115TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPT. 115–459
Part 1

PRESERVING EMPLOYEE WELLNESS PROGRAMS ACT

DECEMBER 11, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Ms. FOXX, from the Committee on Education and the Workforce, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 1313]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 1313) to clarify rules relating to nondiscriminatory workplace wellness programs, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Preserving Employee Wellness Programs Act".

SEC. 2. FINDINGS.

Congress finds that—

(1) Congress has a strong tradition of protecting and preserving employee workplace wellness programs, including programs that utilize a health risk assessment, biometric screening, or other resources to inform and empower employees in making healthier lifestyle choices;

(2) health promotion and prevention programs are a means to reduce the burden of chronic illness, improve health, and limit the growth of health care costs;

(3) in enacting the Patient Protection and Affordable Care Act (Public Law 111–148), Congress intended that employers would be permitted to implement health promotion and prevention programs that provide incentives, rewards, rebates, surcharges, penalties, or other inducements related to wellness programs, including rewards of up to 50 percent off of insurance premiums for employees participating in programs designed to encourage healthier lifestyle choices; and

(4) Congress has struck an appropriate balance among employees, health care providers, and wellness plan sponsors to protect individual privacy and con-

fidentiality in a wellness program which is designed to improve health outcomes.

SEC. 3. NONDISCRIMINATORY WORKPLACE WELLNESS PROGRAMS.

(a) UNIFORMITY ACROSS FEDERAL AGENCIES.—

(1) PROGRAMS OFFERED IN CONJUNCTION WITH AN EMPLOYER-SPONSORED HEALTH PLAN.—

(A) IN GENERAL.—Notwithstanding any other provision of law, a workplace wellness program and any program of health promotion or disease prevention offered by an employer in conjunction with an employer-sponsored health plan that complies with section 2705(j) of the Public Health Service Act (42 U.S.C. 300gg–4(j)) (and any regulations promulgated with respect to such section by the Secretary of Labor, the Secretary of Health and Human Services, or the Secretary of the Treasury) shall be considered to be in compliance with the following provisions (to the extent such programs are subject to the Acts described in such provisions):

(i) the acceptable examinations and inquiries set forth in section 102(d)(4)(B) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112(d)(4)(B));

(ii) section 2705(d) of the Public Health Service Act (42 U.S.C. 300gg–4(d)); and

(iii) section 202(b)(2) of the Genetic Information Nondiscrimination Act of 2008 (42 U.S.C. 2000ff–1(b)(2)).

(B) SAFE HARBOR.—Notwithstanding any other provision of law, section 501(c)(2) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201(c)(2)) shall apply to any workplace wellness program or program of health promotion or disease prevention offered by an employer in conjunction with an employer-sponsored health plan.

(2) OTHER PROGRAMS OFFERING MORE FAVORABLE TREATMENT FOR ADVERSE HEALTH FACTORS.—Notwithstanding any other provision of law, a workplace wellness program and a program of health promotion or disease prevention offered by an employer that provides for more favorable treatment of individuals with adverse health factors as described in section 146.121(g) of title 45, Code of Federal Regulations (or any successor regulations) shall be considered to be in compliance with—

(A) the acceptable examinations and inquiries set forth in section 102(d)(4)(B) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112(d)(4)(B));

(B) section 2705(d) of the Public Health Service Act (42 U.S.C. 300gg–4(d)); and

(C) section 202(b)(2) of the Genetic Information Nondiscrimination Act of 2008 (42 U.S.C. 2000ff–1(b)(2)).

(3) PROGRAMS NOT OFFERED IN CONJUNCTION WITH AN EMPLOYER-SPONSORED HEALTH PLAN.—

(A) IN GENERAL.—Notwithstanding any other provision of law, a workplace wellness program and any program of health promotion or disease prevention offered by an employer that are not offered in conjunction with an employer-sponsored health plan that is not described in section 2705(j) of the Public Health Service Act (42 U.S.C. 300gg–4(j)) that meet the requirement set forth in subparagraph (B) shall be considered to be in compliance with—

(i) the acceptable examinations and inquiries as set forth in section 102(d)(4)(B) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112(d)(4)(B));

(ii) section 2705(d) of the Public Health Service Act (42 U.S.C. 300gg–4(d)); and

(iii) section 202(b)(2) of the Genetic Information Nondiscrimination Act of 2008 (42 U.S.C. 2000ff–1(b)(2)).

(B) LIMITATION ON REWARDS.—The requirement referenced in subparagraph (A) is that any reward provided or offered by a program described in such subparagraph shall be less than or equal to the maximum reward amounts provided for by section 2705(j)(3)(A) of the Public Health Service Act (42 U.S.C. 300gg–4(j)(3)(A)), and any regulations promulgated with respect to such section by the Secretary of Labor, the Secretary of Health and Human Services, or the Secretary of the Treasury.

(b) COLLECTION OF INFORMATION.—Notwithstanding any other provision of law, the collection of information about the manifested disease or disorder of a family member shall not be considered an unlawful acquisition of genetic information with respect to another family member as part of a workplace wellness program de-

scribed in subsection (a) offered by an employer (or in conjunction with an employer-sponsored health plan described in section 2705(j) of the Public Health Service Act (42 U.S.C. 300gg–4(j))) and shall not violate title I or title II of the Genetic Information Nondiscrimination Act of 2008 (Public Law 110–233). For purposes of the preceding sentence, the term "family member"has the meaning given such term in section 201 of the Genetic Information Nondiscrimination Act (Public Law 110–233).

(c) RULE OF CONSTRUCTION.—Nothing in subsection (a)(1)(A) shall be construed to prevent an employer that is offering a wellness program to an employee from requiring such employee, within 45 days from the date the employee first has an opportunity to earn a reward, to request a reasonable alternative standard (or waiver of the otherwise applicable standard). Nothing in subsection (a)(1)(A) shall be construed to prevent an employer from imposing a reasonable time period, based upon all the facts and circumstances, during which the employee must complete the reasonable alternative standard. Such a reasonable alternative standard (or waiver of the otherwise applicable standard) is provided for in section 2705(j)(3)(D) of the Public Health Service Act (42 U.S.C. 300 gg-4(j)(3)(D)) (and any regulations promulgated with respect to such section by the Secretary of Labor, the Secretary of Health and Human Services, or the Secretary of the Treasury).

PURPOSE

H.R. 1313, the *Preserving Employee Wellness Programs Act*, clarifies that if an employer-sponsored wellness program complies with the *Patient Protection and Affordable Care Act* (ACA)[1] and its regulations, the program will be considered to comply with the applicable sections of the *Americans with Disabilities Act* of 1990 (ADA)[2] or the *Genetic Information Nondiscrimination Act* of 2008 (GINA) relating to wellness programs.[3] The bill also clarifies that offering an incentive to provide medical information for an employee's family member who is voluntarily participating in the wellness program does not violate GINA.

COMMITTEE ACTION

112TH CONGRESS

Full Committee Hearing Examining the Impact of the Health Care Law on the Economy, Employers, and the Workforce

On February 9, 2011, the Committee on Education and the Workforce (Committee) held a hearing entitled "The Impact of the Health Care Law on the Economy, Employers, and the Workforce" to discuss, among other things, wellness and prevention plans. The witnesses were Dr. Paul Howard, Senior Fellow, Manhattan Institute, New York, New York; Ms. Gail Johnson, President and CEO, Rainbow Station, Inc., Glenn Allen, Virginia; Dr. Paul Van de Water, Senior Fellow, Center on Budget and Policy Priorities, Washington, D.C.; and Mr. Neil Trautwein, Vice President and Employee Benefits Policy Counsel, National Retail Federation, Washington, D.C.

Subcommittee Hearing Examining the Recent Health Care Law: Consequences for Indiana Families and Workers

On June 7, 2011, the Health, Employment, Labor, and Pensions (HELP) Subcommittee held a field hearing in Evansville, Indiana, entitled "The Recent Health Care Law: Consequences for Indiana

[1] Patient Protection and Affordable Care Act, Pub. L. No. 111–148 (2010), and Health and Education Reconciliation Act, Pub. L. No. 111–152 (2010) [hereinafter Affordable Care Act or ACA].

[2] Americans with Disabilities Act of 1990, Pub. L. 101–336 (1990).

[3] Genetic Information Nondiscrimination Act of 2008, Pub. L. 110–233 (2008).

Families and Workers" to examine, among other things, prevention and wellness programs. The witnesses were the Honorable Mark Messmer, Indiana House of Representatives, Messmer Mechanical, Jasper, Indiana; Ms. Robyn Crosson, Company Compliance Services, State of Indiana Department of Insurance, Indianapolis, Indiana; Ms. Sherry Lang, Human Resources Director, Womack Restaurants, Terre Haute, Indiana; Mr. Denis Johnson, VP of Operations, Boston Scientific, Spencer, Indiana; Mr. David J. Carlson, M.D., General Surgeon, Deaconess Hospital, Evansville, Indiana; and Mr. Glen Graber, President, Graber Post Building, Inc. Odon, Indiana.

