The Affordable Care Act and Other Developments in Employment Law (Federal and State)

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Qualified employers must provide health care coverage under the Patient Protection and Affordable Care Act of 2010 or face a fine beginning January 2015. As employers actively attempt to minimize the costs that they will incur, the possibility emerges that employers will retaliate against or harass employees who seek coverage. This Essay discusses the protections for employees under the law and the possible deficiencies in the law. It shows that employers and employees often have contrasting incentives – employers to avoid coverage, and employees to take coverage – and these incentives may result in employer harassment and retaliation of employees. Presently, in an analogous context, employees often raise retaliation claims after they have complained of discrimination, and these claims have had significant success. Because of similarities between these situations, comparable retaliation under the ACA is likely, and perhaps it will occur even more due to the significant specific costs that employers face under the ACA.

I. INTRODUCTION

Almost two and a half years have passed since President Obama signed into law the Patient Protection and Affordable Care Act ("PPACA"; P.L. 111-148, 124 Stat. 119), and its companion amendment, the Health Care and Education Reconciliation Act of 2010 ("HCERA"; P.L. 111-152, 124 Stat. 1029), (collectively,

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the "Affordable Care Act" or "ACA"). The ACA makes a remarkable number of changes to the U.S. health care system, many of which directly affect employers in their role as sponsors of group health plans offered to current and former employees, and their dependents. The ACA also altered many other facets of the U.S. health care delivery and payment system, such as Medicare, Medicaid, and community health services.

Shortly after the ACA was enacted, various legal actions were filed challenging its constitutionality, focusing largely on the individual mandate and the statute's expansion of Medicaid coverage. These key issues were finally decided in the Supreme Court's controversial *National Federation of Independent Business* decision.[1] Additional legal challenges continue to be filed, but it is not expected they will be finally determined any time soon, or that their potential impact will be significant to the ACA overall.

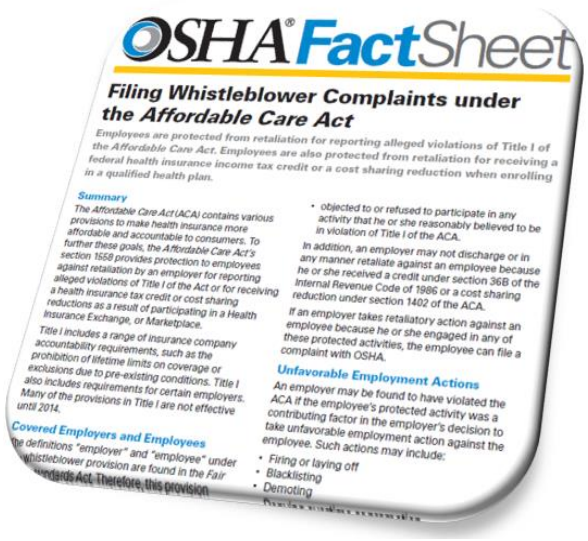
Thus, it appears likely that the ACA is here to stay. A good portion of the law gets implemented in 2014, and it is important for employers to understand the forthcoming rules and how they will affect their providing health benefits to current and former employees. To be sure, significant pieces of the reform architecture were left to the Departments of Treasury, Labor ("DOL"), and Health and Human Services ("HHS") to frame out in regulations and new disclosure forms, and a good deal of it has yet to be determined.

Under one of the most significant parts of the ACA, many employers must provide health care coverage or face financial penalties beginning in January 2015. Likewise, employees must obtain health care coverage or face penalties. Employers

have spoken out against this law because it may increase their costs.[2] Such an increase in costs may motivate employers to react by firing or otherwise retaliating against employees.

The actual text of the ACA, along with provisions of the Employee Retirement Income Security Act ("ERISA"), partially protects employees from retaliation and harassment. The ACA amends the Fair Labor Standards Act to prohibit employers from discharging an employee or discriminating against an employee with respect to any of the terms of his or her employment merely because the employee has received a premium tax credit for use in paying for a "qualified health plan," obtained a cost-sharing subsidy, provided information about a violation of the PHSA provisions, testified or assisted (or is about to testify or assist) in a proceeding concerning such violation, or objected or refused to participate in any activity that the employee reasonably believed to be such a violation. (FLSA § 18C, 29 U.S.C. § 218C). *Effective for plan years beginning on or after January 1, 2014*, these provisions also apply to group health plans and health insurance issuers with respect to individuals. (PHSA § 2706(b)). The relief available to such employee or individual in the event of such a violation will be the same as that provided under the whistleblower protections of the Consumer Product Safety Improvement Act.

*"**OSHA's Fact Sheet explains**: To further these goals, the Affordable Care Act's section 1558 provides protection to employees against retaliation by an employer for reporting alleged violations of Title I of the Act or for receiving a health insurance tax credit or cost sharing reductions as a result of participating in a Health Insurance Exchange, or Marketplace."*



OSHA FactSheet

Filing Whistleblower Complaints under the Affordable Care Act

Employees are protected from retaliation for reporting alleged violations of Title I of the Affordable Care Act. Employees are also protected from retaliation for receiving a federal health insurance income tax credit or a cost sharing reduction when enrolling in a qualified health plan.

