informed consent to medical treatment). *See id.* at 10-14.

205. It should be noted, however, that our analysis will not reflect all of the distinctions and refinements that have been made by various philosophers over the years. Instead, we will focus our attention on the most prominent formulation of the view of coercion, developed by Alan Wertheimer. *See generally id.* at 171-74.

206. A. Wertheimer & F. G. Miller, *Payment for Research Participation: A Coercive Offer?*, 34 J. MED. ETHICS 389, 390 (2008).

207. *Id.*

208. *See* Kristin Madison, *Employer Wellness Incentives, the ACA, and the ADA: Reconciling Policy Objectives,* 51 WILLAMETTE L. REV. 407, 418-21 (2015) (considering and then abandoning this type of approach because of its complexity).

209. *See* Wertheimer & Miller, *supra* note 206, at 390.

210. *See id.*

when a prosecutor proposes to take a defendant to trial unless she pleads guilty to a lesser charge, her decision to plead guilty is treated as both voluntary and valid.[211] In plea bargaining situations, the prosecutor has intentionally exercised a controlling influence over the defendant, the defendant has been threatened with a harm, and the defendant may have no reasonable alternative but to acquiesce.[212] Nonetheless, the defendant's decision is still not treated as coerced because the prosecutor is not proposing to violate a right—the prosecutor's actions are not "morally illegitimate."[213] To the contrary, the prosecutor is actually pursuing "a more lenient punishment than [s]he has the right to pursue."[214] A moralized view of coercion can therefore explain when and why a controlling influence would undermine the validity of a person's decisions in the eyes of the law.

To be more precise, what distinguishes coercion from *other* types of controlling influences that do not negate voluntariness and are, therefore, perfectly valid is the presence of a rights violation.[215] A proposal is coercive, in part, because it threatens to violate a person's rights and it is specifically attributable to another person.[216] This does not occur, for example, when someone must act to avoid an unacceptable eventuality, or someone must act under conditions

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211. We borrow this example from Wertheimer, *supra* note 181, at 233.

212. *See* Wertheimer & Miller, *supra* note 206, at 390.

213. Wertheimer, *supra* note 181, at 233.

214. *Id.*

215. Robert Nozick writes, for example,

> Whether a person's actions are voluntary depends on what it is that limits his alternatives. If facts of nature do so, the actions are voluntary. (I may voluntarily walk to someplace I would prefer to fly to unaided.) Other people's actions place limits on one's available opportunities. Whether this makes one's resulting action non-voluntary depends upon whether these others had the right to act as they did.... A person's choice among differing degrees of unpalatable alternatives is not rendered nonvoluntary by the fact that others voluntarily chose and acted within their rights in a way that did not provide him with a more palatable alternative.

ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 262-64 (1974). Along similar lines, Frank Knight writes that a robber coerces a victim "not because the character of his choice between the alternatives presented is different from any other choice, but because we think the robber does 'wrong' in making the alternatives what they are." FRANK H. KNIGHT, FREEDOM AND REFORM: ESSAYS IN ECONOMICS AND SOCIAL PHILOSOPHY 17 (1947).

216. *See* Wertheimer & Miller, *supra* note 206, at 390.

of hard bargaining.[217] When a doctor says to her patient, "Without chemotherapy your condition is fatal," the patient's decision to take chemotherapy is thought to be voluntary.[218] Even though the patient faces a difficult choice by virtue of her cancer, and she takes herself to be "forced" by her circumstances, she is not coerced into taking chemotherapy because the doctor has no plan to violate her rights.

Similarly, when a cafeteria tells its food supplier, "Lower your price by 50 percent or else lose future business," we might call their agreement unfair but not involuntary.[219] In this case, the cafeteria's proposal has imperiled the food supplier, and the supplier would be irrational to decline the cafeteria's proposal, but the supplier is not coerced without a prior right to bargain at a certain price.[220] The fact that the food supplier is reluctant to agree to the new price ultimately has no bearing on its validity. To compare the choices, if the doctor were to charge the patient for her chemotherapy, the patient still has not been coerced unless she is entitled to treatment free of charge.[221] In each case, there has been no proposal to disregard the person's rights, and, as a result, the person's decision is regarded as both voluntary and valid.

