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Bargaining for Equality: Wellness Programs, Voluntariness, and the Commodification of ADA Protections

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INTRODUCTION

Wellness programs are commonly implemented in firms that offer employer-sponsored health insurance plans. A wellness program is generally defined as a program aimed at "health promotion or disease prevention."[1] Many employers adopt wellness programs with the belief that guiding employees toward healthier habits will lead to a healthier workforce, thereby lowering the costs of providing health insurance and reducing absenteeism due to illness.[2] These programs have been highly popular among large employers, with over eighty percent of firms employing at least 200 workers implementing some type of wellness program.[3]

The two most common types of wellness programs are participatory and health-contingent programs. Employers use a wide range of both positive and negative incentives to improve employee participation in both types of programs, which can include material goods and reduced premiums, or penalties in the form of increased premiums imposed on employees that do not participate in the program. While both types offer incentives to employees who participate, health-contingent programs require employees to satisfy certain health criteria to

[1] 29 C.F.R. § 2590.702(f)(2016).
[2] Elizabeth A. Brown, *Workplace Wellness: Social Injustice*, 20 N.Y.U.J. LEGIS. & PUB. POL'Y 191, 201 (2017).
[3] Stefanie Brody, *Working Well(Ness): The Impact of the ADA Final Rule on Wellness Program Regulation and A Proposal for A Zero-Incentive Rule*, 11 ST. LOUIS U.J. HEALTH L. & POL'Y 209, 212–13 (2017).

receive a reward. Thus, a health-contingent wellness program may require an employee to lower their cholesterol or weight in order to earn a reward.

Sometimes, participation in either type of wellness program may require the employee to complete a health risk assessment (HRA). HRAs typically require employees to undergo health screenings and disclose information about their medical history.[4] As recently as 2016, over half of firms employing at least 200 workers used HRAs as a part of their wellness programs.[5]

The use of HRAs has prompted criticism from commentators concerned that employers may used the information disclosed in the assessments to make discriminatory employment decisions.[6] For example, an employer may decide against promoting an employee if their HRA suggests they are at high-risk of developing a condition that may affect their ability to work.

Wellness programs and the potential misuse of information disclosed in HRAs is particularly worrisome when considering the nature of the incentives used to make nonparticipation unattractive for employees. While there is plenty to gain from participating in a wellness program, there is also a lot to lose. Since 2016, employers have been able to impose penalties of up to thirty percent of the total cost of an employee's cost of coverage on employees who choose not to participate in a wellness program.[7] However, this was not always the case. Prior to 2016, imposing any penalty on an employee for their nonparticipation in a wellness program ran afoul of the Americans with Disabilities Act.

The ADA prohibits any employer with fifteen or more employees from discriminating on the basis of disability in regard to "hiring, advancement, or discharge of employees, employee

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[4] *Id.*
[5] *Id.*
[6] Elizabeth A. Brown, *Workplace Wellness: Social Injustice*, 20 N.Y.U.J. LEGIS. & PUB. POL'Y 191, 207–08 (2017).
[7] 29 C.F.R. § 1630.14(d)(3)(2016).

compensation, job training, and other terms, conditions, and privileges of employment."[8] The ADA also limits an employer's ability to compel an employee to undergo a medical examination:

> A covered entity shall not require a medical examination and shall not make medical 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.[9]

Thus, the ADA permits an employer to require an employee to undergo a medical examination only if the examination is job-related and consistent with business necessity. However, the ADA carves out an additional exception. Employers are allowed to conduct "voluntary medical examinations, including voluntary medical histories," that are a component of an "employee health program."[10]

The term "voluntary" is problematic here since the statute does not explain what makes a medical examination "voluntary" under these circumstances. In 2000, the EEOC issued guidance which explained what the term meant under this portion of the ADA: "A wellness program is 'voluntary' as long as an employer neither requires participation nor penalizes employees who do not participate."[11] This definition of "voluntary" stood for over a decade until the EEOC provided a new definition of the term in 2016.

The new regulations stated that "the use of incentives 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 thirty percent of the

[8] 42 U.S.C. § 12112(a).
[9] 42 U.S.C. § 12112(d)(4)(A).
[10] 42 U.S.C. § 12112(d)(4)(B).
[11] 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.

employee's total cost of self-coverage.[12] In 2017, the D.C. District Court vacated this component of the regulations.[13] Currently, the EEOC has yet to promulgate any new regulations.

Since the adoption of the 2016 EEOC regulations, a significant amount of scholarly discussion has been devoted to the concept of voluntariness under the ADA and how the EEOC's definition of voluntary may result in increased employment discrimination against individuals with disabilities.

