



June 17, 2015

Equal Employment Opportunity Commission  
131 M Street NE  
Washington, DC 20507  
Attention: Bernadette Wilson, Acting Executive Officer, Executive Secretariat

Dear Administrators,

HERO, the Health Enhancement Research Organization, is a national collaborative of employers, population health researchers, non-profit organizations, health care systems and plans, and wellness program providers who are seeking to improve the health of their employees through research, thought leadership and sharing of best practices for workplace wellness programs. We would like to thank the Equal Employment Opportunity Commission (EEOC) for issuing its proposed regulations regarding the extent to which employers may use incentives in wellness programs that include disability-related inquiries or medical examinations, as our employer members seek to understand the applicable legislation and regulations that impact their programs.

We understand that the EEOC has jurisdiction over programs that apply to individual employees only, but there is a need to work with other existing laws and governing bodies to ensure that new EEOC regulations do not contradict existing laws, making it overly burdensome or impossible for employers to remain compliant with all rules governing workplace wellness programs—be they for individuals or groups. If we are to improve the health of our country and our workforce, it is essential that employers remain involved and engaged and that they are able to continue supporting workplace wellness programs and making clear decisions that improve the health of their employees because:

- Employers are absolutely essential to society/countries achieving health for their people.
- Success in engaging the business community, with appropriate actions as part of a broad societal strategy to improve health, is an imperative.
- To have optimal impact, employers need to have a comprehensive health strategy.
- The health of employees and the communities in which business operates have connections to multiple business/ employer priorities.
- We know from research and the experience of our members that it is possible to have a significant impact on the health of the employees through corporate health strategies and programs.

HERO member companies regularly tell us how important their wellness programs are to their culture, employee morale and bottom line. HERO recently published findings of a survey of more than 500 employers from across the country representing various industry types and sizes. This large sample of

employers reported that productivity, performance and employee morale are the top three reasons they provide workplace wellness programs. These findings can be found in the report, [“HERO Business Leader Survey: Exploring the Value of Workplace Health.”](#)

Our members recognize and appreciate the role the EEOC plays in ensuring that discriminatory practices are not permitted in the workplace. At the same time, we look for clear direction regarding the development and delivery of health improvement programs to employees. While the proposed regulations are an important step forward in providing clarity for the rules governing workplace wellness programs, the material discrepancies between the proposed EEOC regulations and current (Health Insurance Patient Protection and Portability Act (HIPAA) and Affordable Care Act (ACA) regulations are of concern to HERO and its members. With this in mind, we offer the following recommendations.

First and foremost, we encourage the EEOC to integrate its regulations into the HIPAA and ACA so the laws are consistent. We encourage this because it is the best way to assure employers continue to support the health of their employees. Inconsistencies among laws or complex regulatory requirements added to the current ones will risk causing employers to back away from programs designed to improve health. Considering that over the past several decades, research has shown the worksite setting is well suited to improve population health, this would be a serious setback in attempts to improve the health of our nation.

The EEOC’s focus on preventing employment discrimination and assuring compliance with the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA) is necessary and appreciated. On Page 1 of the summary, it is stated that the proposed EEOC regulations apply specifically to amending ADA regulations to address employer wellness, and in particular wellness incentives. Such an amendment will be most helpful to the public if the new EEOC regulations are consistent with the ACA regulations, except where the ACA regulations interfere with areas of responsibility within the jurisdiction of the EEOC. Ideally, the EEOC regulations will complement the ACA by addressing concerns not already accounted for, such as protections for employees who do not participate in the employer-sponsored health plan. We believe that ACA and HIPAA regulations adequately protect most EEOC interests and, therefore, the EEOC regulations should not introduce inconsistent or administratively burdensome requirements.

On Page 14 of the proposed regulations, the issue of additional protections for low-income employees is first addressed. Then, a specific request for comment on the issue of being fair to low-income people is made in Part 1B, Page 20. Affordability was a major concern of the ACA and strict guidelines concerning the maximum cost of coverage have already been set forth, regardless of the impact of a wellness incentive or penalty. Thus, it is recommended that existing provisions that address this in the ACA, such as the 9.56 percent rule, be allowed to prevail. While we, too, are concerned about the affordability of health care for low-income individuals, we believe this issue is adequately addressed in the ACA, and that any regulations under ADA or GINA that are inconsistent with the ACA, would cause needless confusion.

