June 19, 2015

Ms. Bernadette B. Wilson, Acting Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507

Re: RIN 3046-AB01; Amendments to Regulations under the Americans with Disabilities Act; Proposed Rule

Dear Ms. Wilson:

We are pleased to submit these comments on behalf of the College and University Professional Association for Human Resources, the International Public Management Association for Human Resources, the National Public Employer Labor Relations Association, the Associated Builders and Contractors, the National Retail Federation, and the Retail Industry Leaders Association in response to the Equal Employment Opportunity Commission's (EEOC's or Commission's) proposed amendments to the regulations implementing Title I of the Americans with Disabilities Act (ADA) as published in the *Federal Register* on April 20, 2015.[1] The proposal addresses the use of employer wellness programs and the extent to which the use of incentives in conjunction with such programs may violate the ADA.

Summary of Comments

We are pleased that the Commission has confirmed that it is seeking to revise its regulations under the ADA in a manner that comports with the Affordable Care Act (ACA) and regulations issued under the Health Insurance Portability and Accountability Act (HIPAA) by the Department of Labor, Department of Treasury, and Department of Health and Human Services (the tri-agency regulation).[2] However, we have several significant concerns with the Commission's proposed amendments. In these comments, we address the proposal's inappropriate treatment of the ADA's insurance safe harbor and urge the Commission to adopt incentive limits and reasonable design standards consistent with existing tri-agency regulations.

In addition, these comments urge

a new notice or affordability standard. Additional matters addressed include clarifying the reasonable accommodation duty, potential interaction with GINA, and the need for a significant amount of time for employers to come into compliance with any new requirements.

Statement of Interest

The **College and University Professional Association for Human Resources** (CUPA-HR) serves as the voice of human resources in higher education, representing more than 18,000 human resources professionals and other campus leaders at over 1,900 colleges and universities across the country, including 91 percent of all United States doctoral institutions, 77 percent of all master's institutions, 57 percent of all bachelor's institutions, and 600 two-year and specialized institutions. Higher education employs over 3.7 million workers nationwide, with colleges and universities in all 50 states.

The **International Public Management Association for Human Resources** (IPMA-HR) represents public sector human resource professionals and human resource departments. Since 1906, IPMA-HR has enhanced public sector human resource management excellence through research, publications, professional development and conferences, certification, assessment and advocacy.

The **National Public Employer Labor Relations Association** (NPELRA), a not-for-profit corporation established in 1970, represents public sector and not-for-profit entities and practitioners of labor and employee relations employed therein. NPELRA and its members function as fiduciaries to the interests of the citizens, in part, by advocating the development of sound local, state and national policy relative to hiring, compensation, benefits, and employee/labor management relations.

Associated Builders and Contractors (ABC) is a national construction industry trade association with 22,000 chapter members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC member contractors employ workers, whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value. This process assures that taxpayers and consumers will receive the most for their construction dollar.

The **National Retail Federation** (NRF) is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street

(3) a [covered entity] from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

The ADA, as enacted, granted the EEOC the authority to issue regulations interpreting Title I of the ADA. The ADA Amendments Act of 2008 expanded this regulatory authority to

(B) Acceptable Inquiries.—A covered entity may make inquiries into the ability of an employee to perform job-related functions.[8]

During consideration by the House Judiciary Committee, these provisions were changed.

were not part of an insurance program and might be more properly analyzed under the medical examinations and inquiries paragraphs cited above.

While the Commission's proposal focuses exclusively on wellness programs that operate as part of a group health plan, it should be emphasized that many employers provide wellness

The Proposed Regulation Impermissibly Seeks To Regulate Health Program Design

Proposed section 1630.14(d)(1) sets forth a requirement that any "employee health program" must be "reasonably designed to promote health or prevent disease." The proposal further states that:

> A program satisfies this standard if it has a reasonable chance of improving the health of, or preventing disease in, participating employees, and it is not overly burdensome, is not a subterfuge for violating the ADA or other laws prohibiting employment discrimination, and is not highly suspect in the method chosen to promote health or prevent disease.

In the proposal's Preamble, the Commission states that the standard is similar to that codified in the tri-agency regulations.