Many commentators have focused on the apparent inefficacy of wellness programs and how that should change the balancing of the interests involved. Generally, wellness programs are crafted with two goals in mind: (1) cost savings and (2) improved employee health.[14] Given that the ADA generally prohibits any medical inquiry that isn't "job-related and consistent with business necessity,"[15] whether or not wellness programs actually achieve their goals with a reasonable degree of success is worth consideration.

An additional requirement for compliance with the ADA is that a wellness program must be "reasonably designed" such that it has a "reasonable chance of improving the health" of participating employees.[16] Indeed, if participation in a wellness programs involves relinquishing some of the protections afforded by the ADA, one would expect measurable improvements in employee health in return. However, the data suggests that wellness programs are not particularly successful at achieving their aims.[17]

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[12] 29 C.F.R. § 1630.14(d)(3) (2016) (emphasis added).
[13] *AARP v. EEOC*, 292 F. Supp. 3d 238 (D.D.C. 2017).
[14] *The Affordable Care Act and Health Promotion: The Role of Insurance in Defining Responsibility for Health Risks and Costs*, 50 DUQ. L. REV. 271, 299-300 (2012)
[15] *Supra*, note 1.
[16] Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.14(d)(1) (2016).
[17] Stefanie Brody, *Working Well(Ness): The Impact of the ADA Final Rule on Wellness Program Regulation and A Proposal for A Zero-Incentive Rule*, 11 ST LOUIS UJ HEALTH L & POL'Y 209, 213 (2017)

The lack of data demonstrating the effectiveness of wellness programs has led some commentators to suggest a "zero-incentive" rule.[18] Given the apparent ineffectiveness of wellness programs, these scholars argue that prohibiting incentives of any kind is the best way to ensure that individuals are not coerced into relinquishing their rights under the ADA. After all, they argue, individuals with disabilities who are "already wracked with medical expenses" are most susceptible to being coerced into participating in these programs.[19] Thus, if participation doesn't result in any measurable effect on employee health, there isn't any competing good to weigh against the coercion inherent in providing incentives for participation.

While this approach deems the presence of any level of incentive to act as a bar to voluntary choice, other approaches take a more data-driven route. Strassle and Berkman argue that "an employer coerces an employee in a way that vitiates voluntariness if, and only if, (1) the employer intentionally threatens the employee with what a *reasonable* person would view as a serious harm unless the employee complies with some demand, and (2) a *reasonable* person would find the threat irresistible and therefore comply."[20] The second prong in their definition of coercion requires determining what level of "threat" a reasonable person would find "irresistible." The authors make this determination by referencing a report from the Federal Reserve which states that a significant number of Americans would be greatly burdened by an unexpected expense of $400.[21] Thus, in their view, any incentive over $400 would be coercive. Of course, such a definition of coercion would result in a significant number of false positives.

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[18] *Id.*
[19] Emily Koruda, *More Carrot, Less Stick: Workplace Wellness Programs & the Discriminatory Impact of Financial and Health-Based Incentives*, 36 B.C. J.L. & SOC. JUST. 131, 138 (2016)
[20] Camila Strassle & Benjamin E. Berkman, *Workplace Wellness Programs: Empirical Doubt, Legal Ambiguity, and Conceptual Confusion*, 61 WM & MARY L REV. 1663, 1706-07 (2020)
[21] *Id.*

However, the authors posit that applying a reasonable person test on a case-by-case basis would be impractical. Other commentators have taken the middle ground and refused to go so far as to identify a certain dollar amount that would constitute coercion, but also reject an absolute prohibition on incentives.[22]

The other extreme is perhaps best exemplified by the Wisconsin court in *EEOC v. Orion Energy Systems, Inc*.[23] In that case, an employer's wellness program, which allowed an employee who completed a health screen to pay no premium at all, was challenged as being involuntary.[24] Since the employer's wellness program was instituted before the 2016 EEOC regulations were promulgated, and the regulations were not held to be retroactive, the court was prompted to provide its own definition of voluntariness. The court held that "even a strong incentive is still no more than an incentive; it is not compulsion."[25] The court asserted that any program that is "optional" is necessarily a "voluntary" one.[26] Thus, the court reasoned that the difficulty of a decision does not render it involuntary. The only relevant consideration is whether non-participation would result in termination or another type of adverse employment action.

