STATEMENT FOR THE RECORD

SUBMITTED TO THE

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON

EMPLOYMENT DISCRIMINATION ISSUES RAISED BY WORKPLACE WELLNESS PROGRAMS

May 8, 2013

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Introduction

On behalf of our more than 37 million members and all Americans age 50 and older, AARP is pleased that the Equal Employment Opportunity Commission (EEOC) is holding this hearing on the civil rights issues raised by workplace wellness programs, and hereby submits this statement for the record.

AARP is a nonprofit, nonpartisan organization that strengthens communities and fights for the issues that matter most to families, including healthcare, equal employment opportunity, and income security. We were active in supporting passage of the Patient Protection and Affordable Care Act (ACA), and we have consistently participated in ACA-related policy discussions and rulemaking proceedings regarding wellness programs. As part of larger coalitions over the past few years, AARP has also participated in informal discussions with various EEOC Commissioners regarding the civil rights implications of wellness programs.

AARP supports promising strategies to promote wellness as a means of helping individuals to pursue healthy behaviors and thereby help reduce health care expenditures and improve health outcomes. However, as a general principle, AARP opposes discrimination based on a person’s health status, lifestyle, or behaviors, and opposes penalties in the form of higher premiums, increased cost sharing, or other charges based on a beneficiary’s health status or failure to achieve specified outcomes. AARP also opposes discrimination in all aspects of employment, including in compensation and the provision of employee benefits. Accordingly, in response to proposed regulations on wellness programs under the ACA, AARP in previous comments urged caution to ensure that wellness programs did not deny care or make health coverage unaffordable.1 The EEOC’s inquiry, however, entails examination of compliance with a different set of laws and regulations, with their own applicable legal standards, complaint procedures, remedies, and enforcement agencies. AARP has additional and significant concerns here as well.

The design and operation of some wellness programs are difficult to square with well-established civil rights principles and statutory mandates. Despite the ACA’s codification and expansion of employer-sponsored wellness programs, the civil rights laws and the EEOC’s mandate to enforce them require respect and deference. Over the years, the EEOC has issued some helpful guidance, but that guidance has some clear gaps, and new questions have arisen in the light of recently enacted laws. Consequently, the EEOC should update and clarify its regulatory and enforcement guidance on wellness programs.

I. Workplace Wellness Programs Remain Subject to the Civil Rights Laws and EEOC Jurisdiction

Before the adoption of the ACA, the Health Insurance Portability and Accountability Act (HIPAA) prohibited employer-provided health insurance plans from discriminating against insured persons on the basis of a health factor. HIPAA permitted financial rewards/penalties in connection with a workplace wellness program as long as those rewards/penalties were limited and the program itself was properly structured and not a subterfuge for discrimination. At the request of the EEOC, HHS expressly stated that: the regulations promulgated under HIPAA had no effect on other laws;

compliance with HIPAA was not determinative of compliance with any other federal or state laws, including the Americans with Disabilities Act (ADA); and employers should consider the applicability of other laws in designing their programs.2

Likewise, after the ACA, our nation’s civil rights laws remain in full force and effect. In fact, several provisions of the ACA prohibit discrimination on some of the same bases as the civil rights laws. For example, Sec. 1302(b)(4) prohibits discrimination on the basis of disability and age in the definition of essential health benefits.3 Sec. 1557 of the ACA extends application of the laws that prohibit discrimination in programs or activities receiving federal financial assistance, plus Title VII, to the health insurance exchanges4 (in this case enforced by the HHS Office of Civil Rights).

While the ACA reaffirmed wellness programs and increased permissible incentives, these programs must still comply with all other applicable laws, including the civil rights laws enforced by the EEOC. Nothing in the ACA countermands the applicability of employment discrimination laws to workplace wellness programs. Thus, a wellness program’s compliance with the ACA is neither dispositive, nor even particularly compelling, as to questions of compliance with the civil rights laws enforced by the EEOC -- compliance with the strictures of the ACA is no safe harbor for compliance with the ADA, the Age Discrimination in Employment Act (ADEA), and other civil rights statutes and regulations.