Subcommittee Hearing Examining Health Care: Challenges Facing Pennsylvania's Workers and Job Creators

On February 22, 2012, the HELP Subcommittee held a field hearing in Butler, Pennsylvania, entitled "Health Care: Challenges Facing Pennsylvania's Workers and Job Creators," to discuss, among other thing, the benefits of wellness plans in the workplace. The witnesses were the Honorable Donald C. White, Senator, Pennsylvania State Senate, Harrisburg, Pennsylvania; Ms. Kathleen Bishop, President and CEO, Meadville-Western Crawford, County Chamber of Commerce, Meadville, Pennsylvania; Ms. Georgeanne Koehler, Pittsburg, Pennsylvania; Ms. Lori Joint, Director of Government Affairs, Manufacturer & Business Association, Erie, Pennsylvania; Ms. Patti-Ann Kanterman, Chief Financial Officer, Associated Ceramics & Technology, Inc., Sarver, Pennsylvania; Mr. Paul T. Nelson, Owner and CEO, Waldameer Park, Inc., Erie, Pennsylvania; Mr. Ralph Vitt, Owner, Vitt Insure, Pittsburg, Pennsylvania; and Mr. Will Knecht, President, Wendell August Forge; Grove City, Pennsylvania.

Subcommittee Hearing Examining Barriers to Lower Health Care Costs for Workers and Employers

On May 31, 2012, the HELP Subcommittee held a hearing entitled "Barriers to Lower Health Care Costs for Workers and Employers" to examine rising health care costs facing employers and employees, including the destructive impact of the ACA. During the hearing, members and witnesses discussed the benefits of wellness programs to lower the cost of health care. The witnesses were Mr. Ed Fensholt, Senior Vice President, Lockton Companies, LLC, Kansas City, Missouri; Mr. Roy Ramthun, President, HAS Consulting Services, Washington, D.C.; Ms. Jody Hall, Founder and Owner, Cupcake Royale, Seattle, Washington; and Mr. Bill Streitberger, Vice President of Human Resources, Red Robin, Greenwood Village, Colorado.

113TH CONGRESS

Subcommittee Hearing Examining Health Care Challenges Facing North Carolina's Workers and Job Creators

On April 30, 2013, the HELP Subcommittee held a field hearing in Concord, North Carolina, entitled "Health Care Challenges Facing North Carolina's Workers and Job Creators," during which the benefits of workplace wellness programs were discussed. The witnesses were Mr. Chuck Horne, President, Hornwood Inc., Lilesville,

North Carolina; Ms. Tina Haynes, Chief Human Resource Officer, Rowan-Cabarrus Community College, Salisbury, North Carolina; Mr. Adam Searing, Director, Health Access Coalition, Raleigh, North Carolina; Mr. Ken Conrad, Chairman, Libby Hill Seafood Restaurants, Greensboro, North Carolina; Mr. Dave Bass, Vice President, Compensation and Associate Wellness, Delhaize America, Concord, North Carolina; Mr. Ed Tubel, Founder and CEO, Tricor Inc., Charlotte, North Carolina; Dr. Olson Huff, Pediatrician, Asheville, North Carolina; and Mr. Bruce Silver, President and CEO, Racing Electronics, Concord, North Carolina.

Subcommittee Hearing Examining the Regulatory and Enforcement Actions of the Equal Employment Opportunity Commission

On May 22, 2013, the Workforce Protections Subcommittee held a hearing entitled "Examining the Regulatory and Enforcement Actions of the Equal Employment Opportunity Commission" to discuss, among other things, the Equal Employment Opportunity Commission's (EEOC) proposed and future guidance on wellness programs. The sole witness at the hearing was the Honorable Jacqueline A. Berrien, Chair, EEOC, Washington, D.C.

Subcommittee Hearing Regarding the Employer Mandate: Examining the Delay and Its Effect on Workplaces

On July 23, 2013, the HELP Subcommittee and the Workforce Protections Subcommittee jointly held a hearing entitled "The Employer Mandate: Examining the Delay and Its Effect on Workplaces" to review the costly impact of the administration's recent decision to delay the employer mandate and to discuss wellness programs. Witnesses before the subcommittees were Ms. Grace-Marie Turner, President, Galen Institute, Alexandria, Virginia; Mr. Jamie T. Richardson, Vice President, White Castle System, Inc., Columbus, Ohio; Mr. Ron Pollack, Executive Director, Families USA, Washington, D.C.; and Dr. Douglas Holtz-Eakin, President, American Action Forum, Washington, D.C.

Subcommittee Hearing Regarding Health Care Challenges Facing Kentucky's Workers and Job Creators

On August 27, 2013, the HELP Subcommittee held a field hearing in Lexington, Kentucky, entitled "Health Care Challenges Facing Kentucky's Workers and Job Creators," which included an examination of the harmful impact of the ACA on Kentucky's employers and their employees and to discuss wellness programs. Witnesses before the subcommittee were Mr. Tim Kanaly, Owner and President, Gary Force Honda, Bowling Green, Kentucky; Mr. Joe Bologna, Owner, Joes Bologna's—Italian Pizzeria & Restaurant, Lexington, Kentucky; Ms. Carrie Banahan, Executive Director, Office of the Kentucky Health Benefit Exchange, Frankfort, Kentucky; Mr. John Humkey, President, Employee Benefit Associates, Inc., Lexington, Kentucky; Ms. Janey Moores, President and CEO, BJM & Associates, Inc., Lexington, Kentucky; Mr. Donnie Meadows, Vice President of Human Resources, K-VA-T Food Stores, Inc., Abingdon, VA; Ms. Debbie Basham, Southwest Breast Cancer Awareness Group, Louisville, Kentucky; and Mr. John McPhearson, CEO, Lectrodryer, Richmond, Kentucky.

Subcommittee Hearing on Providing Access to Affordable, Flexible Health Plans through Self-Insurance

On February 26, 2014, the HELP Subcommittee held a hearing entitled "Providing Access to Affordable, Flexible Health Plans through Self-Insurance," during which witnesses discussed workplace wellness programs. The witnesses were Mr. Michael Ferguson, President and CEO, Self-Insurance Institute of America, Simpsonville, South Carolina; Mr. Wes Kelley, Executive Director, Columbia Power and Water Systems, Columbia, Tennessee; Ms. Maura Calsyn, Director of Health Policy, Center for American Progress, Washington, D.C.; and Mr. Robert Melillo, National Vice President of Risk Financing Solutions, USI Insurance, Glastonbury, Connecticut.

Subcommittee Hearing Examining the Effects of the President's Health Care Law on Indiana's Classrooms and Workplaces

On September 4, 2014, the HELP Subcommittee held a field hearing in Greenfield, Indiana, entitled "The Effects of the President's Health Care Law on Indiana's Classrooms and Workplaces," during which witnesses testified about employee wellness programs. The witnesses were Mr. Mike Shafer, Chief Financial Officer, Zionsville Community Schools, Zionsville, Indiana; Mr. Tom Snyder, President, Ivy Tech Community College, Indianapolis, Indiana; Mr. Danny Tanoos, Superintendent, Vigo County School Corporation, Terre Haute, Indiana; Mr. Tom Forkner, President, Anderson Federation of Teachers, AFT Local 519, Anderson, Indiana; Mr. Mark DeFabis, President and Chief Executive Officer, Integrated Distribution Services, Plainfield, Indiana; Mr. Nate LaMar, International Regional Manager, Draper, Inc., Spiceland, Indiana; Mr. Dan Wolfe, Owner, Wolfe's Auto Auction, Terre Haute, Indiana; and Mr. Robert Stone, Director of Palliative Care, IU Health Bloomington Hospital, Bloomington, Indiana.

114TH CONGRESS

Subcommittee Hearing on H.R. 548, Certainty in Enforcement Act of 2015; H.R. 549, Litigation Oversight Act of 2015; H.R. 550, EEOC Transparency and Accountability Act; H.R. 1189, Preserving Employee Wellness Programs Act

On March 24, 2015, the Workforce Protections Subcommittee held a hearing entitled "H.R. 548, *Certainty in Enforcement Act of 2015;* H.R. 549, *Litigation Oversight Act of 2015;* H.R. 550, *EEOC Transparency and Accountability Act;* H.R. 1189, *Preserving Employee Wellness Programs Act,*" during which witnesses testified regarding their concerns about the EEOC's litigation challenging wellness programs, as well as the history of bipartisan support for employee wellness programs. Witnesses at the hearing were Ms. Gail Heriot, Professor of Law, University of San Diego School of Law, San Diego, California; Ms. Tanya Clay House, Director of Public Policy, Lawyers' Committee for Civil Rights Under Law, Washington, D.C.; Mr. Paul Kehoe, Senior Counsel, Seyfarth Shaw LLP, Washington, D.C.; and Ms. Tamara Simon, Managing Director, Knowledge Resource Center, Buck Consultants, Washington, D.C.

