

2017

The EEOC, the ADA, and Workplace Wellness Programs

Samuel R. Bagenstos

University of Michigan Law School, sambagen@umich.edu

Available at: <https://repository.law.umich.edu/articles/1888>

Follow this and additional works at: <https://repository.law.umich.edu/articles>

 Part of the [Civil Rights and Discrimination Commons](#), [Health Law and Policy Commons](#), [Labor and Employment Law Commons](#), and the [Privacy Law Commons](#)

Recommended Citation

Bagenstos, Samuel R. "The EEOC, the ADA, and Workplace Wellness Programs." *Health Matrix* 27 (2017): 81-100.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

The EEOC, the ADA, and Workplace Wellness Programs

Samuel R. Bagenstos[†]

Contents

I. Introduction	81
II. Workplace Wellness Programs and the ADA’s Voluntariness Requirement.....	83
III. The EEOC and Voluntariness in Wellness Programs	92
IV. Conclusion	99

I. Introduction

It seems that everybody loves workplace wellness programs. The Chamber of Commerce has firmly endorsed those programs, as have other business groups.¹ So has President Obama, and even liberal firebrands like former Senator Tom Harkin.² And why not? After all, what’s not to like about programs that encourage people to adopt healthy habits like exercise, nutritious eating, and quitting smoking? The proponents of these programs speak passionately, and with evident good intentions, about reducing the crushing burden that chronic disease places on individuals, families, communities, and the economy as a whole.³

What’s not to like? Plenty. Workplace wellness programs are often well-intentioned, and they are certainly pushed forward by an industry of consultants who offer data that are facially convincing regarding their value. But many workplace wellness programs push—if not exceed—the boundaries of the law. A growing body of evidence indicates that reliance

† Frank G. Millard Professor of Law, University of Michigan Law School. Thanks to the hosts of this symposium for inviting my contribution, and to Sarah Scheinman for able research assistance.

1. See Ronald Loeppke, *Wrap-Up*, in WINNING WITH WELLNESS 25 (2016).
2. Tom Harkin, *Health Care, Not Sick Care*, 19 AM. J. HEALTH PROMOTION 1, 2 (2004); Marianne Levine, *Obamacare’s “Wellness” Gamble*, POLITICO (May 13, 2016), <http://www.politico.com/agenda/agenda/story/2016/05/wellness-obamacare-000114>.
3. See *The Healthcare Leadership Council and the Congressional Wellness Caucus Hold Briefing Titled “How Private Sector Wellness and Prevention Initiatives Are Showing Quantifiable Results in Improving Health and Lowering Healthcare Costs.”*, HIGHBEAM RESEARCH (Mar. 24, 2012), <https://www.highbeam.com/doc/1P3-2617209161.html>; Mehmet Oz & Mike Roizen, *Drs. Oz and Roizen: Five Secrets to Get Healthy at Work*, BUFFALO NEWS (Apr. 2, 2016), <http://www.buffalonews.com/columns/drs-oz-and-roizen/drs-oz-and-roizen-five-secrets-to-get-healthy-at-work-20160402>.

on workplace wellness programs to reduce the burden of disease is bad—and likely futile—health policy. Although those programs may work well in shifting health costs to sicker employees, this body of evidence indicates that they are unlikely to actually improve health in any significant way.⁴ And workplace-wellness programs give employers a power over their workers' private lives that we ought not to allow. Elsewhere, I have argued that, as a matter of privacy and social equality, employers should not be permitted to leverage their economic power over employees as a means of controlling the aspects of workers' out-of-work lives that wellness programs affect.⁵

The remainder of this paper elaborates on the first of these points. I focus on an important recent episode in the regulation of workplace-wellness programs—the Equal Employment Opportunity Commission's ("EEOC" or "Commission") adoption of new rules governing those programs under the Americans with Disabilities Act ("ADA").⁶ The Commission promulgated those rules in a fraught political environment.⁷ It had recently brought three suits that offered hints that it would aggressively challenge workplace wellness programs under the ADA.⁸ After a business backlash to those suits, the White House reportedly pressured the Commission to reverse its stance; the new regulations, which came out after that controversy, would significantly loosen restrictions on wellness programs.⁹

-
4. See, e.g., Jill R. Horwitz et al., *Wellness Incentives in the Workplace: Cost Savings Through Cost Shifting to Unhealthy Workers*, 32 HEALTH AFFAIRS 468, 469, 471-72 (2013); Alfred Lewis et al., *Employers Should Disband Employee Weight Control Programs*, 21 AM. J. MANAGED CARE e91 (2015); Sharon Begley, *Do Workplace Wellness Programs Improve Employees' Health?*, STAT (Feb. 19, 2016), <https://www.statnews.com/2016/02/19/workplace-wellness-programs-employee-health/>; see generally Lindsay F. Wiley, *Access to Health Care As an Incentive for Healthy Behavior? An Assessment of the Affordable Care Act's Personal Responsibility for Wellness Reforms*, 11 IND. HEALTH L. REV. 635, 640-41 (2014) (arguing that "personal responsibility reforms" like wellness programs "reflect cultural biases that exaggerate the extent to which ill health is attributable to the personal failings of unhealthy individuals and that they serve as a political distraction from less punitive measures aimed at making our communities, workplaces, schools, and marketplaces more conducive to healthy living").
 5. See Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 252-53 (2013).
 6. E.g., 29 C.F.R. § 1630.14(d) (2016).
 7. See, e.g., Rachel Emma Silverman, *EEOC Issues New Rules for Wellness Programs*, WALL ST. J. (May 16, 2016 5:20 PM ET), <http://www.wsj.com/articles/eec-issues-new-rules-for-wellness-programs-1463433655>.
 8. E.E.O.C. v. Orion Energy Sys. Inc., 145 F. Supp. 3d 841, 841-42 (E.D. Wis. 2015); E.E.O.C. v. Flambeau, Inc., 131 F. Supp. 3d 849, 849 (W.D. Wis. 2015); E.E.O.C. v. Honeywell Int'l, Inc., No. CIV. 14-4517 ADM/TNL, 2014 WL 5795481 at *1 (D. Minn. Nov. 6, 2014).
 9. See Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. 31,126 (May 17, 2016) (to be codified at 29 C.F.R. pt. 1630); Jonathan Cohn, *Big Business Gets a Win on Controversial Workplace Wellness Plans*, HUFFINGTON POST (Apr. 16, 2015, 10:28 PM ET), <http://www.huffingtonpost.com/2015/04/16/workplace->