II. Age and Disability Discrimination Are Heavily Implicated by Workplace Wellness Programs

Traditionally under HIPAA5 and now under the ACA,6 two kinds of wellness programs have been recognized: 1) participatory programs, which are not tied to the achievement of any particular health standard or outcome, such as offering a partial reimbursement for gym memberships, and 2) health-contingent programs, which are tied to the achievement of health outcomes, for instance, where a worker must lower their cholesterol level or else pay a higher health insurance premium.

Programs that impose financial penalties or deny financial rewards based on failure to achieve a particular health outcome -- the health-contingent programs -- have caused consumer and worker advocates the most consternation, but both types of programs raise possible civil rights concerns.

AARP is most focused on the impact such programs may have based on age (under the ADEA), as well as on the basis of disability (under the ADA), which is highly correlated with age. One example of a wellness program might discriminate against older workers is one in which employees were penalized for not participating in a wellness activity, such as an exercise program, that might be more difficult for older employees. A wellness program that required employees with a given health condition to meet a particular health outcome, without any adjustment for variations based on age, might also be considered age discriminatory. The ADEA prohibits discrimination in compensation and benefits on the basis of age; however, under limited circumstances, the ADEA permits employers to treat older workers differently than younger workers. The “equal cost-equal

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4 Id., at Sec. 1557 (to be codified at 42 U.S.C. § 18116).
5 29 C.F.R. § 2590.702(f).
6 ACA, supra n. 3, at Sec. 1201 (to be codified at 42 U.S.C. § 300gg-4).
benefit rule” only requires the employer to spend the same amount on older employees’ benefits as is spent for younger employees. As long as the employer incurs the same cost, and keeps employee contributions proportional across age cohorts, older workers can sometimes be asked to contribute higher premiums, or to accept reduced benefits. Fortunately for older workers and workers with disabilities, it would appear that few plans do this. However, if an employer did require older workers to contribute more to their health insurance premium, and a wellness program penalty compounded that cost, the differential imposed on older workers could be very substantial. Certainly, wellness penalties/rewards should not be allowed to vary by age.

Disability discrimination by wellness programs is also a major concern for older workers. A very large proportion -- two-thirds -- of all workers in the labor force who have disabilities are 45 and older. Moreover, there is a high correlation between certain health conditions and age. For instance, workers age 45-64 are about three times more likely than workers 18-44 to have diabetes. Age is also a risk factor for coronary heart disease. Any program that disadvantages workers with these types of diseases by charging them more could have a disparate impact on older workers. Such a program would need to be evaluated on an individualized, case-by-case basis, be reasonable in both its design and in the way it is administered, take into account the extent to which the employer took steps to assess the adverse impact of its practice on older workers, or meet other criteria.

Under the ADA, disability-related inquiries made of employees are only permissible if they are job-related and consistent with business necessity. This same standard applies to practices that have a disparate impact on the basis of race, sex, or national origin under Title VII. “Job-related” means that the inquiry or practice must be aimed at determining whether the employee is able to perform the essential duties of her or his job. In the face of a practice that has a discriminatory impact, “business necessity” means that a practice is essential to the safe and efficient operation of the business, and that there is no less discriminatory alternative available to accomplish the same purpose. For instance, a medical assessment of airline pilots’ ability to see, hear, or perform other

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8 AARP is not aware of any significant practice of “list billing” by employers now, under which employees are separately charged for the cost of their insurance based on their personal rating factors. Instead, most employers engage in composite billing, whereby the cost of insuring all employees is aggregated and then divided by the number of employees. Patient Protection and Affordable Care Act; Health Insurance Market Rules; Rate Review, Proposed Rule, 77 Fed. Reg. 70584, 70591 (Nov. 26, 2012), available at http://www.gpo.gov/fdsys/pkg/FR-2012-11-26/pdf/2012-28428.pdf. Composite billing has the effect of pooling the risks and making insurance more affordable for those at higher risk of health conditions.
12 See Disparate Impact and Reasonable Factors Other Than Age under the Age Discrimination in Employment Act; Final Rule, 77 Fed. Reg. 19080 (Mar. 30, 2012) (to be codified at 29 C.F.R. § 1625.7) [hereinafter RFOA Regulations].
functions key to flying a plane might have a disparate impact on persons with disabilities but could be considered job-related and a business necessity.