This paper is a response to the scholarly discussion about the boundaries of voluntariness under the ADA and suggests a return to the definition of voluntariness that was put forth by the EEOC in the year 2000. Part I will describe the changes in the EEOC's position on this issue since the year 2000. Part II examines how courts have handled the issue. Part III contextualizes

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[22] Kristin Madison, *Employer Wellness Incentives, the Aca, and the ADA: Reconciling Policy Objectives*, 51 WILLAMETTE L. REV. 407, 455-56 (2015).
[23] 208 F. Supp. 3d 989, 1000-01 (E.D. Wis. 2016).
[24] *Id.*
[25] *Id.*
[26] *Id.*

the issue within the larger philosophical discussion of voluntariness and coercion. Part IV examines the concept of voluntariness and coercion as understood in contract law. Part V argues that a return to a definition of voluntariness that prohibits employers from imposing any penalties on employees best serves the goals of the ADA, not because penalties vitiate voluntariness, but because they allow for the commodification of the protections provided by the statute.

I. CHANGES IN THE EEOC'S GUIDANCE

EEOC guidance on the definition of the word "voluntary," as used in the exception carved out by the ADA for voluntary medical inquiries that are part of an employee health program, has undergone significant changes since the year 2000. In 2000, the EEOC issued guidance stating that a wellness program is voluntary "as long as an employer neither requires participation nor penalizes employees who do not participate."[27] While this conception of voluntariness seems straight-forward, closer inspection reveals it to be more ambiguous than it may seem.

While certain adverse employment actions such as termination and demotion are clearly penalties, the distinction between a financial reward and a penalty can be blurry. For example, an employer could set every employee's salary at $29,000, but increase it by $1000 for employees who participate in a wellness program. While this could be considered a positive incentive, it could also plausibly be considered a penalty since an equally qualified employee loses out on

[27] 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.

$1,000 simply because they want to exercise their right under the ADA to keep their medical information private.[28]

The apparent ambiguity of the guidelines garnered significant attention when the EEOC brought a series of suits against employers, alleging that their wellness programs violated the ADA because penalties were imposed on employees who did not participate in the programs.[29] Recognizing that the EEOC's position threatened to invalidate many wellness programs, a number of C.E.O.s were reportedly considering aligning themselves with President Obama's opponents in Congress.[30]

Although compliance with the Affordable Care Act does not necessarily entail compliance with the ADA, executives were confused as to why a "plan in compliance with the Affordable Care Act" would be the target of a lawsuit.[31] In a letter sent to the Labor, Treasury and Health and Human Services cabinet secretaries on November 14, 2014, the Business Roundtable, a group of executives representing more than 200 U.S. corporations, called for a stop to the "inappropriate actions" taken by the EEOC.[32] The letter warned that allowing the EEOC to act in contravention of the provisions of the ACA would "send a message to employers that certain ACA provisions are interpretive only and remain subject to litigation."[33]

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[28] Samuel R. Bagenstos, *The EEOC, the ADA, and Workplace Wellness Programs*, 27 Health Matrix 81, 89 (2017)
[29] *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
[30] 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-exclusiveidUSKCN0JD0AC20141129.
[31] *Id.*
[32] Stephen Miller, *EEOC's Wellness Lawsuits Target Incentives, Spark Criticism*, SOC'Y FOR HUMAN RESOURCES MGMT. (Nov. 3, 2014), https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/eeoc-sueshoneywell.aspx
[33] John Engler, *BRT Letter in Response to EEOC Actions Targeting Employer Wellness Programs*, BUSINESS ROUNDTABLE (Nov. 14, 2014), https://www.businessroundtable.org/archive/resources/brt-letter-response-eeoc-actions-targeting-employer-wellness-programs

The outcry of the business community over the actions of the EEOC focused on the fact that their wellness programs were compliant with the ACA. However, compliance with the ACA is not determinative of a program's compliance with the ADA. The ACA allows health-contingent wellness programs to impose incentives of up to thirty percent of the total cost of self-coverage.[34] Moreover, while the ACA requires that programs be "reasonably designed to promote health or prevent disease," they do not have to be voluntary.[35] Thus, the ACA incentive caps are not meant to set the boundaries of voluntariness.

In contrast to the ACA, under the ADA, all medical inquiries pursuant to a wellness program must be "voluntary."[36] Moreover, according to the EEOC guidelines in place until 2016, a program is only voluntary if it "neither requires participation nor penalizes employees who do not participate."[37] Additionally, compliance with ACA wellness regulations is not determinative of compliance with "any other provision of any other state or federal law, including, but not limited to, the ADA."[38]

Thus, given the distinct requirements of the two statutes, an employer could not be certain that their ACA compliant wellness program was also compliant with the ADA. A health-contingent wellness program that required disclosure of medical information and offered an incentive up to thirty percent of the cost of self-coverage would be compliant with the ACA,

[34] See 42 U.S.C. § 300gg-4(j)(3)(A) (2010).
[35] 42 U.S.C. § 300gg-4(j)(3)(B); Nondiscrimination and Wellness Programs in Health Coverage in the Group Market, 71 Fed. Reg. at 75,018.
[36] 42 U.S.C. § 12112(d)(4)(B).
[37] 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.
[38] 81 Fed. Reg. at 31,128 (citing 78 Fed. Reg. at 33168).

however, that same program would violate the ADA because the penalties imposed render it involuntary.