In particular, the regulations would allow employers to impose a significant financial cost—up to thirty percent of the total cost of self-only health coverage—on workers who refuse to submit private medical information as part of wellness programs.¹⁰

Part II discusses the legal questions that workplace wellness programs present under the Americans with Disabilities Act. In that part, I argue that the ADA, properly construed, would prohibit common elements of workplace-wellness programs. In particular, the ADA requires medical disclosures as part of a workplace-wellness program to be “voluntary;” I argue that the best interpretation of that voluntariness requirement would prohibit employers from imposing any financial incentives on employees to reveal private medical information. Part III discusses the EEOC’s recent regulations. I argue that those regulations not only fail to incorporate the best interpretation of “voluntary,” but also fail to incorporate any reasonable interpretation of the term—and, indeed, barely try to interpret the term at all. Thus, I argue that the new regulation’s thirty-percent rule should be invalidated. Part IV is a brief conclusion.

II. Workplace Wellness Programs and the ADA’s Voluntariness Requirement

Much of the legal architecture and terminology classifying wellness programs comes from the Health Insurance Portability and Accountability Act (“HIPAA”) as amended by the Affordable Care Act (“ACA”)¹¹ and the regulations implementing those statutes.¹² Under the HIPAA/ACA regime, workplace-wellness programs come in two basic flavors, and the law imposes distinct regulations on each flavor. What the law calls participatory wellness programs provide some incentive or opportunity to participate in an activity that the employer deems healthy.¹³ Examples might include a discount on membership in a gym, free participation in a smoking-cessation program (perhaps with some additional reward for participation), or incentives to obtain health screenings and education in healthy habits.¹⁴ What the law calls health-contingent wellness programs condition incentives on achievement of some health-related factor.¹⁵ The factor can be either completion of a health-related activity, such as an exercise or

wellness-eeoc_n_7083506.html; Jonathan Cohn, *Obama is Smack in the Middle of a Brewing Fight Over Workplace Wellness*, HUFFINGTON POST (Mar. 14, 2015, 9:00 PM), http://www.huffingtonpost.com/2015/03/14/workplace-wellness-obama_n_684256.html.

10. See *infra* notes 88 – 107 and accompanying text.
11. See 42 U.S.C. § 300gg-4(j) (2012).
12. See 26 C.F.R. § 54.9802-1 (2016).
13. See 26 C.F.R. § 54.9802-1(f)(1)(ii) (2016).
14. See 26 C.F.R. § 54.9802-1(f)(1)(ii) (2016).
15. See 26 C.F.R. § 54.9802-1(f)(1)(iii) (2016).

smoking-cessation program (the law calls such a wellness plan “activity-based”), or the achievement of a health outcome, such as losing weight or quitting smoking (the law calls such a wellness plan “outcome-based”).¹⁶

HIPAA, as amended by the Affordable Care Act, contained a number of requirements for health-contingent wellness programs, though it did not meaningfully restrict participatory wellness programs.¹⁷ But both sorts of programs give rise to significant disability-discrimination concerns, even if they fully comply with the regulations the ACA put into place. For one thing, wellness programs might be constructed in ways that directly impose barriers to participation by workers with particular kinds of disabilities. If an employer incentivizes workers to participate in or complete an exercise class, but that class is held in a facility that is not accessible to persons who, say, use wheelchairs, then wheelchair users cannot receive the incentive. If an employer incentivizes the achievement of an outcome standard that an individual, because of her disability, cannot satisfy, that decision, too, will exclude individuals with disabilities.

Key provisions of the ADA target employer practices that exclude workers with disabilities in this way. In particular, the statute requires an employer to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability,” unless that employer “can demonstrate that the accommodation would impose an undue hardship on the operation of the business.”¹⁸ As a result of this provision, an employer who sets up a wellness program that imposes barriers to workers with disabilities must make a reasonable accommodation—such as by moving an exercise class to an accessible space or giving disabled workers an alternative means of satisfying the requirements of a health-contingent program—so long as that does not impose an undue hardship. Fortunately, this principle is uncontroversial, even if its application to particular wellness-program rules may not be. The recent EEOC regulations specifically require reasonable accommodation in circumstances like this,¹⁹ and the ACA imposes parallel requirements.²⁰

The disability-discrimination issues do not end there, however. Many wellness programs require workers, as condition of participating and receiving whatever incentive is attached, to provide private medical information to their employers or to the contractor that administers the program.²¹ But as Congress learned during its consideration of the ADA, employers have often, upon learning about individuals’ disabling

16. See 26 C.F.R. § 54.9802-1(f)(1)(iv), (v) (2016).

17. See 26 C.F.R. § 54.9802-1(f)(3)-(5) (2016).

18. 42 U.S.C. § 12112(b)(5)(A) (2016).