Because wellness programs tend to be focused on measuring indicia or predictors of health conditions, totally divorced from the core job duties or job performance of the employee being measured, they are unlikely to be considered job-related. Moreover, while controlling health care costs is an important and legitimate objective for employers that offer health coverage to their employees, it would be difficult to maintain that wellness programs are a necessity for the business to function, especially if the programs themselves have not been demonstrated as effective in meeting their objectives.

A review of the effectiveness of wellness programs indicates that "...[the] wellness industry has outpaced its underlying evidence base."15 There is a wide variety of wellness programs, and not all have been subjected to rigorous evaluation. According to Rand’s review of the literature, it did find that, of the eight studies that assessed the impact of wellness programs on health costs, all but one found "significant decreases."16 On the other hand, the three agencies that promulgated the proposed wellness regulations under the ACA conceded in their economic analysis that "insufficient broad-based evidence makes it difficult to definitively assess the impact of workplace wellness programs on health outcomes and cost."17 However, to the extent wellness programs do reduce health costs for employers, they may do so by shifting costs to less healthy, and thus more vulnerable, employees.18 A practice that cannot be shown to accomplish its stated objectives would have a hard time being judged consistent with business necessity under the civil rights laws, especially if less discriminatory alternatives are available. Significantly, the Rand review of the literature noted that "[t]here are also no data on potential unintended effects, such as discrimination against employees based on their health or health behaviors."19

III. The EEOC Should Issue Additional Guidance on Wellness Programs

The EEOC has issued some very helpful guidance regarding wellness programs over the years. In 2000, the Commission issued extensive guidance on medical inquiries under the ADA.20 While wellness programs were not a focus of the guidance, one of the Q&As advised that both participatory and health-contingent wellness programs are permissible under ADA -- without having to show they are job-related or consistent with business necessity -- as long as participation by the employee is voluntary, and any information gleaned from this voluntary provision is kept confidential and separate from the employer's personnel records. Critically, the Commission

16 Id., 25.
19 Rand Review, supra n. 15, at 7.
stipulated that "a wellness program is 'voluntary' as long as an employer neither requires participation nor penalizes employees who do not participate."\(^{21}\)

In informal discussion letters by the Commission's Legal Counsel, the Commission has offered more detailed guidance on wellness programs. In these letters, the Commission has reiterated that penalizing employees who will not participate in disability-related inquiries renders the program not voluntary and therefore in violation of the ADA.\(^ {22}\) Even when a health-contingent wellness program is voluntary, employers are required to provide reasonable accommodation to workers who, due to a disability, cannot meet the outcomes and therefore cannot qualify for the reward.\(^ {23}\) In addition, the Commission has pointed out that wellness programs requiring or incentivizing health risk assessments that are aimed at all employees do not appear to be job-related or consistent with business necessity because they are not motivated by concerns that a particular employee cannot perform the job.\(^ {24}\) Finally, Legal Counsel has made clear that voluntariness is a touchstone of the lawfulness of employer medical inquiries under the Genetic Information Nondiscrimination Act (GINA) as well.\(^ {25}\)

This guidance is effective, as far as it goes. In particular, the Commission should maintain adherence to requirements that any medical or disability-related inquiries associated with wellness programs be voluntary, job-related and consistent with business necessity, under the ADA. However, there are gaps that the Commission should address to clarify the acceptable parameters of wellness programs under the civil rights laws. The Commission’s recent issuance of regulations under the ADA Amendments Act of 2008,\(^ {26}\) GINA,\(^ {27}\) and disparate impact under the ADEA,\(^ {28}\) all of which strengthened protections for workers, also argue for an update of the EEOC’s enforcement guidance in this area. Other federal agencies have taken the lead under the ACA in promulgating proposed regulations on wellness programs; however, it is critical that the EEOC’s statutory authority and expertise regarding the interpretation and enforcement of the civil rights laws be brought to bear regarding these programs as well.

