MINORITY VIEWS
H.R. 1313, the Preserving Employee Wellness Programs Act
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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 families 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,

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

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 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

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[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_ib1.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.

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' attempts 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 Citizen with Disabilities stated that, "[it

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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_0.pdf.

9 *Id.*

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.

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 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.

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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.

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.

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. 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

[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-nondiscrimination-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.

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

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 collecting 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

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

(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 contradictory 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.

[20] 42 U.S.C. § 12201

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