19. See 81 Fed. Reg. at 31,141.

20. See 26 C.F.R. § 54.9802-1(f)(3)(iv), (4)(iv) (2016).

21. See, e.g., Michelle Chen, *Employer Wellness Programs Are A Great Idea—Right?*, NATION (June 1, 2016), <https://www.thenation.com/article/employer-wellness-programs-are-a-great-idea-right/>.

conditions, drawn overbroad conclusions about the limiting effects of those conditions and either fired or refused to hire individuals with those conditions.²² Researchers and disability-rights activists have long noted the existence of a spread effect, in which people reflexively think that an impairment that limits some physical or mental functions is more broadly disabling.²³ The stereotypes and fears that attach to many hidden disabilities—disabilities that are not immediately obvious to observers—may be even greater than those that attach to more obvious disabilities.²⁴

To address this issue, Congress constructed a complex set of rules regarding when an employer may ask for or receive medical information from an applicant or employee.²⁵ The ADA adopts different rules for each of three stages of application and employment. First, during the job application process and prior to the extension of an offer of employment, an employer “shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.”²⁶ At that stage, the employer may ask an applicant about her “ability . . . to perform job-related functions,” but not about what disabilities or medical conditions she has.²⁷ After an employer has extended a conditional offer of employment, the rules for the second stage kick in. At that stage, an employer may require a full medical examination, so long as all entering employees—or, at least, all entering employees in a particular job category—must undergo the same examination.²⁸ The results of such an examination must be kept confidential, though they may be shared with supervisors and emergency personnel as relevant to determine necessary work restrictions or emergency medical services.²⁹

The rules governing medical examinations and inquiries at the first two stages of hiring and employment serve to create a record of discrimination. If an employer was willing to extend a conditional offer of employment at the first stage, when it did not know of a worker’s medical conditions, and then revoked that offer after learning of those medical conditions at the second stage, the obvious conclusion is that the employer acted because of those conditions. For employees with hidden disabilities, the first two stages thus help to avoid the most difficult problem for most claims of hiring

22. See H.R. REP. NO. 101-485, pt. 2, at *50 (1990).

23. See Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397, 423-24 (2000).

24. See *id.* at 492-494.

25. 42 U.S.C. § 12112(d) (2012).

26. 42 U.S.C. § 12112(d)(2)(A) (2012).

27. 42 U.S.C. § 12112(d)(2)(B) (2012).

28. 42 U.S.C. § 12112(d)(3)(A) (2012).

29. 42 U.S.C. § 12112(d)(3)(B) (2012).

discrimination—proving that a protected characteristic, and not some other factor, caused the refusal to hire.³⁰

Despite the medical examination permitted after a conditional offer of employment, many employees' disabilities will remain hidden. Many employers choose not to require medical examinations at the time of hire.³¹ And many hidden disabilities develop *after* an employee starts work. To protect workers with hidden disabilities at the third stage of the relationship, Congress provided that an employer

shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.³²

On its face, this provision would impose significant limitations on participatory wellness programs that incentivize workers to provide medical information. If an employer either requires a medical examination or even makes an “inquir[y]” regarding disability—an inquiry the employee could refuse to answer—the general rule requires the employer to show that the examination or inquiry satisfies the relatively stringent “job-related and consistent with business necessity” standard.³³

Wellness programs existed in 1990, and, just as today, they were extremely popular with members of Congress and other elites.³⁴ Accordingly, the ADA provided an exception to the job-related/business-

30. See, e.g., Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315, 1321 (2008) (“Employment discrimination cases are difficult to prove, especially since few cases turn up ‘smoking gun’ evidence of discrimination.”).

31. See, e.g., Donald H. Stone, *Pre-Employment Inquiries: Drug Testing, Alcohol Screening, Physical Exams, Honesty Testing, Genetics Screening—Do They Discriminate? An Empirical Study*, 25 AKRON L. REV. 367, 367 (1991).

32. 42 U.S.C. § 12112(d)(4)(A) (2012).

33. Nobody knows exactly what “job-related and consistent with business necessity”—“which combine[s] relatively lenient language (‘job related,’ ‘consistent with’) with stringent language (‘business necessity’)”—means. See Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After Inclusive Communities*, 101 CORNELL L. REV. 1115, 1140 (2016). But employers are understandably unwilling to rest the validity of their wellness programs on satisfying the standard.

34. See H.R. Rep. No. 101-485 (Pt. II), 101st Cong., 2d Sess. 53 (1990) (“A growing number of employers today are offering voluntary wellness programs in the workplace. These programs often include medical screening for high blood pressure, weight control, cancer detection, and the like. As long as the programs are voluntary and the medical records are maintained in a confidential manner and not used for the purpose of limiting health insurance eligibility or of preventing occupational advancement, these activities would fall within the purview of accepted activities.”).

necessity requirement for “voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site.”³⁵ That exception, and particularly the voluntariness requirement that it imposes, has been the focus of the recent legal controversies regarding workplace-wellness programs.³⁶

Voluntariness is an extremely contested concept in the law. Webster’s defines “voluntary” as “proceeding from the will or from one’s own choice or consent” or “unconstrained by interference.”³⁷ But, of course, all choices are made under constraint.³⁸ A voluntariness requirement thus cannot demand that a choice be free from all constraint or influence. Rather, a determination that a choice is voluntary is necessarily a normative judgment that the constraints under which that particular choice was made are neither so great, nor of a sufficiently problematic type, for the law to vitiate the choice. How one makes that normative judgment might depend on considerations that are specific to the context in which a particular choice is made, on one’s broader normative commitments, or both. For example, a strong believer in a conventional libertarian understanding of freedom of contract might say that, in the absence of force, fraud, or perhaps an unusual degree of monopsony power, any condition imposed by an employer on an employee is voluntary; after all, the worker can always refuse the condition and look for another job.³⁹ Others might find a lack of voluntariness precisely because it can be so difficult to find work elsewhere if one loses one’s job.⁴⁰ Still others might find a work condition inconsistent with voluntariness because it exceeds a normative limitation on the proper power of employers. For example, I have argued that, as a matter of social equality, employers should not be permitted to leverage the economic power they have over workers to control their out-of-work lives.⁴¹

Although normative considerations like these are key to understanding and applying a voluntariness requirement, they rarely appear on the face of

35. 42 U.S.C. § 12112(d)(4)(B) (2012).

