

January 28, 2016

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

**Re: RIN 3046-AB02; Amendments to Regulations under the Genetic Information  
Nondiscrimination Act of 2008; 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 the Genetic Information Nondiscrimination Act of 2008 (GINA) as published in the *Federal Register* on October 30, 2015.<sup>1</sup> The proposal addresses the

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In these comments, we address the proposal's failure to adopt incentive limits consistent with those established under the ACA and regulations issued under the Health Insurance Portability and Accountability Act (HIPAA) by the Department of Health and Human Services, Department of Labor, and Department of Treasury (the tri-agency regulations).<sup>3</sup> We are also critical of the Commission's proposal to establish a new "reasonable design" requirement inconsistent with the tri-agency regulations and encourage the Commission to allow greater flexibility in apportioning plan incentives used for employees and spouses.

In addition, these comments express our opposition to any requirement that would mandate that incentives be available to those who do not participate in the wellness program but instead "medically certify" that any issues are under treatment. We also urge the Commission to refrain from rulemaking regarding electronic storage of records and emphasize

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 representing nearly 21,000 chapter members. Founded on the merit shop philosophy, ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically, profitably and for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors.

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 merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing \$2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy.

**Retail Industry Leaders Association (RILA)**, the trade association of the world's largest and most innovative retail companies, product manufacturers, and service suppliers, promotes consumer choice and economic freedom through public policy and industry operational excellence. RILA's members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

**GINA and Wellness Plans, to3(lln)-Ep.004 Tn0/eaac0p**





interpreting health care law and urge the Commission to revise its proposal to mirror the tri-agency regulations.

Tri-Agency Regulations and the ACA

When Congress enacted the ACA, it was mindful of a regulatory regime established in 2006 by the Departments of Health and Human Services, Labor, and Treasury that, among other things, regulated the use of incentives in wellness programs. In the ACA, Congress generally endorsed the tri-agency regulatory framework that had been established, including different treatment of participatory wellness programs and health-contingent wellness programs.

Under the tri-agency regulations, participatory wellness programs are programs that are made available to all similarly situated individuals and that do not either provide a reward or do not include any conditions for obtaining a reward that are based on an individual satisfying a standard related to a health factor. Examples of participatory wellness programs include an employer subsidizing the cost of gym membership for all employees or an employer that provides an incentive to all employees who complete a health risk assessment regardless of any health issues identified.

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bipartisan basis, an amendment to increase the incentive limit from 20 percent of the total cost of health care coverage to 30 percent. The Committee also empowered the three agencies to increase the incentive limit to as high as 50 percent if they determine such an increase “is appropriate.” This compromise survived the legislative process and has been codified into law.<sup>14</sup>

By enacting the ACA and largely codifying and expanding upon the approach originally adopted in the tri-agency regulations, Congress intended to create an environment that would encourage greater use of such progr

Smoking Cessation Programs Generally Not Impacted Under GINA; However, Regulations Should Permit Higher Incentives If Authorized Under Tri-Agency Regulations

Under its proposal, the Commission notes in a footnote that GINA is unlikely to apply to smoking cessation programs as such programs are unlikely to request genetic information and therefore would not be covered by the GINA regulations.<sup>17</sup> We agree with this assessment and support the inclusion of such a statement in the final rule or its preamble.

While we agree with the Commission's assessment with respect to smoking cessation programs, neither this proposed rule nor the proposed ADA regulations acknowledge that the ACA permits a higher incentive for certain types of wellness programs if the Secretaries of Health and Human Services, Labor, and Treasury determine that such an increase is appropriate. To date, the Secretaries have only authorized a higher incentive for smoking cessation programs. However, they retain the authority to do so in the future. Neither the Commission's proposed revision to its 4(ch)-4( )-10(atm22)5(s)]d0(ul)-2(a)4(t)-2(i)-2(one)4( nor)3( t)-2( TD





to participatory wellness programs. The Commission has no authority to extend the reach of the reasonable design requirement beyond that set by Congress.

A fourth and related concern that employers have with the proposed reasonable design component of the proposed regulations is that even if the Commission proposed regulatory language identical to that used in the tri-agency regulations, the Commission might interpret those regulations inconsistently with the manner in which those same requirements are interpreted by the Departments of Health and Human Services, Labor, and Treasury. If the Commission ultimately decides to retain the reasonable design requirement it should explicitly state that it intends the provision to be interpreted consistent with the tri-agency rules to help mitigate the chance that the Commission would later make inconsistent interpretations.

#### Reasonable Design Standard Appears To Be Backdoor Attempt to Breach GINA's Firewalls

A key consideration of Congress in enacting GINA was the creation of several firewalls to ensure that the EEOC would not be permitted to enforce or interpret health care laws. Two key firewall provisions are included within Section 209 of GINA. Section 209(a)(2)(B) of GINA states that nothing in Title II [of GINA] shall be construed "to provide for enforcement of, or penalties for violation of, any requirement or prohibition applicable to any employer" or other covered entity under certain enumerated sections of health law, described below. A companion provision, Section 209(c), states that Title II of GINA does not prohibit group health plans and health insurance issuers offering group health insurance coverage in connection with a group health plan from engaging in any activity authorized under the enumerated statutory provisions.