AARP calls upon the EEOC to issue guidance now, and regulations later. Formal enforcement guidance updating the circumstances and characteristics under which employer-sponsored wellness programs can pass muster under the ADA, ADEA, Title VII, and other laws enforced by

\(^{21}\) Id., at Q&A #22.
\(^{28}\) RFOA Regulations, supra n. 12.
the EEOC\textsuperscript{29} is needed as soon as possible because the development of regulations under the ACA is nearing the end of the process,\textsuperscript{30} and because the three agencies proposing the ACA regulations have indicated their desire to permit wellness programs inducements to be increased to 30% even before 2014.\textsuperscript{31} It is important that additional guidance reflecting the EEOC’s expertise in applying the laws it is charged with enforcing also be available to guide employers and employees. Once guidance is issued, the Commission should use that as a starting point to promulgate regulations. The guidance should address several pressing issues.

First, the Commission should \textbf{weigh in (again) with the three agencies} issuing wellness regulations under the ACA. In light of its hearing on this issue, and in addition to any comments made during the interagency review period, the EEOC perspective would be very helpful prior to the agencies issuing their final regulations. The EEOC could urge the Departments to include a HIPAA-like provision clarifying the simultaneous application of other laws, including the civil rights laws. Our reading of the ACA does not make this necessary, but the additional clarification would head off any confusion. The Commission could also encourage the three issuing agencies to draw upon legal principles well-developed under the civil rights laws to define ACA wellness concepts such as “subterfuge for discrimination” and “highly suspect.”

Second, the Commission should address the issue of \textbf{permissible inducements} under the various laws it enforces. EEOC guidance is consistent in its declarations that the imposition of \textit{penalties} for nonparticipation in wellness programs that make disability-related or genetic-background inquiries renders those inquiries non-voluntary. However, the Commission keeps “taking no position” on the issue of whether inducements are permitted under the ADA, and if so, at what level, before they taint a program as involuntary.

The dichotomy the Commission seems to be drawing between penalties and rewards is unclear, as there would appear to be little meaningful difference, either legally or practically, between the imposition of a penalty and the denial of a reward. Clearly, if only younger employees were offered an inducement to join a gym, but older employees were denied that opportunity, the denial of the inducement would discriminate on the basis of age and violate the ADEA. Rewards and penalties in this context are two sides of the same coin. Denial of a discount on health premiums, or denial of a waiver of the annual deductible, based on age or disability, is discrimination. Such denials based on criteria with an adverse disparate impact on older workers or workers with disabilities likewise may violate federal civil rights law.

The EEOC should also clarify that the level of inducement does not make a difference. It is one thing if an employer gives out \textit{de minimus} rewards, such as a $10 gift card to everyone attending a health fair, or an ipod prize to employees who participate in a workplace fitness program and meet their weight loss goals. However, when it comes to an employer imposing higher premiums/copays/deductibles for health coverage, or denying discounts on those costs, based on nonparticipation or lack of achievement of particular health outcomes, the EEOC should make it clear that the program crosses the line into significant differences in employee compensation and

\textsuperscript{29} E.g., Wellness programs that provide financial penalties/rewards in insurance premiums and cost-sharing also implicate the Equal Pay Act.
\textsuperscript{30} J. Haberkorn, Business groups push back on wellness regulation changes, \textit{PoliticoPro} (subscriber-only access) (May 6, 2013).
\textsuperscript{31} U.S. Dept. of Labor, FAQs about Affordable Care Act Implementation Part V and Mental Health Parity Implementation (Dec. 22, 2010) (“The Departments intend to propose regulations that use existing regulatory authority under HIPAA to raise the percentage for the maximum reward that can be provided under a health-contingent wellness program to 30 percent before the year 2014.”), available at http://www.dol.gov/ebsa/faqs/faq-aca5.html.
benefits and other terms, conditions, and privileges of employment. This would be the case whether those differences amount to 5%, 10%, up to 20% as before under HIPAA, or up to 30% and even 50% as now permitted under ACA. If these differences are allocated on the basis of a protected characteristic, on their face or by their impact, they constitute at least prima facie evidence of unlawful discrimination and should be scrutinized. In this vein, it would be extremely helpful if the Commission’s guidance could elaborate upon the definition of what constitutes “voluntary” participation. In the context of GINA, at least, the Commission has been clear that an employer’s offer of inducements to provide information on family medical history is not voluntary.32

