

Cleveland State University
EngagedScholarship@CSU



Cleveland-Marshall
College of Law Library

Journal of Law and Health

Law Journals

12-31-2016

Expansion of Employee Wellness Programs Under PPACA Creates Additional Barriers to Healthcare Insurance for Individuals with Disabilities

Amy B. Cheng
Buckley Beal, LLP

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/jlh>

 Part of the [Disability Law Commons](#), [Health Law and Policy Commons](#), and the [Medical Jurisprudence Commons](#)

How does access to this work benefit you? Let us know!

Recommended Citation

Amy B. Cheng, *Expansion of Employee Wellness Programs Under PPACA Creates Additional Barriers to Healthcare Insurance for Individuals with Disabilities*, 29 J.L. & Health 192 (2016)
available at <https://engagedscholarship.csuohio.edu/jlh/vol29/iss2/6>

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Journal of Law and Health by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

EXPANSION OF EMPLOYEE WELLNESS PROGRAMS UNDER PPACA CREATES ADDITIONAL BARRIERS TO HEALTHCARE INSURANCE FOR INDIVIDUALS WITH DISABILITIES

AMY B. CHENG*

I. INTRODUCTION	192
II. MEANINGFUL ACCESS AFTER THE PPACA	196
A. <i>Alexander v. Choate</i>	197
B. <i>Meaningful Access under the ADA</i>	199
C. <i>Meaningful Access and Premiums under PPACA</i>	203
III. WELLNESS PROGRAMS SHIFTS COSTS TO THE EMPLOYEE	204
A. <i>PPACA Antidiscrimination Provision</i>	206
B. <i>PPACA Continues Cycle of Discrimination</i>	208
C. <i>Seff v. Broward County</i>	209
IV. REASONABLE ACCOMMODATION UNDER THE ADA AND ITS IMPACT ON WELLNESS PROGRAMS	211
A. <i>Statutory Language Requirement for Alternative Considerations in Wellness Programs</i>	212
B. <i>Impact of Reasonable Accommodation to Wellness Programs for Individuals With Disabilities</i>	213
V. CONCLUSION.....	215
A. <i>Redefining What It Means to be Voluntary</i>	215
B. <i>Through the Eyes of an Egalitarian: Re-interpreting Reasonable Accommodation under the ADA</i>	217
C. <i>Additional Barriers in Healthcare</i>	218

I. INTRODUCTION

There are many barriers to healthcare for the general population that has been documented throughout the years, with one particularly affected group being individuals with disabilities.¹ One identified healthcare barrier for individuals with disabilities is the inability to gain access to the healthcare system through health

* Amy B. Cheng, Esq., MPH of Buckley Beal, LLP

¹ *The Current State of Health Care for People with Disabilities*, Nat'l Council on Disability (Sept. 30, 2009), http://www.ncd.gov/rawmedia_repository/0d7c848f_3d97_43b3_bea5_36e1d97f973d.pdf.

insurance.² While many attempts have been made to resolve this issue, serious problems have yet to be resolved.³ The Patient Protection Affordable Care Act (“PPACA”) attempted to solve the issue by expanding Health Insurance Portability and Accountability Act of 1996’s (“HIPAA”) current regulations on employee wellness programs. The relevant regulations govern employee wellness programs to allow employers to offer their employees greater incentives for meeting employer-defined health targets.⁴ This expansion has an adverse effect because it disadvantages groups like individuals with disabilities by penalizing them through higher premiums or cost sharing when they are unable to meet wellness targets.⁵

The cost of healthcare in the United States (“U.S.”) continues to rise every day, and is currently the highest per capita in the world.⁶ In 2012, the U.S. spent an estimated \$2.8 trillion on healthcare.⁷ The continued rise of medical care and health insurance costs mainly impact the uninsured and the underinsured.⁸ Such increases deprive over fifty million people of the proper healthcare they need, including many individuals with disabilities.⁹ Many individuals with disabilities are either uninsured, underinsured, or both.¹⁰ As a result, individuals with disabilities who are underinsured are burdened with high cost-sharing obligations, which prevent them from obtaining a variety of healthcare needs.¹¹ As a way to curb healthcare costs, employers who offer

² *Id.*

³ *Id.*

⁴ Sabrina Corlette, *Wellness Incentive Programs*, Cancer Action Network, <http://www.acscan.org/pdf/healthcare/implementation/background/WellnessIncentivePrograms.pdf>.

⁵ *Id.*

⁶ WORLD HEALTH ORGANIZATION: HEALTH EXPENDITURE, TOTAL (% OF GDP), <http://data.worldbank.org/indicator/SH.XPD.TOTL.ZS>, (last visited Apr. 8, 2015).

⁷ Katherine B. Wilson, *Health Care Costs 101: Slow Growth Persists*, CALIFORNIA HEALTHCARE FOUNDATION (Apr. 18, 2015, 10:41 AM), <http://www.chcf.org/publications/2014/07/health-care-costs-101>; see also *See generally Health Expenditure, Total (% of GDP), The World Bank*, <http://data.worldbank.org/indicator/SH.XPD.TOTL.ZS>.

⁸ *Health Care Costs 101: Reaching a Spending Plateau?*, California Health Care Almanac, <http://www.chcf.org/publications/2015/11/health-care-costs-101> (last updated Nov. 2015).

⁹ HEALTH CARE IN THE UNITED STATES, <http://www.nesri.org/programs/health-care-in-the-united-states> (last visited Apr. 8, 2015); see also *Health Care Statistics, HealthCareProblems.org*, <http://www.healthcareproblems.org/health-care-statistics.html>.

¹⁰ *Health Care in the United States, Nat’l Econ. & Soc. Rights Initiative*, <http://www.nesri.org/programs/health-care-in-the-united-states>. Specifically, the underinsured are people who “have health insurance but still struggle to pay their health care bills due to increase in health care premiums, deductibles, and copayments, as well as limits on coverage for various services or other limits and excluded services that can increase out-of-pocket expenses.” *Id.*

¹¹ NAT’L COUNCIL ON DISABILITY, <http://www.ncd.gov/publications/2009/Sept302009#exesum> (last visited Apr. 8, 2015). They are not able to get “health-preserving prescription medications, medical equipment, specialty care, dental and vision care, long-term care, and care coordination.” *Id.*

benefits to their employees now offer employee wellness programs.¹² Wellness programs, known as disease-management programs, can take many different forms and offer a wide range of benefits from informational to preventative care.¹³

Health law means “laws that govern access to health services and health insurance coverage, as well as those intended to restore or promote health and wellness with a focus on 1) public health insurance, laws governing private health insurance, and 3) public health initiatives and regulation.”¹⁴ The PPACA is a health law that regulates the health industry. PPACA expands the employee wellness program, a program that promotes health and disease prevention at work.¹⁵ This new rule allows employers to reasonably design and make available to every employee a health wellness program that reward or punish their employees monetarily through their health insurance payments plans as a way to encourage employees to meet a specific health standard.¹⁶ PPACA appropriated \$200 million dollars to assist certain groups of employers with providing comprehensive workplace wellness programs and authorized the Centers for Disease Control and Prevention (“CDC”) to evaluate these employee based wellness programs for its effectiveness and ability for preventive care.¹⁷ PPACA also expanded the employee wellness program exemption, which now allows employers to offer “incentives of up to thirty percent, expandable to up to fifty percent with approval from the secretaries of the DOL, HHS and the Treasury, of the total cost of coverage for standard-based wellness programs.”¹⁸ As a result PPACA intended to further the goals of the American Disabilities Act of 1990 (“ADA”) by giving individuals to disabilities greater access to healthcare.¹⁹

Nearly nineteen percent of the US population has some type of disability under the ADA.²⁰ The rate of disabilities also increases with age.²¹ According to one report, in 2005, 89.4 million Americans had some type of disability.²² Individuals with disabilities tend to be in poorer general health than other individuals and face many

¹² See *The Current State of Health Care for People with Disabilities*, *supra* note 1.

¹³ *Id.*

¹⁴ Jessica L. Roberts, *Health Law as a Disability Right*, MIL. L. REV. 1963, 1963 (2013).

¹⁵ Stephan Miller, *Final Rule Provides Wellness Incentive Guidance*, SOC’Y FOR HUMAN RES. AND MGMT. (Apr. 18, 2015, 10: 53AM), <http://www.shrm.org/hrdisciplines/benefits/articles/pages/final-rule-wellness-programs.aspx>.

¹⁶ See Corlette, *supra* note 4.

¹⁷ WELLNESS PROGRAM REQUIREMENTS, http://www.benefits-partners.com/hr/nfp_life_and_benefits/benefitscompliance/Wellness_Program_Requirements.aspx, (last visited Apr. 8, 2015).

¹⁸ *Id.*

¹⁹ See Roberts, *supra* note 15 at 1965.

²⁰ *Nearly 1 in 5 People Have a Disability in the U.S.*, *Census Bureau Reports*, United States Census Bureau (July 25, 2012), <https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html>.

²¹ See *Id.*; See also *The Current State of Health Care for People with Disabilities*, *supra* note 1.