36. *E.g.* Michelle Andrews, *Government Says Bosses Can’t Force Workers To Get Health Tests*, NPR (Dec. 2, 2014, 10:55 AM), <http://www.npr.org/sections/health-shots/2014/12/02/367842386/government-says-bosses-cant-force-workers-to-get-health-tests> (discussing the EEOC’s lawsuit in *Honeywell International*).

37. *Voluntary*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/voluntary> (last visited Apr. 1, 2017).

38. *See generally* Martha Minow, *Choices and Constraints: For Justice Thurgood Marshall*, 80 GEO. L.J. 2093, 2093 (1992).

39. *See, e.g.*, Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 955 (1984).

40. *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 472 (1923).

41. *See* Bagenstos, *supra* note 5, at 253 (suggesting that workplace wellness programs often violate that normative principle).

statutes or court opinions. As a result, the normative work in determining what is voluntary tends to take place offstage. So it is with the ADA's exception for voluntary medical inquiries that are part of an employee-health program.⁴² The statute does not elaborate on what is "voluntary" in this context.⁴³ In 2000, the EEOC issued enforcement guidance that sought to define the term: "A wellness program is 'voluntary' as long as an employer neither requires participation nor penalizes employees who do not participate."⁴⁴ That definition clearly rejected the libertarian free-contract position—a position that would leave no work for the ADA's voluntariness requirement, as conditions on employment would basically never be involuntary if we accepted the free-contract premise.

But the EEOC's guidance did not resolve the more difficult question of what kinds of incentives—short of firing or refusing to hire—vitiating voluntariness. Answering that question, under the EEOC's definition, required deciding what it means to "penalize" employees who refuse to participate. But the concept of a penalty, too, is typically ambiguous and contested in the law and often depends on the same sorts of normative considerations that inform a determination whether a choice is voluntary.

What constitutes a penalty for refusing to participate in a wellness program? One intuitive response is that a penalty is a negative incentive; penalties are thus to be distinguished from rewards, which are positive incentives. But this way of framing the question ends up, once again, just pushing off the normative inquiry to another place. It's a classic baseline problem.⁴⁵ If a penalty (impermissible) takes something away from you when you fail to take a particular action, and a reward (permissible) gives you something when you do take that action, we need to figure out the proper baseline against which to measure whether something has been taken away from you or given to you.

-
42. Rebecca Greenfield, *Employee Wellness Programs Not So Voluntary Anymore*, BLOOMBERG (Jan. 15, 2016, 7:00 AM), <http://www.bloomberg.com/news/articles/2016-01-15/employee-wellness-programs-not-so-voluntary-anymore>.
 43. See 42 U.S.C. § 12112(d)(4)(B) (1990) (Stating merely, "[a] covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site.").
 44. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, EEOC.GOV (July 27, 2000), <https://www.eeoc.gov/policy/docs/guidance-inquiries.html>.
 45. See Louis Michael Seidman & Mark V. Tushnet, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 31-38 (1996); see also Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 875 (1987).

A common approach to the baseline question is to look to legal entitlements.⁴⁶ If one person offers another a choice between two outcomes, both of which would deprive the second person of a legal entitlement, that would render the choice involuntary. The paradigm case is, of course, “your money or your life.”⁴⁷ But the prevalence of at-will employment in the United States would mean that a baseline of legal entitlements would provide no protection to most employees. “Sign up for the wellness program or you’re fired” gives at-will employees an option that would not deprive them of any legal entitlement because they have no entitlement to their job.⁴⁸ The far more common proposition of “sign up for the wellness program or forgo the opportunity to earn some money” would seem at least as voluntary on this analysis—the lesser power included within the greater. But a law that prohibited employers from making medical inquiries as part of a wellness program unless participation was “voluntary” and then treated participation as voluntary as a matter of law whenever the workers were employed at will would do very little work. There is no reason to believe that the Congress that enacted the ADA intended for the provision to have such a minuscule scope. Nor would a reasonable reader understand the word “voluntary,” in this context, as imposing such a transparently thin requirement.

A fair approach to the baseline problem requires looking beyond the prior legal entitlements of workers. One intuitive way of addressing the problem would be to focus on the express form that an offer takes. If an employer proposes to increase a worker’s base salary for participating in a wellness program, that would count as a reward, while if the employer proposed to decrease the base salary for refusing to participate, that would count as a penalty. The problem here should be obvious: employers generally have the managerial prerogative to set pay at whatever level they want, so long as they do not discriminate based on specifically forbidden factors such as race, sex, age, and disability. That basic fact makes a purely formal approach highly manipulable. To take a stylized example, an employer could set every employee’s salary at \$30,000 but cut that amount by \$1000 for employees who refuse to participate in a wellness program. Or the same employer could set every employee’s salary at \$29,000 and augment that amount by \$1000 for employees who agree to participate in the program. In terms of the financial cost to workers of refusing to participate in the wellness program, these two regimes are the same.

46. See, e.g., Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 (1972).

47. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2605 n.12 (2012) (“Your money or your life’ is a coercive proposition, whether you have a single dollar in your pocket or \$500.”).

48. See Joel Rogers, *Divide and Conquer: Further “Reflections on the Distinctive Character of American Labor Laws”*, 1990 WIS. L. REV. 1, 9–10 n.26 (1990).

Should they receive decisively different legal treatment simply because of the formal difference between them?⁴⁹

The argument that the formal difference should compel a different result would rely heavily on the phenomenon of loss aversion—“the idea that people tend to disfavor a loss from a given reference point more than they favor an equivalent gain.”⁵⁰ An incentive that is framed as a threatened cut in pay will be, all else equal, more likely to lead to compliance than an incentive that is framed as a promised increase in pay.⁵¹ But that does not fully answer the question. For one thing, the effect on compliance will depend not just on the formal framing of the incentive—pay cut or pay increase—but, crucially, on its magnitude. It is easy to imagine that a promise to add \$1000 to the pay of those who participate in a wellness program would lead to a greater uptake than a threat to cut fifty dollars from the pay of those who refuse. If all we care about is the likelihood of securing compliance, other factors are likely to be as important—and, in many cases, more important—than the formal framing of the incentive as an addition or cut to pay.