Summary

The Affordable Care Act (ACA) contains various provisions to make health insurance more affordable and accountable to consumers. To further these goals, the Affordable Care Act's section 1558 provides protection to employees against retaliation by an employer for reporting alleged violations of Title I of the Act or for receiving a health insurance tax credit or cost sharing reductions as a result of participating in a Health Insurance Exchange, or Marketplace.

Title I includes a range of insurance company accountability requirements, such as the prohibition of lifetime limits on coverage or exclusions due to pre-existing conditions. Title I also includes requirements for certain employers. Many of the provisions in Title I are not effective until 2014.

Covered Employers and Employees

The definitions "employer" and "employee" under whistleblower provision are found in the Fair ...ndards Act. Therefore, this provision

- objected to or refused to participate in any activity that he or she reasonably believed to be in violation of Title I of the ACA.

In addition, an employer may not discharge or in any manner retaliate against an employee because he or she received a credit under section 36B of the Internal Revenue Code of 1986 or a cost sharing reduction under section 1402 of the ACA.

If an employer takes retaliatory action against an employee because he or she engaged in any of these protected activities, the employee can file a complaint with OSHA.

Unfavorable Employment Actions

An employer may be found to have violated the ACA if the employee's protected activity was a contributing factor in the employer's decision to take unfavorable employment action against the employee. Such actions may include:

- Firing or laying off
- Blacklisting
- Demoting

However, given the gaps in protection and the incentives of employers under the ACA, retaliation and harassment under the ACA is likely, and special attention given to employer responsibilities is required to avoid intended and unintended discrimination and retaliation.

The ACA places employers and employees at odds. To begin, however, the responsibilities of employers and employees under the ACA must be addressed.

II. EMPLOYER AND EMPLOYEE RESPONSIBILITIES UNDER THE ACA

The ACA takes two approaches to further its goal of increasing the number of individuals with health insurance. Large employers who do not make appropriate coverage available to employees are subject to a series of fines, and fines apply to employees who refuse to obtain proper health insurance.

A. What Employers Have to Pay

Employers with fifty or more full-time employees or the equivalent must either offer insurance to full-time employees or pay a fine to the federal government.[3] The fine can be triggered in two ways. First, employers can refuse to offer *any* health insurance to employees, in which case the employer must pay $2,000 per full-time employee in excess of thirty employees.[4] Or second, employers can offer "inadequate" health insurance (insurance that is either not sufficiently comprehensive or too expensive)[5] to employees, in which case the employer must pay the lesser of the above fine or $3,000 per eligible employee who opts for, and receives, individual coverage subsidized by the federal government through state health insurance exchange.[6]

B. What Employees Have to Pay

The ACA creates an "individual mandate" requiring individuals, including employees, to obtain health insurance or face a fine.[7] Except for certain very low income individuals, those who do not obtain health insurance must pay a fine of the greater of $95 or 1% of income over the threshold amount necessary to file a federal income tax return in 2014, growing to $695 or 2.5% of income over the threshold in 2016 and indexed to the cost of living thereafter.[8]

III. EMPLOYERS AND EMPLOYEES AT ODDS UNDER THE ACA

Assuming for now that the employer maintains its existing employment structure,[9] both employers and employees can minimize the ACA's financial impact, but their ways of doing so push in opposing directions.

> ***Option 1***- *Provide health care coverage that is both "adequate" and "affordable" under the ACA. Determining if coverage meets these requirements requires analysis of the costs of the plan to full time employees and the number of full time employees eligible under the plan. The employer must also determine if providing coverage is more costly than the fines it would be subject to if it chose not to provide coverage.*

First, the employer can offer "adequate" coverage to employees: this absolves the employer of fines regardless of whether employees elect employer-provided insurance. Adequate coverage is insurance where the employee's premium contributions do not exceed 9.5% of her salary[10] and where the insurance covers, on balance, 60% of the expenses allowable under the insurance.[11] Under this coverage, then, employees who participate in such employer-sponsored coverage cost the employer money, because in many cases the employer must pay sizable portions of the employees' premiums.[12] Thus, for each employee who decides not to take the employer's insurance, the employer saves a substantial amount of money.

> ***Option 2*** *– Do nothing and provide no coverage to the employees, potentially subjecting the employer to a $2000 fine per employee. Rather than simply rejecting this option of out of hand, the employer needs to determine the potential fine it faces and whether or not certain exemptions are applicable that could greatly reduce, if not eliminate the fine entirely.*

There is a second option for employers. An employer can eliminate or reduce fines if it offers employees inadequate coverage (but still offers coverage) and then attempts to minimize the number of employees obtaining individual subsidized coverage from an outside state health insurance exchange. [13] Assuming the applicable fine is $3,000 per employee, [14] each employee foregoing subsidized coverage saves the employer $3,000. The statutory fine regime thus pushes employers to minimize the number of employees who take employer-provided health insurance and, if the health insurance is inadequate, to minimize the number of employees obtaining subsidized health insurance through an exchange. Such employer "encouragement" need not be overt or direct: one can imagine an employer warning its employees of impending job cuts if too many employees sign up for the employer's insurance or individual subsidized insurance.[15]

The ACA pushes employees in precisely the opposite direction, towards obtaining insurance. It does so in two ways. First, employees avoid the ACA's individual mandate fine by having health insurance.[16] And second, employees gain whatever incremental value that having health insurance provides them. Subsidies enacted by the ACA that assist low-income individuals give those individuals even more incentive to elect insurance through the exchanges by offsetting some of their

premium costs.[17] With that said, employees might not take insurance if their jobs would be jeopardized by doing so.