²² NAT’L COUNCIL ON DISABILITY, <http://www.ncd.gov/publications/2009/Sept302009#exesum> (last visited Apr. 8, 2015).

barriers regarding their care.²³ These individuals tend to use health care at a higher rate but use preventive services at a lower rate than individuals without disabilities.²⁴ However, many individuals with disabilities have no health coverage because the U.S. health care system can be so restrictive in its eligibility requirements.²⁵ There are key needs for individuals with disabilities, which most can only access if they have health care insurance, as Medicare and Medicaid have difficulty obtaining the care and services individuals with disabilities require.²⁶ Most individuals with disabilities do not qualify for private health plans because they are not able to obtain jobs where employers pay for their health insurance.²⁷ Even for those individuals with a disability who do have health insurance through their employer, such plans are not adequate.²⁸ Additional insurance barriers for individuals with disabilities include the inability to obtain private health insurance through employer based health insurance or, if accepted, significant premium surcharges, which makes insurance unaffordable for many individuals with disabilities.²⁹

The ADA protects individuals with disabilities from societal bias.³⁰ Employer based health insurance is the most common form of private health insurance to which many individuals with disabilities do not have access, since they remain unemployed.³¹ The employee wellness program offered by employers' awards benefits based either on the result of a health test, or on how employees perform in mandated employee wellness programs at work.³² Therefore, these employee wellness programs need both to allow individuals with disabilities equal access to the benefits of the program and to not impose additional barriers to avoid regulatory issues under the ADA.³³

²³ See *The Current State of Health Care for People with Disabilities*, *supra* note 1.

²⁴ Elizabeth Pendo, *Reducing Disparities Through Health Care Reform: Disability And Accessible Medical Equipment*, 4 Utah L. Rev. 1057 (2010); See also, *The Current State of Health Care for People with Disabilities*, *supra* note 1.

²⁵ NAT'L COUNCIL ON DISABILITY, <http://www.ncd.gov/publications/2009/Sept302009#exesum> (last visited Apr. 8, 2015).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* That is, employers limit annual payments towards durable medical equipment, prescription drug costs, and do not provide for rehabilitation. *Id.*

²⁹ *Id.*

³⁰ WELLNESS PROGRAM REQUIREMENTS, http://www.benefits-partners.com/hr/nfp_life_and_benefits/benefitscompliance/Wellness_Program_Requirements.aspx, (last visited Apr. 8, 2015).

³¹ *Ill Prepared, Health Care's Barriers for People with Disabilities*, EQUAL RIGHTS CENTER 2 (Nov. 2011), http://www.equalrightscenter.org/site/DocServer/Ill_Prepared.pdf?docID=561.

³² WELLNESS PROGRAM REQUIREMENTS, http://www.benefits-partners.com/hr/nfp_life_and_benefits/benefitscompliance/Wellness_Program_Requirements.aspx (last visited Apr. 8, 2015).

³³ *Id.*

Moreover, if the employer requires answers to medical questions or screening for the wellness program, these questions need to be conducted on a voluntary basis.³⁴ The Equal Employment Opportunity Commission (“EEOC”) has long stood on the sidelines of what “voluntary” means.³⁵ The ADA and its amendments were meant to be an anti-discriminatory statute that protected the rights of individuals with disabilities and ensured remedies for instances of discrimination against this group by requiring employers to provide reasonable accommodations to employees with disabilities.³⁶ The ADA further imposes accessibility requirements on public accommodations.³⁷ On its face, the ADA prevents discrimination against individuals with disability; however, low employment rates post- ADA is continued evidence of discrimination towards individuals with disabilities in the workplace.³⁸

This article argues PPACA’s requirement for employee wellness programs provides additional barriers to healthcare insurance for individuals with disabilities. Part I of this Comment describes how the healthcare industry discriminates against individuals with disabilities by continuing to deny them meaningful access to health care through payment of higher premiums. Part II examines how the wellness program provision allows employers to shift the cost of medical coverage to the employee for failure to participate in the wellness program. Part III summarizes how the ADA’s reasonable requirement places an obligation on employers to make reasonable accommodation to individuals with disabilities, which will improve the health of working individuals with disabilities. Part IV concludes with suggestions for further reform.

II. MEANINGFUL ACCESS AFTER THE PPACA

Most Americans are insured through a mixture of private and public health insurance.³⁹ Currently, the percentage of individuals with disabilities who are employed is lower compared to individuals who have no disability.⁴⁰ Since most private insurance is employer based, individuals with disabilities have a hard time obtaining private health insurance.⁴¹ While the public health care system is designed to help individuals with disabilities, there is no duty to procure them the health benefits they need.⁴² Therefore, many individuals who need healthcare access the most almost

³⁴ *Id.*

³⁵ *Id.*

³⁶ *The Americans with Disabilities Act of 1990 and Revised ADA Regulations Implementing Title II and Title III*, ADA.GOV, http://www.ada.gov/2010_regs.htm.

³⁷ Americans With Disability Act, 42 U.S.C § 12112(b)(5), (1990).

³⁸ Ani Satz, *Disability, Vulnerability, And The Limits Of Antidiscrimination*, 83 WASH. L. REV. 513, 516–17 (2008).

³⁹ Anita Silvers & Leslie Francis, *Human Rights, Civil Rights: Prescribing Disability Discrimination Prevention in Packaging Essential Health Benefits*, 41 J. L. MED. & ETHICS 781 (2013).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

never get it.⁴³ As a result, the healthcare industry discriminates against individuals with disabilities by denying them meaningful access to care. This part analyzes A) the meaning of meaningful access after *Alexander v. Choate*,⁴⁴ B) the meaning of meaningful access under the ADA, and C) how PPACA hinders individuals with disability from achieving meaning access to healthcare.

A. *Alexander v. Choate*⁴⁵

Alexander v. Choate was a case decided before the ADA was passed.⁴⁶ During the era of *Choate*, the Rehabilitation Act of 1973 protected the rights of individuals with disabilities.⁴⁷ Specifically, § 504 of the Rehabilitation Act states:

No otherwise qualified individual with a disability in the United States, as defined in section 705 (20) of this title, shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Development Disabilities Act of 1978. Copies of any proposed regulations shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date of which such regulation is so submitted to such committees.⁴⁸

Section 504 of the Rehabilitation Act applies to any healthcare provider that receives federal money through Medicare, Medicaid, or Federal block grants.⁴⁹ Therefore, many individuals with disabilities will cite to the Rehabilitation Act if they feel their rights and privileges have been violated by a healthcare provider who accepts financial aid from the federal government.⁵⁰

In *Alexander v. Choate*,⁵¹ Tennessee tried to curb the costs of Medicaid by proposing to reduce the number of inpatient hospital days from twenty to fourteen

⁴³ *Id.*

⁴⁴ See *Alexander v. Choate*, 469 U.S. 287 (1985).

⁴⁵ *Id.*

⁴⁶ See generally *Alexander v. Choate*, 469 U.S. 287 (1985).

⁴⁷ See generally *id.*

⁴⁸ Leslie Francis & Anita Silvers, *Debilitating Alexander v. Choate: "Meaningful Access" To Healthcare For People with Disabilities*, 35 FORDHAM URB. L.J. 447(2008).

⁴⁹ ILL PREPARED, HEALTH CARE'S BARRIERS FOR PEOPLE WITH DISABILITIES, http://www.equalrightscenter.org/site/DocServer/III_Prepared.pdf?docID=561 (last visited Apr. 8, 2015).

⁵⁰ *Id.*

⁵¹ 469 U.S. 287, 288 (1985).

days in the hospital.⁵² This new proposal would affect many individuals with disabilities since significantly more individuals with disabilities require longer stays at the hospital compared to individuals without disabilities. The Tennessee Medicaid recipients challenged this proposal stating that it discriminated against individuals with disabilities under § 504 of the Rehabilitation Act by decreasing the number of days in the hospital.⁵³ This decrease would prevent individuals with disabilities from achieving meaningful access within the healthcare system.⁵⁴ Ultimately, the U.S. Supreme Court weighed in on this issue and sided with the state of Tennessee to reduce Medicaid spending.⁵⁵ In its analysis, the court rejected that § 504 prohibited only intentional discrimination, but the court also believed that § 504 was not meant to ensure equal results for individuals with disability and individuals with disability.⁵⁶ The court relied on its decision from *Southeastern College v. Davis*,⁵⁷ which dealt with a hearing impaired child who wanted to attend nursing school, but the school denied her admission.⁵⁸ The court ultimately held in *Davis* that “§ 504 of the Rehabilitation Act did not require the college to compromise its program integrity by admitting a student who was not otherwise qualified for admission.”⁵⁹ The court used the same rationale in *Davis* to state that there was meaningful access in *Choate* because both individuals with disability and individuals without disability were subject to the reduction in the number of days of hospital stay.⁶⁰

Since this decision, *Choate*⁶¹ has been misinterpreted to imply that states who want to cut back Medicaid spending is not a violation of disability discrimination.⁶² This misinterpretation gives states the wide discretion to cut Medicaid funding, and it has limited the development and understanding of meaningful access for individuals

⁵² See *Alexander v. Choate*, 469 U.S. 287, *supra* note 46 at paragraph one of syllabus; See also Francis, *supra* note 46, at 448.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Southeastern College v. Davis*, 442 U.S. 397 (1979); See also, Leslie Francis and Anita Silvers, DEBILITATING ALEXANDER V. CHOATE: “MEANINGFUL ACCESS” TO HEALTHCARE FOR PEOPLE WITH DISABILITIES, 35 FORDHAM URB. L.J. 447, 449 (2008).

