

January 27, 2015

U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

CC: Secretary Sylvia Burwell, Department of Health and Human Services;
Secretary Thomas E. Perez, Department of Labor

RE: EEOC Lawsuits Challenging Wellness Programs

Dear Commissioners Barker, Burrows, Feldblum, Lipnic, and Yang:

We, the undersigned organizations, are writing on behalf of the millions of patients, consumers, and workers that our organizations represent. We commend the Equal Employment Opportunity Commission (EEOC) for its recent legal actions against select employers' wellness programs for violating the Americans with Disabilities Act and other critical nondiscrimination laws (EEOC v. Flambeau Inc., Civil Action No. 3:13-cv-00638; EEOC v. Orion Energy Systems, Civil Action 1:14-cv-01019; EEOC v. Honeywell Inc., Civil Action 1:14-cv-04517).

The Americans with Disabilities Act (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.

We agree with the EEOC, as asserted in their suits, that the aforementioned employers' wellness programs include penalties for not completing medical exams that are so large that they effectively make the medical exams involuntary and in violation of the ADA. These employers' penalties for non-participation include thousands of dollars in penalties tied to employees' medical plan costs, disciplinary action, and loss of any employer contributions to health care benefits. Such penalties could leave employees feeling that they have no choice but to provide private health information that, under the ADA, they have a legal right not to disclose.

In the case of Honeywell Inc., we have significant concerns with the company's penalty for nonparticipation in its wellness program's biometric testing, which is up to \$4,000 in penalties tied to employees' medical plan costs and employer HSA contributions. This includes a tobacco surcharge of \$1,000 on any individual who refuses to complete the medical exam, including employees and employees' spouses who do not use tobacco but do not wish to complete the exam for other reasons. For many working families who simply can't afford to pay this additional cost, programs with monetary penalties of this magnitude can be as coercive as programs that

revoke all employer contributions towards an employee's health coverage if they do not participate.

Section 1201 of the Patient Protection and Affordable Care Act (ACA) allows employers to provide incentives for meeting certain wellness program requirements. However, this section only amended requirements of the HIPAA nondiscrimination and wellness provisions, under the Public Health Service Act and Employee Retirement Income Security Act. These provisions do not speak to the issue of how employers can gain access to an employee's health information. If Congress had intended for the ACA amendments to the HIPAA nondiscrimination and wellness provisions to override the ADA limitations on an employer's ability to request medical information about an employee or to require an employee to submit to a medical exam, it would have explicitly done so as part of the ACA wellness provisions. Just two years earlier, in the Genetic Information Nondiscrimination Act of 2008, Congress clearly addressed how job-based health plans could use genetic information (in title I amendments to ERISA) and how job-based health plans could inquire about genetic information (in title II amendments to the ADA). Absent language explicitly modifying the ADA provisions that limit employers' ability to request medical information or to require employees to submit to a medical exam, it seems clear that Congress intended to leave them intact.

Both Section 1201 of the ACA and enforcing regulations in §146.121 of the Code of Federal Regulations clearly state that compliance with wellness incentive requirements under HIPAA, as amended by the ACA, does not assure compliance with other federal and state laws¹.

The law is clear that employers must design and implement wellness incentive programs in a manner that ensures that they do not violate employees' rights under the ADA, the Genetic Information Nondiscrimination Act of 2008, and all other nondiscrimination laws, in addition to ensuring that they comply with requirements under the ACA and HIPAA. Therefore, 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.

¹ § 146.121(h) of the Code, states "*compliance with this section is not determinative of compliance with any other provisions of the PHS Act (including the COBRA continuation provisions) or any other State or Federal law, such as the Americans with Disabilities Act.*" The preamble to the 2013 final tri-agency rule enforcing ACA amendments to the HIPAA and wellness provisions of the PHS Act, "Incentives for Nondiscriminatory Wellness Programs in Group Health Plans," also states that "*the Departments recognize that many other laws may regulate plans and issuers in their provision of benefits to participants and beneficiaries. These laws include, but are not limited to, the ADA, Title VII of the Civil Rights Act of 1964, Code section 105(h) and PHS Act section 2716 (prohibiting discrimination in favor of highly compensated individuals), the Genetic Information Nondiscrimination Act of 2008, the Family and Medical Leave Act, ERISA's fiduciary provisions, and State law. The Departments did not attempt to summarize the requirements of those laws in the 2006 regulations and do not attempt to do so in these final regulations.*"

We thank the EEOC for taking action to ensure that employers' wellness programs are carried out in a nondiscriminatory manner that preserves all employees' rights.

If you have any questions or need additional information, please do not hesitate to contact Lydia Mitts, Senior Policy Analyst, Families USA, at 202-628-3030 or lmitts@familiesusa.org.

American Diabetes Association

American Federation of State, County, and Municipal Employees

American Society of Bariatric Physicians

Binge Behavior

Epilepsy Foundation

Families USA

Obesity Action Coalition