Despite its many advantages, the moralized view of coercion cannot helpfully explain which wellness programs would be voluntary and which would not. To see this, consider an employee's rights.

An employee has legal rights defined by federal statutes, state law, and standing contracts; there are specific conditions under which it is permissible to employ her. Thus, an employer cannot ask an employee to work for lower than minimum wage, no matter how desperate she is for the money.[222] With regard to an employee's rights under wellness programs, however, one might be tempted to

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217. *See id.* at 391.

218. We have modified this example from WERTHEIMER, *supra* note 185, at 63-64. He argues that "[i]llness is unfortunate, but it does not violate one's rights." *Id.* at 64. In fact, he argues, much less powerful, illicit pressures by the doctor might compromise the voluntariness of informed consent whereas the prospect of death from illness does not. *See id.*

219. *See id.* at 210 (offering a similar example).

220. See Wertheimer & Miller, *supra* note 206, at 390, for a medical example of an individual with a prior right to a service.

221. *See* Joseph Millum & Michael Garnett, *How Payment for Research Participation Can Be Coercive,* 19 AM. J. BIOETHICS 21, 22 (2019).

222. *See* 29 U.S.C. § 206 (2012).

think that an employee is always potentially uninsured and thus has no prior right to a certain level of insurance subsidy.[223] In this respect, any financial incentive associated with a wellness program could be described as a permissible variation of an employee's health benefits. This is precisely the court's reasoning in *Orion*:

> [E]ven a strong incentive is still no more than an incentive; it is not compulsion. Orion's wellness initiative is voluntary in the sense that it is optional. An employee is not required to participate in the program and is instead given a choice: either elect to complete the [health risk assessment] as part of the [wellness] program or pay the full amount of the health benefit premium. A corporation is not required to fully pay for an employee's health insurance—indeed, it is not required to provide health insurance at all—and it is not unlawful to give an employee a choice regarding her health benefits provided the choices are among lawful alternatives. There may be strong reasons to comply with an employer's wellness initiative, and the employee must balance the considerations in deciding whether to participate or not. But a "hard choice is not the same as no choice."[224]

The court is ambiguous as to whether financial incentives do not compromise the voluntariness of an employee's consent because they happen not to violate an employee's legal rights with respect to health insurance in particular or because they are metaphysically incapable of exerting an impermissible form of control on a person's decisions in general.[225] However, the court's implication seems to be

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223. *See* EEOC v. Orion Energy Sys., Inc., 208 F. Supp. 3d 989, 1001 (E.D. Wis. 2016).

224. *Id.*

225. *Id.* If the court does mean the latter, then its conceptualization of voluntariness is seriously flawed. In most standard cases of coercion—including "your money or your life" situations—the person is, strictly speaking, given a choice. As Nir Eyal notes, "the option of dying remains open in principle": the person is not physically forced. Nir Eyal, *Informed Consent*, STAN. ENCYCLOPEDIA PHIL., https://plato.stanford.edu/archives/spr2019/entries/informed-consent/ [https://perma.cc/C5DP-R5PH]. Craig Carr adds, "Coercion, it is all but universally agreed, is antithetical to freedom," even though "situations that are generally recognized as coercive seem to involve an element of choice." Craig L. Carr, *Coercion and Freedom*, 25 AM. PHIL. Q. 59, 59 (1988). The *Orion* court cannot mean to imply that the employee's choice is voluntary because, in every case and everywhere, being offered a choice alone is sufficient for voluntariness in the legal sense. Voluntariness does not equal the logical possibility for an employee to choose otherwise. Rather, it has something to do with the reasonableness of an employee's choices or the acceptability of her alternatives.

that no financial incentive tied to health insurance can be coercive because an employee has no legal right to health insurance at a certain price and because an employer has no legal obligation to provide it. If this is correct, then virtually any wellness program with financial incentives would be voluntary.

Still, HIPAA and the ACA also prevent employers from varying an employee's health benefits based on health factors.[226] An employee, we may conclude, has no general right to health benefits at a certain price, but she does have a particular right to receive health benefits that are on a par with similarly situated employees.