Employers are generally comfortable with the reasonable design requirement that was enacted as part of the ACA and implemented in the tri-agency regulations. However, they have significant concerns with the Commission's use of a new reasonable design standard that may not be consistent with current regulations. Employers are also concerned that the Commission could interpret its new standard inconsistent with the tri-agency standards for reasonable design enforced by the Departments of Labor, Treasury, and Health and Human Services.

The ACA makes clear that the purpose of the reasonableness determination is not prescriptive. This was emphasized during the rulemaking process that led to the current tri-agency re-

If such an employer decides mid-way through its plan year to abandon its current wellness plan and develop a new plan, the old plan will fail the Commission's reasonable design test if the data for the most recent year are not, in fact, used. Should the decision to abandon a plan part way through the year be enough to fail the Commission's reasonable design standard when such conduct would not run afoul of the standard used in the tri-agency regulation?

We do not believe it is necessary for the Commission to include a reasonable design standard as part of its ADA regulations and we recommend that the Commission remove this provision from its final rules. If, however, the Commission decides to retain a reasonable design standard, it should make it clear that the standard is the same as that used under the tri-agency regulations.

If the Commission includes a section on reasonable design in its interpretative guidance, it should clarify that the examples of medical examinations and inquiries discussed, and the purposes for which they are used, are illustrative only. There are a number of other legitimate purposes for which a wellness program might utilize a health risk assessment, for example, including helping focus an employee's attention on a known health problem or as a measure of progress in addressing that problem. In addition, while an employer may review aggregate health information obtained through a wellness program with program design in mind, there may be any number of reasons why the employer chooses not to make modifications to its program from year to year. The current proposed interpretative guidance could be read to imply that an employer's decision to keep a current program in place is somehow not reasonably designed.

Under the ACA and tri-agency regulations, an employer may offer different benefit options under its health plan, including options that are only available to those who choose to participate in a wellness program.

If there is to be a notice requirement, the Commission should waive the notice requirement if incentives are only de minimis. If incentives are de minimis, such as the cost of a t-shirt, coffee mug, or a gift card for coffee or a meal, then the size of incentives will simply not be coercive under any circumstance. Waiving the notice requirement in such cases will ease compliance burdens.

The ADA Does Not Require Prior, Written, and Knowing Confirmation That Participation is Voluntary

The EEOC has invited comments on whether employers should be required to obtain prior, written, knowing confirmation that participation in a wellness program that includes disability-related inquiries or medical examinations is voluntary.

While prior, written, or knowing confirmation may be *evidence* of voluntariness, the ADA does not establish any such requirements in order for a medical examination or disability-related inquiry to be voluntary. This request for comments appears based on a provision of GINA that permits employers to request or require employee genetic information where an employer offers health or genetic services. One element of that provision requires that the employee provide prior, knowing, voluntary, and written authorization in order to invoke the exception.[13]

The interaction between GINA and the ADA are important with respect to employer wellness programs. Questions such as this present compelling evidence that the two rulemakings should occur in parallel with stakeholders able to comment on both proposals simultaneously. However, the instant rulemaking is about voluntariness under the ADA, not GINA. The Commission should refrain from including such a requirement in its final rule.

Clarification Needed for Reasonable Accommodation Requirements

The proposed revision to the interpretive guidance describes how wellness programs must offer reasonable accommodations to employees with disabilities, absent undue hardship. The proposal is broader than the tri-agency regulations because it applies to both participatory and health-contingent wellness programs while the tri-agency requirement only applies its reasonable alternative standard to health contingent wellness programs. In the Commission's proposed interpretive guidance, the Commission notes that providing a reasonable alternative standard along with notice to employees that a reasonable alternative standard is available "would likely fulfill a covered entity's obligation to provide a reasonable accommodation under the ADA."

[13] 42 U.S.C. § 2000ff-1(b)(2)(B).

We are supportive of the Commission's assurance that compliance with the tri-agency regulations' requirement to provide a reasonable alternative standard will likely comply with the obligation to provide reasonable accommodations under the ADA. However, by use of the term "likely," the Commission is implying that there may be some practices in compliance with the reasonable alternative standard requirement of the tri-agency regulations that do not meet the ADA's standards. The Commission should offer an example or state more definitively that compliance with the reasonable alternative standard will be compliant with the ADA.

In addition, we are concerned that the Commission's proposed interpretive guidance may confuse an employer's duty to provide a reasonable accommodation under Title I of the ADA with the duty of a provider of public accommodations to provide auxiliary aids and services under Title III