CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA
1615 H STREET, N.W.
WASHINGTON, D.C. 20062

RANDEL K. JOHNSON
SENIOR VICE PRESIDENT
LABOR, IMMIGRATION, &
EMPLOYEE BENEFITS

JAMES PLUNKETT
DIRECTOR
LABOR LAW POLICY

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Hon. Lamar Alexander, Chairman
Committee on Health, Education, Labor & Pensions
United States Senate
Washington, DC 20515

Dear Chairman Alexander:

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, appreciates this opportunity to provide a statement for the record as part of the Committee's January 29, 2015 hearing entitled "Employer Wellness Programs: Better Health Outcomes and Lower Costs." The vast majority of Chamber members are employers covered by the laws relevant to the hearing, including the Affordable Care Act ("ACA"), the Health Insurance Portability and Accountability Act ("HIPAA"), the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"). The purpose of this letter is to provide you with a summary of our members' concerns regarding recent actions by the Equal Employment Opportunity Commission ("EEOC") which have created uncertainty in the employer community as to the lawfulness of their wellness programs.[1]

I. Employer Wellness Programs Are Widely Accepted

Employer-sponsored insurance remains a crucial element of our health care system – providing the most stable, innovative, and affordable health care coverage to Americans. Many employers who offer health care coverage to their employees also provide voluntary workplace wellness programs as an additional way to improve health and reduce costs. These programs are hugely popular among employers and employees alike. Indeed, according to a recent study by the Society of Human Resource Management, 76% of respondent businesses offered employees a workplace

[1] Of course, it should come as no surprise to the Committee that EEOC is again engaging in questionable litigation tactics. *See* "*EEOC: An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities, and Lack of Transparency Raise Concerns about Important Anti-Discrimination Agency*" (November, 2014); "*A Review of EEOC Enforcement and Litigation Strategy during the Obama Administration—A Misuse of Authority*" (U.S. Chamber of Commerce, June 2014).

wellness program. For respondents who did offer wellness programs, 67% of them offered incentives or rewards as a way to encourage employee participation.[2] The popularity of such programs is no surprise, as according to one recent study, employer medical costs fall about $3.27 for every dollar spent on wellness programs, and absentee day costs fall by about $2.73 for every dollar spent.[3]

Although the Chamber has long championed the adoption, expansion and diversification of workplace wellness programs, it is not alone in recognizing both the prevalence and importance of employer sponsored wellness programs. Indeed, both Congress and the EEOC have recognized the significance of these programs multiple times in the past.[4] President Obama has even taken the time to tout the importance of workplace wellness programs: "By working to improve safety and health in the workplace, we can reduce costs, increase productivity, and implement best practices that further citizen's well-being."[5]

II. The Current Legal and Policy and Framework Surrounding Wellness Programs

Though popular, wellness programs can be complicated. When implementing and operating a wellness program, employers must negotiate a series of legal and regulatory requirements. Employers must navigate not just the PPACA, but also HIPAA, ADA, GINA and other federal laws. The Department of Labor ("DOL"), the Department of the Treasury ("Treasury") and the Department of Health and Human Services ("HHS") all oversee aspects of employer wellness programs, and have issued joint regulations on the matter.[6] As explained in more detail below, although EEOC has always had jurisdiction over the ADA and Title II of GINA, in recent months the Commission has embarked upon an enforcement strategy that: (1) has left employers wondering if they may be liable for implementing wellness programs; and

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[2] *See* SHRM Survey Findings: Strategic Benefits - Wellness Initiatives (January 22, 2015), available at http://www.shrm.org/research/surveyfindings/articles/pages/2014-shrm-strategic-use-of-benefits-wellness-initiatives.aspx

[3] Katherine Baicker, David Cutler, and Zurui Song, "Workplace Wellness Programs Can Generate Savings," available at http://dash.harvard.edu/handle/1/5345879

[4] *See, e.g.,* the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"); the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1201(1), 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010); s*ee also* EEOC, Enforcement Guidance: Disability-related Inquires And Medical Examinations of Employees Under the Americans With Disabilities Act (ADA), July 27, 2000, available at http://www.eeoc.gov/policy/docs/guidance-inquiries.html

[5] *See* April 9, 2009 letter from President Obama commemorating "National Workplace Wellness Week,," available at http://www.uswwa.org/files/2010/11/WorkPlaceWellnessMessage.pdf

[6] "Incentives for Nondiscriminatory Wellness Programs in Group Health Plans," 26 Fed. Reg. 33158 (June 3, 2013).

(2) will likely have a chilling effect on the development and innovation of wellness programs.