And why is the likelihood of securing compliance what we care about? Employers adopt incentives—positive and negative—precisely because they hope that those incentives will encourage workers to participate in wellness programs.⁵² It is certainly possible to say that any incentive makes participation in such a program involuntary—that whatever else influences an employee’s decision whether to participate, an employer should not be able to put an additional thumb on the scale in favor of participation. But

-
49. See, e.g., Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in A Positive State*, 132 U. PA. L. REV. 1293, 1359, 1371-1374 (1984) (discussing “history as a baseline”). A related formal approach would use an employee’s existing salary as the base so that any offer of money beyond that salary counts as a record and any deduction from that salary counts as a penalty. Alternatively, one might use the salary an employee expected to be earning (taking into account any anticipated salary increase) as the base. These approaches would have all of the same problems articulated in the text, if not more. See *infra* note 51.
50. Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 129 (1994); see generally Eyal Zamir, *Loss Aversion and the Law*, 65 VAND. L. REV. 829, 834-43 (2012).
51. See generally Zamir, *supra* note 50, at 836. An employee’s reference point need not be the salary that the employer designates as the base rate of pay. It might be the salary the employee received immediately before the announcement of the wellness program, or it might be the salary the employee previously *expected* to be receiving (taking account of anticipated increases in pay) by the time the wellness program was put into effect. The empirical psychological literature suggests that employees might well adopt *any* of these possible reference points. The uncertainty in identifying which reference point employees will adopt in any particular context presents an additional difficulty in applying a formal positive-incentive/negative-incentive distinction. But even if we could solve *that* difficulty, the more fundamental problem identified in the text would still exist.
52. See, e.g., SOEREN MATTKE ET AL., RAND CORP., INCENTIVES FOR WORKPLACE WELLNESS PROGRAMS (2015).

doing so requires an argument. And it cannot be an argument that is based on the mere fact that an incentive is successful. To determine whether the incentive renders a choice involuntary, we must ask not just whether the influence was effective, but whether it was effective in a way that was, in some way, normatively objectionable.

The better way of reading the ADA's voluntariness requirement for wellness programs, I would suggest, is that the requirement bars employers from imposing incentives that give an employee "no fair choice" but to participate.⁵³ What "no fair choice" means is, of course, an open question.⁵⁴ But it is easy enough to suggest some guideposts that connect to basic purposes of the ADA.

Starting with the most general point, the ADA is, in the relevant respect, a law mandating and limiting the terms of the employment relationship. Employment laws like the ADA necessarily reject the libertarian free-contract premise that because workers can always seek another job we should not be concerned about the terms imposed by private employers.⁵⁵ This rejection reflects, in part, a conclusion that workers are, in general, asymmetrically vulnerable in the employment relationship—that it is generally much easier for an employer to find another worker than it is for an employee to find another job.⁵⁶ It reflects a conclusion that the workplace itself is a location for the exercise of power with which the polity might properly be concerned—that the law appropriately limits the ways people with relatively more power treat others with relatively less, particularly in a relationship like employment that is so central to the day-to-day lives of most adults.⁵⁷

These points come into sharper relief when we focus on the premises of employment laws, like the ADA, that prohibit discrimination. Laws prohibiting employment discrimination rest in part on the premise that integration is a positive value—that it is in society's interest for workplaces to bring together people across all of the identity axes along which discrimination is prohibited.⁵⁸ And they rest in part on the premise that members of disempowered groups—whether defined by race, sex, age, disability, or the other forbidden axes of discrimination—ought not to bear greater burdens than their fellow employees.⁵⁹ In particular, if employers are permitted to discriminate and some employers do, then members of

53. See Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How A Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 520 (2003).

54. See *id.* at 521 (calling this concept "amorphous").

55. See, e.g., Epstein, *supra* note 39, at 951.

56. See Bagenstos, *supra* note 5, at 238.

57. *Id.* at 264.

58. See ELIZABETH S. ANDERSON, *THE IMPERATIVE OF INTEGRATION* 22 (2010).

59. See Bagenstos, *supra* note 5, at 228.

discriminated-against groups will typically receive lower wages from those employers who are willing to hire them. A key function of antidiscrimination laws is to put all workers, when compared across the forbidden axes of discrimination, on the same footing in dealing with their employers.⁶⁰

And recall the reason for the ADA's prohibition on medical inquiries—that those inquiries may reveal hidden disabilities and thus serve as an occasion for discrimination. When an employer conditions a payment on a worker's agreement to provide medical information as part of a wellness program, an employee with a hidden disability faces a choice: reveal the information and place herself at risk of discrimination, or forgo a payment that her nondisabled coworkers can receive without putting themselves at similar risk. Seen in that way, the employer's offer replicates paradigm situations that the ADA aimed to prevent—the driving out of workers with disabilities from particular workplaces and the suppression of their wages in the workplaces that would hire them.

This analysis suggests a robust understanding of voluntariness in the context of the ADA's medical-inquiry provisions. A monetary incentive for participating in a wellness program that requires employees to provide otherwise private medical information, in this view, should render the decision to participate involuntary. And that is precisely because such an incentive puts workers with disabilities to the type of choice from which the ADA was designed to protect them. It should not matter whether the incentive is formally positive ("Earn extra money if you give us your information") or negative ("We'll cut your pay if you don't give us your information"), even if an incentive framed as a pay cut is more likely to lead workers to participate in the program. Nor should it matter whether the money at stake is a lot or a little, even though we can expect that workers will be more likely to participate in the program if more money is at stake. What should matter is the structure of the situation—that the worker with a disability must place herself at risk of discrimination or earn less money than the employer would otherwise pay her. If an employer paid nondisabled workers fifty dollars more per year than workers with disabilities, that would constitute impermissible discrimination. And if hiring discrimination by some employers had the overall effect of depressing disabled workers' wages by fifty dollars per year, that would be a clear violation of the ADA notwithstanding the small monetary stakes. It is the structure of the incentive, not the size, that matters.