This presents the following problem. Current interpretation of HIPAA and the ACA suggests that an employer cannot vary an employee's health benefits relative to similarly situated employees by more than 50 percent of the cost of single coverage under health-contingent wellness programs.[227] Yet, it would seem that employers face no legal limit on varying health benefits under participatory wellness programs.[228] This means that a 60 percent incentive would coerce employees under a health-contingent wellness program but not under a participatory wellness program, all other things being equal. If this is correct, then the moral justification for labeling an incentive as coercive under one program but not the other is mysterious.

Moreover, without HIPAA and the ACA's exceptions for wellness programs, which have broadened over time, employers would not be allowed to vary an employee's health benefits at all. Should the law ante (that is, the law before these exceptions have been applied) then be treated as the relevant baseline set of rights against which to compare an employer's proposal? Deciding how to establish the appropriate baseline in this context is puzzling and could result in morally unacceptable judgements about which decisions are treated as valid and which are not.

Generally speaking, then, wellness programs illustrate important problems with transposing the moralized view of coercion onto the law. It is possible, in many cases, that a person's legal rights will not be motivated by moral considerations in a way that gives them

226. *See* 42 U.S.C. §§ 300gg-4 (2012), 18001 (2012).
227. *See id.* § 300gg-4(j)(3).
228. *See id.* § 300gg-4(j)(2).

moral force.[229] Whatever the law currently says about a person's rights, there might still be strong, independent reasons to think that she should not be held responsible for her decisions or that her decisions should not be treated as valid.[230]

A related problem is that the moralized view can create a form of circularity: it answers the question of which legal restrictions need to be put in place in order to facilitate voluntariness by appealing to what the legal restrictions already are. In this respect, a legal requirement for voluntariness can end up vacuous: rather than motivate the law, it is merely a restatement of the law.[231]

For these reasons, we prefer an account of coercion that has both independent plausibility and explanatory simplicity and that can lend itself to an acceptable public policy.

b. The Value-Neutral Approach

On a value-neutral view, an employer coerces an employee in a way that vitiates voluntariness if, and only if, (1) the employer intentionally threatens the employee with what a *reasonable* person would view as a serious harm unless the employee complies with some demand, and (2) a *reasonable* person would find the threat irresistible and therefore comply.[232] As with the moralized view,

229. *See* Wertheimer, *supra* note 181, at 231-32.

230. This problem is mentioned in Wertheimer, *supra* note 181, at 232.

231. *See id.* at 252-53. David Zimmerman additionally takes the position that a dispute over the coerciveness of a proposal is ultimately a dispute about freedom, not moral or legal rights. David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121, 123 (1981). Yet, if coercion were an essentially moral concept, then the only real dispute could be over rights. *Id.* On these grounds, Zimmerman argues that a moralized view of coercion does not link up in the right way with the underlying idea that coercion undermines freedom. *Id.* In light of this, he proposes that the coerciveness of a proposal should be "determined independently of any prior rights." *Id.* at 126. Meanwhile, J. R. Lucas points out that many people think that "imprisonment is the paradigm form of coercion," though a justified one. J. R. LUCAS, THE PRINCIPLES OF POLITICS 60 (1966). To restrict coercion to a rights violation would therefore conflict with ordinary usage of the term. Gerald Dworkin has likewise criticized the moralized view because it cannot make sense of ordinary talk of justified coercion. Gerald B. Dworkin, *Compulsion and Moral Concepts*, 78 ETHICS 227, 228, 231 (1968). For an example of this, see JEREMY BENTHAM, OF LAWS IN GENERAL 54 (H. L. A. Hart ed., 1970). Although we do not necessarily endorse these arguments, we submit them as additional reasons why someone may want to use a value-neutral view.

232. Again, we will not recount all of the variations on the value-neutral view that have appeared throughout the literature. Instead, we will focus on the formulation that we favor,

these two conditions are each necessary and are jointly sufficient for coercion. However, unlike with the moralized view, the baseline condition against which to assess an employer's threat is the preprogram status quo rather than the employee's preexisting rights.[233] In other words, the baseline is what would have happened to the employee had the employer's threat not been made.[234]

There are several implications of this view. The first is that coercion is fundamentally value-neutral rather than moral: whether a person is coerced depends on the facts of her situation (i.e., what would have happened in the normal course of events without another person's deliberate intervention and how would a reasonable person respond) as opposed to the moral legitimacy of her situation.[235] As a result, for instance, when a cafeteria tells its food supplier, "Lower your price by 50 percent or else lose future business," we would now call their agreement involuntary. The cafeteria has intentionally exercised a controlling influence over the food supplier by threatening to harm the supplier in order to solicit a desired response, and, presumably, the threat would not be resisted by a reasonable person. Whether the controlling influence has violated the food supplier's rights has nothing to do with voluntariness in this case.