Perhaps due to the pressure from business groups, or the desire to better align the ADA with the ACA, in 2016 the EEOC promulgated new regulations on the application of the ADA to wellness programs. Under the 2016 regulations, an employee health program is voluntary as long as a covered entity:

(i) does not require participation;
(ii) does not deny coverage to employees who do not participate; and
(iii) does not take any adverse employment action against an employee who does not participate.[39]

Additionally, the new regulations stated that "the use of incentives 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 thirty percent of the total cost of coverage.[40]

The new regulations thus represent a significant departure from the Commission's prior stance. Under the previous regulations, *any* penalty would render a wellness program involuntary. In contrast, the current regulations assert that voluntariness is only vitiated by penalties of a certain *degree*.

[39] 29 C.F.R. § 1630.14(d)(2)(i), (iii) (2016).
[40] 29 C.F.R. § 1630.14(d)(3) (2016) (emphasis added).

II. JUDICIAL TREATMENT

Although two courts have recently dealt with the issue of voluntariness under the ADA, each court reached a very different conclusion on the nature of voluntariness.

In the Wisconsin case *EEOC v. Orion Energy Systems, Inc*., the court adopted a very narrow definition of voluntariness.[41] Orion Energy Systems adopted a wellness program that allowed employees to pay no insurance premium at all if they completed a health screen.[42] The health screen required the employee to fill out a health questionnaire, have their weight measured, and have their blood drawn.[43] An employee who decided against completing the health screen had to pay the full monthly premium amount, which costed $413 for individual coverage.[44] The EEOC brought suit and argued that the wellness program was involuntary because shifting the full cost of the monthly premium to an employee who opted out of the program was "so substantial" that Orion's offer to pay the premium in exchange for participation should not be considered a "mere incentive."[45]

Importantly, the wellness program in *Orion* was implemented before the 2016 EEOC regulations were promulgated, and the regulations did not apply retroactively. Thus, the court was prompted to provide its own definition of what constitutes a "voluntary" medical examination or inquiry under the ADA.

The court sided with Orion and held that the wellness program was voluntary "in the sense that it is optional."[46] The court asserted that "even a strong incentive is still no more than

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[41] *EEOC v. Orion Energy Systems, Inc*., 208 F. Supp. 3d 989, 1000-01 (E.D. Wis. 2016).
[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*.

an incentive," and even though an incentive may require an employee to make a difficult choice, "a hard choice is not the same as no choice."[47] Thus, according to the court, voluntariness exists whenever one is able to freely choose to participate in a wellness program or not. As such, the court deemed it unnecessary to consider how certain incentives may affect how an employee weighs their options. Voluntariness is not negated where an employee is in a situation in which they must choose between two things that are important to them. According to the court in *Orion*, as long as the employer does not otherwise violate the ADA by taking an adverse employment action against the employee or denying coverage for non-participation, an employer can implement any type of financial incentive to ensure participation without vitiating voluntariness.

In *AARP v. EEOC*, which dealt directly with the 2016 regulations, the D.C. District Court adopted a much broader approach.[48] The AARP challenged the EEOC regulations on the grounds that a 30 percent incentive level is coercive and thus not aligned with the ADA.[49] The court held that the EEOC's regulations, which limited incentives to no more than thirty percent of the employee's cost of coverage, were not grounded in any data or analysis which indicated that incentives less than 30 percent of the cost of coverage were not coercive.[50] According to the court, even an incentive below the 30 percent threshold could be used to pressure employees to give up private medical information.[51] The court held that the EEOC failed to demonstrate that

[47] *Id.* (quoting United States v. Martinez-Salazar, 528 U.S. 304, 315 (2000).
[48] *AARP v. EEOC*, 292 F. Supp. 3d 238 (D.D.C. 2017).
[49] *Id.*
[50] *Id.* at 243.
[51] *Id.* at 244.

an incentive falling within the thirty percent threshold would not be coercive and thus vacated that portion of the regulations.[52]

The District Court of Connecticut is set to be the next court to consider this issue. In 2019, a class action suit was brought on behalf of all current and former employees of Yale University.[53] Yale's wellness program, called the Health Expectation Program, imposes a fine of $25 per week, or $1,300 annually on all employees who do not participate in the program.[54] The complaint points out that in New Haven, Connecticut, where Yale is located, $1,300 is equal to the costs of "five and a half weeks' worth of food, four months of utility costs, nearly a months' worth of housing, or a months' worth of childcare."[55]

The program, which the complaint describes as "unusually punitive," thus forces employees to make a difficult choice: either share protected medical information with their employer or keep this information private and face a substantial penalty.[56] The plaintiffs allege that such circumstances coerce employees into participating in the program and thus violates the ADA.[57]

These cases demonstrate that the courts have offered little guidance on the issue on voluntariness under the ADA. While the court in *Orion* suggests a definition of voluntariness that is attractive for its simplicity, it would allow employers to effectively shift the entire cost of coverage to employees. While it is certainly true that a difficult choice can still be a voluntary one, there are certain difficult choices that the ADA prohibits employees from having to make.