III. The EEOC and Voluntariness in Wellness Programs

In Part II, I argued that the best interpretation of the ADA's voluntariness requirement would not permit employers to give workers any financial incentive to provide private health information as part of a

60. See Rachel A. Spector, *"Dignified Jobs at Decent Wages": Reviving an Economic Equity Model of Employment Discrimination Law*, 36 BERKELEY J. EMP. & LAB. L. 123 (2015) (providing a nice recent discussion).

wellness program. As I discuss in this Part, the EEOC has taken a dramatically different approach. The Commission's 2016 wellness rules permit employers to impose large monetary costs, whether framed as rewards or penalties, on workers who refuse to provide their health information.⁶¹ I argue that the portions of the new regulations that permit those incentives should be invalidated.

Controversies regarding the application of the ADA to wellness programs heated up significantly in the last few years of the Obama Administration. The immediate trigger was the EEOC's filing of a set of lawsuits challenging the programs adopted by particular employers.⁶² These lawsuits spurred a backlash from business interests, who heavily lobbied the White House to get the Commission—nominally an independent agency, but one made up of presidential appointees—to back off.⁶³ After that lobbying effort, the EEOC announced its new regulations, which adopted an extremely loose standard of voluntariness.⁶⁴

It happened like this: in the late summer and early fall of 2014, the EEOC brought three well-publicized suits challenging employer wellness programs. The first of these cases, *EEOC v. Orion Energy Systems, Inc.*, involved a wellness program in which participants were required to submit a health-risk assessment and other medical information.⁶⁵ The EEOC alleged that the employer shifted the entire health-insurance-premium cost, including what would otherwise have been the employer's share, onto those workers who refused to participate.⁶⁶ The Commission also alleged that the employer had fired a worker who refused to participate.⁶⁷ The second case, *EEOC v. Flambeau, Inc.*, involved similar allegations.⁶⁸ Participants in the employer's wellness program were required to submit a health-risk assessment and undergo medical tests.⁶⁹ If employees refused to participate, the employer canceled their health insurance and thus required them to pay for their own insurance without any employer

61. 29 C.F.R. § 1630.14(d)(3) (2016).

62. See *Orion Energy Sys. Inc.*, 145 F. Supp. 3d at 841; *Flambeau, Inc.*, 131 F. Supp. 3d at 849; *Honeywell Int'l, Inc.*, 2014 WL 5795481 at *2.

63. See Sharon Begley, *Exclusive: U.S. CEOs Threaten to Pull Tacit Obamacare Support Over "Wellness" Spat*, REUTERS (Nov. 29, 2014), <http://www.reuters.com/article/us-usa-healthcare-wellness-exclusive-idUSKCN0JDOAC20141129>.

64. 29 C.F.R. § 1630.14(d)(2)(i), (iii) (2016).

65. See Complaint, *E.E.O.C. v. Orion Energy Sys., Inc.*, No. 1:14-cv-01019, at ¶ 11 (E.D. Wis., filed Aug. 20, 2014).

66. See *id.* ¶¶ 16-18.

67. See *id.* ¶ 20.

68. See *Flambeau, Inc.*, 131 F. Supp. 3d at 851.

69. See *id.* at 852.

contribution.⁷⁰ Finally, in *EEOC v. Honeywell, Inc.*, the Commission alleged that the employer imposed additional costs of up to \$4000 on employees who refused to submit to biomedical testing as part of its wellness program.⁷¹

These cases met mixed success at best. The district court granted summary judgment to the employer in *Flambeau*;⁷² the Seventh Circuit recently affirmed that judgment on procedural grounds without reaching the merits.⁷³ The district court denied the EEOC's motion for a preliminary injunction in *Honeywell*,⁷⁴ and the EEOC did not pursue the case any further. The EEOC and Orion Energy recently settled their case.⁷⁵

But the voluntary-wellness cases in the EEOC's 2014 trio were more important for the backlash they triggered than for the judgments the courts reached. Particularly after the EEOC filed the *Honeywell* case, business groups reacted harshly. They described the Commission's actions as "outrageous," as targeting popular wellness-plan features such as premium reductions for participation, and as creating a conflict between the ACA—which allows quite significant financial incentives for wellness program participation—and the ADA—which, in the then-apparent view of the EEOC, did not.⁷⁶ A number of these groups complained to the White House

70. *See id.*

71. *Honeywell*, 2014 WL 5795481 at *1-2.

72. *See Flambeau*, 131 F. Supp.3d at 852. *See id.* at 855 (holding the employer's wellness program was protected under the ADA's insurance safe-harbor provision); 42 U.S.C. § 12201(c)(2) (Stating that the ADA "shall not be construed to prohibit or restrict," among other things, an employer 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."); The court concluded that the wellness program was a term of the employer's health insurance plan—because participating in the program was a condition of receiving insurance—and that the insurance plan underwrote, classified, or administered risks. *See Flambeau*, 131 F. Supp.3d at 855-856. Although engagement with that question would take me beyond the scope of this essay, it should be apparent that the *Flambeau* court's decision reads the safe-harbor provision as creating a ready means of evading the ADA's substantive provisions. The better reading of the safe-harbor provision, I would suggest, would interpret it as applying only to those plan rules that themselves underwrite, classify, or administer risks—and not to other practices that an employer decides to tie to receipt of health insurance. In this respect, my views largely accord with those of the EEOC. *See* 81 Fed. Reg. at 31,130-31,131.

73. *See Equal Employment Opportunity Comm'n v. Flambeau, Inc.*, 846 F.3d 941 (7th Cir. 2017).

74. *See Honeywell*, 2014 WL 5795481 at 1*-2*.