⁵⁸ *Id.*

⁵⁹ Leslie Francis & Anita Silvers, DEBILITATING ALEXANDER V. CHOATE: “MEANINGFUL ACCESS” TO HEALTHCARE FOR PEOPLE WITH DISABILITIES, 35 FORDHAM URB. L.J. 447, 449 (2008).

⁶⁰ *Id.*

⁶¹ *Alexander v. Choate*, 469 U.S. 287, 288 (1985); See also, Leslie Francis & Anita Silvers, DEBILITATING ALEXANDER V. CHOATE: “MEANINGFUL ACCESS” TO HEALTHCARE FOR PEOPLE WITH DISABILITIES, 35 FORDHAM URB. L.J. 447, 449 (2008).

⁶² Anita Silvers & Leslie Francis, HUMAN RIGHTS, CIVIL RIGHTS: PRESCRIBING DISABILITY DISCRIMINATION PREVENTION IN PACKAGING ESSENTIAL HEALTH BENEFITS, 41 J. L. Med. & Ethics 781, 787 (2013).

with disabilities.⁶³ This misinterpretation has hindered the development and interpretation of meaningful access for individuals with disability within the healthcare system.⁶⁴

B. Meaningful Access under the ADA

The ADA was enacted in 1990 with its amendment Americans with Disabilities Act Amendment Act of 2008 (“ADAAA”), further expanding the scope of the ADA to help protect the rights and benefits of individuals with disabilities in 2010.⁶⁵ The ADA and the ADAAA was meant to be a civil rights law intended to protect individuals with disabilities and designed so that individuals with disabilities have the same opportunities and quality of life as every other person.⁶⁶

The ADA is divided into five titles.⁶⁷ Title I, Equal Employment Opportunity for Individuals with Disabilities, is meant to help individuals with disabilities gain access to employment.⁶⁸ Employers with fifteen employees or more must provide reasonable accommodation to qualified individuals applying for the position.⁶⁹ Title II, Nondiscrimination on the Basis of Disability in State and Local Government Services, prohibits any business operated by local or state government to discriminate against individuals with disabilities.⁷⁰ Title II outlines “the administrative processes to be followed, including requirements for self-evaluation and planning; requirements for making reasonable modifications to policies, practices, and procedures where necessary to avoid discrimination; architectural barriers to be identified; and the need for effective communication with people with hearing, vision and speech disabilities.”⁷¹ Title III, Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, states that places such as restaurants or doctor’s offices cannot discriminate against individuals with disabilities and need to have structural accessibility for individuals with disabilities.⁷² Title IV relates to telephone and internet companies to provide equipment to those who have hearing and speech disabilities to be able to communicate via phone.⁷³ Lastly, Title V contains a

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Edward Fensholt & Mark Holloway, ADA AMENDMENTS ACT: UNCHARTERED WATERS FOR HEALTH PLANS AND WELLNESS PROGRAMS, 22 BENEFITS L.J. 2, 69, 69 (2009).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Edward Fensholt & Mark Holloway, ADA AMENDMENTS ACT: UNCHARTERED WATERS FOR HEALTH PLANS AND WELLNESS PROGRAMS, 22 BENEFITS L.J. 2, 69, 69 (2009).

⁷¹ What is the Americans with Disabilities Act? (ADA), (Apr. 8, 2015, 6:34PM) <https://adata.org/learn-about-ada>; see also Edward Fensholt & Mark Holloway, ADA Amendments Act: Unchartered Waters for Health Plans and Wellness Programs, 22 Benefits L.J. 2, 69, 69 (2009).

⁷² *Id.*

⁷³ *Id.*

variety of provisions “including its relationship to other laws, state immunity, its impact on insurance providers and benefits, prohibition against retaliation and coercion, illegal use of drugs, and attorney’s fees.”⁷⁴

“Meaningful Access,” in Title II of the ADA, has been defined as ‘equal opportunity’ to make use of or enjoy a benefit or service.⁷⁵ That is not its only definition, and it does not mean that every facility or office must be accessible and usable by individuals with disabilities.⁷⁶ Cases involving education, transportation, and the use of public facilities have held that meaningful access:

requires access that enables recipients of services to benefit from them in a reasonable way—in a way comparable to the opportunities others have to use them—but not access that is of the kind recipients desire, of the kind that would be most beneficial to them, or even access that meets a determined set of minimal standards. Meaningful access is understood comparatively, and not in terms of the extent to which the access satisfies the desires of the person with disabilities.⁷⁷

Title II reads:

Title II applies to State and local government entities, and, in subtitle A, protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by State and local government entities. Title II extends the prohibition on discrimination established by section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, to all activities of State and local governments regardless of whether these entities receive Federal financial assistance.⁷⁸

Courts have tried to apply and interpret meaningful access under Title II of the ADA.⁷⁹ Specifically, in the education setting, in cases such as *Rothschild v.*

⁷⁴ *Id.*

⁷⁵ Leslie Francis & Anita Silvers, *Debilitating Alexander v. Choate: “Meaningful Access” To Healthcare For People with Disabilities*, 35 Fordham Urb. L.J. 447, 453 (2008).

⁷⁶ *Id.*

⁷⁷ *Id.* at 454.

⁷⁸ STATE AND LOCAL GOVERNMENTS (TITLE II), http://www.ada.gov/ada_title_II.htm, (last visited Apr. 8, 2015).

⁷⁹ Leslie Francis & Anita Silvers, *DEBILITATING ALEXANDER V. CHOATE: “MEANINGFUL ACCESS” TO HEALTHCARE FOR PEOPLE WITH DISABILITIES*, 35 FORDHAM URB. L.J. 447, 453 (2008).

⁷⁹ *See supra* note 78.

*Grottenthale*⁸⁰ and *Bd. of Educ. v. Rowley*,⁸¹ courts state that a benefit is not meaningful to individuals with disabilities if they are not given the same opportunities to thrive.⁸²

Jacob tenBroek, a leader in blind civil rights movement,⁸³ once said individuals with disabilities had a right “live in the world.”⁸⁴ tenBroek’s influence led people to read meaningful access in the transportation arena as an equal right.⁸⁵ In *Lloyd v. Regional Transportation Authority*,⁸⁶ the court held that it was an equal right for individuals with disabilities to use buses.⁸⁷ As such, public transportation that wasn’t designed to accommodate individuals with disabilities was a form of unequal treatment.⁸⁸ Discretion exists for transportation agencies when they are already providing services that ensure individuals with disabilities can access public transportation.⁸⁹

As far as health care related meaningful access cases, many cite to *Choate*.⁹⁰ These cases often analyze the opportunities afforded to individuals with disabilities and individuals without a disability based on *Choate*,⁹¹ but so many of the healthcare cases have been so egregious that courts have deemed that no comparison was necessary.⁹²

⁸⁰ *Rothschild v. Grottenthale*, 907 F.2d 286 (2nd Cir. 1990); *see also*, Leslie Francis & Anita Silvers, *DEBILITATING ALEXANDER V. CHOATE: “MEANINGFUL ACCESS” TO HEALTHCARE FOR PEOPLE WITH DISABILITIES*, 35 *FORDHAM URB. L.J.* 447, 453 (2008).

⁸¹ *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *see also*, Leslie Francis & Anita Silvers, *DEBILITATING ALEXANDER V. CHOATE: “MEANINGFUL ACCESS” TO HEALTHCARE FOR PEOPLE WITH DISABILITIES*, 35 *FORDHAM URB. L.J.* 447, 453 (2008).

⁸² *See* Leslie Francis & Anita Silvers, *supra* note 79; *see also* STATE AND LOCAL GOVERNMENTS (TITLE II), http://www.ada.gov/ada_title_II.htm, (last visited Apr. 8, 2015).

⁸³ Lou Ann Blake, *Who was Jacobus tenBroek?*, *BRILLE MONITOR*(Apr. 8, 2015, 11:34AM), <https://nfb.org/images/nfb/publications/bm/bm06/bm0605/bm060503.htm>

⁸⁴ *See supra* note 79, at 461.

⁸⁵ *See supra* note 79, at 461.

⁸⁶ *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977); *See also supra* note 79, at 461.

⁸⁷ *Id.*

⁸⁸ *Id.* at 462.

⁸⁹ *Id.*

⁹⁰ *Id.* at 466.

⁹¹ *Id.*

⁹² Leslie Francis & Anita Silvers, *DEBILITATING ALEXANDER V. CHOATE: “MEANINGFUL ACCESS” TO HEALTHCARE FOR PEOPLE WITH DISABILITIES*, 35 *FORDHAM URB. L.J.* 447, 466 (2008).