> ***Option 3*** *– Provide coverage that is not considered "affordable" under the ACA, subjecting the employer to a $3000 fine for each employee who chooses not to partake in the employer offered health plan and who instead purchases coverage through an insurance exchange and receives a tax credit or subsidy. Before taking this route, an employer must carefully consider whether it believes its employees will seek coverage through an exchange and whether the savings it will gain from not paying its portion of the employee's health care coverage will offset any potential penalty.*

Employers could attempt to avoid the ACA completely. They could lay off workers to decrease the size of their full-time workforce below fifty so that the ACA does not apply.[18] Employers could also substitute part-time employees for full-time employees even if employers cannot reduce the number of full-time employees below fifty, because part-time employees do not count with respect to employer fines. [19] Or employers could decrease employees' take home pay to make up for employers' higher insurance costs.[20] Separate from any attempts to avoid the ACA completely, employers may be motivated to employ younger workers, who may be less expensive to insure than older ones.[21]

IV. THE PROTECTIONS UNDER THE ACA

The Affordable Care Act's section 1558 provides protection to employees against retaliation by an employer for reporting alleged violations of Title I of the Act or for receiving a health insurance tax credit or cost sharing reductions as a result of participating in a Health Insurance Exchange, or Marketplace.

Title I includes a range of insurance company accountability requirements, such as the prohibition of lifetime limits on coverage or exclusions due to pre-existing conditions. Title I also includes requirements for certain employers.

Many of the provisions in Title I are not effective until 2014.

> Section 1558 of the ACA protects employees from discrimination for obtaining subsidized individual insurance. It states in part that "[n]o employer shall discharge or in any manner discriminate against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment because the employee . . . has . . . received . . . a subsidy [for buying individual insurance]." Under this provision of the ACA, plaintiffs may be reinstated and recover back pay, attorneys' fees, and costs if they prevail.

A. Covered Employers and Employees

The definitions "employer" and "employee" under this whistleblower provision are found in the Fair Labor Standards Act. Therefore, this provision prohibits retaliation by private and public sector employers.

B. Protected Activity

An employer may not discharge or in any manner retaliate against an employee because he or she:

• provided information relating to any violation of Title I of the ACA, or any act that he or she reasonably believed to be a violation of Title I of the ACA to:

- the employer,
- the Federal Government, or
- the attorney general of a state;

• testified, assisted, or participated in a proceeding concerning a violation of Title I of the ACA, or is about to do so; or

• objected to or refused to participate in any activity that he or she reasonably believed to be in violation of Title I of the ACA.

In addition, an employer may not discharge or in any manner retaliate against an employee because he or she received a credit under section 36B of the Internal Revenue Code of 1986 or a cost sharing reduction under section 1402 of the ACA.

If an employer takes retaliatory action against an employee because he or she engaged in any of these protected activities, the employee can file a complaint with OSHA.

C. Unfavorable Employment Actions

An employer may be found to have violated the ACA if the employee's protected activity was a contributing factor in the employer's decision to take unfavorable employment action against the employee. Such actions may include:

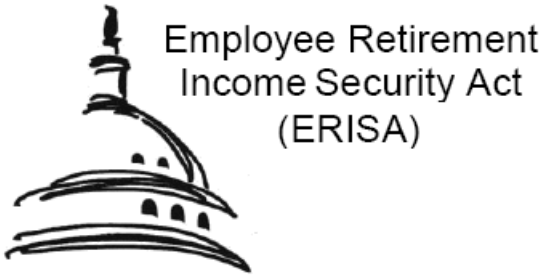
- Firing or laying off
- Blacklisting
- Demoting

- Denying overtime or promotion
- Disciplining
- Denying benefits
- Failure to hire or rehire
- Intimidation
- Making threats
- Reassignment affecting prospects for promotion
- Reducing pay or hours

D. Deadline for Filing Complaints

Complaints must be filed within 180 days after an alleged violation of the ACA occurs. An employee, or representative of an employee, who believes that he or she has been retaliated against in violation of the ACA may file a complaint with OSHA.

V. ERISA



Well before the enactment of the ACA, Congress passed ERISA. ERISA protects employees from employer retaliation or harassment in connection with obtaining and using benefits such as employer-provided health insurance.[22] The

statute provides "[i]t shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under . . . an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ."[23] "[29 U.S.C. § 1140] is intended to discourage employers from discharging or harassing their employees in an attempt to prevent them from using their pension or medical benefits."[24]

Moreover, 29 U.S.C. § 1141 provides that "[i]t shall be unlawful for any person through the use of fraud . . . to restrain, coerce, intimidate, or attempt to restrain, coerce, or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled . . . ."[25] Under these provisions, a plaintiff may recover benefits, enforce his rights, clarify his rights to future benefits, obtain other equitable relief,[26] and recover attorneys' fees and costs if he prevails.[27]

VI. TITLE VII

Similar to the protection for retaliation against an employee electing health insurance coverage, under the employment discrimination laws if an employer retaliates against an employee for complaining about discrimination, the employer is

liable for monetary damages. Title VII, which contains the main employment discrimination laws, states "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter . . . ."[28]

Also similar to the retaliation protection in the health insurance context, attorneys' fees and costs, along with back pay, are recoverable in successful employment discrimination retaliation actions. [29] These protections have been deemed invaluable to discrimination law as adding necessary protection for employees alleging discrimination, and likewise should be valuable in the health care context. Because the laws are very similar,[30] the discrimination area is likely a predictor of actions that employers may take under the ACA.