A. HIPAA and ACA

HIPAA prohibits discrimination in eligibility, premium costs, benefits and the like on the basis of a health factor, such as genetic information or disability. However, there are some exceptions that permit incentives to encourage employees to meet certain health standards, such as achieving healthy cholesterol or blood pressure levels. Such incentives are commonly embodied in wellness programs. If the incentive is provided merely for participating (e.g., providing a discount for membership at the local gym), then the program is permitted as long as it is made available to all similarly situated employees. On the other hand, when a wellness program conditions its incentives on a particular outcome, such as achieving a certain blood pressure or cholesterol level, then the program must meet certain safeguards to ensure that it does not discriminate. For example, the incentive must be capped at 20% of the total cost of an employee's coverage and employees must be permitted to achieve the reward through an alternative standard. [7]

Building upon the nondiscrimination standards set forth in HIPAA, ACA expressly endorses employer wellness plans as a means to improve both employee health and employer costs. In fact, ACA goes even further by permitting allowable incentives of up to 30% of their premium and gives the Secretaries of Health and Human Services, Labor, and Treasury the ability to increase it to 50% of the cost of coverage "if the Secretaries determine that such an increase is appropriate."[8] Subsequent joint regulations issued by DOL, Treasury and HHS set the cap at 30% for wellness programs (and up to 50% for smoking cessation programs). Thus, both PPACA and the current joint regulations issued by DOL, Treasury and HHS specifically endorse the use of incentives in health-contingent wellness programs.

B. ADA and GINA

But, of course, HIPAA and ACA are not the only provisions of which employers must be aware when implementing wellness programs. The ADA and GINA help to prevent discrimination by limiting employers' abilities to solicit health or genetic-related information from employees and applicants; nor can employers use such information when making employment decisions. Certain exceptions apply, though. For example, under the ADA, such inquiries – which include biometric

[7] The additional factors that must be met are: (1) The wellness program must be reasonably designed to promote health, (2) eligible individuals must be given the opportunity to qualify for the award at least once each year, and (3) the reward is available to all similarly situated individuals. *See* 26 CFR 54.9802-1(f)(4).

[8] 42 USC 200gg-4(j)(3)(A).

screenings that are a part of an employer wellness program – are permissible as long as they are voluntary. *See* 42 USCS § 12112(d)(4)(B)("A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site.").[9] Thus, as long as a wellness program is determined to be "voluntary," it is lawful under the ADA. This is not as easy it seems, however, because although some questions remain as to the roll that GINA plays with respect to wellness plans, much of the current policy debate concerns what it actually means to be "voluntary" under the ADA.

III. The EEOC's View of Wellness Plans Creates Uncertainty for Employers

A. EEOC's Interpretation of "Voluntary" Under ADA

The ADA does not define what constitutes a "voluntary" medical examination. However, EEOC guidance states that at least with regard to wellness programs, such a program is voluntary "as long as the employer neither requires participation nor penalizes employees who do not participate."[10] This description raises the question of when an incentive can actually coerce participation or constitute a penalty, and thus render a program "involuntary." Therefore, the EEOC guidance does little to clarify the situation.

However, as far back as 2009, EEOC's Office of Legal Counsel recognized this lack of clarity, and set forth clear guidance on the issue:

> employers may offer inducements to encourage voluntary participation in wellness programs that require completion of health risk assessments, as long as any financial inducements do not exceed the 20 percent limit set forth in the final regulations implementing the Health Insurance Portability and Accountability Act (HIPAA) nondiscrimination requirement. Borrowing from the HIPAA rule is

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[9] GINA allows covered entities to collect genetic information where (1) "health or genetic services are offered by the employer, including services offered as part of a wellness program;" (2) "the employee provides prior, knowing, voluntary, and written authorization;" (3) "only the employee . . . and the licensed health care professional or board certified genetic counselor involved in providing such services receive individually identifiable information concerning the results of such services;" and (4) "individual identifiable genetic information provided . . . is only available for purposes of such services and shall not be disclosed to the employer except in aggregate terms that do not disclose the identity of specific employees." 42 U.S.C. § 2000ff-1(b)(2).

[10] *See* EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) http://www.eeoc.gov/policy/docs/guidance-inquiries.html#5

> appropriate because the ADA lacks specific standards on financial inducements and because it will help increase consistency in the implementation of wellness programs.[11]

Thus, the EEOC has previously relied on HIPAA to shape its guidance and sought to ensure consistency between its interpretation of the ADA and the legal framework which existed at the time concerning employer wellness plans. Unfortunately, without explanation the EEOC rescinded the letter just two months later, stating that "[t]he Commission is continuing to examine what level, if any, of financial inducement to participate in a wellness program would be permissible under the ADA."[12] According to the Fall 2014 Regulatory Agenda, later this month EEOC will issue a Notice of Proposed Rulemaking "to address the interaction between title I of the ADA and financial inducements and/or penalties as part of wellness programs offered through health plans."[13] Because the Commission has delayed issuing these regulations for approximately six years, there is little confidence among employers that such regulations will issue any time soon. There is perhaps even less confidence – given the EEOC's abrupt rescission of its 2009 letter – that any regulations will be in harmony with the current statutory and regulatory framework described above.