The regulations proposed by the EEOC are sometimes in direct conflict with the ACA and HIPAA regulations. Except where these laws inadequately protect people with disabilities, we believe these

inconsistencies should be eliminated in the final EEOC regulations, as they will cause further confusion for the public and fail to support the EEOC's purpose. Specific areas of concern include:

**The definition and interpretation of "voluntary."** For many employers, health care coverage is an important means of attracting and retaining talented employees. The vast majority offer coverage that far exceeds ACA "minimum value" requirements, at a cost to employees that is well below the maximum amounts they could charge employees to elect coverage, while still qualifying as "affordable" under the ACA. The use of financial incentives to recognize individual efforts that keep the cost of coverage lower for everyone is a pillar of many employers' health insurance strategy. Employers are required to offer coverage that meets minimum requirements as well as the affordability requirements of the ACA, which includes clear provisions concerning wellness programs, financial incentives and requirements to qualify for a safe-harbor from discrimination based on individual health status or related factors when participating in a wellness program. If the ADA defines "voluntary" in a more restrictive and inconsistent way, it will render the ACA limitations irrelevant and create significant burden for currently compliant plans and employer programs.

**The ACA does not limit the amount of incentives that may be offered to individuals who are not participating in the employer-sponsored group health plan.** The EEOC amendments to the ADA would help bring consistency by allowing the same financial values offered to health plan participants to be offered to non-participants in the health plan, without fear of it being viewed as discriminatory.

The proposed rule states that voluntary means that a covered entity "does not deny coverage under any of its group health plans or particular benefits packages with a group health plan for non-participants or limit the extent of such coverage (except pursuant to allowed incentives)." A significant number of employers and health insurers currently offer multiple health plans, all of which meet the minimum benefits requirements of the ACA, with enrollment in certain of these plans contingent on meeting a wellness program incentive requirement. An example is an employer that offers two different ACA-compliant health plan options, with one being a "premium" plan that requires an individual to complete a health assessment, health screening or some other wellness program to enroll. Such premium plans offer lower cost sharing and/or enhanced benefit schedules beyond the minimum benefits requirements of the ACA. Assuming this approach complies with the wellness incentive provisions of the ACA, and the difference in value between the premium plan and the basic plan falls within the 30 percent limitation in this proposed rule, we believe it would be considered to be "pursuant to allowed incentives" and acceptable under the proposed rule. Is this the type of exception provided for by the parenthetical "except pursuant to allowed incentives" language in the proposed rule?

**The rule requires employers who are administering health risk assessments or health/biometric screenings as part of a group health plan to provide employees with a written notice that employees can understand.** The notice is also supposed to explain the type of medical information that will be obtained, the specific purposes for which the medical information will be used, and to describe the restrictions on the disclosure of the employee's medical information and the methods that the covered entity will use to ensure that medical information is not improperly disclosed. The recommendation also calls for employers to gear the notice to the appropriate reading level of the employees within their organization.

We support this requirement. Privacy is a foremost concern for employees when they share their medical information with their employer or a third-party vendor. Employers work diligently to protect personal medical data and comply with HIPAA regulations. This requirement provides further assurance to employees that their data will be protected and not identified in any attributable way. The Office of Management and Budget estimates that compliance with this requirement will cost employers approximately \$43 million. However, it is likely that many employers are already complying with this type of paperwork requirement, and for those who are not, this will be a one-time cost to develop the necessary forms. We would recommend the EEOC allow the use of appropriate automated, electronic, or other technological collection techniques to permit the electronic submission and acknowledgement of receipt of these forms in order to minimize collection, dissemination, and cost burden. We would also recommend the EEOC draft suggested model language that would aid organizations in fashioning their privacy notices.

**The definition and interpretation of “reasonably designed” and “not overly burdensome.”** We believe these terms are adequately defined under the ACA and plans should not have to worry about satisfying a different interpretation of the same terms by the EEOC. Employers need and appreciate flexibility in designing their wellness programs according to the evidence base and needs of their employee population.