Subcommittee Hearing on Five Years of Broken Promises: How the President's Health Care Law is Affecting America's Workplaces

On April 14, 2015, the HELP Subcommittee held a hearing entitled "Five Years of Broken Promises: How the President's Health Care Law is Affecting America's Workplaces," which examined the continued negative impact of the ACA on employer-sponsored health coverage. Witnesses at the hearing were the former Deputy Secretary of the Department of Health and Human Services the Honorable Tevi Troy, Ph.D., President, American Health Policy Institute, Washington, D.C.; Mr. Rutland Paal, Jr., President, Rutland Beard Floral Group, Scotch Plains, New Jersey; Michael Brev, President, Brev Corp. t/a Hobby Works®, WingTOTE Manufacturing, LLC, Laurel, Maryland; and Ms. Sally Roberts, Human Resources Director, Morris Communications Company, LLC, Augusta, Georgia. During the hearing, Ms. Roberts testified that "some employers are implementing incentive-based wellness programs as cost-containment strategies" and noted concern that EEOC may threaten these programs.[4]

Comment Letter to EEOC Regarding the Proposed Rule on Amendments to Regulations Under the ADA

On June 19, 2015, Rep. John Kline (R–MN), then-Chairman of the Committee, along with other House and Senate members, submitted a comment letter to EEOC in response to the Notice of Proposed Rulemaking (NPRM) regarding amendments to regulations under the ADA. In particular, the letter noted EEOC's proposed interpretation of the ADA and workplace wellness programs was inconsistent with the bipartisan intent of Congress in the wellness provisions of the ACA and requested EEOC not create further confusion for employees and employers.

Comment Letter to EEOC Regarding the Proposed Rule Amending Regulations Implementing GINA

On January 28, 2016, then-Chairman John Kline, along with Rep. Tim Walberg (R–MI), then-Chairman of the Workforce Protections Subcommittee, and Rep. David "Phil" Roe (R–TN), then-Chairman of the HELP Subcommittee, submitted a comment letter to EEOC in response to the NPRM regarding amendments to the regulations implementing Title II of GINA, as they relate to employee wellness programs. In particular, the letter noted the Committee's concerns with aspects of the proposed rule being contrary to law and undermining the effectiveness of employer programs designed to encourage employees to adopt health behaviors.

115TH CONGRESS

Full Committee Hearing on Rescuing Americans from the Failed Health Care Law and Advancing Patient-Centered Solutions

On February 1, 2017, the Committee held a hearing entitled "Rescuing Americans from the Failed Health Care Law and Advancing Patient-Centered Solutions," which examined failures of

[4] *Five Years of Broken Promises: How the President's Health Care Law is Affecting America's Workplaces: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 30 (2015) (statement of Sally Roberts, Human Resources Director, Morris Communications Co., LLC).

the ACA and the need "to preserve employee wellness plans that have been under attack in recent years."[5] Witnesses before the Committee were Mr. Scott Bollenbacher, CPA, Managing Partner, Bollenbacher & Associates, LLC, Portland, Indiana; Mr. Joe Eddy, President and Chief Executive Officer, Eagle Manufacturing Company, Wellsburg, West Virginia; Ms. Angela Schlaack, St. Joseph, Michigan; and Dr. Tevi Troy, Chief Executive Officer, American Health Policy Institute, Washington, D.C.

Full Committee Hearing on Legislative Proposals to Improve Health Care Coverage and Provide Lower Costs for Families

On March 1, 2017, the Committee held a hearing entitled "Legislative Proposals to Improve Health Care Coverage and Provide Lower Costs for Families," which examined H.R. 1101, the *Small Business Health Fairness Act;* a discussion draft of the *Self-Insurance Protection Act;* and a discussion draft of the *Preserving Employee Wellness Programs Act.* Witnesses before the Committee included Mr. Jon B. Hurst, President, Retailers Association of Massachusetts, Boston, Massachusetts; Ms. Allison R. Klausner, JD, Principal, Government Relations Leader, Conduent, Secaucus, New Jersey; Ms. Lydia Mitts, Associate Director of Affordability Initiatives, Families USA, Washington, D.C.; and Mr. Jay Ritchie, Executive Vice President, Tokio Marine HHC, Kennesaw, Georgia.

Introduction of H.R. 1313, Preserving Employee Wellness Programs Act

On March 2, 2017, Committee Chairwoman Virginia Foxx (R–NC) introduced the *Preserving Employee Wellness Programs Act* (H.R. 1313), along with HELP Subcommittee Chairman Tim Walberg.[6] Chairwoman Foxx introduced the bill to bring uniformity to the regulation of employee wellness programs by clarifying that if a program complies with the wellness provisions of the ACA and the regulations related to those provisions, such program will be considered to be in compliance with the ADA and GINA.

Committee Passes H.R. 1313, Preserving Employee Wellness Programs Act

On March 8, 2017, the Committee considered H.R. 1313, the *Preserving Employee Wellness Programs Act*.[7] Rep. Bradley Byrne (R–AL) offered an amendment in the nature of a substitute making technical changes to the introduced bill. The Committee voted to adopt the amendment in the nature of a substitute by voice vote. Five additional amendments were offered but not adopted. Rep. Adriano Espaillat (D–NY) offered an amendment, which failed by a vote of 17 to 22, relating to information obtained in a wellness program. Rep. Joe Courtney (D–CT) offered an amendment, which failed by a vote of 17 to 22, relating to the sale of information obtained in a wellness program. Rep. Jared Polis (D–CO) offered an amendment, which failed by a vote of 17 to 22, relating to permission for the sale of information obtained from a wellness program.

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[5] *Rescuing Americans from the Failed Health Care Law and Advancing Patient-Centered Solutions: Hearing Before the H. Comm. on Educ. and the Workforce*, 115th Cong. (2017) (opening statement of Rep. Foxx, Chairwoman, H. Comm. on Educ. and the Workforce).

[6] H.R. 1313, 115th Cong. (2017).

[7] H.R. 1313, *Preserving Employee Wellness Programs Act: Markup Before the H. Comm. on Educ. and the Workforce*, 115th Cong. (Mar. 8, 2017).

Rep. Polis offered a second amendment relating to the bill's treatment of family members under a wellness program, which failed by a vote of 17 to 22. Additionally, Ranking Member Robert C. "Bobby" Scott (D–VA) offered an amendment, which failed by a vote of 17 to 22, relating to the ADA safe harbor. The Committee favorably reported H.R. 1313, as amended, to the U.S. House of Representatives by a vote of 22 to 17.

SUMMARY OF H.R. 1313

Currently, wellness programs are subject to three different sets of statutory and regulatory provisions: the *Health Insurance Portability and Accountability Act of 1996* (HIPAA), the ADA, and GINA. Chairwoman Foxx introduced H.R. 1313 to create consistency among the laws that govern wellness programs by providing a uniform set of rules under which wellness programs can be considered compliant. Regulatory clarity is needed due to a number of enforcement actions and regulatory steps taken in recent years by EEOC. EEOC's actions contradicted HIPAA, as amended by the ACA, and the rules promulgated by the Obama administration implementing the ACA. As a result, employers and employees who want to participate in these programs are caught in a regulatory trap. By reaffirming the policies outlined in the ACA with respect to wellness programs, H.R. 1313 will provide private-sector employers the legal certainty they need to continue offering these voluntary programs.

Specifically, the bill provides that if a workplace wellness program offered in conjunction with an employer-sponsored group health plan complies with the provisions relating to wellness programs in HIPAA, then it shall be considered to comply with the applicable provisions relating to wellness programs in the ADA and GINA. For programs not offered in conjunction with a group health plan, the bill provides that any incentives offered must not be more than the maximum allowed under the ACA and the ACA's regulations. The bill also permits a wellness program to provide more favorable treatment of individuals with adverse health factors.

At its core, H.R. 1313 is about allowing workers to participate voluntarily in programs that lower their health care costs and contribute to improving their health and the health of their families.

COMMITTEE VIEWS

Legal Background

For decades, employers have developed and implemented wellness programs to improve the health of employees and their families, increase productivity, and reduce overall health care costs. Wellness programs typically focus on health promotion and disease prevention and can be offered directly by the employer or their insurance company. To encourage participation in a wellness program, an employer or insurance company may offer incentives, such as insurance premium discounts, cash rewards, or free health club memberships.

HIPAA generally prohibits group health plans and insurers from discriminating against individuals' eligibility, benefits, or pre-

miums based on a health factor.[8] However, the law exempts from this prohibition premium discounts or rebates in return for adherence to a wellness program.[9] The ACA included provisions that expanded incentives for health-contingent wellness program participation. These wellness provisions were among the few in the law that received bipartisan support. New rules implementing these provisions then increased the maximum reward from 20 percent to 30 percent of premiums for employee participants in health-contingent wellness programs, and up to 50 percent for smoking cessation programs.[10] Under the ACA regulations, participatory programs are compliant with the nondiscrimination provisions as long as participation is available to all similarly situated individuals, regardless of health status.