*Helen v. DiDario*⁹³ involved a Pennsylvania home care program that was supposed to provide attendant care services to Medicaid patients who qualified.⁹⁴ However, these patients were refused the benefit of these attendant care services because they lacked the funding.⁹⁵ The state of Pennsylvania argued that their state practice was not discriminatory against individuals with disabilities because *only* individuals with disabilities were given those benefits.⁹⁶ The Third Circuit rejected the state's argument and held there was no meaningful access for the Medicaid patients and state had used "benign negligence" and "unnecessary segregation" towards its benefactors—situations, which the ADA was designed to remedy.⁹⁷

In *Lovell v. Chandler*,⁹⁸ Hawaii had a State Health Insurance Plan ("SHIP"), but due to rises in healthcare, Hawaii sought to curb costs by replacing their plans with a single managed care plan ("QUEST") approved under a federal waiver.⁹⁹ SHIP members would only be qualified for QUEST so long as they were not aged, blind, or disabled—and this would leave individuals with disabilities without coverage.¹⁰⁰ Hawaii's justification was that managed health care plans would not participate in QUEST if the aged, blind, or disabled were allowed to join and its decision to segregate was just a financial criterion this group of individuals could not meet.¹⁰¹ The Ninth Circuit was not persuaded by Hawaii's argument and held that the state violated the ADA by not providing meaningful access to individuals with disabilities.¹⁰²

Many healthcare cases follow the reasoning and analysis used in *Choate*.¹⁰³ Courts usually agree that meaningful access for individuals with disabilities does not mean that they have access to each and every provider.¹⁰⁴ However, there needs to be equal opportunity for accessibility for individuals with disabilities as there is for individuals without disability. Assurance that there is accessibility does not cut it.¹⁰⁵

While there are cases related to the healthcare arena that interpret meaningful access under Title II of the ADA to mean that opportunities afforded to individuals

⁹³ *Helen v. DiDario*, 46 F.3d 325 (3d Cir. 1995); *see also* Leslie Francis & Anita Silvers, *supra* note 79 at 467.

⁹⁴ Leslie Francis & Anita Silvers,

⁹⁵ *Id.* at 467.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Lovell v. Chandler*, 303 F.3d 1039 (9th Cir. 2002); Leslie Francis & Anita Silvers, *supra* note 79 at 468.

⁹⁹ *Id.* at 469.

¹⁰⁰ *Id.* at 469.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 447.

¹⁰⁴ *Id.* at 470.

¹⁰⁵ *Id.* at 468.

without a disability needs to be equal to be the same for individuals with a disability, there could be more meaningful access if *Choate* was interpreted correctly.¹⁰⁶

C. Meaningful Access and Premiums under PPACA

When PPACA was first being drafted, it was promoted as the answer where all individuals with disabilities were finally going to be allowed access and use the U.S. healthcare system.¹⁰⁷ While it eliminated previous determinative factors insurers use to discriminate against individuals with disabilities, it did not, however, really state what the benefits would be.¹⁰⁸ PPACA attempted to balance the need to reduce healthcare costs with the need to care for people by trying to tailor services to the needs of typical patients.¹⁰⁹

Since 2014, PPACA made sure that all individual and small group health plans needed to offer “essential health benefits.”¹¹⁰ The ten categories comprising essential health benefits are as follows:

ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; and pediatric services, including oral and vision care.¹¹¹

These essential health benefits are necessary to help prevent and treat illness, which would greatly benefit many individuals with disabilities.¹¹² While PPACA had hoped that the essential benefits be provided uniformly throughout the country, this has been difficult in practice.¹¹³ Each state has plans which differ in what they offer, resulting in a wide range of different possibilities.¹¹⁴ As a result, these essential benefits continue to hinder many of these individuals from gaining meaningful access to healthcare.¹¹⁵

¹⁰⁶ *Id.* at 447.

¹⁰⁷ Anita Silvers and Leslie Francis, HUMAN RIGHTS, CIVIL RIGHTS: PRESCRIBING DISABILITY DISCRIMINATION PREVENTION IN PACKAGING ESSENTIAL HEALTH BENEFITS, 41 J. L. Med. & Ethics 781, 787 (2013).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* 787-88.

¹¹⁰ ESSENTIAL HEALTH BENEFITS, <https://www.healthcare.gov/glossary/essential-health-benefits/> (last visited Apr. 8, 2015).

¹¹¹ *Id.*

¹¹² OBAMACARE ESSENTIAL HEALTH BENEFITS, <http://obamacarefacts.com/essential-health-benefits/>, (last visited Apr. 8, 2015).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

Pre-PPACA, all states participated in Medicaid offering only the minimum coverage, thus excluding many individuals with disabilities either because they didn't fit a specified group, or because they were over the income threshold but unable to purchase health insurance in the private market.¹¹⁶ Recognizing this gap, PPACA expanded Medicaid to cover everyone whose income was within 138 percent of the federal poverty level.¹¹⁷ Since, the U.S. Supreme Court held such an expansion violates states' rights, many states have resisted expanding Medicaid coverage, leaving many individuals without access to care.¹¹⁸ A few states have tried to bargain with the federal government to see if they could use Medicaid money to pay for exchange coverage, but the federal government has resisted these bargaining ploys.¹¹⁹ Under PPACA, individuals with disabilities still will not have meaningful access to healthcare, because individuals with disabilities still will not qualify for Medicaid due to states refusing to expand Medicaid; those who do qualify for Medicaid may not qualify either since the cost of healthcare is continuing to rise.¹²⁰

Another way individuals with disabilities are being disadvantaged is that while coverage sold through the new healthcare exchange system now covers pre-existing conditions and premiums are community based, failure to meet wellness target goals mean premium surcharges.¹²¹ This can affect many individuals with disabilities due to their inability to meet target goals set out in these employee wellness programs.¹²² Since premium discrimination is not discrimination under PPACA because it affects both individuals with disabilities and individuals without disabilities, many employee wellness programs are able to penalize individuals with disabilities, which prevents them from achieving meaningful access to healthcare.¹²³

III. WELLNESS PROGRAMS SHIFTS COSTS TO THE EMPLOYEE

Wellness programs help employees make positive changes to their lifestyle so that they can remain healthy longer.¹²⁴ Employers incentivize their employees for participating or meeting a certain health standard.¹²⁵ Pre-PPACA, only HIPAA

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Anita Silvers and Leslie Francis, HUMAN RIGHTS, CIVIL RIGHTS: PRESCRIBING DISABILITY DISCRIMINATION PREVENTION IN PACKAGING ESSENTIAL HEALTH BENEFITS, 41 J. L. Med. & Ethics 781, 788 (2013).

¹¹⁹ *Id.* at 789.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Anita Silvers and Leslie Francis, HUMAN RIGHTS, CIVIL RIGHTS: PRESCRIBING DISABILITY DISCRIMINATION PREVENTION IN PACKAGING ESSENTIAL HEALTH BENEFITS, 41 J. L. Med. & Ethics 781, 789 (2013).

¹²⁴ WELLNESS INCENTIVE PROGRAM, <http://www.acscan.org/pdf/healthcare/implementation/background/WellnessIncentivePrograms.pdf> (last visited Apr. 8, 2015).

¹²⁵ *Id.*

regulated participation based and standards based wellness programs.¹²⁶ The Department of Labor (“DOL”), the U.S. Department of Health and Human Services, (“HHS”), and the U.S. Department of Treasury (“Treasury”) came out with final regulations on what constituted a participation based and standards based wellness program.¹²⁷

Participatory wellness programs are programs where as long as you participate, you receive a deduction in co-pay or less payment on premiums.¹²⁸ Standards based wellness programs are divided into activity-only and outcome-based programs.¹²⁹ Outcome-based wellness programs will only reward the employee if he/she has hit a specific target, which means employees either receive an award or receive a penalty.¹³⁰ Standards-based wellness programs have additional requirements for compliance such as:

- The reward for the program can’t exceed 20% of the cost of employee-only coverage under the plan;
- The program must be “reasonably designed” to promote health or prevent disease; the program must give employees the opportunity to qualify for the reward at least once per year;
- The reward must be available to all employees, and a “reasonable alternative standard” must be available to any individual for whom it is unreasonably difficult to meet the standard due to a medical condition, or for whom is “medically inadvisable” to attempt to meet the standard; and
- The plan must disclose in its written materials that a reasonable alternative standard is available.¹³¹

Under PPACA, employee wellness programs are divided into programs where an employee does not have to meet the standard related to his or her health factor to obtain the reward or programs that are more outcome based and require the employee to meet the standard related to his or her health factor.¹³² These employee based wellness

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Anne E. Moran, *Wellness Program After the ACA*, 39 Emp. Relations L.J. 2, 75, 79 (2013).

¹²⁹ WELLNESS PROGRAM REQUIREMENTS, http://www.benefits-partners.com/hr/nfp_life_and_benefits/benefitscompliance/Wellness_Program_Requirements.aspx, (last visited Apr. 8, 2015).

¹²⁹ WELLNESS INCENTIVE PROGRAM, <http://www.acscan.org/pdf/healthcare/implementation/background/WellnessIncentivePrograms.pdf> (last visited Apr. 8, 2015).

¹³⁰ *Id.*

¹³¹ 26 CFR § 54.9801-1(b); 29 CFR § 2590.702(f)(1)(v); 45 CFR § 146.121(f)(3)(v); WELLNESS INCENTIVE PROGRAM, <http://www.acscan.org/pdf/healthcare/implementation/background/WellnessIncentivePrograms.pdf> (last visited Apr. 8, 2015).