**The amount of “voluntary” incentive an employer can offer.** The EEOC-proposed regulations differ from the ACA regulations both in regard to the maximum allowable incentive an employer can offer (30/50 percent of a single plan in all instances, rather than 30/50 percent of employee/spouse plan when both partners are offered the incentive) and in what is included in the incentive value calculation (both participatory incentives and health-contingent incentives count toward the 30 percent in the proposed regulations, whereas only health-contingent incentives are used in the ACA regulations). Again, we believe the ACA regulations are adequate and that the EEOC regulations should be consistent with the ACA.

**Tobacco use being verifiable by blood, urine, or saliva assessment.** We believe this should be allowable, as it currently is within the ACA regulations. The ACA requires that anyone who fails the tobacco/nicotine test but completes a comprehensive cessation program receive the full reward, regardless of whether or not they are able to quit using tobacco. We believe this is a fair and reasonable request of people who put themselves at the well-known and significant health risk of tobacco use, and that using a test to verify tobacco non-use or nicotine use for people enrolled in a cessation program is reasonable. Employers need to be given some latitude to make decisions within the limits of the law regarding premium differentials for tobacco use. And, although there is no known evidence to support that a higher premium reduction will produce a higher quit rate, we believe that it is more important for there to be consistency between regulatory bodies.

**Physician verification in lieu of completing any part of the wellness program.** It is proposed under the ADA (but not allowed under the ACA) that a person under the care of a physician for any reason can provide verification from their physician to avoid complying with any aspect of the wellness program, while still receiving all available incentives. We believe the ACA approach, which requires programs to allow an individual’s personal physician to provide an alternative standard for those with a relevant medical condition or who join in the request for a modified alternative standard even in the absence of

a medical issue, while also permitting the employer to waive the otherwise applicable standard, is fairer to all employees, more effective in helping employees stay healthy, and avoids a clear loophole for any employee who does not want to comply with the intent of the incentive plan.

**The ADA exception for “bona fide benefit plans” at Section 501(c).** We believe this regulation should not be dismissed. A key benefit of wellness plans is to provide employers with valuable insight to develop and administer present and future benefit plans using accepted principles of risk assessment. When a program includes aggregate information that supports an employer’s ability to evaluate, plan for and mitigate this risk, the safe harbor should apply.

In its proposed regulations, the EEOC also requested comments in a number of specific areas. We address several of these areas in the following paragraphs.

**(1) Whether the way in which the Commission reconciles the ADA's "voluntary" requirement with the wellness program provisions in the Affordable Care Act is appropriate given the intent behind both provisions. Specifically, the Commission seeks comment on:**

**(c) Whether there are any methods other than those mentioned in the proposed regulation and the questions above by which the Commission can effectuate the intent of both the "voluntary" requirement in the ADA and the provisions in the Affordable Care Act intended to encourage workplace health promotion and disease prevention.**

Aside from our comments requesting clarification and encouraging the EEOC to reconcile differences between the proposed regulations and corresponding ACA provisions, we believe the proposed methods are sufficient to effectuate the intent of the “voluntary” requirement in the ADA, while encouraging workplace health promotion and disease prevention. A reason employers commonly cite for implementing health promotion and disease prevention programs is to improve the health and well-being of employees and their families. The cultural and social milieu of the workplace makes it an under-utilized setting for implementing effective population health improvement programs. While we fully support the need to maintain the voluntary nature of wellness programs to protect employees from discrimination based on disabilities, we urge the EEOC to finalize regulations that will fully support the growth of, and engagement in, workplace promotion and disease prevention programs.

**(2) Should the proposed notice requirements of this rule, at section 1630.14(d)(2)(iv), also include a requirement that employees participating in wellness programs that include disability-related inquiries and/or medical examination, and that are part of a group health plan, provide prior, written and knowing confirmation that their participation is voluntary?**

We support transparency regarding the use and movement of health-related data for individuals participating in wellness programs. We do not, however, support the requirement to obtain and maintain written confirmation of such notice.