Generally, the ADA prohibits mandatory medical examinations and inquiries, and GINA prohibits the collection of certain medical information from an employee or the employee's family member.[11] However, the ADA and GINA provide exceptions for wellness programs offered to employees.[12]

ACA-compliant wellness programs have come under legal attack from EEOC. On October 27, 2014, EEOC filed a petition in federal district court seeking a preliminary injunction to stop Honeywell International, Inc. from implementing its employee wellness program, claiming the wellness program's incentives to participate made it *involuntary* and therefore in violation of the ADA and GINA.[13] On November 3, 2014, the district court denied the petition, citing uncertainty as to how the ADA, GINA, and the ACA are intended to interact. The case was later voluntarily dismissed. Since then, EEOC has unsuccessfully challenged wellness programs in other cases.[14]

After its unsuccessful efforts in *EEOC v. Honeywell International, Inc.*, EEOC issued proposed regulations in April and October 2015 on the interaction between the ADA, GINA, and the ACA with regard to wellness programs. The Committee urged EEOC to make significant changes to the proposed rules.[15] The Committee explained that aspects of the proposed rules were contrary to law and would undermine the effectiveness of programs designed to encourage healthy behaviors through wellness programs.

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[8] 42 U.S.C. § 300gg–4 (2010).

[9] 42 U.S.C. § 300gg–4(j)(3)(A) (2010). Wellness programs that are operated separately from a group health plan are not subject to HIPAA nondiscrimination regulations, but may be subject to other federal or state nondiscrimination laws.

[10] Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 78 Fed. Reg. 106 (June 3, 2013).

[11] ADA § 102(d)(4)(A), 42 U.S.C. § 12112(d)(4)(A); GINA § 202(b)(2), 42 U.S.C. § 2000ff–1(b)(2).

[12] 42 U.S.C. § 12112(d)(4)(B); 42 U.S.C. § 2000ff–1(b)(2)(A).

[13] *EEOC v. Honeywell Int'l, Inc.*, No.14–4517, 2014 WL 5795481 (D. Minn. Nov. 6, 2014).

[14] *See EEOC v. Flambeau, Inc.*, 131 F.Supp.3d 849 (W.D. Wis. 2015) (employer's wellness program did not violate the ADA because the program fell within the ADA's safe harbor for bona fide benefit plans), *aff'd on other grounds, EEOC v. Flambeau, Inc.*, 846 F.3d 941 (7th Cir. 2017) (not reaching the merits of the ADA claim); *EEOC v. Orion Energy Systems, Inc.*, No. 14–CV–1019, 2016 WL 5107019 (E.D. Wis. Sept. 19, 2016) (wellness program was voluntary under the ADA where employee who refused to complete health risk assessment (HRA) had to pay full health insurance premium while employees who completed the HRA did not have to pay any premium).

[15] *See* Letter from John Kline, Chairman, House Comm. on Educ. and the Workforce, et al. to Bernadette Wilson, Acting Exec. Officer, U.S. Equal Emp't Opportunity Comm'n (Jun. 19, 2015) (on file with author); Letter from John Kline, Chairman, House Comm. on Educ. and the Workforce, et al. to Bernadette Wilson, Acting Exec. Officer, U.S. Equal Emp't Opportunity Comm'n (Jan. 28, 2016) (on file with author).

In May 2016, EEOC published final rules on wellness programs under the ADA and GINA.[16] While the regulations permit employers to offer financial rewards to employees adhering to a wellness program, the EEOC rules are inconsistent with the ACA and its regulations.

Wellness Programs Benefit Workers and Their Employers

Across the country, workers and families are enjoying increasing access to voluntary employee wellness plans. According to a Kaiser Family Foundation survey, 81 percent of large businesses and 49 percent of smaller businesses offer a wellness program.[17] Another survey indicated 61 percent of employers offered wellness programs, while 92 percent offered at least one kind of wellness benefit.[18] Ms. Allison Klausner, Principal with Conduent Human Resources, stated the following in her testimony at a Committee hearing on March 1, 2017:

> The prospect of a healthier workforce has compelled a growing number of companies to develop and implement wellness strategies. . . . The remarkable take-up of these programs by employers and employees, combined with the capacity and incentives for growth, make wellness an area of tremendous promise for the future of health care and employer-sponsored benefits.[19]

These programs have the potential to contribute to several positive outcomes, such as improving the health of employees, lowering overall health care costs, increasing productivity, improving workforce morale, and reducing absenteeism. Ms. Tamara M. Simon, Managing Director with Buck Consultants, elaborated on wellness program objectives in her testimony before the Workforce Protections Subcommittee on March 24, 2015, stating:

> While improving worker productivity and reducing presenteeism (the practice of attending work while sick) is cited as the most important wellness program objective on a global basis (with 82 percent of respondents calling it very important or extremely important), these programs hold the promise of more direct economic benefits under the principle that successful preventive actions, better-managed chronic conditions and fewer episodes of care will result in reduced health service utilization and fewer claims.[20]

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[16] Regulations Under the Americans With Disabilities Act; Final Rule, 81 Fed. Reg. 31126 (May 17, 2016); Genetic Information Nondiscrimination Act; Final Rule, 81 Fed. Reg. 31143 (May 17, 2016).

[17] Karen Pollitz & Matthew Rae, *Workplace Wellness Programs Characteristics and Requirements*, THE HENRY J. KAISER FAMILY FOUND. (2016), *http://kff.org/private-insurance/issue-brief/workplace-wellness-programs-characteristics-and-requirements/*.

[18] Tanya Mulvey, *2016 Employee Benefits: Looking Back at 20 Years of Employee Benefits Offerings in the U.S.*, SOC'Y FOR HUMAN RES. MGMT., 51 (2016), *https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/2016-employee-benefits.aspx*.

[19] *Legislative Proposals to Improve Health Care Coverage and Provide Lower Costs for Families: Hearing Before the H. Comm. on Educ. and the Workforce*, 115th Cong. (2017) (written statement of Allison Klausner, Principal, Government Relations Leader, Conduent Human Resource Services).

[20] *H.R. 548, "Certainty in Enforcement Act of 2015", H.R. 549, "Litigation Oversight Act of 2015"*, H.R. 550, "EEOC Transparency and Accountability Act", and H.R. 1189, *"Preserving Wellness Programs Act': Hearing Before the Subcomm. on Workforce Prot's. of the H. Comm. on*

Continued

Additionally, Ms. Klausner pointed in her testimony to evidence of the positive results of wellness programs, saying:

> A RAND Employer Survey examining wellness program outcomes, sponsored by the U.S. Department of Labor, found that while it is not clear at this point whether improved health-related behavior will translate into lower health care cost, there is reason to be optimistic. Fully 60 percent of respondents indicated that their wellness program reduced health care cost, with reductions in inpatient costs accounting for 62 percent of the total cost reduction, compared to outpatient costs (28 percent) and prescription drug costs.
>
> The available evidence also supports the aspirational goals of wellness programs—like improving productivity, morale and safety. Data from the RAND survey shows 78 percent of responding employers stated that their wellness program has decreased absenteeism and 80 percent stated that it has increased productivity. Likewise, 32 percent of respondents to a 2014 Mercer Survey said specifically that health risks of the population served by their wellness programs were improving.
>
> These results support published research findings that workplace wellness programs can improve health status, as measured with physiological markers (such as body mass index, cholesterol levels and blood pressure).[21]

Offering a reward can be an important part of encouraging participation in wellness programs. According to Ms. Klausner, 90 percent of employers with wellness programs responding to a Conduent survey reported using incentives.[22] Common activities tied to incentives include the "participation in tobacco cessation programs or workplace health challenges' (such as walking)." Studies have shown an increased participation rate from "40 percent without an incentive to more than 70 percent with a $200 incentive and to 90 percent when incentives are built into health-plan premiums or deductibles."[23]

EEOC Regulations are Inconsistent with Regulations Under the ACA

Congress has long approved policies that help promote the use of voluntary employee wellness programs, most recently through the ACA.[24] However, recent actions by EEOC have undermined Congress's preferred policy. EEOC's litigation challenging employee wellness programs thought to be compliant with the ACA has caused uncertainty for employers.[25] The many differences between the wellness regulations under HIPAA and EEOC's regulations have also created complexity. These conditions inhibit the development and expansion of wellness programs, which is contrary to Congress's intent to promote these programs.

Educ. and the Workforce, 114th Cong. 36 (2015) (written testimony of Tamara Simon, Managing Director, Knowledge Resource Center, Buck Consultants) (quotation marks omitted).

[21] Klausner, *supra* note 19.

[22] *Id.*

[23] *Id.*

[24] *See* 42 U.S.C. 300gg–4(j) ("Programs of health promotion or disease prevention").

[25] *See EEOC v. Honeywell Int'l, Inc.*, No.14–4517, 2014 WL 5795481 (D. Minn. Nov. 6, 2014).