¹³² Michael Arnold, *The Affordable Care Act – The Countdown to Compliance for Employers, Week 4: EEOC v. Honeywell and the Future of Wellness Programs*, (April 8, 2015, 12:26PM, <http://www.employmentmattersblog.com/2014/12/the-affordable-care-act->

programs are incentives provided by health insurance providers as a way to cut costs on healthcare.¹³³ One incentive is discounts to health insurance if the employee voluntarily participates in health risk assessments.¹³⁴ Under PPACA, it is acceptable for employers to require their employee to complete a health-risk assessment survey; the health insurance plan may make the employee ineligible to participate in their health insurance plan if the employee does not cooperate by completing the survey.¹³⁵ Therefore, the wellness program provision allows employers to shift the cost of medical coverage to the employee for failure to participate in the wellness program.

This part analyzes A) PPACA discrimination provision as a way to combat health insurers bias, B) how PPACA continues the cycle of discrimination, and C) a case study through *Seff v. Broward County*.¹³⁶

A. PPACA Antidiscrimination Provision

Health insurers have always used a myriad of factors to determining pricing and coverage for an individual.¹³⁷ In the U.S., there is both an individual and a group health-insurance market.¹³⁸ In the individual health insurance market, there is often an adverse selection, which drives the increase in healthcare costs.¹³⁹ The individual health insurance system prefers healthier individuals and disadvantages the more sick individuals through eligibility requirements, limited coverage, and underwriting.¹⁴⁰ Therefore, many individuals who actually need the insurance will pay for care out of pocket to avoid insurers accessing their health information.¹⁴¹ Most individuals in the U.S. are insured through a group plan, including employer based health insurance.¹⁴² Group health insurance plans distribute the risk to everyone in the group.¹⁴³ Group based insurance discriminates against individuals within the group based on his/her

[countdown-to-compliance-for-employers-week-4-eeoc-v-honeywell-and-the-future-of-wellness-programs/](#).

¹³³ Amanda K. Sarata, Nancy Lee Jones, & Jennifer Staman, *The Genetic Information Nondiscrimination Act of 2008 and the Patient Protection and Affordable Care Act of 2010: Overview and Legal Analysis of Potential Interactions*, CONGRESSIONAL RESEARCH SERVICE.

¹³⁴ Allen Smith, *EEOC will Square Financial Inducements to Wellness Programs with ADA*, (Apr. 8, 2015, 12:28 PM), <http://www.shrm.org/legalissues/federalresources/pages/eeoc-financial-inducements.aspx>.

¹³⁵ *Id.*

¹³⁶ *Seff v. Broward Cnty.*, 691 F.3d 1221, 1222 (11th Cir. 2012).

¹³⁷ Jessica L. Roberts, HEALTHISM: A CRITIQUE OF THE ANTIDISCRIMINATION APPROACH TO HEALTH INSURANCE AND HEALTH-CARE REFORM, UNIV. ILL. L.REV. 1, 7 (2012).

¹³⁸ *Id.* at 8-12.

¹³⁹ *Id.* at 8.

¹⁴⁰ *Id.*

¹⁴¹ Jessica L. Roberts, HEALTHISM: A CRITIQUE OF THE ANTIDISCRIMINATION APPROACH TO HEALTH INSURANCE AND HEALTH-CARE REFORM, UNIV. ILL. L.REV. 1, 12 (2012).

¹⁴² *Id.* at 13.

¹⁴³ *Id.*

status, which results in the employer asking the employee to leave the group plan.¹⁴⁴ Serious disabilities can affect a person's health, and the individual can be discriminated against based on their health status, a concept known as "healthism."¹⁴⁵

PPACA attempts to amend the US healthcare system by creating antidiscrimination laws against healthism. At the time of PPACA's inception, many believed it to be:

[T]he civil rights bill for the sick. And make no mistake about it: this is a civil rights issue on par with racism. With the passage of this bill, insurers can no longer discriminate against sick people simply because they are sick. What is being created is a system of health care that is fair for everyone and we leave behind a system that has been patently unfair to too many.¹⁴⁶

Statutorily, PPACA amends the Public Health Service Act ("PHSA") and eliminates a health insurer's ability to preclude based on pre-existing condition by requiring that a:

[G]roup health plan and a health insurance issuer offering group or individual health insurance coverage may not impose any preexisting condition exclusion with respect to such plan or coverage.¹⁴⁷

It also amended PHSA to limit the information used to set premium rates to: "1) whether insurance covers an individual or a family; geographic location; 2) age; and 3) tobacco use."¹⁴⁸ However, PPACA only sets out guidelines, and health insurance companies can still use the limited four factors to discriminate against individuals based on their health status.¹⁴⁹ Lastly, PPACA attempts to prevent discrimination based on a person's health status by stating health insurers can't use the following to make eligibility decisions:

1) Health status; 2) Medical condition (including both physical and mental illnesses); 3) Claims experience; 4) Receipt of health care; 5) Medical history; 6) Genetic information; 7) Evidence of insurability (including conditions arising out of acts of domestic violence); 8)

¹⁴⁴ *Id.* at 15.

¹⁴⁵ *Id.*

¹⁴⁶ California Endowment, *The Health Reform You Haven't Heard About*, STATE NEWS SERVS., March 30, 2010; Jessica L Roberts, HEALTHISM: A CRITIQUE OF THE ANTIDISCRIMINATION APPROACH TO HEALTH INSURANCE AND HEALTH-CARE REFORM, UNIV. ILL. L.REV. 1, 40 (2012).

¹⁴⁷ The Patient Protection and Affordable Care Act, § 1201 (amending PHSA §2704(a)) (2010).

¹⁴⁸ *See id.*

¹⁴⁹ Jessica L Roberts, HEALTHISM: A CRITIQUE OF THE ANTIDISCRIMINATION APPROACH TO HEALTH INSURANCE AND HEALTH-CARE REFORM, UNIV. ILL. L.REV. 1, 41 (2012).

Disability, and 9) Any other health status-related factor determined appropriate by the Secretary.¹⁵⁰

Employers can help with eligibility and cut insurance premium costs by encouraging employees to participate in a wellness program, which then encourages employees to promote their own health.¹⁵¹

B. PPACA Continues Cycle of Discrimination

The setup of the U.S. healthcare system is by its nature discriminatory.¹⁵² While PPACA tries to equalize the playing field for *all* people and resolve a moral dilemma, the same people who benefited pre-PPACA still benefit post-PPACA.¹⁵³ The new rating criteria still allow for insurers to discriminate based on pre-existing conditions.¹⁵⁴ Under PPACA, employee wellness programs also discriminate against the sick because they are unable to participate in these programs as much as an individual who does not have any illness, which means they get penalized.¹⁵⁵ The law allows for these penalties to finance a healthy person's health insurance discount.¹⁵⁶ Essentially, PPACA still allows health insurers to discriminate against individuals based on their health-status.¹⁵⁷

While, on its face, PPACA seems to have achieved its goal of anti-discrimination, it functionally does nothing to eliminate discrimination of health insurers based on health outcomes.¹⁵⁸ PPACA encourages employee based wellness programs, which can offset health insurance premiums by up to thirty percent, low-income individuals, individuals with disabilities, and older individuals will be limited in their participation.¹⁵⁹ This can cause premium surcharges for individuals with disabilities and force them out of the health insurance offered by employers because the coverage cost will be so high that they will no longer be able to afford it.¹⁶⁰ Therefore, groups like individuals with disabilities, most likely to use and in need of the healthcare system, are at risk of continued disadvantage under the new system because insurers

¹⁵⁰ PPACA §1201; Jessica L Roberts, HEALTHISM: A CRITIQUE OF THE ANTIDISCRIMINATION APPROACH TO HEALTH INSURANCE AND HEALTH-CARE REFORM, UNIV. ILL. L.REV. 1, 43 (2012).

¹⁵¹ *See supra* note 149.

¹⁵² *Id.* at 44.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ WELLNESS INCENTIVE PROGRAMS, <http://www.acscan.org/pdf/healthcare/implementation/background/WellnessIncentivePrograms.pdf> (last visited Apr. 8, 2015).

¹⁵⁷ *See supra* note 149.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 46-47.

¹⁶⁰ WELLNESS INCENTIVE PROGRAMS, <http://www.acscan.org/pdf/healthcare/implementation/background/WellnessIncentivePrograms.pdf> (last visited Apr. 8, 2015).

can still use the factors that preclude them from participating in the program as a way to determine who is a good or bad risk.¹⁶¹

PPACA fails and continues the cycle of discrimination because it is an antidiscriminatory statute that preserves the existence of practices by private, for-profit health-insurance industry.¹⁶² The driving force of PPACA is an antidiscriminatory model that health insurers should not discriminate against anyone based on their health status; yet, Congress preserved the traditional practices of health insurers by giving the health industry a different set of criteria by which they can discriminate and disadvantage the sick.¹⁶³ These two pulling forces will result in continued discriminatory against individuals with disabilities, the sick, and the poor because the interests of antidiscrimination and the for-profit health insurance world can never reconcile.¹⁶⁴

*C. Seff v. Broward County*¹⁶⁵

The ADA protects individuals with disabilities by prohibiting employers from inquiring about disability related injuries or medical examinations unless they are essential to the function or the job or the employee volunteers the information through voluntary wellness programs.¹⁶⁶ For a wellness program to be successful to the employee, it needs the patient's health assessments or health screening results.¹⁶⁷

Currently, Title IV of the ADA includes language for an insurance safe harbor and states:

[S]ubchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict:

- (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
- (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
- (3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

¹⁶¹ See *supra* note 149.