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[52] *Id.* at 245.
[53] Complaint at 2, Kwesell v. Yale Univ., No. 3:19-cv-1098 (D. Conn. July 16, 2019).
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*

An employee who is threatened with termination if they refuse to divulge their medical history is certainly faced with a difficult choice, but according to the court in *Orion*, the employee is still capable of making a voluntary choice. However, the ADA clearly prohibits an employer from placing an employee in such a situation.

The current EEOC regulations suggest that the Commission is not aiming to ensure that employees never have to make a difficult decision which requires them to choose between preserving the protections afforded by the ADA or facing financial penalties. Instead, by limiting penalties to thirty percent of the total cost of coverage, the EEOC aims to protect employees from having to make decisions of a certain *degree* of difficulty. However, the problem with this approach, as the court in *AARP* pointed out, is that the EEOC did not sufficiently explain why the thirty percent threshold would achieve that aim. The Commission simply stated 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."[58]

Data on the average cost of health insurance provided by an employer does not lend much support to the Commission's position. In 2020, the average annual premium for single coverage was $7,470.[59] At firms employing a high number of workers who earned $26,000 per year or less, the average annual cost of coverage was $7,148.[60] Under the current EEOC regulations, an employer could penalize an employee up to thirty percent of the total cost of coverage for nonparticipation in a wellness program. Thus, an employee earning $26,000 per year or less whose annual cost of coverage is $7,148 could be penalized $2,144, or $178 per

[58] See Equal Employment Opportunity Commission: Rules and Regulations: Regulations Under the Americans With Disabilities Act, 81 Fed. Reg. at 31133 (May 17, 2016) (codified at 29 C.F.R pt. 1630).
[59] Kaiser Family Foundation, 2020 Employer Health Benefits Survey
[60] *Id.* Figure 1.6.

month. The Commission offers no explanation as to why such an employee would not be coerced into participating in a wellness program that requires them to divulge information protected by the ADA.

III. CONCEPTIONS OF VOLUNTARINESS AND COERCION

A voluntary decision is commonly understood as one made without external compulsion. Thus, "voluntariness" implies that the decision-maker enjoys a certain degree of control over the choices they make.[61] However, voluntariness is vitiated where the decision-maker is subjected to influence that is "external, intentional, and illegitimate."[62] Where the decision-maker is subject to such external and illegitimate influence, any decision they make can be considered a product of coercion. This conception of voluntariness raises numerous questions. First, is *any* degree of external influence sufficient to constitute coercion? Also, what constitutes an "illegitimate" influence? The philosophical literature on the nature of voluntariness and coercion is vast and complex, and a thorough treatment of the philosophical literature beyond the aim of this paper. However, the purpose of this paper does call for a framing of the philosophical discussion on voluntariness and coercion.

Philosophical discussion of coercion can generally be categorized by the use of two different approaches: the "moralized" approach or the "non-moralized" approach.[63] On the

[61] Edmund Wall, *Voluntary Action*, 28 PHILOSOPHIA 127, 130 (2001).
[62] Paul S. Appelbaum et al., *Voluntariness of Consent to Research: A Conceptual Model*, 39 HASTINGS CTR. REP. 30, 32-33 (2009).
[63] Stanford Encyclopedia of Philosophy, https://plato.stanford.edu/archives/win2017/entries/coercion/#NozNewAppCoe

moralized view, coercion only exists when an individual's rights are at stake in a decision.[64] For example, on the moralized view, a decision would be the product of coercion if the decision-maker was threatened with physical harm if they did not accept a proposal. This view of coercion is "moralized" because it focuses on the presence of an "illegitimate" influence–the threat of losing one's "rights"–in determining if coercion exists.