Ms. Klausner expressed the following concerns regarding the uncertain regulatory environment:

> [T]he future of workplace wellness programs remains at risk. Despite explicit Congressional support of wellness programs in recent years . . ., employers continue to face complex and inconsistent regulations for the design and administration of these programs, . . . Unfortunately, the EEOC's recently finalized rules . . . are not consistent with the well-established and employee-protective regulatory framework under HIPAA. The result is that many wellness programs already subject to regulation under HIPAA may now also be subject to incongruent and competing regulations under Title II of GINA and the ADA.[26]

Ms. Klausner gave in her testimony specific examples of inconsistencies between the HIPAA regulation and EEOC's regulations. To clarify what constitutes voluntary participation in a wellness program, EEOC's ADA regulation permits a maximum reward of 30 percent of the cost of self-only coverage. This is contrary to HIPAA, which permits a maximum reward of 30 percent of the total cost of the employee's and dependent's coverage where a dependent participates in the wellness program. Additionally, EEOC's GINA regulation has an entirely different method for calculating the maximum reward. The permissible reward under the GINA regulation is twice the cost of 30 percent of self-only coverage if the inducement applies to both the employee and his or her spouse.[27] Ms. Klausner also noted that although HIPAA already requires notice be provided to employees, the "final EEOC regulations require the use of a much more prescriptive and lengthy notice."[28]

Another area of concern relates to disease management as part of a voluntary wellness program. HIPAA permits disease management programs; however, it is unclear how they will be treated under EEOC's ADA regulation. Ms. Klausner described how disease management works and the need to clarify its status under the ADA regulation, stating:

> Under these programs, individuals with a health factor may be provided financial incentives to engage with the wellness program—but at all times they must be treated better than similarly situated employees who lack the health factor. Many employers sponsor disease management programs under this rubric, such as healthy mother/health baby programs, or diabetes management programs. One example is that a plan may charge a copay for the purchase of insulin, but may waive the copay for their enrollees with diabetes given the clinical evidence supporting the importance of properly managing blood sugar levels.
>
> While these programs are excepted from HIPAA's prescriptive regime—which is appropriate given the favorable treatment under these programs of persons with an adverse health status—the 2016 ADA regulations could subject these types of disease management programs to the regulations' requirements, which would likely cause many

[26] Klausner, *supra* note 19.
[27] Genetic Information Nondiscrimination Act, 81 Fed. Reg. at 31146.
[28] Klausner, *supra* note 19.

> employers to reconsider offering these very valuable and helpful programs.[29]

With respect to smoking cessation programs, the HIPAA regulations and the ADA regulation are inconsistent. The HIPAA regulations permit a maximum incentive of 50 percent of the employee's cost of health care coverage for enrolling in these programs. However, the ADA regulation only allows a maximum incentive of 50 percent if the program merely asks the employee whether he or she uses tobacco. If an additional health screening tests for tobacco use, then the maximum incentive is 30 percent.[30]

The result of the inconsistencies between the HIPAA, ADA, and GINA regulations is that employers are discouraged from offering employee wellness programs, which is contrary to bipartisan congressional intent to promote these programs. Ms. Klausner explained the effects of the regulatory inconsistency, saying:

> Notwithstanding the important role of wellness programs in promoting the health and productivity of employees and their families, the inconsistent federal regulatory framework under HIPAA, GINA, and the ADA has caused many employers to take a step back or pause in their implementation of innovative wellness programs. This is because the new rules under GINA and the ADA added complexity and inconsistency and have made it significantly more difficult for employers to structure programs that comply with all applicable federal regulatory regimes.[31]

Worker Protections

The Committee is concerned with protecting the privacy and confidentiality of employee information, including health and genetic information, and protecting employees from discrimination. Specifically, workers are protected in the following ways:

- The HIPAA Privacy Rule[32] protects against the unauthorized disclosure or transfer of private health information by health plans. Under H.R. 1313, health plans, including wellness programs, will still be subject to the HIPAA Privacy Rule. In addition, wellness programs will still be subject to ADA and GINA confidentiality provisions.[33]
- HIPAA's provisions prohibiting discrimination against individuals on the basis of health status will continue to apply to health plans, including wellness plans. Moreover, under the ADA and GINA, employers cannot discriminate against employees or job applicants on the basis of disability or genetic information.
- Under the bill, employers cannot force employees to submit to genetic testing. Wellness programs have always been completely voluntary. They were voluntary under the ACA, as well as under regulations issued by the Obama administration. They remain voluntary under H.R. 1313.
- GINA prohibits employment discrimination on the basis of genetic information, including information acquired through a

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[29] *Id.*
[30] Regulations Under the Americans with Disabilities Act, 81 Fed. Reg. at 31136.
[31] Klausner, *supra* note 19.
[32] 45 C.F.R. Parts 160, 164(A), (E).
[33] *See* 42 U.S.C. § 12112(4)(C); 42 U.S.C. § 2000ff–5.

wellness program. This prohibition will remain under H.R. 1313.

- Under the bill, employers cannot charge smokers more for health insurance than non-smokers. As is already the case under current law, employees have a choice of whether to enroll in a smoking cessation program to receive a reduction in their health insurance premiums. If they choose not to enroll, they are not paying any more for health care premiums than non-smokers who choose not to enroll.

CONCLUSION

For many years, voluntary employee wellness programs have helped to lower health care costs and improve the quality of life of employees and their families. Today tens of millions of Americans have access to an employee wellness plan, a testament to the broad support and popularity of these voluntary programs. H.R. 1313 will bring uniformity to the regulation of wellness programs under HIPAA, the ADA, and GINA. The bill will provide the regulatory clarity and certainty employers need as they develop and implement these programs. Under the bill, worker protections will remain in place to ensure these programs are voluntary and do not discriminate, and health information remains confidential.

SECTION-BY-SECTION

The following is a section-by-section analysis of the Amendment in the Nature of a Substitute offered by Rep. Byrne and reported favorably by the Committee.

Section 1. Short title

Section 1 provides the short title is the "Preserving Employee Wellness Programs Act."

Section 2. Findings

Section 2 describes the findings of H.R. 1313 regarding Congress's tradition of protecting and preserving employee wellness programs; wellness programs as a means to improve health and lower health care costs; the ACA's provisions allowing financial incentives; and the balance Congress has struck to protect individual privacy and confidentiality.

Section 3. Nondiscriminatory workplace wellness programs

Section 3(a)(1) provides that a wellness program offered in conjunction with an employer-sponsored health plan, if the program complies with the non-discrimination provisions in HIPPA relating to wellness programs, shall be considered to be in compliance with certain provisions relating to the voluntary collection of health information in the ADA and GINA; provides that the ADA provision relating to bona fide benefit plans applies to workplace wellness programs.

Section 3(a)(2) provides that programs offering more favorable treatment for adverse health factors, as described in the Code of Federal Regulations, shall be considered to be in compliance with certain provisions relating to the voluntary collection of health information in the ADA and GINA.

Section 3(a)(3) provides that programs not offered in conjunction with an employer-sponsored health plan, if the program complies with the maximum reward amounts for wellness programs as set forth in HIPAA, shall be considered to be in compliance with certain provisions relating to the voluntary collection of health information in the ADA and GINA.

Section 3(b) provides that the collection of information in a voluntary wellness program about the manifested disease or disorder of a family member shall not be considered an unlawful acquisition of genetic information in violation of GINA. This provision is not intended to indicate GINA's other rules are otherwise inapplicable to wellness programs with respect to an employee's spouse or child.

Section 3(c) provides that an employer offering a wellness program may require an employee, within 45 days from the date the employee first has the opportunity to earn a reward, to request a reasonable alternative standard or waiver of the standard. An employer may also impose a reasonable time period, based on all the facts and circumstances, during which the employee must complete the reasonable alternative standard.

EXPLANATION OF AMENDMENTS

The amendments, including the amendment in the nature of a substitute, are explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. H.R. 1313 will create consistency among the laws that govern wellness programs by providing a uniform set of rules under which wellness programs can be considered compliant.

UNFUNDED MANDATE STATEMENT

With respect to the requirements of Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4), the Committee has requested but not received from the Director of the Congressional Budget Office a statement as to whether the provisions of the reported bill include unfunded mandates.

EARMARK STATEMENT

H.R. 1313 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of House Rule XXI.

ROLL CALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against.

Date: March 8, 2017

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 1 Bill: H.R. 1313 Amendment Number: 3

Disposition: Defeated by a vote of 17 yeas and 22 nays.

Sponsor/Amendment: Mr. Espaillat - Prohibits employment discrimination

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)	X		
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)	X		
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Mr. RUSSELL (OK)		X		Ms. BLUNT ROCHESTER (DE)	X		
Ms. STEFANIK (NY)		X		Mr. KRISHNAMOORTHI (IL)	X		
Mr. ALLEN (GA)		X		Ms. SHEA-PORTER (NH)	X		
Mr. LEWIS (MN)		X		Mr. ESPAILLAT (NY)	X		
Mr. ROONEY (FL)		X					
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
vacancy							

TOTALS: Aye: 17 No: 22 Not Voting:

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

Date: March 8, 2017

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 2 Bill: H.R. 1313 Amendment Number: 4

Disposition: Defeated by a vote of 17 yeas and 22 nays.