A second implication, then, is that coercion is no longer morally and legally transformative. To illustrate, consider three alternatives with regard to the food supplier case: (1) we could accept that voluntariness is always necessary for valid consent and treat the food supplier's agreement as both voluntary and valid on a moralized

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which we have adapted from Ruth Faden and Tom Beauchamp. Faden and Beauchamp's original formulation of the view is subjective and, as such, it depends heavily on the individual response of the person at whom the coercion attempt is directed, per the following conditions: (1) person "A intentionally threatens [person] B with what A believes B will view as a serious harm, H, in order to induce compliance" and (2) "B finds the threat of H irresistible and therefore complies." FADEN & BEAUCHAMP, *supra* note 167, at 341. We think that a formulation that uses a reasonable person standard is advisable for policy. Our formulation is also generally consistent with the work of Robert Nelson and his collaborators. *See* Nelson et al., *supra* note 187, at 6-7, 9-10.

233. As Harry Frankfurt puts it, in deciding whether one person is threatening another, "it is necessary to consider ... what would *now* happen but for their proposed interventions." Harry G. Frankfurt, *Coercion and Moral Responsibility*, *in* ESSAYS ON FREEDOM OF ACTION 63, 69 (Ted Honderich ed., 1973).

234. *See id.*

235. *See id.* at 70.

account of coercion, (2) we could accept that voluntariness is always necessary for valid consent and treat the food supplier's agreement as both involuntary and invalid on a value-neutral account of coercion, or (3) we could reject that voluntariness is always necessary for valid consent and treat the food supplier's agreement as involuntary but valid on a value-neutral account of coercion.[236] Whereas (2) reaches an implausible conclusion about the validity of consent because we tend to think of the food supplier's agreement as valid, (1) and (3) reach plausible conclusions.[237] If we adopt (3), the value-neutral approach, then coercion is no longer intrinsically wrongful or incompatible with valid consent: it is no longer transformative.

However, coercion is still prima facie, or *pro tanto*, wrongful. We can still presume that coercion negates the validity of consent under ordinary circumstances, though this presumptive effect of coercion on validity can be outweighed.[238] For example, in the food supplier case, we may treat the supplier's agreement as valid despite the presence of a coercive influence because we regard coercion as compatible with the public interest in this specific case. (As a result, the value-neutral view still requires moralized judgements regarding the validity of agreements, and these judgements still depend on whether the use of coercion is justifiable; the key difference is that the actual definition of coercion is now independent of these moral and legal judgements.) Nevertheless, we decline to engage in this discussion because of its low relevance for wellness programs.

It seems fairly clear that it would not be in the public interest to regard an employee's consent as valid despite her subjection to coercion. In other words, an employer's use of coercion would not be perceived as justifiable. And, in any case, the statutory language ultimately requires that an employee's consent be "voluntary," not "valid."[239] As we have discussed, there is virtually unanimous scholarly agreement that coercion negates voluntariness, at the very least.[240] As a result, a value-neutral view of coercion can be applied

236. This line of reasoning is included in Wertheimer, *supra* note 181, at 232-33.
237. *See id.*
238. *See* Appelbaum et al., *supra* note 164, at 32-33.
239. 42 U.S.C. § 12112(d)(4)(B) (2012).
240. *See supra* notes 191-96 and accompanying text.

to wellness programs to essentially the same effect as a moralized view of coercion.