¹⁶² *Id.* at 48.

¹⁶³ *Id.* at 52.

¹⁶⁴ *Id.* at 53.

¹⁶⁵ *Seff v. Broward Cnty.*, 691 F.3d 1221, 1222 (11th Cir. 2012).

¹⁶⁶ Christine L. Richardson, Thomas N. Makris and Marta K. Porwit, *Wellness Programs: Keeping Up with the Times*, <http://www.pillsburylaw.com/siteFiles/Publications/Alert20121228ExecCompWellnessProgramsKeepingUpWiththeTimes.pdf>.

¹⁶⁷ *Id.*

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter.¹⁶⁸

This provision under Title IV of the ADA is meant to protect underwriting and help classify risks for health insurers.¹⁶⁹ Since employee wellness programs are entered into the risk classification after premiums have been set, it allows companies to use the safe harbor provision under Title IV of the ADA as a defense to claims that wellness programs violate the ADA.¹⁷⁰ The Eleventh Circuit upheld in *Seff v. Broward County*¹⁷¹ a Florida federal district case, where an employer's wellness group did not violate the ADA because it fell within the ADA's safe harbor provision.¹⁷²

In *Seff v. Broward County*,¹⁷³ Broward County offered its employees an insurance plan, which allowed for participation in an employee wellness program as long as each employee completed the health assessment and a biometric screening beforehand.¹⁷⁴ The County stated that any employee who did not complete the questionnaire and undergo a screening would incur a penalty cost.¹⁷⁵ The plaintiff, Bradley Seff ("Seff"), filed a complaint against Broward County alleging that it violated the ADA when it forced employees to answer questions related to their medical history.¹⁷⁶ The Southern District of Florida relied on *Barnes v. Benham*¹⁷⁷ and *Zamora-Quezada v. Health Texas Medical Group*¹⁷⁸ when it held that Broward County did not violate the ADA because its wellness program fell under the ADA's safe harbor provision.¹⁷⁹ In essence, the court found that the county's employee wellness program was a benefit plan, and the County acted as an administrator of the benefits plan, so it "may require a covered employee to undergo a medical examination or

¹⁶⁸ Patient Protection Affordable Care Act, 42 U.S.C. §§ 1201 (2006).

¹⁶⁹ E. Pierce Blue, WELLNESS PROGRAMS, THE ADA, AND GINA: FRAMING THE CONFLICT, 31 HOFSTRA LAB. & EMP. L.J. 367, 378 (2014). Underwriting is the "process [that] determines the premiums that an insurance company will charge a company or individual seeking coverage." *Id.*

¹⁷⁰ *Id.*

¹⁷¹ 691 F.3d 1221, 1222 (11th Cir. 2012).

¹⁷² Morgan Lewis, Wellness Program Falls Within Safe Harbor, (Apr. 8, 2015; 12: 45PM) http://www.morganlewis.com/pubs/lepg_If_wellnessprogramfallswithinadasafeharbor_18sep12.

¹⁷³ 691 F.3d 1221, 1221 (11th Cir. 2012).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Barnes v. Benham Group, Inc.*, 22 F.Supp.2d 1013 (D.Minn.1998).

¹⁷⁸ 778 F.Supp.2d at 1373-74 (citing *Barnes v. Benham Group, Inc.*, 22 F.Supp.2d 1013 (D.Minn.1998); *Zamora-Quezada v. Health-Texas Med. Grp.*, 34 F.Supp 433, 443 (W.D. Tex. 1998).

¹⁷⁹ 691 F.3d 1221, 1222 (11th Cir. 2012).

answer medical inquiries.”¹⁸⁰ The court in *Seff*¹⁸¹ used *Barnes*¹⁸² and *Quezada*¹⁸³ to state that underwriting and risk classification were not discriminatory because the information were used to set premiums on a macro-level that benefited the disabled and nondisabled, and this process is protected under the ADA since “[t]he purpose of the safe harbor provision is to permit the development and administration of benefit plans in accordance with accepted principles of risk assessment.”¹⁸⁴ When *Seff* appealed the district’s decision to the Eleventh Circuit, the circuit court upheld the district court’s analysis and only overturned the fact that the district could find the wellness program was a “term” for the health plan.¹⁸⁵

The court reasoned that the “term” reference did not require that the program be set out in the benefit plan document itself. Rather, the court held that the program was a “term” of the plan, noting that the same insurer provided both the wellness program and the group health insurance plan, and under the same contract; the wellness program was available only to enrollees in the plan, and the wellness program was presented as part of the plan in at least two employee handouts.¹⁸⁶

This ruling favors employers and suggests that if a health insurance plan falls within the ADA’s safe harbor provision for insurance plan, then it does not need to comply with the rest of the ADA.¹⁸⁷

IV. REASONABLE ACCOMMODATION UNDER THE ADA AND ITS IMPACT ON WELLNESS PROGRAMS

With wellness programs on the rise as a way to curb healthcare costs to employers, the EEOC issued an interpretation letter, which concluded that employers still had a duty to their employees to provide reasonable accommodation.¹⁸⁸ The ADA’s reasonable accommodation requirement will force employers to make reasonable alternatives to individuals with disabilities, which will improve the health of working individuals with disabilities. This part outlines specific A) ADA statutory language

¹⁸⁰ *Id.*

¹⁸¹ 691 F.3d 1221, 1221 (11th Cir. 2012).

¹⁸² 22 F.Supp.2d 1013 (D.Minn.1998).

¹⁸³ 778 F.Supp.2d at 1373-74.

¹⁸⁴ *Id.* at 1223; quoting *Barnes v. Benham Group* 22 F. Supp. 2d 1013, 1020 (D. Minn. 1998); E. Pierce Blue, WELLNESS PROGRAMS, THE ADA, AND GINA: FRAMING THE CONFLICT, 31 HOFSTRA LAB. & EMP. L.J. 367, 379 (2014).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Morgan Lewis, Wellness Program Falls Within Safe Harbor, (Apr. 8, 2015; 12: 45PM) http://www.morganlewis.com/pubs/lepp_lf_wellnessprogramfallswithinadasafeharbor_18sep12.

¹⁸⁸ Letter from U.S. Equal Employment Opportunity Commission, Voluntary Wellness Programs & Reasonable Accommodation Obligations, <http://www.btlaw.com/files/Uploads/Documents/Misc%20Blog%20Attachments/EEOC%20Interp%20letter%201-18-13%20ADA%20and%20wellness.pdf>.

for reasonable accommodation imposed on employers, and B) the impact of the reasonable accommodation requirement to wellness programs.

A. Statutory Language Requirement for Alternative Considerations in Wellness Programs

Congress intended the ADA to be considered an anti-discrimination statute and contains provisions regarding reasonable accommodations, which Congress believed would help curb any bias against individuals with disabilities.¹⁸⁹ Title I of the ADA requires that employers provide employees and applicants a reasonable accommodation to individuals with disabilities unless doing so would create an undue hardship to the employer.¹⁹⁰ An accommodation under the ADA is “any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.”¹⁹¹ The three categories of reasonable accommodations are:

- (i) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
- (ii) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
- (iii) modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.¹⁹²

The ADA lists a number of possible reasonable accommodations employers could provide including:

1. making existing facilities accessible;
2. job restructuring;
3. part-time or modified work schedules;
4. acquiring or modifying equipment;
5. changing tests, training materials, or policies;
6. providing qualified readers or interpreters; and
7. reassignment to a vacant position.¹⁹³

¹⁸⁹ See generally *Id.*

¹⁹⁰ Enforcement Guidance: *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, http://www.eeoc.gov/policy/docs/accommodation.html#N_1 (last visited Apr. 8, 2015); 42 U.S.C. §§ 12101-12117, 12201-12213 (1994); 42 U.S.C. § 12112(a), (b)(5)(A) (1994).

¹⁹¹ Enforcement Guidance: *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, http://www.eeoc.gov/policy/docs/accommodation.html#N_2, (last visited Apr. 8, 2015); 29 C.F.R. pt. 1630 app.

¹⁹² 42 U.S.C. § 12111(9) (1994); 29 C.F.R. § 1630.2(o)(2)(i-ii) (1997).