Sponsor/Amendment: Mr. Courtney - Prohibits information from being sold

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)	X		
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)	X		
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Mr. RUSSELL (OK)		X		Ms. BLUNT ROCHESTER (DE)	X		
Ms. STEFANIK (NY)		X		Mr. KRISHNAMOORTHI (IL)	X		
Mr. ALLEN (GA)		X		Ms. SHEA-PORTER (NH)	X		
Mr. LEWIS (MN)		X		Mr. ESPAILLAT (NY)	X		
Mr. ROONEY (FL)		X					
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
vacancy							

TOTALS: Aye: 17 No: 22 Not Voting:

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

Date: March 8, 2017

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 3 Bill: H.R. 1313 Amendment Number: 5

Disposition: Defeated by a vote of 17 yeas and 22 nays.

Sponsor/Amendment: Mr. Polis - Requires permission before information can be sold

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)	X		
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)	X		
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Mr. RUSSELL (OK)		X		Ms. BLUNT ROCHESTER (DE)	X		
Ms. STEFANIK (NY)		X		Mr. KRISHNAMOORTHI (IL)	X		
Mr. ALLEN (GA)		X		Ms. SHEA-PORTER (NH)	X		
Mr. LEWIS (MN)		X		Mr. ESPAILLAT (NY)	X		
Mr. ROONEY (FL)		X					
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
vacancy							

TOTALS: Aye: 17 No: 22 Not Voting:

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

Date: March 8, 2017

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 4 Bill: H.R. 1313 Amendment Number: 6

Disposition: Defeated by a vote of 17 yeas and 22 nays.

Sponsor/Amendment: Mr. Polis - Strikes language requiring genetic information of family members

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)	X		
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)	X		
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Mr. RUSSELL (OK)		X		Ms. BLUNT ROCHESTER (DE)	X		
Ms. STEFANIK (NY)		X		Mr. KRISHNAMOORTHI (IL)	X		
Mr. ALLEN (GA)		X		Ms. SHEA-PORTER (NH)	X		
Mr. LEWIS (MN)		X		Mr. ESPAILLAT (NY)	X		
Mr. ROONEY (FL)		X					
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
vacancy							

TOTALS: Aye: 17 No: 22 Not Voting:

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

Date: March 8, 2017

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 5 Bill: H.R. 1313 Amendment Number: 7

Disposition: Defeated by a vote of 17 yeas and 22 nays.

Sponsor/Amendment: Mr. Scott - Removes safe harbor application

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)	X		
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)	X		
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Mr. RUSSELL (OK)		X		Ms. BLUNT ROCHESTER (DE)	X		
Ms. STEFANIK (NY)		X		Mr. KRISHNAMOORTHI (IL)	X		
Mr. ALLEN (GA)		X		Ms. SHEA-PORTER (NH)	X		
Mr. LEWIS (MN)		X		Mr. ESPAILLAT (NY)	X		
Mr. ROONEY (FL)		X					
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
vacancy							

TOTALS: Aye: 17 No: 22 Not Voting:

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

Date: March 8, 2017

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 6 Bill: H.R. 1313 Amendment Number:

Disposition: Ordered favorably reported to the House, as amended, by a vote of 22 yeas and 17 nays.

Sponsor/Amendment: Mr. Wilson - motion to report the bill to the House with an amendment and with the recommendation that the amendment be agreed to, and the bill as amended do pass.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)	X			Mr. SCOTT (VA) (Ranking)		X	
Mr. WILSON (SC)	X			Mrs. DAVIS (CA)		X	
Mr. HUNTER (CA)	X			Mr. GRIJALVA (AZ)		X	
Mr. ROE (TN)	X			Mr. COURTNEY (CT)		X	
Mr. THOMPSON (PA)	X			Ms. FUDGE (OH)		X	
Mr. WALBERG (MI)	X			Mr. POLIS (CO)		X	
Mr. GUTHRIE (KY)	X			Mr. SABLAN (MP)		X	
Mr. ROKITA (IN)	X			Ms. WILSON (FL)		X	
Mr. BARLETTA (PA)	X			Ms. BONAMICI (OR)		X	
Mr. MESSER (IN)	X			Mr. TAKANO (CA)		X	
Mr. BYRNE (AL)	X			Ms. ADAMS (NC)		X	
Mr. BRAT (VA)	X			Mr. DeSAULNIER (CA)		X	
Mr. GROTHMAN (WI)	X			Mr. NORCROSS (NJ)		X	
Mr. RUSSELL (OK)	X			Ms. BLUNT ROCHESTER (DE)		X	
Ms. STEFANIK (NY)	X			Mr. KRISHNAMOORTHI (IL)		X	
Mr. ALLEN (GA)	X			Ms. SHEA-PORTER (NH)		X	
Mr. LEWIS (MN)	X			Mr. ESPAILLAT (NY)		X	
Mr. ROONEY (FL)	X						
Mr. MITCHELL (MI)	X						
Mr. GARRETT (VA)	X						
Mr. SMUCKER (PA)	X						
Mr. FERGUSON (GA)	X						
vacancy							

TOTALS: Aye: 22 No: 17 Not Voting:

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House Rule XIII, the goal of H.R. 1313 is to create consistency among the laws that govern wellness programs by providing a uniform set of rules under which wellness programs can be considered compliant.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 1313 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The committee estimates that enacting H.R. 1313 does not specifically direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE COMMITTEE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for H.R. 1313 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 26, 2017.

Hon. VIRGINIA FOXX,
Chairwoman, Committee on Education and the Workforce,
House of Representatives, Washington, DC.

DEAR MADAM CHAIRWOMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1313, the Preserving Employee Wellness Programs Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Emily King.

Sincerely,

KEITH HALL,
Director.

Enclosure.

H.R. 1313—Preserving Employee Wellness Programs Act

H.R. 1313 would exempt workplace wellness programs from some provisions of the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). If enacted, wellness programs that meet certain requirements in the Public Health Service Act (PHSA) would be exempt from some non-discrimination and privacy requirements under the ADA and GINA. The bill also would allow employers to collect health information from an employee's spouse or children as a part of a wellness program, which is currently only permissible if certain privacy conditions are met.

If H.R. 1313 were enacted, the Equal Employment Opportunity Commission (EEOC) would likely need to revise existing regulations on wellness programs. Based on information from the EEOC, CBO estimates that promulgating those regulations would cost less than $1 million over the 2018–2022 period; any spending would be subject to the availability of appropriated funds.

The bill would not directly affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 1313 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 1313 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Emily King. The estimate was approved by Holly Harvey, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

The requirements of clause 3(e) of rule XIII of the Rules of the House of Representatives do not apply to H.R. 1313.

MINORITY VIEWS

INTRODUCTION

Committee Democrats strongly oppose H.R. 1313, *the Preserving Employee Wellness Programs* Act. The legislation would allow for unnecessary circumvention of important civil rights laws and threaten the privacy of workers. The legislation would, in many instances, give employers access to sensitive information that they may not even need or want. Committee Democrats were also troubled by the Majority's insistence on moving three health-related bills while two other Committees (Energy and Commerce and Ways and Means) simultaneously considered legislation to gut the Affordable Care Act (ACA).

BEFORE THE AFFORDABLE CARE ACT WORKERS HAD FEW OPTIONS

Before the ACA, employer-provided coverage was shrinking and costs were increasing dramatically. From 1999 to 2010, the cost of premiums for employer-provided health insurance increased by 138%.[1] Additionally, workers often had limited options for affordable health insurance. Those who were employed were often locked in to their employment for fear of losing their health insurance, even if they wanted to retire, work part-time, or start a new business, due to inadequate coverage options outside the employer-sponsored system. Workers with pre-existing conditions were particularly disadvantaged, since they could be charged higher rates or denied coverage altogether in the individual market.

Further, before the ACA, many families struggled to manage chronic health conditions that required regular or expensive treatment. All too often, families would "cap out"—hitting an annual or lifetime limitation on benefits. After the cap, working people commonly ran out of health care benefits and were left to pay for the services they desperately needed. This led to financial instability for many families, who were forced to make tough choices, such as whether to pay for health care or pay rent.

PROGRESS OF THE ACA IMPROVES THE HEALTH AND WELLNESS OF FAMILIES

The Affordable Care Act both improved access to health coverage and also improved benefits for millions of working families. One of the most important elements of the ACA is its robust focus on prevention. The ACA expanded access to free preventive services with no cost-sharing for 137 million Americans, including 55 million women and 28 million children.[2] Simply, this means that if fami-

[1] Kaiser Family Foundation, *Snapshots: Employer Health Insurance Costs and Worker Compensation,* (February 27, 2011) available at: http://kff.org/health-costs/issue-brief/snapshots-employer-health-insurance-costs-and-worker-compensation/.