Third, and finally, coercion now encompasses threats of increased negative outcomes as well as decreased positive outcomes. Because the baseline condition for assessing threats is the normal course of events without the proposed intervention, an employer can coerce an employee either by threatening to introduce or increase a harm, threatening to remove or reduce a good, or a combination thereof.[241] So, if an employer would have offered an employee $30,000 of compensation plus five vacation days in the normal course of events, then a proposal to offer her $29,000 of compensation plus three vacation days unless she participates in a wellness program would constitute a threat.[242]

Whether the employer has actually *coerced* the employee would depend on what a reasonable person could resist. Recall that coercion includes any intentional threat of a real and serious harm that would be irresistible to a reasonable person.[243] In this context, a wellness program could be coercive even though individual employees have in fact resisted the threat, provided a reasonable person would not. And, conversely, a wellness program could fail to be coercive even though individual employees have been overwhelmed by the threat beyond their ability to resist, provided a reasonable person would not. For this reason, the extent to which employees actually resist a threat can serve as an indicator of how a reasonable person might respond to the threat, but this would not be conclusive. A finding of coercion does not ultimately depend on individual employees' powers of resistance. Instead, courts and regulators must apply a reasonable person test to determine that a given threat is irresistible.

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241. *See supra* note 232 and accompanying text.

242. In this context, the determination of a threat is objective, meaning that it does not depend on psychological facts about the employees. *See supra* notes 177-79 and accompanying text. For example, suppose that an employer has made it clear that there will be no retaliation against an employee if the employee decides not to participate in a wellness program, but the employee is new to the firm and is nonetheless too intimidated not to acquiesce. Maybe the employee believes that participation is socially expected, or that it would encourage a better relationship with her employer. According to our approach, the employer has not coerced the employee because, following the first condition of coercion, the employer has intended no threat of harm and a reasonable person would perceive no threat of harm.

243. *See supra* note 233 and accompanying text.

In that case, what could a reasonable person resist? The outcome of a reasonable person test depends on circumstantial facts about the group of employees. To see why, suppose that two employees, Malena and Facundo, have both declined to participate in a wellness program and will each be penalized $25 per week as a result. Malena is a financially comfortable, single professor who earns a six-digit salary and has already paid off her mortgage; Facundo is a maintenance worker who has two dependents, earns $24,000 per year, and is already struggling to pay the monthly out-of-pocket costs on his diabetes medication. It is clear that the $25 penalty has a different impact on Malena and Facundo. A reasonable person in Malena's position could certainly resist the penalty, whereas a reasonable person in Facundo's position very well might not. It is possible, in this context, that the financial penalty would affect the voluntariness of Facundo's consent—a reasonable person may find it difficult to resist the penalty under his circumstances. In some circumstances, then, a $25 penalty could be sufficient to coerce an employee, and in other circumstances, much larger penalties would be needed.

However, regulators should not commence the difficult, if not impossible, task of applying a reasonable person test on a case-by-case basis. Instead, regulators should create a policy that can be applied broadly by taking into consideration the circumstances of the aggregate population. For instance, the Federal Reserve's 2018 report on the economic well-being of American households found that a sizeable share of U.S. adults would not be able to afford an unexpected expense of $400.[244] Regulators could take this as evidence that a reasonable person under ordinary circumstances would find an annual threat of $400 irresistible and therefore set a default upper limit on financial threats at $400 of value, for example, $400 worth of foregone compensation plus vacation days.

Meanwhile, courts have the option of taking the more painstaking case-by-case approach, particularly for employees at the extremes. For example, courts could raise the upper limit on threats for individual wellness programs that cater to an exclusively high-

244. BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018 2 (2019), https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf [https://perma.cc/R62R-9254].

income population, or courts could lower the limit on threats for especially vulnerable and low-income populations. In cases such as *Kwesell v. Yale University*, where the wellness program serves a wide range of employees, including both professors such as Malena and maintenance workers such as Facundo, the court could simply adopt the default limit.[245] The end result is that we have a view on which some financial incentives can negate voluntariness but where the mere presence of a financial incentive is not sufficient to negate voluntariness, and we have established a clear mechanism to distinguish between the two. We have therefore accomplished the principal task set out for us.

A final substantive question that we have yet to address, though, is whether an offer, such as a threat, can coerce.[246] A similar but, as we will see, nonidentical way of framing this question is whether both a wellness program's financial rewards and financial penalties can coerce. Can an employer's promise of increased positive outcomes or decreased negative outcomes coerce an employee, thereby rendering her decisions involuntary?

The answer in the philosophical literature is generally no: genuine offers do not coerce.[247] For example, H. J. McCloskey argues

245. Complaint at 2-3, Kwesell v. Yale Univ., No. 3:19-cv-01098 (D. Conn. July 16, 2019). A more complicated alternative would be for the court to adopt a tiered limit based on income. For example, professors may be subject to one limit and cafeteria and maintenance workers to another. A court could also decide to restrict the limit based on which threats could be resisted by a reasonable person occupying the position of the worst-off employee served by the program.

