



February 6, 2015

Honorable Lamar Alexander
Chair, Committee on Health, Education, Labor and Pensions
455 Dirksen Office Bldg.
Washington, DC 20510

Honorable Patty Murray
Ranking Member, Committee on Health, Education, Labor and Pensions
154 Russell Senate Office Building
Washington, D.C. 20510

Dear Senators Alexander and Murray:

The Epilepsy Foundation submits this letter for purposes of the HELP Committee hearing on January 29, 2015 concerning employer-based wellness programs. The Epilepsy Foundation is the leading national voluntary health organization that speaks on behalf of the more than 2.8 million Americans with epilepsy. The Foundation fosters the well-being of children and adults affected by seizures through research programs, educational activities, advocacy, and direct services.

We are thankful to the Committee for leading this conversation on wellness programs. We are in agreement with other disability-related organizations that wellness programs can play an important role in improving health outcomes for employees with disabilities and others. However, we are concerned that employer-based wellness programs are not being conducted in a manner consistent with civil rights laws. While the Affordable Care Act (ACA) and the Health Insurance Portability and Accountability Act (HIPAA) set forth rules for the operation of wellness programs, other laws, such as the Americans with Disabilities Act (ADA), also apply to these programs. Indeed, the ACA did not supersede or eliminate the requirements of the ADA. Employer-based wellness programs should operate in ways that both promote better health outcomes and comply with the ADA's workplace protections. These protections do not conflict with the rules set forth in the ACA.

Title I of the ADA, as amended by the ADA Amendments Act, places important limits on employers' abilities to make disability-related inquiries and to require medical examinations of their employees. Unless the examination or inquiry is "job-related and consistent with business necessity," any disability-related inquiries or medical examinations must be voluntary for employees, as part of an employee health program.

The EEOC's recent challenges to several employee wellness programs found violations of the ADA, in the form of high penalties for non-participation, such as 100% shifting of premium costs to employees for non-participation, and non-job-related medical inquiries. We agree with the EEOC's findings that the high penalties placed on employees work to compel participation in these wellness programs, which in turn cannot be called voluntary and are therefore in violation of the ADA. After being compelled to join the wellness program or face high penalties, these wellness programs also require disclosure of personal health



matters. The requirements may consist of filling out lengthy and invasive questionnaires about extremely personal health matters, which under the ADA, employees have a right not to disclose.

The Epilepsy Foundation is in favor of comprehensive workplace wellness programs that improve employee health and lower medical costs. However, under the current regulations, the rights and protections of individuals with epilepsy and other qualified disabilities are endangered by premium based incentives. These regulations are extremely burdensome and intimidating to those with conditions that may prevent them from participating in a wellness program and make it even more difficult for individuals with disabilities to maintain employment on fair and equal terms. We believe savings from wellness programs should be the result of improved employee health and not merely cost-shifting or measures to divert employees to alternative coverage.

We strongly support the EEOC's pursuit of litigation to enforce the rights of people with disabilities with respect to wellness programs. Employers must be directed to design and implement employee wellness programs that do not penalize employees or otherwise violate their rights under the ADA and also comply with the requirements under the ACA and HIPAA. It is the EEOC's duty to pursue these cases to ensure compliance with the ADA prohibition on compelling employees to disclose health information to their employers. Please do not hesitate to contact Angela Ostrom, Chief Operating Officer and Vice President Public Policy at 301-918-3766 or aostrom@efa.org with any questions or concerns.

Sincerely,

A handwritten signature in black ink that reads "Philip M. Gattone".

Philip M. Gattone, M.Ed.
President & CEO