¹⁹³ 42 U.S.C. § 12111(9) (1994); 29 C.F.R. § 1630.2(o)(2)(i-ii) (1997); ¹⁹³ Enforcement Guidance: *Reasonable Accommodation and Undue Hardship Under the*

Similarly, HIPAA in its statutory language states that the employer must furnish a reasonable alternative standard or the condition for obtaining the reward must be waived.¹⁹⁴ While these scenarios tend to be on a case-by-case basis, the employer or plan issuer needs to take into account the following:

- If the reasonable alternative standard is completion of an educational program, the plan or issuer must make the educational program available or assist the employee in finding such a program (instead of requiring an individual to find such a program unassisted), and may not require an individual to pay for the cost of the program.
- The time commitment required must be reasonable (e.g., requiring attendance nightly at a one-hour class would be unreasonable).
- If the reasonable alternative standard is a diet program, the plan or issuer is not required to pay for the cost of food but must pay any membership or participation fee.
- If an individual's personal physician states a plan standard (including, if applicable, the recommendations of the plan's medical professional) is not medically appropriate for that individual, the plan or issuer must provide a reasonable alternative standard that accommodates the recommendations of the individual's personal physician with regard to medical appropriateness. Plans and issuers may impose standard cost sharing under the plan or coverage for medical items and services furnished pursuant to the physician's recommendations.¹⁹⁵

The statutory languages in both the ADA and HIPAA ensure that employers have a duty to provide individuals with disabilities a reasonable accommodation in the work place, which includes employee wellness programs.

B. Impact of Reasonable Accommodation to Wellness Programs for Individuals With Disabilities

According to Title I of the ADA, employers must limit when they can ask their employees about disability-related inquiries or about medical exams unless: it is through a voluntary wellness program, information is maintained through confidentiality requirements, and the information is not used for discriminatory purposes.¹⁹⁶ An employers' obligation to create reasonable accommodation at the

Americans with Disabilities Act, http://www.eeoc.gov/policy/docs/accommodation.html#N_1 (last visited Apr. 8, 2015).

¹⁹⁴ Martin Haitz, *Health reform Final Wellness Regulations Issued*, http://www.marcumfs.com/newsletters/plansponsor/2013/august/070213_P_ERC_Final_Wellness_Regulations_BRO.pdf (last visited Apr. 8, 2015).

¹⁹⁵ *Id.*

¹⁹⁶ See 42 U.S.C. § 12112(d); 29 C.F.R. §§1630.13, 1630.14; Russell Chapman, EEOC ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE ADA, <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> (hereinafter Enforcement Guidance), available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>; ADA: Voluntary Wellness Programs & Reasonable Accommodation Obligations, (Jan. 8, 2013). "A wellness program is

work place includes that employers give all of its employee's equal access to benefits, which includes wellness programs.¹⁹⁷ Therefore, if an individual with a disability is unable to achieve the goals set out in a wellness program at work, then the covered entity must make reasonable accommodation to ensure the individual can participate in the wellness program.¹⁹⁸ The ADA forces an employer to have the duty to provide reasonable accommodation as a way to eliminate discrimination against individuals with disabilities because there are barriers in the workplace that force many individuals with disabilities to not seek employment.¹⁹⁹ Therefore, in a job setting, an individual with a disability with reasonable accommodation can now continue to perform in his/her position as well as enjoy benefits of being employed that others without a disability get to have.²⁰⁰

The EEOC recently issued an interpretation letter and stated that employers who have voluntary outcome based wellness programs to earn rewards at the work place needed to provide reasonable accommodations to individuals who might not be able to meet the program's goals or achieve its pre-set standards.²⁰¹ For example, EEOC stated in its interpretation letter:

[T]he program required that participants maintain a certain level of medication adherence to remain in the program. According to the EEOC, if an employee is unable to maintain that adherence because of a disability, the employer would need to provide a reasonable accommodation (absent undue hardship) to allow the employee to participate in the program and to earn the reward. The EEOC said that in any case in which a participant may be removed from a program for failure to adhere to its requirements, a participant with a disability must be provided reasonable accommodation (absent undue hardship).²⁰²

It is believed that between HIPAA's reasonable alternative standard and ADA's reasonable accommodation standards being imposed on employers, individuals with

voluntary as long as an employer neither requires participation nor penalizes employees who do not participate." *Id.*

¹⁹⁷ E. Pierce Blue, *Wellness Programs, the ADA, and Gina: Framing the Conflict*, 31 Hofstra Lab. & Emp. L.J. 367, 379 (2014).

¹⁹⁸ *Id.*

¹⁹⁹ Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, http://www.eeoc.gov/policy/docs/accommodation.html#N_1 (last visited Apr. 8, 2015). Courts have interpreted reasonable to mean if it "seems reasonable on its face" or if it appears to be "feasible" or "plausible." *Id.* Furthermore, "an accommodation also must be effective in meeting the needs of the individual." *Id.*

²⁰⁰ Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, http://www.eeoc.gov/policy/docs/accommodation.html#N_7 (last visited Apr. 8, 2015).

²⁰¹ *Id.*

²⁰² Angela Bohmann, *EEOC Requires Reasonable Accommodation for Wellness Plans*, (Apr. 30, 2013) <http://benefitsnotes.com/2013/04/eeoc-requires-reasonable-accommodations-for-wellness-plans/>.

disabilities will be able to achieve the same health result as others who participate in employer wellness programs.²⁰³

V. CONCLUSION

Wellness programs are being utilized more and more in the working world.²⁰⁴ One study shows that sixty-five percent of multinational employers have some wellness program at the workplace.²⁰⁵ Advocates of wellness program believe that it helps employees become aware of their own health problems, which helps employers in “lost productivity and the employer’s medical plan in terms of claims avoidance.”²⁰⁶ This section discusses: A) redefining what it means to have a voluntary wellness program; B) considering reasonable accommodation through the eyes of a utilitarian; and C) additional barriers to healthcare for individuals with disabilities.

A. Redefining What It Means to be Voluntary

While incentive based wellness programs have always been encouraged by the government, the EEOC seem to now target those companies that use it because they violate the ADA as illustrated in *EEOC v. Orion Energy Systems*, *EEOC v. Flambeau, Inc.*, and *EEOC v. Honeywell International Inc.*²⁰⁷

In *EEOC v. Orion Energy Systems*,²⁰⁸ the employer subjected the employee to medical testing and disability related inquires for wellness program purposes but not as part of the essential duties of the job.²⁰⁹ The EEOC alleged that Orion Energy shifted the entire cost of the health insurance to the employee when the employee refused to participate in the wellness program and eventually fired said employee.²¹⁰ According to the EEOC, this violated the ADA because wellness programs are not actually voluntary when the company shifted the entire premium cost of healthcare benefits to the employee for not answering the questions related to the wellness program or simply fire the employee who chooses not to participate. “Having to choose between

²⁰³ NATIONAL LAW REVIEW, *Americans with Disabilities (ADA) Reasonable Accommodations and Wellness Program*, <http://benefitsnotes.com/2013/04/eec-requires-reasonable-accommodations-for-wellness-plans/> (last visited Apr. 8, 2015).

²⁰⁴ Brian Lindenberg, *The Future of Wellness Programs*, <http://www.iscebs.org/Documents/PDF/PandT14.pdf>.

²⁰⁵ Carrie Griffin Basas, *What’s Bad About Wellness? What the Disability Rights Perspective Offers About Limitations of Wellness*, 39 JOURNAL OF HEALTH POLITICS, POLICY, AND LAW 5, 1013, 1013 (2014).

²⁰⁶ Benefits Law Alert, *Wellness Programs After the Affordable Care Act (Part II)*, (July 14, 2014) http://www.nixonpeabody.com/Wellness_programs_after_the_Affordable_Care_Act_Part_II.

²⁰⁷ Stephen Miller, *EEOC Sues Employers’ Wellness Programs*, (Aug. 26, 2014) <http://www.shrm.org/hrdisciplines/benefits/Articles/pages/eec-wellness-lawsuit.aspx>.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

responding to medical exams and inquires—which are not job-related—in a wellness program, on the one hand, or being fired, on the other hand, is no choice at all.”²¹¹

Just two months later, the EEOC filed a suit against Flambeau, Inc. in *EEOC v. Flambeau Inc.*²¹² In this case the EEOC alleged that Flambeau violated the ADA by threatening to cancel an employee’s health insurance because the employee would not submit to a medical test assessment for the employer wellness program.²¹³ The EEOC stated that threats of cancellation and discipline make the wellness program involuntary, which violates the ADA.²¹⁴

In early 2015, the EEOC filed a suit against Honeywell International Inc. in *EEOC v. Honeywell International Inc.*²¹⁵ where it was seeking an injunction against the company from implementing its wellness program, because Honeywell International’s wellness program penalized those employees or employee’s spouses who did not want to participate in medical examinations.²¹⁶ While Honeywell defended that it was not in violation of ADA because of the ADA safe harbor provision, the EEOC responded that compliance under PPACA does not mean compliance under ADA.²¹⁷

The combination of these three suits filed by the EEOC indicates that the agency is no longer sitting on the sidelines regarding incentive wellness programs.²¹⁸ The EEOC’s position in filing suits in these cases indicates that penalizing employees for not participating in a voluntary wellness program is indeed *involuntary* for the employee and a violation of the ADA.²¹⁹ These cases highlight the continued tension between PPACA and ADA of what it means to have a voluntary employer wellness program.²²⁰ The EEOC’s arguments are not without merit because employees or their spouses should have the choice to participate in employee wellness program without being penalized. PPACA incentive employee wellness program provision does not help further the goals of the ADA if it still allows discrimination against individuals with disabilities.