Wellness programs have many components that may or may not be interdependent. We would support the requirement that a written notice, at the appropriate reading level, be prominent for any wellness program component in order for the individual to clearly understand that their participation is voluntary, as well as how their personal health information will be used and who will receive their information. This will not only reduce the complexity of maintaining such authorizations, but will also

allow the individual to decide each and every time whether they want to voluntarily participate in the wellness program component.

Additionally, it is not clear why entities such as group health plans and health insurers, which are subject to the extensive requirements related to the collection, use, and sharing of protected health information (PHI) under HIPAA should be required to comply with additional standards in order to meet their obligations under the ADA with respect to medical examinations and inquiries. As noted in the preamble to the proposed rule and the guidance section of the proposed rule, covered entities under HIPAA must only use PHI for specific purposes, may not use information to make employment decisions, are required to establish safeguards to protect PHI from wrongful disclosure and notify individuals if the security of their PHI is breached, and must inform individuals of the entity's privacy practices including who the PHI is shared with. We believe the protections under HIPAA appropriately protect any PHI resulting from a medical examination or inquiry in connection with a wellness program and compliance with those rules should be sufficient protection for an individual's PHI. In particular, HIPAA provides sufficient disclosure of the use of PHI to wellness program participants, and additional notices should not be required

**(3) Should the proposed notice requirement apply only to wellness programs that offer more than *de minimis* rewards or penalties to employees who participate (or decline to participate) in wellness programs that ask them to respond to disability-related inquiries and/or undergo medical examinations? If so, how should the Commission define "*de minimis*"?**

In our response to question 2 above, we recommend that the EEOC not impose additional notice requirements for employers to include confirmation processes that prove employees received and understand that these programs are voluntary in nature. Should the EEOC accept our recommendation, we believe it would be unnecessary to establish a separate definition for *de minimis* rewards. Should the EEOC not accept our recommendation and impose additional notice requirements, we believe the EEOC should establish a set dollar value indexed for inflation in order to make administration as simple and objective as possible for employer plan sponsors. We would suggest a starting *de minimis* value of approximately \$300.

**(4) Which best practices ensure that wellness programs are designed to promote health and do not operate to shift costs to employees with health impairments or stigmatized conditions?**

HERO has done considerable work in the area of identifying "reasonably designed" workplace wellness programs. As described in our joint consensus statement published in the [Journal of Occupational & Environmental Medicine, \(Volume 54, Number 7, July 2012\)](#) HERO, the American College of Occupational and Environmental Medicine, American Cancer Society, American Cancer Network, American Diabetes Association and the American Heart Association came together to provide guidance on this question and others for employers as the ACA regulations were being finalized.

Our intent was to identify "best practices" for wellness programs. These best practices are evidence-based or experience-based practices that are generally agreed upon by wellness industry authorities to represent current best practices. These practices have been reported through the [HERO Employee Health Management Best Practices Scorecard in Collaboration with Mercer](#). Over 1,200 companies (large, medium and small and from a variety of industries) have completed the HERO Scorecard survey,

thereby providing data that clearly identifies which practices are most important in providing a reasonably designed program with the best chance of producing positive health outcomes. The elements of the HERO Scorecard include organizational support that creates a culture of health in a workplace, strategic planning, appropriate programs for the individual worker, engagement methods to encourage participation and behavior change in personal health practices where warranted, and measurement of the outcomes of these activities to encourage continuous program improvement.

**5. Whether employers offer wellness programs outside of a group health plan that use incentives to promote participation in such programs or to achieve certain health outcomes and the extent to which the ADA regulations should limit incentives provided as part of such programs.**

Given that the current HIPAA and ACA/Tri-Agency wellness regulations (which includes the guidance issued by the Departments of Health and Human Services, Labor and Treasury) only serve as a safe-harbor to allow conditional discrimination within a group health plan that is otherwise not permitted, we believe it is critical for the EEOC to address this void in regulations by protecting employee privacy and preventing discrimination in cases where employers choose to offer the same or different incentives to employees not enrolled in the company health plan. HERO offers the following recommendations:

- Do not compel employers to offer wellness programs and/or incentives to employees who choose not to enroll in the health plan, but permit them to include these employees if they so choose.
- If employers choose to offer wellness programs and/or incentives to those who are not enrolled in the group health plan, exclude de-minimis rewards for participation from any further requirements.
- As the “30 percent of employee only premium” standard would not apply for those who are not enrolled in any of the health plans offered by an employer, consider providing a fixed annual cap (noting that these incentives would be paid as taxable income unlike adjustments to premium contributions or adjustments to plan design). We recommend the EEOC provide specific guidance for how employers should calculate this adjustment for people who are not enrolled in their company-sponsored health plan.