Although the protections against retaliation in the employment discrimination context are significant, the number of successful retaliation claims made by employees has been surprising. Indeed, retaliation claims constitute the highest percentage of employment discrimination claims presently brought – almost 40% – more than, for example, claims of race and sex discrimination, [31] and employment discrimination claims more generally constitute a considerable portion of the federal docket.[31a]

Retaliation claims have been aided by generous interpretations of the retaliation statutes by courts.[32] The plethora of successful retaliation claims in the discrimination context [33] suggests that employer retaliation persists – that employers retaliate against employees who complain about discrimination – despite penalties for doing so, and

that employers will also retaliate against employees who seek ACA coverage. Because the ACA actually requires employers to pay money to provide health care insurance under the ACA, retaliation may be even more likely to occur under the ACA because employers will want to avoid these specific costs.[34]

VII. NEW JERSEY LAW AGAINST DISCRIMINATION

A recent amendment to the New Jersey Law Against Discrimination ("NJLAD") prohibits employers from retaliating against employees who request certain information from co-workers regarding their salary, benefits, or other job information for the purpose of uncovering potential pay discrimination.

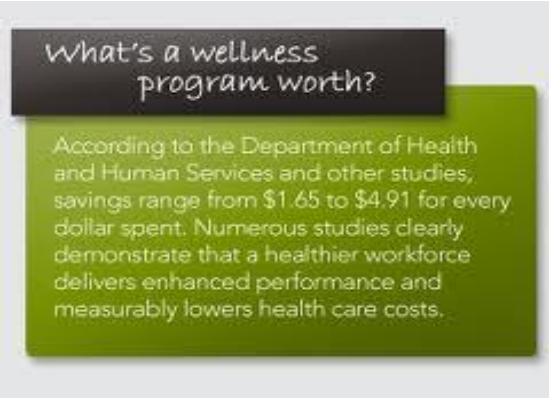
Specifically, on August 29, 2013, Governor Chris Christie signed into law Assembly Bill A2648, which permits employees to ask current or former co-workers about their job title, occupational category, salary, *benefits*, and membership in protected classes (e.g., gender, race, ethnicity, military status, or national origin) without fear of reprisal, provided that the purpose of the request is to investigate or take legal action regarding potential discriminatory treatment pertaining to salary, bonuses, or *benefits*. This amendment became effective upon its signing.

Retaliation is prohibited regardless of whether the individual(s) involved actually respond to the request for information. Further, the law makes clear that individuals are not required to disclose their salary or other information in response to such a request.

While this particular New Jersey law limits the circumstances under which employees may ask about co-workers' salary and other job information without reprisal, under federal law (in particular, pursuant to the National Labor Relations Act ("NLRA")), employee discussions about the terms and conditions of employment, including salary, are considered protected concerted activity. The NLRA applies to both union and non-union employees, nationwide.

Employers would be wise to review company policies regarding confidentiality to ensure that they do not prohibit employees from discussing their compensation, *benefits*, or other job information with current or former co-workers, or otherwise engaging in potentially protected concerted activity. Employers should also take steps to ensure that managers, human resources personnel, and others are aware that employees should not be prohibited from discussing salary, *benefits*, or other terms and conditions of employment.

VIII. EEO LEGAL CONSIDERATIONS & THE ACA-WELLNESS PROGRAMS



The ACA has been championed in many respects as a law promoting equal treatment for women, racial and ethnic minorities and assisting those suffering from disabilities.[35] Even so, from an EEO perspective, certain programs implemented under the ACA may be subject to challenge by the EEOC. In particular, employer wellness programs, which are used as a measure to contain health care costs, have come under particular scrutiny.

Under the ACA, wellness programs are generally encouraged for both large and small employers. For example, the ACA provides grants for up to five years to small employers that establish wellness programs.[36] it also permits employers to offer employee rewards in the form of discounts and waivers in connection with wellness programs and increases the amount of the incentive that can be offered.[37]

However, there has already been concern expressed by disability consumer groups regarding the implementation of such wellness programs from an ADA perspective. As an example, on January 25, 2013, members of the Consortium for

Citizens with Disabilities (CCD), a group of 22 national disability groups, submitted comments to the Employee Benefits Security Administration (EBSA), which is the division of the Department of Labor partly responsible for drafting proposed rules implementing the ACA.[38] The CCD's comments concern nondiscrimination in workplace wellness programs.