246. Genuine offers should be contrasted with "throffers," which are structured as follows: "If you succumb to my demand, I will reward you, but if you do not, I will harm you." *See* Anderson, *supra* note 197, at 22. Throffers are straightforwardly understood as a type of threat because the person will ultimately experience a harm unless they accede. *See id.*

247. For example, Bernard Gert makes the firm assertion that "not only does [an offer] not necessarily limit freedom, it does not limit freedom at all." Bernard Gert, *Coercion and Freedom*, *in* COERCION 30, 36 (J. Roland Pennock & John W. Chapman eds., 1972); *see also* Michael D. Bayles, *A Concept of Coercion*, *in* COERCION 16, 23 (J. Roland Pennock & John W. Chapman eds., 1972). There are, of course, a few exceptions. David Zimmerman, for example, maintains that certain offers can involve coercion, provided that one person actively prevents another person from being in a preproposal situation that she would strongly prefer. Zimmerman, *supra* note 231, at 128-29. One of the examples Zimmerman discusses is "that of a slave-owner who beats his slave every day," such that the normally expected course of events is for the slave to receive a beating. *Id.* at 126. One day, the slave owner proposes to "forgo the day's beating if the slave will perform some task." *Id.* Given the slave's baseline condition, "this proposal counts as an offer." *Id.* Zimmerman suggests that this proposal nonetheless coerces the slave because the slave owner has violated the slave's autonomy by

that coercion is a threat of harms to be imposed or goods to be withdrawn as opposed to an offer of rewards to be bestowed.[248] Another way of putting it is that people normally scorn threats but welcome offers.[249] Along this line, Jennifer Hawkins and Ezekiel Emanuel argue that coercion is a type of choice in which a person's options have been altered unfavorably, thereby ruling out the possibility of coercive offers.[250] As Alan Wertheimer writes:

> When are proposals coercive? The intuitive answer is that threats are coercive whereas offers are not, that threats limit freedom, whereas offers enhance it, that one acts involuntarily in response to a threat, whereas one voluntarily accepts an offer, that the recipient of an offer can decline to accept it, whereas the recipient of a threat cannot.[251]

Accordingly, in a "your money or your life" situation, the gunman *diminishes* the pedestrian's options, whereas an employer who attracts new employees through an unexpectedly generous contract *enhances* their options. The employer does not coerce the employees into accepting the job, irrespective of whether they lack equally attractive alternatives, because the employer has not threatened to

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preventing him from freeing himself in the preproposal situation. *See id.* at 127-29. Even on this type of view, though, an employer's offer of a financial reward would not count as coercive; the employer is not preventing the employee from getting the reward elsewhere. Zimmerman concedes, "By and large, threats involve coercion and offers do not: mainly because people do not like to be threatened whereas they do like to receive offers." *Id.* at 125. For a critique of Zimmerman, see Lawrence A. Alexander, *Zimmerman on Coercive Wage Offers*, 12 PHIL. & PUB. AFF. 160, 161-64 (1983).

248. H. J. McCloskey, *Coercion: Its Nature and Significance*, 18 S. J. PHIL. 335, 340 (1980).

249. Vinit Haksar, *Coercive Proposals [Rawls and Gandhi]*, 4 POL. THEORY 65, 66 (1976).

250. Jennifer S. Hawkins & Ezekiel J. Emanuel, *Clarifying Confusions About Coercion*, 35 HASTINGS CTR. REP. 16, 17 (2012).

251. WERTHEIMER, *supra* note 185, at 204.

make them worse off if they decline.[252] We endorse this interpretation.

There is, however, one respect in which this distinction between threats and offers seems illusory. One could reconstrue a person's baseline condition so as to mistake an offer for a threat, and vice versa. For example, in his helpful article, Daniel Lyons shows that two people could have the following exchange: one person says to another, "I will give you *x* if you will give me *y*," and the other person retorts, "In other words you are trying to force me to give up *y* or else lose out on *x*!"[253] Similarly, if we reset the pedestrian's baseline such that we now expect her to get shot, then we could say that the gunman is offering to give the pedestrian her life for her wallet. Given that we believe a threat would be coercive whereas an offer would not, establishing an appropriate baseline is critical for our understanding of voluntariness.