B. The Safe Harbor for Bona Fide Benefit Plans

In the meantime, with the prevalence of wellness programs and the lack of direction from the EEOC, it should be no surprise that this issue has already made its way to the courts. In *Seff v. Broward County*, the 11th Circuit Court of Appeals upheld a district court decision which found that a $20 charge levied on each paycheck of employees who participated in the employer group insurance plan but who refused to complete an online HRA and participate in biometric screening was lawful under the ADA. However, rather than analyzing the case under the "voluntary" component of the ADA, the court found that the wellness program was compliant under the ADA safe harbor for "bona fide benefit plan[s]." 42 USC 12201(c). Unfortunately, the decision provides little guidance for employers because it does not go into detail as to why the wellness program was considered a "bona fide benefit plan." Moreover, the EEOC continues to push its "voluntary" theory under the ADA.

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[11] *See* January 6, 2009 letter, "ADA: Disability Related Inquiries and Medical Exams/Mandatory Clinical Health Risk Assessment" available at http://pdfserver.amlaw.com/cc/WellnessEEOC2009.pdf

[12] *See* http://www.eeoc.gov/eeoc/foia/letters/2009/ada_disability_medexam_healthrisk.html

[13] Similarly, the Regulatory Agenda states that EEOC will issue an NPRM in February amending the GINA regulations "to address inducements to employees' spouses or other family members who respond to questions about their current or past medical conditions on health risk assessments."

C. EEOC Litigation Over Employer Wellness Plans

Despite this unclear legal backdrop, in the second half of 2014, EEOC filed several high profile cases against employers which alleged that the employers' wellness programs were not voluntary under the ADA.[14] The most controversial of these cases has been the temporary restraining order and preliminary injunction that EEOC sought against Honeywell, whose wellness program was lawful under HIPAA and ACA.[15] Alleging that surcharges and incentives rendered Honeywell's program involuntary under the ADA, EEOC argued that the *Seff* case was incorrectly decided and that "compliance with HIPAA and ACA are not defenses to the ADA." The court denied EEOC's request for several reasons, including EEOC's inability to demonstrate irreparable harm, noting that legal damages would be sufficient to address any resultant harms, which would be purely monetary in nature. Significantly, the court also stated that "great uncertainty persists in regard to how the ACA, ADA and other federal statutes such as GINA are intended to act."

EEOC's actions in the Honeywell case are in direct conflict with the joint regulations passed by three White House Cabinet officials and are, at best, inconsistent with a clear White House policy favoring wellness plans.[16] At a White House press briefing on December 3, 2014, Press Secretary Josh Earnest stated that, with regard to the Honeywell case, "as a general matter, . . . the administration, and particularly the White House, is concerned that this . . . could be inconsistent with what we know about wellness programs and the fact that we know that wellness programs are good for both employers and employees."[17]

Despite their popularity among employers and employees, employer wellness programs are now in a state of limbo. Employers whose programs are compliant with HIPAA and ACA cannot be sure that they will not be sued by the EEOC. Moreover, regulatory guidance from the EEOC is likely a long ways away and unlikely to resolve the existing confusion. Consequently, legislation is needed to clarify that wellness programs which comply with HIPAA and ACA regulations do not violate the ADA.

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[14] *EEOC v. Orion Energy Systems, Inc.*, Case No. 14-1019 (E.D. Wis. filed Aug. 20, 2014) ; *EEOC v. Flambeau, Inc.*, Case No. 14-638 (W.D. Wis. filed Sept. 30, 2014); *EEOC v. Honeywell Int'l, Inc.*, Civil No. 14-4517 (D. Minn. Oct. 27, 2014) *EEOC v. Honeywell Int'l, Inc.*, Civil No. 14-4517, 2014 U.S. Dist. LEXIS 157945 (D. Minn. Nov. 6, 2014).

[15] "*Wellness Program at Honeywell Faces Test; EEOC to Challenge Companies' Health Screenings*," WALL STREET JOURNAL (October 29, 2014).

[16] Additionally, given the rapid nature in which the EEOC went to court, it is unlikely that it engaged in its statutory duty to conciliate; nor is it likely that the case was approved by the individual Commissioners.

[17] *See* http://www.whitehouse.gov/the-press-office/2014/12/03/press-briefing-press-secretary-josh-earnest-1232014

IV. Conclusion

We wish to thank you for taking the time to hold this important hearing on employer wellness programs. We look forward to working with you as you continue to examine this important issue. Please do not hesitate to contact us if we may be of assistance in this matter.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration and
Employee Benefits

James Plunkett
Director
Labor Law Policy