The specifically enumerated statutory provisions referenced in these firewall provisions include key sections of the Public Health Service Act (PHSA).

otherwise applicable copayments or deductibles in return for adherence to programs of health promotion and disease prevention.<sup>22</sup>

It was also this section of the PHSA that Congress amended when it passed the ACA to explicitly authorize the use of incentives in wellness programs. When Congress did so, it added subsections to the end of Section 300gg-4 further describing the types of programs that would be considered programs of health promotion and disease prevention. It was these sections that added to the PHSA the requirement that certain wellness programs be “reasonably designed to promote health or prevent disease.”<sup>23</sup>

Together, these provisions express the intent of Congress that it is not the Commission that should enforce and interpret health care law. Instead, that is the domain of the Departments of Health and Human Services, Labor, and Treasury. While the Commission certainly has the ability to enact regulations interpreting Section 202(b)(2) of GINA, that authority does not extend to the regulation of the design of programs of health promotion or disease prevention regulated under the PHSA.

In sum, we do not believe it is necessary or appropriate for the Commission to include a reasonable design standard as part of its GINA or 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

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There are several problems with the proposed approach. First, as the Commission's own example illustrates, apportioning incentives in this way could often create a situation in which a greater portion of the incentive may be apportioned to a spouse than to an employee. For many employers, this approach will seem backwards and counterintuitive.

Second, by setting an incentive limit on employees that is not directly tied to a health plan that the employee participates in, the proposed apportionment does not account for situations where an employer has several different health plans available. Of course, as noted later in these comments, the apportionment method also makes little sense when the employee or spouse are not enrolled in any health plan that the employer offers.

If the incentive limit is to be measured with reference to the total cost of health insurance premiums, we recommend the Commission use the same apportionment approach discussed in the preamble to the tri-agency regulations. In addressing comments that the agencies received on the apportionment issue in its rulemaking, and in particular, addressing the administrative challenging in apportioning incentives among covered family members, the agencies stated:

...these final regulations do not set forth detailed rules governing apportionment of the reward under a health-contingent wellness program. Instead, plans and issuers have flexibility to determine apportionment of the reward among family members, as long as that method is reasonable. Additional subregulatory guidance may be provided by the Departments if questions persist or if the Departments become aware of apportionment designs that appear unreasonable.<sup>24</sup>

We urge the Commission to adopt a similar approach. Allowing plans and issuers and employers the flexibility to apportion incentives will likely significantly reduce administrative burdens imposed by the rule.

### **The Commission Should Not Mandate Full Incentive Payments Based on Medical Certification**

In the preamble to the proposal, the Commission invites comments on whether employers that offer incentives to encourage the spouses of employees to disclose information about current or past health must also offer similar incentives to those who choose not to disclose such information if a medical professional certifies that the spouse is under a

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### **The Commission Should Not Limit Employer Wellness Program Questions to Matters Directly Supporting Specific Wellness Activities**

In the preamble to the proposed rule, the Commission invites comments on whether the regulation should restrict the collection of any genetic information by a workplace wellness program to only the minimum necessary to directly support the specific wellness activities, interventions, and advice provided through the program. The Commission should refrain from further restricting the use of wellness programs.

GINA was crafted to encourage employers to offer health and genetic services, not to limit their use. Further limiting the types of inquiries that wellness programs may make is inconsistent with this statutory goal. In addition, GINA's existing restrictions governing employer provided health and genetic services are sufficient to ensure that individually identifiable genetic information is not transmitted to the employer. These provisions are also backed-up by GINA's anti-discrimination and confidentiality provisions. There is simply no need for the Commission to impose such additional limitations on employer wellness programs.

### **The Proposed Rule Does Not Account for Wellness Programs Outside of Group Health Plans**

In the preamble to the proposal, the Commission invites comments on whether employers offer or are likely to offer wellness programs outside of group health plans that use incentives to encourage employees' spouses to provide information about a current or past health status as part of a health risk assessment and whether the GINA regulations should allow incentives provided as part of such programs.

There are a wide variety of wellness plans that operate outside of an employer's group health plan. For example, an employer may host health screenings for employees or provide vaccination services. Similarly, subsidized gym memberships (or even an on-site gym) are commonly available outside of group health plans. Many employers also offer access to weight loss, diabetes control, nutritional/healthy eating, and smoking cessation programs outside of health plans. In addition, some employers provide free access to healthy beverages and snacks while others, particularly in the retail sector, report offering store discounts on healthy foods. Retail employers also report utilizing store gift card incentives for enrolling and participating in wellness programs



offered by the employer in compliance with the Commission's regulations. We support the inclusion of the example in the regulations.

### **Employers Will Need Appropriate Time to Adjust to New Requirements**

The proposal does not identify how long a time period EEOC plans to provide between finalization of the rules and the date that employers must come into compliance. We urge the Commission to consider that its regulations may necessitate significant changes in plan design. Significant lead time is necessary to implement changes in plans, including designing new systems and creating and printing materials in advance of a new plan year.

This was recognized by the Departments of Health and Human Services, Labor, and Treasury when the 3 0 Td2( 3 0 Td2(um)o Td2(um)o Td2(um)o Td2(um)o Td2(um)6(e)-6(g)10((e)-6)-2(s)32 dey,TJ 0 -1.32 TD(z)-4(ns)2(s)-1(s)-1(i)-2(on')3(s)-1( r1.33 Td Tw 0 -1.32 TD [(E-23.61(r)3(e)4(a)1(o)-h)-2 ThBTf0523 Td ( )[-ETh052 T2-3 -6.48D 250.6.48D79.2 9 D 6 26I3259.16



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issue now to urge the Commission to again review its interpretation of the insurance safe harbor.

Thank you for your consideration of these comments. Please do not hesitate to contact us if we may be of further assistance as the Commission proceeds to consider these important issues.

Sincerely,

Josh Ulman  
Chief Government Relations Officer  
College and University Professional  
Association for Human Resources

Neil Reichenberg  
Executive Director  
International Public Management  
Association for Human Resources