On a "non-moralized" or "value-neutral" view, whether or not one stands to suffer a loss or diminishment of their rights is not determinative. Instead, the non-moralized approach considers what would have happened in the absence of any external influence.[65] For example, if a grocery store tells one of its vendors that if they do not lower their prices by 40 percent they will not do business with them anymore, the vendor's decision to lower their prices would not be considered voluntary.[66] On this view, the vendor's decision was a product of coercion even though they do not have a *right* to receive business from the grocery store. Instead, all that matters is that the vendor would not have made the decision to lower their prices had the grocery store not threatened to end their business relationship. However, the value-neutral approach does not consider *any* external influence capable of being coercive. Instead, the approach demands consideration of whether a *reasonable* person in the decision-maker's circumstances would view what is being threatened as a serious harm.[67]

The non-moralized approach offers a much more expansive definition of coercion than the moralized approach. Under the non-moralized approach, the sort of "sharp dealing" that is tolerated under contract law could constitute coercion. Many commentators have supported

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[64] Camila Strassle & Benjamin E. Berkman, *Workplace Wellness Programs: Empirical Doubt, Legal Ambiguity, and Conceptual Confusion*, 61 WM. & MARY L. REV. 1663, 1701 (2020).
[65] *Id.* at 1707.
[66] *Id.*
[67] *Id.*

adopting the non-moralized approach as it applies to the issue of voluntariness under the ADA and have advocated for a rule that prohibits employers from imposing any incentives on employees to participate in wellness programs.[68]

However, while this conception of coercion has many supporters in the field of philosophy, it is inconsistent with the conception of coercion in many areas of the law. The conception of coercion under contract law is indicative of how the concept of voluntariness is generally understood in most areas of law. As such, it is worth considering how the concept of voluntariness in contract law aligns with the non-moralized approach to coercion that has been supported by recent scholarship.

IV. COERCION AND VOLUNTARINESS IN CONTRACT LAW

Contracts are valid when assent to the bargain by the parties is voluntarily given. Thus, when a party's assent is the product of a threat of physical harm or other wrongful act by the other party, the contract is voidable. In such circumstances, assent by the party is said to have been given under duress or coercion.[69]

The Restatement (First) of Contracts defined duress as:

> (a) any wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without his volition, or
>
> (b) any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement.[70]

[68] Stefanie Brody, *Working Well(Ness): The Impact of the ADA Final Rule on Wellness Program Regulation and A Proposal for A Zero-Incentive Rule*, 11 St. Louis U.J. Health L. & Pol'y 209 (2017)
[69] RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981)
[70] RESTATEMENT (FIRST) OF CONTRACTS § 492 (1932).

Part (a) deals with situations in which assent to a bargain was not the product of the party's free will, such as would be the case where someone else uses the actor's hand to sign a contract.[71] Such contracts are deemed to be void instead of voidable.[72]

Part (b), which is the part relevant to the discussion here, describes a type of duress that occurs when a party is subjected to threats by the other party which work to vitiate their free will. This "wrongful threat," which is generally limited to threats of physical harm, must actually "preclude" the exercise of free will and induce entrance into a transaction that the party would not have otherwise entered.[73] In considering whether assent to a bargain was the product of duress as defined by the Restatement (First), courts conduct a two-part inquiry. First, courts would determine if a party had been subjected to a wrongful threat. If there was a wrongful threat made, courts would then determine if the threat actually resulted in a loss of free will.[74]

Commentators have noted that claims of duress are rarely successful, and courts have been highly inconsistent in their application of the doctrine.[75] Some have suggested that part of the courts' issues with applying the doctrine are attributable to the two-part inquiry used.[76] While determining if there was a wrongful threat is a relatively straight-forward task, determining if that threat vitiated the party's free will is not. Even when an individual makes a decision under duress, they may still exercise free will. Although duress may work to limit the number of choices that an individual can make, they are still free to choose between the options presented.[77]

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[71] Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 458 (2005)
[72] *Id.*
[73] RESTATEMENT (FIRST) OF CONTRACTS § 492 cmt. f (1932). "(T)he fear must be a cause inducing entrance into a transaction, and though not necessarily the sole cause, it must be one without which the transaction would not have occurred."
[74] *Supra*, note 36.
[75] *Supra*, note 71.
[76] *Id.*
[77] *Id.*

The Restatement (Second) of Contracts adopted a different approach. Instead of focusing on free will, the Restatement (Second) deems a contract voidable where an improper threat leads a party to assent to a bargain because they were left with no "reasonable alternative."[78] An "improper threat" includes the following: (1) a threat of a crime or a tort, (2) a threat that is a crime or tort, (3) a threat of criminal prosecution, (4) bad faith threat to use civil process, or (5) a threat to breach the duty of good faith and fair dealing in a contract relationship.[79]

Whether based on the loss of free will or the elimination of "reasonable alternatives," a claim of duress always requires a showing that the action of a party was blameworthy. Some courts take a broad view as to what constitutes a blameworthy action, including actions that are "unlawful" as well as morally blameworthy.[80] However, a party is not required to act virtuously. The examples provided in the Restatement (Second) make it clear that "hard bargaining" does not constitute duress:

Illustrations:

- *13.* A, who has sold goods to B on several previous occasions, intentionally misleads B into thinking that he will supply the goods at the usual price and thereby causes B to delay in attempting to buy them elsewhere until it is too late to do so. A then threatens not to sell the goods to B unless he agrees to pay a price greatly in excess of that charged previously. B, being in urgent need of the goods, makes the contract. If the court concludes that the effectiveness of A's threat in inducing B to make the contract was significantly increased by A's prior unfair dealing, A's threat is improper and the contract is voidable by B.
- *14.* The facts being otherwise as stated in Illustration 13, A merely discovers that B is in great need of the goods and that they are in short supply but does not mislead B into thinking that he will supply them. A's threat is not improper, and the contract is not voidable by B.

Illustration 14 suggests that taking advantage of an individual's weakened position does not constitute duress where the advantaged party does not intentionally mislead the other party.

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[78] RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981).
[79] RESTATEMENT (SECOND) OF CONTRACTS § 176(1) (1981).
[80] Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 489 (2005).

The conception of coercion under contract law thus resembles the moralized approach describe above. While coercion can render a contract voidable, an act must be morally or legally blameworthy in order for it to be coercive. Where the balance of power is unequal between parties, it is not considered wrongful for the advantaged party to leverage their superior position so long as the balance of power was not a product of moral or legal wrongdoing. As such, the concept of duress and coercion, as understood in contract law, does not lend support to the argument that an employee who chooses to divulge medical information to avoid penalties does so involuntarily. An employee has no right to be provided affordable health insurance by their employer, so imposing penalties on employees who do not participate in wellness programs is not "unlawful." Moreover, imposing penalties on employees for nonparticipation cannot be described as morally blameworthy either. While numerous commentators have pointed out that wellness programs are not effective at achieving improved employee health, ineffectiveness does not render an act morally blameworthy.

Coercion renders a contract voidable because it wrongfully constrains an individual's freedom of choice. However, there are situations where a contract is unenforceable even though both parties agreed to the bargain voluntarily. The formation of a contract can be valid and yet deemed unenforceable where the subject or terms of the agreement violate public policy.[81]

CONTRACTS UNENFORCEABLE ON PUBLIC POLICY GROUNDS

Contract law affords individuals wide latitude in forming contracts. Contract law favors an unfettered freedom to contract with minimal judicial oversight. The general rule is that individuals should have "the utmost liberty of contracting and that their agreements voluntarily

[81] RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

and fairly made shall be held valid and enforced in the courts."[82] However, while the freedom to set the terms of a contract is expansive, it is not absolute.

Individuals are free to bargain away the things they own or have rights to, but courts have routinely held that freedom to contract does not include the right to "privately waive statutes enacted to protect the public in general."[83] The Restatement (Second) of Contracts supports this limitation, stating that "[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."[84] The Restatement thus supports the use of balancing test in determining if a contract is unenforceable on public policy grounds, with the respect for one's freedom to contract balanced against the detrimental effects enforcement of a contract could have on society.

The Restatement does not limit the public policies a court can take into consideration to those expressed in statutes or constitutions. The Restatement notes that when proscribing conduct, "legislators seldom address themselves explicitly to the problems of contract law that may arise in connection with such conduct."[85] As such, judges will look to legislation for public policies, but also frequently must derive public policies "on the basis of their own perception of the need to protect some aspect of the public welfare."[86]

As a result, many of these policies derived from a judge's own perceptions of the public good "are now rooted in precedents accumulated over centuries."[87] However, the Restatement does not

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[82] *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931).
[83] *Physical Therapy v. Unemp't Ins. Div. Contributions Bureau*, 943 P.2d 523, 528 (Mont. 1997); Yvette Joy Liebesman, *When Selling Your Personal Name Mark Extends to Selling Your Soul*, 83 TEMP. L. REV. 1, 21 (2010).
[84] RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).
[85] RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. b (1981).
[86] *Id.* cmt. A.
[87] *Id.*

direct courts to maintain deference to the societal interests courts sought to protect in the past. Instead, the Restatement urges courts to recognize the changes in a society's interests in order to guard against the enforcement of a contract that might contravene those interests.[88]

Considering the exalted status the freedom to contract holds in our society, rendering a contract unenforceable strikes one as odd, especially given the fact that courts are granted some latitude in determining what constitutes a societal interest worth protecting. It should be noted that a contract can be rendered unenforceable on public policy grounds even when the contract is not illegal, as would be the case where the contract calls for the murder of another person.[89]

Moreover, a court's power to render a contract unenforceable is not limited to situations where what is bargained for is morally repugnant. Although courts are expected to exercise this power only when protecting societal interests "clearly outweigh" enforcement of the contract, the standard is still a very subjective one, and changes in societal interests may prohibit enforcement of contracts that would have been enforced in the past.[90]

V. A ZERO-INCENTIVE POLICY BEST SERVES THE PURPOSE OF THE ADA

This concept in contract law offers a way of understanding the conflict between the ADA and wellness programs that supports a prohibition of negative incentives. Essentially, certain contracts are rendered unenforceable because what has been bargained for should not be commodified.