[2] Department of Health and Human Services, *About 137 Million Individuals with Private Insurance are Guaranteed Access to Free Preventive Services,* (May 14, 2015) available at: http://

Continued

lies go to the doctor for a preventive service, such as annual physicals or blood pressure screenings, that preventive care is free. This benefit extends to all private plans, including those with job-based coverage. Since the cost of care can dissuade many Americans from getting care, free preventive care encourages families to seek out the care they need. Now, the share of adults who report forgoing a needed visit to the doctor because of the cost has dropped significantly across the country and more people are taking advantage of routine checkups.[3] Further, increasing access to preventive care decreases the likelihood of disability, and individuals who are healthier enjoy increased productivity on the job, generating higher incomes for themselves and their families.[4]

The ACA also establishes several safeguards for workers and families so that an illness in the past or present does not threaten health coverage in the future. We know that uninsured people generally receive much less care, both preventive or care for acute and chronic conditions, than insured people.[5] Early estimates after the ACA's passage showed that there were around 129 million Americans with a pre-existing condition, 82 million of whom were enrolled in employer-based coverage.[6] For these millions of American workers, the ACA now means that losing a job does not mean losing health insurance coverage. By prohibiting discrimination based on pre-existing conditions and creating affordable health coverage options through the Marketplace, families know they have options to obtain the coverage they need.

Under the ACA's elimination of lifetime and annual benefit caps, working people—including those with job-based insurance—are protected from these coverage limits. Workers are now safeguarded from incurring unreasonable out-of-pocket expenses, which can be financially crippling for many families, especially those struggling to make ends meet while recovering from a major health issue. These benefits are working together to improve the health and wellness of American families.

THE REPUBLICAN REPLACEMENT PLAN THREATENS THE HEALTH OF AMERICAN FAMILIES

Two days prior to the Committee's consideration of the three bills, Republicans released their ACA replacement plan, the *American Health Care Act.* The Ways and Means and Energy and Commerce Committees moved the bill forward through the Committee process, despite the fact that the Congressional Budget Office had not yet released estimates on the legislation's impact on coverage or cost. Committee Democrats expressed their concern about the

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www.hhs.gov/about/news/2015/05/14/about-137-million-individuals-with-private-insurance-are-guaranteed-access-to-free-preventive-services.html.

[3] The Commonwealth Fund, *A Long Way in a Short Time: States' Progress on Health Care Coverage and Access, 2013–2015,* (December 2015) available at: http://www.commonwealthfund.org//media/files/publications/issue-brief/2016/dec/1922_hayes_long_way_state_coverage_access_ib.pdf.

[4] The National Center for Chronic Disease Prevention, *The Power of Prevention,* (2009) available at: https://www.cdc.gov/chronicdisease/pdf/2009-Power-of-Prevention.pdf.

[5] Mathematica Policy Research, Inc., *How Does Insurance Coverage Improve Health Outcomes?* (April 2010), available at: https://www.mathematica-mpr.com/-/media/publications/.../reformhealthcare_ibl.pdf.

[6] Department of Health and Human Services, At Risk: Pre-Existing Conditions Could Affect 1 in 2 Americans: 129 Million People Could be Denied Affordable Coverage Without Health Reform, (November 1, 2011) available at: https://aspe.hhs.gov/sites/default/files/pdf/76376/index.pdf.

lack of transparency in moving the bill forward and also further expressed concern that the markup in the Education and the Workforce Committee occurred simultaneous to this process—essentially forcing the Committee to consider legislation that represents a moving target.

The *American Health Care Act* is an inadequate and unacceptable replacement plan that runs contrary to the goal of promoting wellness. The legislation eliminates the ACA premium tax credits that millions of Americans depend on to pay for health coverage, in favor of a completely inadequate flat tax credit that leaves working families totally exposed to premium increases. The tax credits provided by the Affordable Care Act are based on income and are also tied to the cost of insurance premiums. In general, the lower an individual's income, the larger the tax credit and the more expensive the premium, the larger the credit. Therefore, the tax credit adapts to address the situation of the individual. However, under the Republican's plan, the credits range from $2,000 to $4,000 depending on age, but do not take into account income or the cost of a typical plan in the area.

In addition, the bill dismantles Medicaid as we know it, endangering the health of 70 million Americans who rely on Medicaid, including seniors with long-term care needs, Americans with disabilities, pregnant women, and vulnerable children. Further, under the Republican bill, American workers could see their premiums and deductibles skyrocket. The American public will have fewer protections—including losing the full protection of the ACA's prohibition against insurers discriminating against people with pre-existing conditions under all circumstances. While Republicans increase health costs for many working families, they give tax breaks to the wealthy.

Older Americans will be forced to pay premiums five times higher than what others pay for health coverage, undoing the current limitation that stipulates that older individuals can only be charged three times more than younger enrollees are charged. The Republican bill also shortens the life of the Medicare Trust Fund.[7] Additionally, the bill includes a provision to defund Planned Parenthood for a year, threatening the health care of millions of women and men throughout the country.

The Congressional Budget Office's analysis of the proposal—released after Committee consideration—verified that 24 million more would be uninsured by 2026 under the Republican health care plan.[8] The report also showed that seven million fewer individuals would be enrolled in employer-sponsored insurance.[9] Further, the report demonstrated that millions would be worse off under the Republican plan and that millions more will end up paying more for less coverage.

For these abovementioned reasons, hospitals, providers, consumer groups and advocacy groups are opposing Republicans' at-

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[7] Center on Budget and Policy Priorities, *House Republican Health Plan Would Weaken Medicare,* (March 14, 2017) available at: http://www.cbpp.org/blog/house-republican-health-plan-would-weaken-medicare.

[8] Congressional Budget Office, *Cost Estimate of the American Health Care Act,* (March 13, 2017) available at: https://www.cbo.gov/sites/default/files/115th-congress-2017-2018/costestimate/americanhealthcareact_O.pdf.

[9] *Id.*

tempts to cause irreparable harm to the health and financial security of Americans. AARP stated that, ". . . [the] bill would weaken Medicare's fiscal sustainability, dramatically increase health care costs for Americans aged 50–64, and put at risk the health care of millions of children and adults with disabilities, and poor seniors who depend on the Medicaid program for long-term services and supports and other benefits."[10] The AFL–CIO maintained that, "The reality is, this isn't a healthcare plan at all. It's a massive transfer of wealth from working people to Wall Street."[11] The Consortium for Citizens with Disabilities stated that, "[it is] simply unconscionable to pay for the repeal of the Affordable Care Act (ACA) by cutting services for low income individuals with disabilities, adults, older adults, and children."[12] Due to its glaring shortcomings, the American Hospital Association has stated that it, ". . . cannot support The American Health Care Act in its current form."[13]

H.R. 1313 Allows Wellness Programs to Circumvent Civil Rights in Order To Shift Health Care Costs to Workers

The term "wellness program" is used to describe a broad spectrum of health programs that are ostensibly designed to incentivize employees to improve their health and lower the employer's cost of their sponsored health care plan. At the same time, the Americans with Disabilities (ADA) and Genetic Information Nondiscrimination Act (GINA) protect workers from discrimination and being forced to divulge sensitive information regarding their disabilities or their families' genetic information. The ADA prohibits discrimination on the basis of disability in employment, including requesting or requiring medical information from employees without justification. The law only allows employers to request or require medical information from employees if the request is job-related and consistent with business necessity or is made as part of a voluntary medical examination that is part of an employee health program available to employees at a work site. In enforcement guidance issued in July of 2000, the Equal Employment Opportunity Commission (EEOC) stated that an employee health program is voluntary if it neither requires participation nor penalizes employees who do not participate.[14]

GINA similarly prohibits employers from requesting, requiring, or purchasing the genetic information of employees except in certain narrow circumstances. It also broadly prohibits group health plans from varying premiums or underwriting on the basis of genetic information. One of the narrow circumstances in which an

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[10] AARP, *Letter to Chairmen and Ranking Members of the Energy and Commerce and Ways and Means Committees,* (March 7, 2017) available at: http://www.aarp.org/content/dam/aarp/politics/advocacy/2017/03/aarp-letter-to-congress-on-american-healthcare-act-march-07-2017.pdf.

[11] AFL–CIO, *Press release: GOP Healthcare Plan Taxes Workers and Destroys Care,* (March 7, 2017) available at: http://www.aflcio.org/Press-Room/Press-Releases/GOP-Healthcare-Plan-Taxes-Workers-and-Destroys-Care.

[12] Consortium for Citizens with Disabilities, *Statement: CCD Responds To American Health Care Act,* (March 8, 2017) available at: http://www.c-c-d.org/fichiers/House-statement-3-8-final.pdf.

[13] American Hospital Association, *Letter to Congress,* (March 7, 2017) available at: http://www.aha.org/advocacy-issues/letter/2017/170307-let-aha-house-ahca.pdf.

[14] EEOC Enforcement Guidance, *Disability-Related Inquiries and medical Examination of Employees Under the Americans With Disabilities Act (ADA),* (July 27, 2000) available at: https://www.eeoc.gov/policy/docs/guidance-inquiries.html.

employer is allowed to ask for genetic information is when the information is requested as part of a voluntary wellness program that offers health or genetic services. In regulations implementing GINA in 2010, the EEOC reiterated its 2000 interpretation that an employee health (or wellness) program is voluntary if it neither requires participation nor penalizes persons who choose not to participate.[15] The regulations further provide that employers can never condition an incentive on the provision of genetic information as that would violate the law's prohibition on underwriting or varying premiums on the basis of genetic information.