To appreciate the extent of the problem before us, consider a pair of examples.

One company, A, decides that it would like to create a wellness program with financial incentives for its employees. A's employees, who earn $30,000 per year, are told that they can enroll in a wellness program or else incur an annual financial penalty of $2000.

Another company, B, decides that it would like to create a wellness program with financial incentives for its employees, who also earn $30,000 per year. However, B's CEO has heard that financial penalties may soon be prohibited by law. As a result, B's employees are told categorically that their annual salaries will be reduced by $2000 each, and then, months later, they are told that they can enroll in a wellness program to recoup the funds.

Is there a meaningful difference between A's proposal and B's proposal? The intuitive answer is no, given that, in either case, the employees will receive $28,000 of compensation unless they

252. There can still be justified moral concerns over offers of rewards. For example, offers of financial rewards may take unfair advantage of employees in vulnerable circumstances, leading them to consent to wellness programs when they stand to assume risks but receive no health benefits. Alternatively, rewards may predictably bring about careless or irrational decisions that betray employees' interests. Or rewards may create or perpetuate social stratification based on health. These potential moral transgressions are not coercion and do not typically involve voluntariness, although they may provide the grounds for statutory changes to create additional protections for employees. *See* Ezekiel J. Emanuel, *Ending Concerns About Undue Inducement*, 32 J.L., MED. & ETHICS 100, 101 (2004).

253. Daniel Lyons, *Welcome Threats and Coercive Offers*, 50 PHIL. 425, 425 (1975).

participate in a wellness program. Yet on our definition of coercion,[254] it seems that A's proposal would almost certainly be regarded as a coercive threat, while B's proposal could be construed as a mere offer. In the case of A, it is clear that an employee who does not succumb to the proposal would be worse off than in her baseline situation, in which she keeps her $30,000 salary. In the case of B, it could be said that an employee who does not succumb would be left no worse off than in her baseline situation, in which she keeps her $28,000 salary. On the other hand, her original $30,000 salary could be treated as the true baseline on the grounds that she would have maintained that salary had it not been for the employer's intentional intervention with respect to the wellness program.

It is in this respect that the employer's intentions matter. Following the first condition of coercion, both A and B have threatened the employee because both A and B have *intended* to reduce her compensation by $2000 unless she enrolls in the wellness program. Since B's motivation for the initial $2000 salary reduction is to get her to enroll in the wellness program, and since the proper baseline is what would have happened to her otherwise,[255] we can conclude that B has in fact threatened her. In other words, while *genuine* offers can never coerce, threats that are *disguised* as offers can.

It should be emphasized that financial rewards do not necessarily equal offers, nor do financial penalties necessarily equal threats. In the case of B, for instance, the financial reward of $2000 is actually a disguised threat. A third company, C, may believe that employees will respond more energetically to financial penalties, and, as a result, C's employees are given a $2000 bonus that they are told they will lose if they do not enroll in a wellness program. Here, C's financial penalty is not actually a threat because it would restore employees to their true baseline. But barring this unusual type of case, financial rewards will generally correspond with offers, and financial penalties, with threats.

To sum up, we have offered a two-part test for voluntariness. A wellness program is voluntary if, and only if, (1) the employee has

254. *See supra* note 232 and accompanying text.

255. *See supra* note 233 and accompanying text.

received adequate information or, to put it differently, the employer has disclosed information that would be material to a reasonable person's deliberation about whether or not to participate, and (2) the employee is free from coercive influences by her employer. In turn, we have offered a two-part test for coercion: a wellness program is coercive if, and only if, (1) the employer has intentionally threatened the employee with what a reasonable person would view as a serious harm unless the employee accedes to the program, and (2) a reasonable person would find the threat irresistible.

In view of this account, we have listed concrete policy recommendations that would ensure minimal protections for employees without excessively burdening employers. We have presumed that a reasonable person standard would entail the disclosure of a wellness program's specific aims, methods, use and sharing of data, anticipated risks and benefits, and any available evidence on the aforementioned risks and benefits, as well as the employee's rights with respect to such a program.