According to the submission, while the proposed rules included some protections for consumers, the CCD has urged the DOL to establish "clear requirements that wellness programs must comply with the Americans with disabilities Act."[39] The CCD focuses on "the potential of wellness programs to discriminate against individuals with disabilities, particularly with the use of financial incentives and penalties tied to health status that jeopardize employee's access to affordable, quality health care."[40]

According to the CCD, Congress enacted the Act's provisions concerning wellness programs and did not insulate employers from compliance with other laws, such as the Americans with Disabilities Act (ADA), Title VII, Age Discrimination in Employment Act (ADEA) or Genetic information nondiscrimination Act (GINA). The CCD contends that Congress "considered and rejected" amendments concerning wellness programs that would have addressed that very issue.[41] The CCD thus argues, "[t]he ADA and ACA therefore must be read together and regulations implementing the wellness programs provisions of the ACA should state unequivocally that the ADA is equally applicable."[42]

To date, there has been no formal regulation or detailed guidance from the EEOC concerning wellness programs since the implementation of the ACA. However,

in general, the EEOC has taken a very restrictive view concerning what is permissible under a wellness program.

A brief history of the EEOC's past informal treatment of employer wellness programs may assist in determining what the future may hold. The EEOC first addressed the topic in July 2000, when issuing guidance on disability-related inquiries, and included a "Q & A" regarding whether it was permissible for an employer to make disability-related inquiries or conduct medical examinations as part of a voluntary wellness program.

The EEOC addressed the meaning of the term "voluntary" in the context of wellness programs, and expressly provided that a program will only be voluntary "as long as an employer neither requires participation nor penalizes employees who do not participate."[43] The EEOC's response underscored that "(t)he ADA allows employers to conduct voluntary medical examinations and activities, including voluntary medical histories…without having to show that they are job-related and consistent with business necessity," including "blood pressure screening, cholesterol testing, glaucoma testing, and cancer detections screening."[44]

In 2009, the EEOC issued numerous opinion letters regarding wellness programs.[45] In one of the earlier opinions, the EEOC stated an employer could not require its employees to take a health risk assessment (including disability-related inquiries and medical examinations) as a prerequisite for obtaining health insurance coverage. In so discussing, the EEOC stated that such a requirement "did not appear to be job-related and consistent with business necessity, and therefore would violate the ADA."

In reliance on the EEOC's 2000 guidance, the EEOC further opined, "(e)ven if the health risk assessment could be considered part of a wellness program, the program would not be voluntary, because individuals who do not participate in the assessment are denied a benefit (i.e., penalized for non-participation) as compared to employees who participate in the assessment."[46]

In another opinion letter from August, 2009, the EEOC reiterated this opinion, stating that a wellness program that required employees to complete a health risk assessment in order to receive monies from an employer-funded reimbursement arrangement was likely violating the ADA because it penalized any employee who did not complete the questionnaire by making that employee ineligible to receive reimbursement for health expenses.[47] However, the EEOC qualified its opinion in one limited respect, stating that certain questions on the subject health risk assessment were not disability-related and gave examples, including whether an employee sees a personal doctor for routine care or as a healthcare directive, questions about how many servings of vegetables or fruit an employee eats, whether he takes a vitamin supplement, whether he eats breakfast and how much he exercises.[48]

In 2010, the EEOC issued final regulations implementing Title II of GINA.[49] The GINA final rule prohibits employers for offering a financial incentive for individuals to provide genetic information in connection with a wellness program.

In 2011, the EEOC issued an opinion letter on wellness programs following enactment of GINA. The employer requested the EEOC to "make clear that: (1) offering incentives for participation in wellness programs does not violate the ADA or GINA; and (2) family medical history provided voluntarily may be used to guide

employees into disease management programs."[50] The EEOC was non-committal regarding whether, and to what extent, Title I of the ADA allows an employer to offer "financial incentives for employees to participate in wellness programs that include disability-related inquiries (such as questions about current health status asked as part of a health risk assessment) or medical examinations (such as blood pressure and cholesterol screening to determine whether an employee has achieved certain health outcomes)." The EEOC simply stated that it would "carefully consider" the comments offered on this "important issue."[51]

In dealing with GINA compliance, the EEOC's Associate Legal Counsel similarly opined that an employer "may use the genetic information voluntarily provided by an individual to guide that individual into an appropriate disease management program." However, financial incentives could not be limited. specifically, "if that program offers financial incentives for participation and/or for achieving certain health outcomes, the program must also be open to employees with current health conditions and/or to individuals whose lifestyle choices put them at increased risk of developing a condition."[52]

Finally, in 2013, the EEOC issued another informal opinion letter regarding wellness programs.[53] Here, the employer was offering employees with certain health conditions a waiver of the health plan's annual deductible if the employee met certain requirements, such as enrollment in a disease management program or adherence to a doctor's exercise and medication recommendations. In defining the program as a wellness program, the EEOC stated that the plan could possibly comply with the EEOC so long as the employer provided reasonable accommodation, absent undue

hardship, to employees who were unable to meet the outcomes or engage in specific activities due to a disability.

The EEOC also stated that if reasonable accommodation was provided, it would not be unlawful to remove an employee from this "higher benefit" plan for failing to meet the plan's requirements so long as the employee could still participate in the standard benefit plan.