75. *See EEOC, Wisconsin Employer Resolves EEOC Case Involving Wellness Program and Retaliation* (Apr. 5, 2017) <https://www.eeoc.gov/eeoc/newsroom/release/4-5-17a.cfm>.

76. Stephen Miller, *EEOC's Wellness Lawsuits Target Incentives, Spark Criticism*, Soc'y FOR HUMAN RESOURCES MGMT. (Nov. 3, 2014),

and threatened to withhold any further support for the Affordable Care Act unless the EEOC changed its approach to this issue.⁷⁷

In the wake of this pressure, in April 2015, the EEOC issued proposed regulations addressing the application of the ADA to workplace-wellness programs.⁷⁸ The Commission issued its final rule, which tracked the proposed rule in the relevant respects, in May 2016.⁷⁹ That rule requires that any workplace wellness program “be reasonably designed to promote health or prevent disease.”⁸⁰ It also provides a very specific definition of “voluntary” for determining whether medical inquiries associated with workplace health programs are permissible.⁸¹ To be voluntary, according to the EEOC’s new rules, the program may “not require employees to participate” or otherwise retaliate against employees in violation of the ADA;⁸² must provide to employees a written notice that informs them of what information will be obtained, the purposes for which that information will be used, and the privacy protections that will guard that information;⁸³ and may not deny health coverage or impose a cost that is greater than thirty percent of the total cost of self-only health insurance.⁸⁴ The new regulations make clear that “the use of incentives (financial or in-kind) in an employee wellness program, *whether in the form of a reward or penalty*, will not render the program involuntary if the maximum allowable incentive available under the program” does not exceed the thirty percent threshold.⁸⁵

Because Congress explicitly gave the EEOC authority to issue regulations implementing the employment provisions of the ADA, the Commission’s new wellness rule will be controlling if it reflects a reasonable interpretation of the term “voluntary.”⁸⁶ In Part II of this piece, I argued that

<https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/eec-sues-honeywell.aspx>.

77. See Begley, *supra* note 63.
78. See Amendments to Regulations Under the Americans with Disabilities Act, 80 Fed. Reg. 21,659 (Apr. 20, 2015).
79. See Regulations Under the Americans with Disabilities Act, 81 Fed. Reg. 31,126 (May 17, 2016).
80. 29 C.F.R. § 1630.14(d)(1) (2016).
81. 29 C.F.R. § 1630.14(d)(2)(i), (iii) (2016).
82. *Id.*
83. 29 C.F.R. § 1630.14(d)(2)(iv) (2016).
84. 29 C.F.R. § 1630.14(d)(2)(ii), (3) (2016); see 29 C.F.R. § 1630.14(d)(3). The self-only policy that to which the 30 percent factor is applied depends on whether the employer provides health coverage; if so, whether the employer offers more than one plan; and if so, whether the wellness program is limited to participants in a particular plan.
85. 29 C.F.R. § 1630.14(d)(3) (2016) (emphasis added).
86. See *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002).

the best interpretation of that term, in the context of the ADA's provision addressing workplace health programs, would bar employers from providing any monetary incentive to reveal private medical information. If my argument is correct, that is a reason why the EEOC should not have adopted the definition of "voluntary" that it did in its recent regulations. But it is not, in and of itself, a reason to invalidate those regulations. It is hornbook administrative law—at least for now—that "if a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."⁸⁷ The question is not whether the EEOC's wellness rule adopts the best interpretation of "voluntary," but instead whether it adopts a reasonable one.

Even with this standard in view, however, there are good arguments that the EEOC's definition fails the test. According to the Kaiser Family Foundation, the average annual premium for self-only coverage in the first half of 2015 was \$6251.⁸⁸ Thirty percent of that number is \$1875.30. Note that the median household income in 2014 was just under \$54,000, and forty percent of American households earned less than \$42,000.⁸⁹ Many workers would find it impossible to refuse to participate in a wellness program when so much money is at stake. And even the \$1875.30 figure understates the cost that many employees will be required to pay under the new rule. The Kaiser Family Foundation notes that "as a result of differences in benefits, cost sharing, covered populations, and geographical location, premiums vary significantly around the averages for both single and family coverage."⁹⁰ For eighteen percent of covered workers, the self-only premium in 2015 was \$7501 or higher,⁹¹ which would mean that employers could impose a cost of \$2250.30—or even more—on workers who refuse to provide their medical information. Forgoing so much money would be a significant burden for all but the most comfortable workers. Requiring workers to absorb such a cost to shield their private medical information would not be, in any reasonable sense, understood as a voluntary choice.

Another way of looking at this issue is to consider the proportionate effect of a thirty-percent-of-coverage penalty on workers' health insurance bills. In 2015, the average employee's share of self-only coverage was

87. Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

88. KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, EMPLOYER HEALTH BENEFITS: 2015 ANNUAL SURVEY (2015).

89. CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-252, INCOME AND POVERTY IN THE UNITED STATES: 2014 at 5 (2015).

90. See KAISER FAMILY FOUND., *supra* note 88, at 1.

91. *Id.* at 3.

eighteen percent of the total coverage cost.⁹² Allowing an employer to impose an additional thirty percent of the total cost on workers would more than double such an employee's insurance bill.

The Commission borrowed the thirty-percent rule from HIPAA and the Affordable Care Act, which state that a health-contingent wellness program can impose incentives of up to thirty percent of the total cost of self-only coverage (fifty percent if the goal of the program is smoking cessation).⁹³ The EEOC's regulations extend that rule to participatory wellness programs.⁹⁴ Notably, HIPAA and the Affordable Care Act do not state that a thirty-percent-of-coverage penalty is consistent with voluntariness; they merely state that those two statutes do not prohibit employers from imposing such a penalty on nonparticipating employees.⁹⁵ Nor do HIPAA and the ACA preempt other federal regulation of wellness programs. To the contrary, as the EEOC specifically recognized, the final ACA wellness regulations specifically "recognize that compliance with HIPAA's nondiscrimination rules (as amended by the Affordable Care Act), including the wellness program requirements, is not determinative of compliance with any other provision of any other state or federal law, including, but not limited to, the ADA."⁹⁶ Taken together, HIPAA and the ACA on the one hand and the ADA on the other impose two relevant requirements on workplace wellness programs: (1) health-contingent programs may not impose a penalty that exceeds thirty percent of the total cost of coverage or they will violate the first two statutes, and (2) even if they satisfy that first requirement, wellness programs of whatever type may not make medical examinations or inquiries unless they are voluntary.