Next, we have suggested that an employee's assent should be recorded through a signature on the disclosure, either electronically or in paper form. And finally, we have argued that wellness programs' financial rewards do not normally coerce, but that financial penalties beyond $400 frequently do. Together, these policies would shore up the legal right of employees to exercise voluntary choice regarding whether to participate in a wellness program.

B. Reasonable Design

This brings us to the concept of reasonable design. As discussed above, an assessment of wellness programs' risks and benefits does not favor a presumption that a given program is reasonably designed. There are weak grounds for assuming that any given program is effective, and prior confidence on this score was mistaken.[256] It follows that we should have a higher evidentiary standard for reasonable design than we do currently. In the face of general uncertainty, there should be some reason to believe a given program will work before awarding it a statutory exception. In

256. *See* discussion *supra* Part I.B.

addition, in light of the concerns we have discussed, it is appropriate for courts and regulators to err on the side of employee protection. Therefore, there would seem to be compelling justification for strengthening the current regulatory interpretation, which maintains that reasonably designed programs must not be overly burdensome, highly suspect, or a subterfuge for violating federal law.[257]

A plausible direction forward would have two prongs. First, courts and regulators should require that reasonably designed wellness programs be closely tailored; each individual program component must be strongly related to the wellness program's aims. We envision this as a strict requirement. It prohibits, for example, creating surveys for the purposes of general information gathering or estimating future medical costs.[258] Instead, employers may collect only the minimum information necessary to administer specific health interventions. In short, each wellness program component must be well motivated and clearly stated for program participants.

Second, courts and regulators should give employers reason to evaluate their programs or seek evidence-based practices. Though not compulsory, this conduct could be used as evidence of reasonable design in court, for example. Already, federal wellness programs are required to evaluate the effectiveness of their interventions in meeting health goals.[259] Since many employers contract with third-party vendors to deliver their wellness services, large-scale evaluations of many workplace wellness programs should be feasible.[260] Given that quality data regarding wellness programs has been heretofore unavailable,[261] we do not expect courts and regulators to require that each wellness program be demonstrably effective. Nevertheless, wellness programs that have unusual methods of promoting health or that pose more than minimal risk to employees should have a greater burden of showing benefit.

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257. *See supra* Part III.A.1.

258. *See* CLAXTON ET AL., *supra* note 51, at 199 (finding that 67 percent of firms use information collected through wellness programs to understand employee health risks).

259. Nadia Chait & Sherry Glied, *Promoting Prevention Under the Affordable Care Act*, 39 ANN. REV. PUB. HEALTH 507, 515 (2018) (explaining that the ACA mandated evaluation of federal health and wellness initiatives and directed the CDC to survey workplace wellness programs nationally).

260. *See* Mattke et al., *supra* note 49, at 17.

261. *See* discussion *supra* Part I.B.

CONCLUSION

With the recent lapse in regulatory guidance,[262] courts and regulators have been given an opportunity to implement a new legal approach. We believe our work can serve as a guide to courts and regulators as they settle on a statutory interpretation.

However, the views we have endorsed need further elaboration, particularly given some of the trade-offs that result. For example, we have encouraged employers to evaluate their wellness programs while also promoting policies that would make it more difficult for them to aggregate the data needed to do so.[263] As a result, it could be harder for programs to get off the ground or experiment with new interventions. In addition, we have tied voluntariness to employees' circumstances,[264] which may strain courts that opt to sift through the circumstances of individual employees who are served by a given wellness program. Undoubtedly, a $400 brightline rule on threats would be easier to administer. Finally, we have focused on voluntariness and reasonable design because these are the statutory criteria that cover most programs, but the statutes could change.[265] In this Article, we have not considered other criteria that could be better suited for wellness programs, nor have we discussed the potential advantages of revising the statutes.

Nevertheless, we believe that any inconveniences posed by our approach are more than justified if one takes an appropriately measured view on whether wellness programs are good for employees. On balance, we believe our work offers a concrete framework for regulating wellness programs that would produce better outcomes for employees as well as provide clarity for employers on how to structure legally compliant programs.

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262. *See* discussion *supra* Part III.A.3.
263. *See* discussion *supra* Part IV.B.
264. *See supra* notes 244-45 and accompanying text.
265. *See supra* Part III.A.