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[88] *Id.*
[89] Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 298 (1998)
[90] RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

Employment discrimination laws such as the ADA aim to better integrate vulnerable populations into the workplace and ensure that they are treated fairly.[91] The main reason that the ADA prohibits an employer from obtaining an employee's medical information, outside of the exceptions provided, is to protect the employee from being discriminated against on the basis of what is revealed in the information. The EEOC has noted that this information has often been used to "discriminate against individuals with disabilities -- particularly nonvisible disabilities, such as diabetes, epilepsy, heart disease, cancer, and mental illness -- despite their ability to perform the job."[92] As such, the ADA generally prohibits the use of medical examinations and inquiries that are not shown to be "job-related and consistent with business necessity."[93] Of course, access to an employee's medical information will not always lead to discrimination, but the ADA clearly seeks to significantly limit an employer's opportunity to do so.

Given this goal, allowing employers to impose penalties on employees for nonparticipation in a wellness program is antithetical to the purpose of the statute. Thus, while the ADA recognizes the need to protect employees with disabilities against discrimination, the Commission's regulations consider the privacy necessary to avoid such discrimination to be something that can be bargained for. While the thirty percent threshold rule adopted by the Commission does not necessarily vitiate voluntariness, it does contradict the purpose of the ADA. Therefore, a better conception of what constitutes a voluntary wellness program under the ADA would be one that imposes no penalties.

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[91] Samuel R. Bagenstos, *The EEOC, the ADA, and Workplace Wellness Programs*, 27 HEALTH MATRIX 81, 91 (2017).
[92] Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA.
[93] 42 U.S.C. § 12112(d)(4)(A).

The relationship between the enforceability of a contract and public policy concerns is analogous to the relationship between voluntariness and the ADA. As stated before, a contract can be unenforceable even though it was formed properly and what is agreed to is legal. This is because the somewhat nebulous idea what is in the "public interest" stands above the formal requirements of valid contract. Public policy can serve as the basis of invalidating a contract even when the interests that being protected are not codified. Thus, adherence to formal requirements is not determinative of enforceability.

The EEOC's regulations stating that penalties up to thirty percent of the total cost of coverage do not render participation in a wellness program involuntary is a justifiable interpretation of the term "voluntary." Even the most difficult decisions are still made voluntarily. In this way, the Commission's regulations seem to provide a reasonable definition of voluntariness.

However, like public policy in contracts, considerations of a higher-order reveal that the regulations conflict with the purpose of the ADA. The overarching purpose or "spirit" of the ADA is to provide robust protection for disabled employees against discrimination. Limiting an employer's ability to compel an employee to divulge their medical history is meant to protect against the use of that information for discriminatory purposes. As noted by the EEOC, employers who obtained this information would often discriminate against individuals with disabilities despite their ability to perform the job, which prompted Congress to enact the ADA.[94]

However, that protection is weakened when the privacy of an employee's medical history is essentially commodified and can be bargained for. For this reason, the EEOC's regulations

[94] *Supra*, note 91.

conflict with the purpose of the ADA, even though the regulations provide a definition of voluntariness that is logical and comports with the definition of voluntariness found in other areas of the law. This is important because while the EEOC has authority to promulgate regulations implementing the portions of the ADA concerning employment matters, the regulations must ultimately reflect a reasonable interpretation of the statutory text.[95]

Thus, while the regulations may reflect a reasonable interpretation of a *term* in the statute, the regulations are at odds with the overall purpose of the statute. Discussion of this issue has perhaps placed too much focus on defining voluntariness. Most of the scholarly attention to this issue has been focused on critiquing the EEOC's definition of the word "voluntary" as used in the ADA. Given the fact that many employees may not be able to afford health insurance if penalties are imposed, many have argued that the thirty percent threshold vitiates voluntariness. However, a difficult decision is still a voluntary one.

A more appropriate and effective critique is that the current EEOC regulations commodify something that the ADA sought to protect: access to an employee's medical information. Nothing in the ADA, which provides broad protection for individuals with disabilities, indicates that Congress intended to allow employers to place their employees in a position where they have to choose between maintaining the privacy of their medical history or affordable health insurance. Thus, a rule which prohibits negative incentives best aligns with the purpose of the ADA.

[95] *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002).