²¹¹ *Id.*

²¹² Press Release, EEOC Lawsuit Challenges Flambeau Over Wellness Program (Oct. 1., 2014) (available at <http://www.eeoc.gov/eeoc/newsroom/release/10-1-14b.cfm>).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Stephen Miller, *EEOC’s Wellness Lawsuits Target Incentives, Spark Criticism*, (Nov. 3, 2014), <http://www.shrm.org/hrdisciplines/benefits/articles/pages/eeoc-sues-honeywell.aspx>.

²¹⁷ Stephen Miller, *EEOC Sues Employers’ Wellness Programs*, (Aug. 26, 2014) <http://www.shrm.org/hrdisciplines/benefits/Articles/pages/eeoc-wellness-lawsuit.aspx>.

²¹⁸ *Id.*

²¹⁹ Stephen Miller, *EEOC Sues Employers’ Wellness Programs*, (Aug. 26, 2014) <http://www.shrm.org/hrdisciplines/benefits/Articles/pages/eeoc-wellness-lawsuit.aspx>; Stephen Miller, *EEOC’s Wellness Lawsuits Target Incentives, Spark Criticism*, (Nov. 3, 2014), <http://www.shrm.org/hrdisciplines/benefits/articles/pages/eeoc-sues-honeywell.aspx>.

²²⁰ *Id.*

B. Through the Eyes of an Egalitarian: Re-interpreting Reasonable Accommodation under the ADA

Many believe that the rationalization of healthcare will occur in the U.S. in the near future because health care resources are limited.²²¹ Two philosophical views of looking at *how* to ration healthcare are utilitarian and egalitarian.²²² Utilitarians believe in trying to achieve the greatest good with limited healthcare resources; egalitarians believe that every person should get an equitable portion.²²³ An egalitarian believes that “all lives have equal worth, and differences in expected benefit are not always a morally valid basis for treating people differently.”²²⁴ The ADA has both concepts of utilitarian and egalitarian in its statutory language.²²⁵ First, the problem is society measures disability from a utilitarian perspective, which results in inequitable allocation of healthcare towards individuals with disabilities.²²⁶ The issue needs to be re-framed where the issue with disability is not the disability itself but society’s construct of how to live without a disability.²²⁷ Since society has an inherent bias towards individuals with disabilities, it is important for the judicial system to view the reasonable accommodation so that individuals with disabilities can be compensated for that bias.²²⁸ In the most traditional sense, federal appellate courts have interpreted, in non-healthcare cases, that reasonable accommodation means schools should provide special education services to ensure that kids with a disability receive an education proportionate to their needs.²²⁹ Extrapolating the interpretation from the federal appellate court’s decision to a health care scenario, physicians and hospitals should compensate for an individual’s disability and that compensation should be accounted for in measuring the success of the doctor’s medical treatment.²³⁰ Moreover, we should not look to outcomes among different people as a way to prefer one person over the other.²³¹ Instead, we should look to the way that care should be allocated such as “whether one patient’s need for care is more urgent than another patient’s or

²²¹ David Orentlicher, *RATIONING OF HEALTHCARE & UNFAIR DISCRIMINATION AGAINST THE SICK*, 31 HARV. C.R. – C.L. L. REV. 1 50, 50 (1996).

²²² David Orentlicher, *Rationing of Healthcare & Unfair Discrimination Against the Sick*, 31 HARV. C.R. – C.L. L. REV. 1 50, 50 (1996).

²²³ *Id.* at 236-37.

²²⁴ *Id.* at 237.

²²⁵ *Id.* at 238.

²²⁶ *Id.* at 242.

²²⁷ David Orentlicher, *Utility, Equality and Healthcare Needs of Persons with Disabilities: Interpreting the ADA’s Requirement of Reasonable Accommodation*, AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS, at 236, 238.

²²⁸ *Id.* at 240.

²²⁹ *Id.*

²³⁰ *Id.* at 241.

²³¹ *Id.*

whether one patient has been waiting for care longer than another patient.”²³² This will help create a more equitable society where the person receiving the care will get as much benefit as possible.²³³

This concept of egalitarianism can be applied to employee wellness programs. Currently, individuals with a disability are discriminated against in wellness programs because there may be certain targets they cannot meet or they might be discriminated against because they do not want to answer certain medical examination questions. When the wellness targets are not met or the individuals do not want to answer questions or conduct testing that hurts their chances in the health insurance pool, they have to pay a higher premium because they are penalized financially. Instead of penalizing individuals with disabilities with higher costs they cannot bear, we should construct and re-frame employee wellness programs to meet the needs of individuals with disabilities from the point of view of an egalitarian. The lens of a utilitarian allows us to only allocate resources to those society deems will receive maximum benefit. We should be evenly allocating resources so that *everyone*, including individuals with a disability, can thrive.

C. Additional Barriers in Healthcare

George, a 19-year-old male, wheels himself to see his doctor regularly for checkups. He gets these regular checkups at ABC Healthcare, a nonprofit health maintenance organization, and his doctors usually examine him in his wheelchair.²³⁴ The facility does not have a lift or transfer assistance to help him onto the patient bed.²³⁵ As a result, the doctor never realized that George developed a pressure sore.²³⁶ The pressure sore remain undetected.²³⁷ Eventually, it becomes infected and requires George to undergo surgery.²³⁸

Sunny, deaf by birth, needed to have her tonsils taken out.²³⁹ Since this was her first surgery, she was nervous and extremely scared.²⁴⁰ She was sedated and when she woke up, she was confused and started crying.²⁴¹ There was swelling post-surgery but

²³² *Id.*

²³³ David Orentlicher, *Utility, Equality and Healthcare Needs of Persons with Disabilities: Interpreting the ADA's Requirement of Reasonable Accommodation*, AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS, at 236, 241.

²³⁴ Disability Healthcare Access Brief, http://dredf.org/healthcare/Access_Brief.pdf (last visited Apr. 8, 2015).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

she didn't know why; she didn't even know if that was normal. Throughout the whole process, there was no sign language interpreter.²⁴²

Chad, father to a child with Down syndrome, wanted his daughter to see Dr. Phil, a specialist whose patients are children with Down syndrome, and therefore knows how to conduct basic hearing and vision tests on children with Down syndrome.²⁴³ Dr. Phil is an out of network specialist for the type of insurance Chad's work provides.²⁴⁴

Amy, a fifty-five year old woman, needed to see a physician for a pelvic exam.²⁴⁵ She searched and searched but no physicians' office had access to the examination table for an individual with a disability.²⁴⁶ Several years later, she was able to find a doctor who had the technology to put her on the examination table to examine her.²⁴⁷ By that time, she had endometrial cancer and died.²⁴⁸

Besides the healthcare insurance barrier that wellness programs under the PPACA may have created, individuals with disabilities face other barriers in healthcare.²⁴⁹ A variety of barriers include:

- Stereotypes about disability on the part of healthcare providers;
- Health care provider misinformation, and lack of appropriately trained staff;
- Limited health care facility accessibility and lack of examination equipment that can be used by people with varying disabilities;
- Lack of sign language interpreters;
- Lack of materials in formats that are accessible to people who are blind or have low vision; and
- Lack of individualized accommodations.²⁵⁰

The illustrations above show just a sample of the additional barriers individuals with disabilities face in the healthcare system.²⁵¹ Many individuals with disabilities are scared to seek the care they need because many health care facilities and personnel lack the patience and expertise to work with individuals with disabilities.²⁵² It is important that there is a system in place where "health care providers are encouraged

²⁴² *Id.*

²⁴³ Disability Healthcare Access Brief, http://dredf.org/healthcare/Access_Brief.pdf (last visited Apr. 8, 2015).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ ILL PREPARED, HEALTH CARE'S BARRIERS FOR PEOPLE WITH DISABILITIES, http://www.equalrightscenter.org/site/DocServer/III_Prepared.pdf?docID=561 (last visited Apr. 8, 2015).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² DREDF, *Disability Healthcare Access Brief*, http://dredf.org/healthcare/Access_Brief.pdf (last visited Apr. 8, 2015).

to see and treat the whole person, not just the disability; educators to teach about disability; a public to see an individual's abilities, not just his or her disability; and a community to ensure accessible health care and wellness services for persons with disabilities."²⁵³ Individuals with disabilities are generally people who are the most vulnerable, and as such, they deserve the care necessary to help them live a long and sustainable life. It is still discrimination even if employers provide the same standards based wellness programs to all of their employees, because the standards adversely affect individuals with disabilities. It is time individuals with disabilities are no longer stigmatized against. The laws in place should help break down the barriers to healthcare instead of continuing to build more barriers, which only deters individuals with disabilities from accessing the care they need.

²⁵³ ILL PREPARED, HEALTH CARE'S BARRIERS FOR PEOPLE WITH DISABILITIES, http://www.equalrightscenter.org/site/DocServer/III_Prepared.pdf?docID=561 (last visited Apr. 8, 2015); Office of the Surgeon General, THE SURGEON GENERAL'S CALL TO ACTION TO IMPROVE THE HEALTH AND WELLNESS OF PERSONS WITH DISABILITIES, (2005).