Third, it would be helpful for the Commission to explain the relationship between the ADA’s statutory provisions on medical inquiries and its so-called "safe harbor" for health insurance under the ADA. Without such guidance, we risk more poorly presented and wrongly decided cases such as Seff v. Broward County, Fla.33 In that case, the 11th Circuit appears to have totally disregarded not only the EEOC’s guidance on wellness programs, but also the ADA's statutory requirements of actuarial justification and lack of subterfuge that attach to the safe harbor.34 Whether and when a wellness program should be considered part of a health plan for purposes of the ADA’s safe harbor is a threshold question here.

Finally, in addressing statutes other than the ADA, the Commission’s guidance should clarify what types of wellness program requirements likely violate those other laws, based on the legal standards that apply under those laws. For example, a wellness program that penalizes employees who have diabetes might well violate the ADA and would likely have a disparate impact on older employees. It is questionable whether such a penalty could be justified as a reasonable factor other than age under the EEOC's recent regulations.35

As part of the recommended updated guidance, the inclusion of examples, Q&As, and best practices would be valuable in assisting employers to design their programs in a way that does not run afoul of the civil rights laws, and it would assist employees in understanding their rights.

In addition to requesting that the EEOC update its guidance, AARP calls upon the Commission to increase enforcement of the law as it now stands. Even without additional guidance or regulations, there appear to be wellness programs in operation that clearly violate the civil rights laws. For instance, CVS Caremark, the nation’s largest pharmacy chain, reportedly instituted a program requiring their employees to go to a doctor, get a “wellness review” exam, and to turn over the results of that exam (e.g., blood pressure, weight and body fat, cholesterol, etc.) to the company’s health insurance provider. The company never sees the individual results, it only finds out whether employees underwent the exam. Employees who don’t participate are surcharged $600/year.36 Under the EEOC’s previous guidance on medical inquiries and exams under the ADA, it is difficult to see how this participatory program could be viewed as “voluntary.” In addition, Pepsi reportedly imposed a $600/year surcharge on employees who have an obesity-related health condition such as high blood pressure or diabetes;37 in other words, it imposed a financial penalty on having a health condition (many of them to which Pepsi’s own products contribute), which would

32 GINA Wellness Letter, supra n. 25, at 2.
33 891 F.3d 1221 (11th Cir. 2012).
34 42 U.S.C. 12201(c).
35 See RFOA Regulations, supra n. 12.
appear to violate the ADA. Moreover, because African American men disproportionately have high blood pressure,\textsuperscript{38} such a penalty may violate Title VII as well.

It is difficult for an employee who believes their workplace wellness program is discriminatory to file a complaint, many for fear of retaliation. Especially in the current economic environment, most workers are concerned over whether they have a job, especially one that offers health insurance, and they are not eager to rock the boat by filing a discrimination complaint. Because of this, the EEOC should conduct directed investigations and issue commissioners' charges to take action on its own initiative against plans that violate the law – including state and local government plans.

Conclusion

The Affordable Care Act had many objectives, including: to make health coverage more available and affordable, to limit medical underwriting and discrimination based on health status, and to help “bend the cost curve” and bring down health expenditures. Wellness programs were included in the ACA primarily to assist in this last goal, although their effectiveness is by no means proven. At the same time, wellness programs must comply with existing civil rights laws. The EEOC has an important, independent role to play in shaping wellness programs and ensuring careful design and enforcement that protects employees’ rights. As a first step, we urge EEOC to fully exercise its authority and apply its expertise in the civil rights laws by issuing updated formal enforcement guidance on the legal parameters of these programs.

Respectfully submitted,

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