While the EEOC's historical treatment of wellness programs casts a potential shadow over many of these programs from an EEO perspective, particularly dealing with potential attacks under the ADA, a recent decision by the Eleventh Circuit, Seff v Broward County, 54 provides support for many employer wellness programs, including health risk assessments. The Seff case involved a class action filed against Broward County alleging a violation of the ADA based on the employer's wellness program. The wellness program consisted of two components: a biometric screening (which entailed a finger stick for glucose and cholesterol) and an online Health risk Assessment questionnaire, which was designed to identify employees who had one of five diseases.[55] Employees with one of the diseases were offered a disease management coaching program, after which they were eligible to receive co-pay waivers for certain medications. Participation in the wellness program was not a condition for enrollment in the group health plan, but a year into the program, the employer imposed a $20 surcharge on each biweekly paycheck for those who refused to participate.[56]

Affirming a district court's summary judgment ruling, the eleventh Circuit held that the employer's wellness program was protected under the ADA's safe harbor

provision. in essence, the safe harbor provision on the ADA does not prevent 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."[57] The district court held that the wellness program constituted a "term" of the employer's group health plan. The Appeals Court affirmed that the wellness program constituted a "term" of the employer's group health plan and, thus, the program fell within the ADA's safe harbor provision.

Bearing in mind this history on wellness programs, employers need to closely monitor the upcoming implementation of all provisions of the ACA in the years to come in order to spot possible EEO issues. Employers should take special care when implementing wellness programs as part of its health care program under the ACA. While mandatory risk assessment questionnaires may pose some risk based on the EEOC's longstanding view that anything other than "voluntary" questionnaires violates the ADA, the "safe harbor" provision in the ADA may be a compelling defense. Employers also should attempt to structure wellness programs so that employees are rewarded for good health, rather than being penalized due to certain health conditions, which could be viewed as disabilities under the ADA.

IX. CONCLUSION

The Affordable Care Act presents some contrasting incentives for employers and employees, and employers face significant costs. Because of these costs, employers may take several different actions, many of which could hurt employees but some of which may be necessary. Currently, the ACA and ERISA provide valuable protections to employees seeking to take advantage of the coverage available under the ACA, but a substantial number of claims of retaliation under the ACA are likely given the significant number of claims in the analogous setting of employment discrimination retaliation.

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1 Nat'l Fed'n of Indep. Bus. v. Sebelius, Nos. 11-393, 11-398, 11-400 (U.S. June 28, 2012).

2 Susan Page, Obamacare: Three Years In, It Faces Steep Challenges, USA Today, May16, 2013, http://www.usatoday.com/story/news/politics/2013/05/16/obamacare- challenges/2166189/ (describing results of Gallup Poll in which approximately 4 of 10 small business owners said they have not hired or grown businesses because of ACA).

3 26 U.S.C. § 4980H(a), (c)(2)(A) (2006 & Supp. V 2011). Solely for the purpose of determining the number of full-time employees, part-time employees are counted as fractional full-time employees proportional to hours worked. 26 U.S.C. § 4980H(c)(2)(E) (2006 & Supp. V 2011).

4 26 U.S.C. § 4980H(a), (c)(1), (c)(2)(D)(i)(I) (2006 & Supp. V 2011). The fine is triggered as long as one full-time employee obtains individual insurance subsidized by the federal government through a state health exchange. Id. at (a)(2).Some commentators believe that employers will stop offering health insurance and pay these associated fines because doing so is the least expensive alternative. Scott Thurm, Will Companies Stop Offering Health Insurance Because of the Affordable Care Act?, WALL ST. J., June 16, 2013, http://online.wsj.com/article/SB10001424127887323582904578488781195872870.html.

5 See infra notes 11–12 and accompanying text.

6 26 U.S.C. § 4980H(b) (2006 & Supp. V 2011). Subsidized overage through a state health insurance exchange is available to certain lower-income individuals. 26 U.S.C. § 36B (2006 & Supp. V 2011). There is some question regarding whether individuals are eligible for subsidies – and hence whether employers are liable for the $3,000 fine per employee – when buying insurance from state exchanges set up by the federal government, which occurs if a state refuses to develop an exchange itself. Twenty-seven states have purely federal exchanges as of August 2013. State, Partnership, or Federal Health Insurance Exchange? Where States Stand So Far, S TATEREFORUM,https://www.statereforum.org/where-states-stand-on-exchanges (last visited Sep. 3, 2013); see also Robert Pear, Most Governors Refuse to Set Up Health Exchanges, N.Y. TIMES, Dec. 14, 2012, http://www.nytimes.com/2012/12/15/us/most-states-miss- deadline-to-set-up-health-exchanges.html?smid=pl-share&_r=0. The IRS, which is tasked with implementing ACA fines and subsidies, has taken the position that subsidies are available in these instances, 77 Fed. Reg. 30377, 30378 (May 23, 2012), and by extension that fines are applicable. Lawsuits have recently been filed challenging this interpretation, and the outcomes could substantially affect future employer and employee behavior. Andrew Zajac, Obama Healthcare Law Challenged in Suit Over Tax Subsidy, BLOOMBERG.COM, May 2, 2013, http://www.bloomberg.com/news/2013-05-02/obama- healthcare-law-challenged-in-suit-over-tax-subsidy.html.