Because the ADA, unlike HIPAA and the ACA, imposes a voluntariness requirement and because the ADA's requirements stand independently of the requirements of HIPAA and the ACA, the burden on the Commission was to explain how the thirty percent rule was consistent with workers making a voluntary choice to provide their medical information. Yet neither the EEOC's regulation itself nor the preamble to that regulation made any attempt to explain why a choice made in the face of a threat to impose such a large financial cost on nonparticipants is voluntary.⁹⁷ To be sure, the Commission repeatedly asserted that the thirty-percent rule ensures that the choice to participate is voluntary. But it never engaged with the questions of how much burden a thirty-percent-of-coverage penalty will

92. *Id.* at 84.

93. *See* 42 U.S.C. § 300gg-4(j)(3)(A) (2010).

94. 29 C.F.R. § 1630.14(d)(3)(i) (2016).

95. *See* 42 U.S.C. § 300gg-4(j)(3)(A) (2010).

96. 81 Fed. Reg. at 31,128 (citing 78 Fed. Reg. at 33168).

97. *See* 29 C.F.R. § 1630.14 (2016).

impose on workers and whether those workers will realistically be able to refuse to participate in the face of such a large penalty.⁹⁸

Instead, the Commission's only engagement with the relevant questions, if it can be called that, came in a series of *ipse dixit* statements.⁹⁹ The Commission asserted that it had concluded "that allowing certain incentives related to wellness programs, while limiting them to prevent economic coercion that could render provision of medical information involuntary, is the best way to effectuate the purposes of the wellness program provisions of both" the ADA and HIPAA.¹⁰⁰ The Commission also announced that it had

decided that by extending the 30 percent limit set under HIPAA and the Affordable Care Act to include participatory wellness programs that ask an employee to respond to a disability-related inquiry or undergo a medical examination, this rule promotes the ADA's interest in ensuring that incentive limits are not so high as to make participation in a wellness program involuntary.¹⁰¹

And: "Nonetheless, although substantial, the Commission concludes that, given current insurance rates, offering an incentive of up to 30 percent of the total cost of self-only coverage does not, without more, render a wellness program coercive."¹⁰² But the Commission made no effort to explain the basis for these conclusions. Surely many workers would find a penalty of nearly \$2000—one that more than doubles their health-insurance bill—to be one that imposes "economic coercion that could render provision of medical information involuntary," for example.¹⁰³ The EEOC made no effort to explain why employees would not experience such a penalty as coercive or under what conception of voluntariness such a penalty would not be coercive. Because the EEOC did not explain how its thirty-percent rule connected to the textual meaning of "voluntary" or any of the normative considerations that underlie the application of that term, the new rule hardly counts as an interpretation of the statutory term at all. It is more apt to call the rule an agency announcement that certain practices will satisfy the statute.

Under standard principles of administrative law, the EEOC's series of *ipse dixit* statements is insufficient to justify the Commission's new thirty-

98. *See id.*

99. *See* Equal Employment Opportunity Commission: Rules and Regulations: Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. at 31,126-31 (May 17, 2016) (codified at 29 C.F.R pt. 1630).

100. *Id.* at 31129.

101. *Id.* at 31132.

102. *Id.* at 31133.

103. *Id.* at 31129.

percent rule.¹⁰⁴ Agencies are required to “provide a reasoned explanation” for new policies.¹⁰⁵ The “reasoned explanation” cannot “rest[] on reasoning divorced from the statutory text.”¹⁰⁶ At least as judged by the Commission’s contemporaneous statements—the only proper basis for evaluating an agency action¹⁰⁷—the EEOC’s thirty percent rule scarcely rested on reasoning at all, and it certainly did not rest on reasoning connected to the statutory text. Just last term, the Supreme Court invalidated a Department of Labor rule in which the agency supported its interpretation merely by *ex cathedra* pronouncement rather than “by explaining why that policy ‘is more consistent with statutory language’ than alternative policies.”¹⁰⁸ The EEOC’s adoption of the thirty-percent rule for determining the voluntariness of a wellness program’s requirement to provide medical information should fall for the same reasons.

IV. Conclusion

My goals in this essay have been twofold. First, I have defended what I take to be the best interpretation of the ADA’s voluntariness requirement for medical inquiries that are part of workplace health programs. Under that interpretation, an employer would not be permitted to give any financial incentive—whether framed as a penalty or a reward—to encourage workers to provide their private medical information. Second, I have argued that the EEOC’s 2016 Wellness Rule not only fails to adopt the best interpretation of “voluntary” but does not even adopt a reasonable interpretation of that term. Accordingly, the thirty-percent rule should be invalidated.

104. *E.g.*, *F.C.C. v. Fox Television Stations Inc.*, 556 U.S. 502 (2009).

105. *E.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

106. *Massachusetts v. E.P.A.*, 549 U.S. 497, 532–35 (2007).

107. *See, e.g.*, *Encino Motorcars*, 136 S. Ct. at 2127.

108. *Id.* (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007)); *see also id.* (noting that the Department “stated only that it would not treat service advisors as exempt because ‘the statute does not include such positions and the Department recognizes that there are circumstances under which the requirements for the exemption would not be met’” and that it “continued that it ‘believes that this interpretation is reasonable’ and ‘sets forth the appropriate approach’”) (quoting 76 Fed. Reg. 18,838 (April 5, 2011) (codified at 29 C.F.R. § 779.372(c)(1))).