**6. What will be the practical effect of adopting the specific incentive limit set forth in the proposed rule?**

Any inconsistencies with the Tri-Agencies guidance under the ACA will result in uncertainty and unnecessary complexity. This particular example essentially eviscerates the Tri-Agency decision to allow up to 50 percent of the applicable premium when designing health-contingent incentives in three ways:

- 1) Reduces from the “applicable premium category” to “the cost of employee-only coverage.” Employee-only coverage is typically less than half of the cost of family or employee-plus-spouse coverage
- 2) Uses 30 percent of this smaller number instead of up to 50 percent when incentives designed to prevent or reduce tobacco use are used in combination with nicotine testing.

Combines participatory incentive values and health-contingent incentives when calculating the maximum incentive available (whereas the ACA requires that coverage meet affordability requirements regardless of the financial impact of wellness incentives).

	<b>ACA Tri-Agency Regulations</b>	<b>EEOC/ADA Regulations</b>
Percent of premium that can be used to incentivize health-contingent goals	30% of applicable premium or up to 50% if amount >30% is limited to tobacco	30% of employee-only premium (includes ALL incentives not just health-contingent)
Percent of premium that can be used to incentivize wellness participation	100% as long as the total cost charged to non-participants still meets affordability requirements (9.56% of income max)	30% of employee-only premium (includes ALL incentives not just participatory)
Tobacco-use standard	Can use inquiry, affidavit and/or verification via blood or saliva test	Tobacco use inquiry is not considered a “health inquiry” so 50% of premium is permissible if self-reported because only ACA rules apply. If verified via blood or saliva test, this constitutes a “health exam” and cap is a total of 30%.
Alternative Standard	Alternative required if medical issue (participatory). Alternative required for all health-contingent incentives (regardless of medical issue)	Alternatives required for participatory programs even in the absence of medical issues preventing a person from participating

It is difficult to assess the impact of placing the cap at 30 percent instead of 50 percent as an isolated question based on existing plan designs, because although very few health-contingent incentive designs approach the 50 percent (or even 30 percent) limit today, the value of all participatory incentives are not currently calculated and used for compliance testing purposes. Additionally, plans currently test their compliance using 30 to 50 percent of the coverage in which a person is enrolled. We believe that the combined impact of all of these changes would be dramatic and significant.

Because the ACA requires that anyone who completes a program designed to prevent or reduce tobacco use receives the full value of incentives offered to non-smokers, and because the ACA also requires that the maximum charge to any employee will not exceed 9.56 percent of their annual household income (even if they do not participate in any wellness programs), we do not believe any of these conflicting regulations are necessary and recommend they be eliminated in the final EEOC regulation.

We offer a final comment on timing. Most employers implement their wellness programs on a plan year basis that may or may not coincide with the calendar year. Please consider making the effective date of the regulations be no earlier than the first day of the first plan year beginning twelve months after the issuance of the final regulations.



In summary, HERO and its over 120 employer member organizations support EEOC's efforts to provide guidance related to employer workplace wellness programs. We believe it is extremely important that the commission work diligently to blend its regulations with those of the ACA / HIPAA to maximize consistency, and minimize confusion and complexity for employers so they may continue to offer these programs to their workers.

HERO was a leading force in bringing employers and employee-focused agencies together to find consensus on a variety of issues related to ACA regulations as those laws were being developed. We will continue this effort when we invite a similar mix of employers and non-profits to meet on July 20 in Minneapolis to discuss their positions on the ADA, GINA, and the ACA as we seek to identify areas of consensus that will allow us to provide input to regulatory agencies and members of Congress.

We look forward to providing additional input to the EEOC as it develops its final regulations.

Thank you,

Jerry Noyce  
Chief Executive Officer  
HERO, The Health Enhancement Research Organization