7 The individual mandate was one of the hotly contested issues in the ACA. See, e.g., Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2584–601(2012) (resolving the constitutional challenges to ACA's individual mandate).

8 26 U.S.C. § 5000A (2006 & Supp. V 2011).

9 But see infra Part II.B.

10 See 26 U.S.C. § 36B(c)(2)(C)(i) (2006 & Supp. V 2011) (triggering a fine if the premium contributions exceed 9.5% of salary).

11 See 26 U.S.C.§ 36B(c)(2)(C)(ii)((2006 & Supp. V 2011) (triggering a fine if insurance covers less than 60% of the expenses allowable under the insurance).

12 To avoid triggering a fine, the employer must pay at least enough of the premiums so that the employee's portion does not exceed 9.5% of the employee's pay.

13 See supra note 7 and accompanying text.

14 See id. The exact amount of the fine depends on the number of employees. See id.

15 See generally Steven Greenhouse, Here's a Memo From the Boss: Vote This Way, N.Y. TIMES, Oct. 26, 2012, http://www.nytimes.com/2012/10/27/us/politics/bosses-offering-timely-advice-how-to-vote.html?pagewanted=all (quoting the chief executive of a time- share company's letter to employees claiming that reelecting President Obama would raise employer costs and threaten employees' jobs).

16 See supra note 9 and accompanying text.

17 26 U.S.C. § 36B (2006 & Supp. V 2011) (premium subsidies for individuals and families earning up to 400% of the federal poverty line); 42 U.S.C. § 18071 (2006 & Supp. V 2011) (cost-sharing subsidies for individuals and families earning up to 400% of the federal poverty line). Professors Monahan and Schwarcz have shown that these employer/employee dynamics could push employers to restructure their insurance offerings to cover only healthy employees, to mutual benefit. Amy Monahan & Daniel Schwarcz, Will Employers Undermine Health Care by Dumping Sick Employees?, 97 VA. L. REV. 125, 174–88 (2011); but see David Hyman, PPACA in Theory and Practice: The Perils of Parallelism, 97 VA. L. REV. IN BRIEF 83, 89–91, 96– 97 (2011), http://www.virginialawreview.org/inbrief/2011/11/04/hyman.pdf (arguing

that the problem the Monahan & Schwarcz article identifies may not materialize). We consider here the related issue of employers and employees acting in ways that could make each other worse off.

18 See Emily Maltby & Sarah E. Needleman, Sizing Up Health Costs: How Three Business Owners are Coping with New Insurance Requirements, WALL ST. J., May 29, 2013, http://online.wsj.com/article/SB10001424127887324031404578483482290350740.html. More precisely, employers must reduce their workforce to below 50 full-time equivalent employees. See supra note 4 and accompanying text.

19 See id.; see also Joshua Rhett Miller, Florida Restaurateur to Impose Surcharge for ObamaCare, FOX NEWS, Nov. 15, 2012, http://www.foxnews.com/us/2012/11/15/florida- restaurateur-to-impose-surcharge-for-obamacare/ (profiling restaurant owner who said he would "slash most of the staff's time to fewer than 30 hours per week" in response to the ACA's incentives).

20 See Maltby & Needleman, supra note 24.

21 Cf. Christopher Weaver & Anne Wilde Mathews, One Strategy for Health-Law Costs: Self-Insure, WALL ST. J., May 27, 2013, http://online.wsj.com/article/SB10001424127887323336104578503130037072460.html (indicating that "self-insurance would tend to most benefit employers with younger, healthier workers . . . ").

22 See 29 U.S.C. § 1140.

23 Id.

24 Dewitt v. Proctor Hosp., 517 F.3d 944, 949 (7th Cir. 2008); see also Kowalski v. L&F Prods., 82 F.3d 1283, 1287 (3d Cir. 1996) (holding that an employer may not terminate an employee "when the termination . . . occurred in retaliation for the employee exercising his or her right to receive ERISA-protected benefits") .

25 29 U.S.C. § 1141.

26 29 U.S.C. § 1132(a)(1)(B) & (3)(B).

27 29 U.S.C. § 1132(g)(1).

28 U.S.C. § 2000e-3(a).

29 42 U.S.C. § 2000e-5(g), (k). Additional damages are also recoverable. See infra note 54 and accompanying text.

30 There are other ways in which the laws are similar. Like employment discrimination, the ACA is relevant to employers. Also, like employment discrimination claims, complaints about subsidized coverage must be filed within a shortened statute of limitations. See 29 C.F.R. § 1984.103(d); 42 U.S.C. 2000e-5(e).

31 5U.S. Equal Opportunity Employment Commission, Charge Statistics FY 1997 Through FY 2012, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Aug. 15, 2013).

31a Employment discrimination cases accounted for between 5 and 6 percent of the federal docket. See Kevin M. Clermont & Stewart J. Schwab, Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?, 3 HARV. L. & POL'Y REV. 103, 103 (2009).

32 See generally Alex B. Long & Sandra F. Sperino, Diminishing Retaliation Liability, 88 N.Y.U. L. REV. ONLINE 7, 7–13 (May 2013) (discussing favorable case law but arguing that recent cases may diminish retaliation protection); but see University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517, 2534 (2013) (interpreting the retaliation statute to require but for causation).