Many wellness programs require the disclosure of some medical information by the participant, but it is difficult to argue that the participants are providing this information voluntarily, as required by the ADA and GINA, when refusing to disclose it could result in thousands of dollars of penalties.

After receiving numerous comments, the EEOC issued final rules in May 2016 regarding the ADA and GINA. The final wellness rules permit employers to use incentives that do not exceed 30% of the cost of employee-only coverage. The rule does not otherwise require employees to participate in the program (e.g., through intimidation, harassment, or retaliation). Regarding the GINA wellness rule, the EEOC stated that an employer can offer incentives to spouses in exchange for current health information without violating GINA's general prohibition on offering incentives for genetic information.[16]

There has been bipartisan criticism of the EEOC's rules. Democrats, as well as disability and consumer protection groups, including AARP, which filed a lawsuit against the rules, objected to the erosion of important civil rights and privacy protections and the allowance for programs to condition massive rewards on the provision of sensitive medical and genetic information.[17]

Under *the Preserving Employee Wellness Programs Act,* introduced by Chairwoman Foxx, wellness programs would enjoy nearly unfettered ability to circumvent civil rights in order to shift costs to workers. Wellness programs would violate neither the ADA nor GINA if they impose up to 30% of the family premium as a penalty for keeping medical information private. Further, the EEOC's interpretation of GINA to forbid penalties for choosing not to disclose one's children's health information would be reversed. In short, this bill would undermine key privacy and civil rights laws that protect workers.

Committee Democrats strongly oppose H.R. 1313 because it allows circumvention of critical privacy and civil rights protection.

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[15] EEOC Final Rule, *Regulations Under the Genetic Information Nondiscrimination Act of 2008,* (November 9, 2010) available at: https://www.federalregister.gov/documents/2010/11/09/2010-28011/regulations-under-the-genetic-information-nondiscrimination-act-of-2008.

[16] EEOC Final Rule, *Genetic Information Nondiscrimination Act,* (May 17, 2016) available at: https://www.federalregister.gov/documents/2016/05/17/2016-11557/genetic-information-non-discrimination-act.

[17] On October 24, 2016, AARP filed a claim against the EEOC arguing that health-contingent wellness programs violate anti-discrimination laws aimed at protecting workers' medical information. The suit also alleges that the EEOC's most recent rules allow employers to prevent the wellness programs from being truly voluntary because the high price of non-participation AARP unsuccessfully sought an injunction to prevent the rules from going into effect as of January 1, 2017. (*AARP v. United States Equal Employment Opportunity Commission,* Case No 16-cv-2113) http://www.aarp.org/content/dam/aarp/aarp_foundation/litigation/pdf-beg-02-01-2016/AARP-v-EEOC-complaint.pdf.

Democrats noted the widespread opposition to the *Preserving Employee Wellness Programs Act* from groups like the Consortium of People with Disabilities (and its member organizations), AARP, American Diabetes Association, the American Society of Human Genetics (ASHG), Bazelon Center for Mental Health, the Leadership Conference on Civil and Human Rights, the Epilepsy Foundation, American Academy of Pediatrics, March of Dimes, Paralyzed Veterans of America, National Partnership for Women & Families, the National Women's Law Center, Families USA, and Huntington's Disease Society of America, among many others. A coalition signed by 69 organizations, such as AARP and others, noted that, "Workplace wellness programs are fully able to encourage healthy behaviors within the current legal framework: they need not collect and retain private genetic and medical information to be effective. . . . individuals ought not be subject to steep financial pressures by their health plans or employers to disclose their or their families" genetic and medical information." [18]

Further, the National Council on Disability (NCD), an independent federal agency with a mission to provide advice to the President and Congress regarding disability policy, "urges the committee to consider rethinking [provisions of the legislation] . . . in order to uphold the integrity of the protections against prohibited inquiries and discrimination offered to employees with disabilities under the ADA. . . . [the legislation] carries with it far too much risk of rolling back the protections of a law that Congress passed on a bi-partisan basis almost thirty years ago and which has served people with disabilities well ever since." [19]

COMMITTEE CONSIDERATION OF H.R. 1313

Democrats offered a number of amendments that, if accepted, would have preserved some of the privacy and civil rights boundaries enacted through the ADA and GINA. Representative Adams offered an amendment that expressed a sense of Congress that any health care reform legislation should build on the current progress of the ACA with CBO analysis that demonstrates improvements in cost and coverage. That amendment was withdrawn. Representative Espaillat offered an amendment to ensure the information obtained through a wellness program cannot be used in employment decisions, such as hiring or firing. Representative Espaillat asserted that, "Employees should not have to choose between disclosing personal health information in order to avoid financial penalties and not disclosing such information for fear they will be discriminated against based on that very information." The amendment, intended to protect employees who would be exposed to potential discrimination under the legislation, was rejected on a party line vote (17–22).

Representative Courtney offered an amendment to protect the information obtained through wellness programs from being sold. In explaining the amendment, he stated, ". . . [those] who are col-

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[18] Coalition Sign On Letter, *Letter to Chairwoman Foxx and Ranking Members Scott,* (March 7, 2017) available at: https://www.aarp.org/en-us/advocacy-and-policy/federal-advocacy/Documents/HR1313groupoppositionletter030717.pdf.

[19] National Council on Disability, *Letter to Chairwoman Foxx and Ranking Members Scott,* (March 7, 2017).

lecting this information should not be able to turn around and sell it without the knowledge of the employees who are again being somewhat coerced in terms of disclosure, whether it is genetic information, preexisting conditions, disabilities, which again, I think, are the core of what every American believes should be private information, and not sold out there to the higher bidder." Representative Polis also offered an amendment requiring employers to notify workers if information obtained through a wellness program was sold. He said, "I think it is very important that we uphold the principal that your boss or an insurance company should not be able to sell data about you without your permission. Not just any data. It is actually some of the most personal data, like how you want to start a family, whether you plan to get pregnant—any medical condition that has no impact on the job." Both amendments to protect the private health and genetic information of workers and their families were defeated on a party line vote (17–22).

Ranking Member Scott offered an amendment to remove the erroneous application of ADA's safe harbor provision to wellness programs, describing its application as "overbroad and dangerous". The safe harbor provision in the ADA law was designed to protect actuarial risk assessment as a basis for developing insurance plans. Title IV of the ADA law expressly states that the safe harbor "shall not be construed to prohibit or restrict

> (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance."[20]

Stated plainly, the safe harbor provision in the ADA law permits the development of risk models which rely on data and actuarial models. Congress adopted the safe harbor provision with the understanding that the information is protected under the Health Insurance Portability and Accountability Act (HIPAA). Further, the ADA allows an employee to choose to reveal their disability to an employer as a condition for consideration of that employee's need for an accommodation and the employer's ability to provide a reasonable accommodation.

H.R. 1313, if adopted, would have the effect of extending the protection that allows health insurance to assess risk under the ADA, to wellness plans. Some employers have argued that the safe harbor applies to wellness programs, but many wellness programs are not part of an actual health plan and have no role in assisting in underwriting, classifying or administering risk. It is therefore con-

[20] 42 U.S.C. § 12201.

tradictory to the spirit of the law to allow wellness programs to avail themselves of a safe harbor intended only for health insurance, as the legislation seeks to do. Moreover, while information divulged in insurance plans have the protection of HIPAA, the information collected under wellness plans often offers no such protection. Even worse, in this instance the employer now has sensitive information, obtained through a wellness program, which may then undermine the protection of an employee's reasonable accommodation or retaliation claim. Ranking Member Scott's amendment would have maintained the ADA's safe harbor for its original and intended purpose. The amendment was defeated on a party line vote (17–22).

H.R. 1313 was favorably reported, as amended, on a party line vote, with all Democratic Members opposing (22–17).

CONCLUSION

After seven years of disparaging the ACA, Republicans released a repeal and replacement plan that will leave millions of Americans worse off. Meanwhile, H.R. 1313 is misguided and would only serve to shift costs onto vulnerable workers. The legislation would neither protect the progress of the ACA nor improve and expand coverage. While wellness programs, if executed properly, can engage both employers and employees in their health, they do not and should not require a wholesale exemption from civil rights laws. There is no compelling evidence to suggest that civil rights present a barrier to effective programs that promote healthy behavior and habits and workers should not be required to divulge sensitive medical information or face an extreme financial penalty.

ROBERT C. "BOBBY" SCOTT,
Ranking Member.
RAÚL M. GRIJALVA.
MARCIA L. FUDGE.
GREGORIO KILILI CAMACHO SABLAN.
SUZANNE BONAMICI.
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SUSAN A. DAVIS.
JOE COURTNEY.
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FREDERICA S. WILSON.
MARK TAKANO.
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