33 See B. Glenn George, Revenge, 83 TUL. L. REV. 439, 467 (2008); John M. Husband, Steven T. Collis & Ken Broda-Bahm, Trying Discrimination and Retaliation Claims in Tandem—How Jurors React, 41 COLO. LAW. 43, 46 (May 2012). Many retaliation cases are reported on Westlaw each week. See, e.g., Mahoney v. Donovan, 2013 WL 3239663 (D.C. Cir. June 28, 2013); Howard v. Office of Chief Administrative Officer, 2013 WL 3242113 (D.C. Cir. June 28, 2013); White v. Standard Ins. Co., 2013 WL 3242297 (6th Cir. June 28, 2013); Smith v. Hebert, 2013 WL 3243535 (5th Cir. June 28, 2013); Daugherty v. Warehouse Home Furnishings Distributors, Inc., 2013 WL 3243561 (N.D. Ala. June 28, 2013); U.S. v. Machado-Erazo, 2013 WL 3244823 (D.D.C. June 28, 2013).

34 In some circumstances, there may also be costs for an employer not to retaliate in the discrimination context. For example, in order not to retaliate, they may need to give a person a raise. Additionally, non-financial motivation to retaliate may be stronger in the discrimination context if employers are motivated because they believe an employee should not have made an accusation of discrimination. An analogy could be made between harassment regarding possible ACA or ERISA benefits and harassment in discrimination litigation. Harassment in discrimination litigation is actionable under the employment discrimination laws. However, as seen above, employer harassment in the health insurance context is not adequately protected against.

35 See http://www.healthcare.gov/news/factsheets/index.html. Fact sheets have been issued on The Affordable Care Act and African Americans; The Affordable Care Act and Latinos; The Affordable Care Act for Americans with Disabilities and The Accordable Care Act and Women.

36 Patient Protection and Affordable Care Act, Pub. L. no. 111-148, §10408, 124 stat. 119, 318-319 (2010), amending 42 U.S.C. 2801.

37 Patient Protection and Affordable Care Act, Pub. L. no. 111-148, §1201, 124 stat. 119, 318-319 (2010), amending 42 U.S.C. 300gg-4.

38 The departments of Labor, Treasury, and Health and Human services have jointly released proposed rules on wellness programs. See http://www.healthcare.

39 gov/news/factsheets/2012/11/wellness11202012a.html.

40 See http://www.epilepsyfoundation.org/getinvolved/advocacy/advocacypriorities/Healthcare.cfm, which includes a copy of the January 25, 2013 letter from the CCD, which included the epilepsy Foundation.

41 Id. (Jan. 25, 2013 CCD letter).

42 Id. (Jan. 25, 2013 CCD letter).

43 The CCD submission focuses specifically on the proposed rule that requires health-contingent wellness programs (i.e. requiring to satisfy a standard related to a health factor to obtain a reward) to allow a "reasonable alternative standard" or waiver of the other applicable standard for obtaining the reward.

44 See http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

45 Id. Based on the ADA, while an employer has significant flexibility regarding medical inquiries prior to hire, so long as they are made on a consistent basis for a particular position, any medical related-inquiries after hire can only be made if they are "job related" and "consistent with business necessity."

46 In the first of the opinion letters issued in 2009, the EEOC further elaborated on what would be considered a "voluntary" wellness program, stating that a program would be considered "voluntary", "as long as the inducement to participate did not exceed twenty percent of the cost of employee only or employee and dependent coverage under the plan, consistent with regulations promulgated pursuant to the Health insurance Portability and Accountability Act ('HIPPA')." Incredibly, the EEOC's Associate Legal Counsel withdrew this opinion, taking the view that the inquiry to the EEOC did not raise the issue. The EEOC has not revised that issue to date. See http://www.eeoc.gov/eeoc/foia/letters/2009/ada_disability_medexam_healthrisk.html.

47 Id.

48 See www.eeoc.gov/eeoc/foia/letters/20 09/ada_ hea lth _ r isk _assessment.htm l.

49 Id.

50 75 Fed. r. 216 (Nov. 9, 2010).

51 See htt p://w w w.eeoc.gov/eeoc/foia/letters/2011/ada_ g ina_ incentives.htm l.

52 Id.

53 Id. The opinion letter cited an example from the regulations: "employees who voluntarily disclose a family medical history of diabetes, heart disease, or high blood pressure on a health risk assessment..... and employees who have a current diagnosis of one or more of these conditions are offered $150 to participate in a wellness program designed to encourage weight loss and a healthy lifestyle. This does not violate Title II of GINA.

54 See http://w w w.eeoc.gov/eeoc/foia/letters/2013/ada_wel lness_ programs.htm l.

55 See Seff v Broward County, 691 F. 3d 1221 (11th Cir., 2012).

56 The five diseases were Asthma, Hypertension, diabetes, Congestive Heart Failure, and Kidney disease.

57 The employer discontinued the program a year later, most likely due to the litigation.

58 The court cited the relevant portion of the ADA involving the "safe harbor" provision, 42 U.S.C §12201(c)(2).