



March 22, 2011

Ms. Jacqueline A. Berrien, Esq.
Chair
United States Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Dear Ms. Berrian:

I am writing in response to the Equal Employment Opportunity Commission's (EEOC's) recent request for suggestions for regulations for review, acting pursuant to the President's recent Executive Order to streamline regulations and make them less burdensome. The National Business Group on Health also submits these comments out of concern that employer-sponsored wellness initiatives, and therefore, efforts to improve employees' health have been hindered because of ambiguity regarding the EEOC's ultimate treatment of financial incentives for wellness programs with regard to the Americans with Disabilities Act (ADA).

The Business Group represents about 320 members, mostly very large employers, who provide health coverage to more than 55 million U.S. employees, retirees, and their families. We are the nation's only non-profit organization devoted exclusively to finding innovative and forward-thinking solutions to large employers' most important health care and related benefits issues.

We appreciate all of the important work that you and the EEOC Commissioners have done to protect employees and the disabled from discrimination in the workplace under ADA and other laws for which EEOC has enforcement responsibility. Consistent with the purpose of the ADA, we believe that EEOC should clarify that voluntary wellness programs offering financial incentives that comply with nondiscrimination requirements under current Health Insurance Portability and Accountability Act (HIPAA) provisions, future permissible HIPAA-allowed incentives under the Affordable Care Act (ACA), and the EEOC regulations governing Title II of the Genetic Information Nondiscrimination Act (GINA), should be permitted and considered voluntary under the ADA. Incentives that comply with these other laws should pose no increased risk of violation of ADA.

In prior informal discussion letters, the EEOC has written that it is continuing to examine this issue. The uncertainty from the EEOC regarding what level of financial incentives would be permissible under the ADA has been a barrier to more widespread employer adoption of wellness programs designed to improve employee health and prevent costly and disabling illness and chronic conditions. This ambiguity continues despite the EEOC's recent issuance of rules pertaining to financial incentives under GINA. Under the ACA, the Departments of Treasury, Labor, and Health and Human Services may soon release regulations implementing the wellness provisions of that law. Without the

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EEOC's clarification regarding the use of incentives and ADA, these other rules will be less effective in promoting wellness programs and employee health. The clarification we seek will reduce the current, pervasive level of uncertainty surrounding the use of incentives and liability risk under the ADA and be consistent with permissible incentives under other relevant laws.

As you are aware, employer group health plans adopt a variety of voluntary wellness programs and interventions for employees, and in some cases dependents, to maintain health and reduce risks of disease and chronic, disabling conditions. The programs provide opportunities for referral to counseling and education, preventive care, disease management programs, health promotion and other behavioral change initiatives. All of these programs are critical in slowing the rising cost of health care by making certain that care is matched to what will work best for each and every patient and in motivating people to proactively maintain and improve their health.

Numerous studies and our employer members' experiences illustrate that incentives drive significant increases in participation in wellness activities. It is essential that group health plans be able to continue to use incentives to motivate employees to participate to improve their health without risk under ADA.

Clarifying that establishing incentives for wellness programs in compliance with HIPAA nondiscrimination rules and EEOC's own recent rules governing GINA's Title II prohibition on the use of genetic information for discrimination in employment is permissible under ADA will remove the current uncertainty that is impairing the ability of employer-sponsored group health plans to improve employee health, their quality of life, and their future health care costs.

Thank you, again, for your consideration of these important issues.

Please contact me or Steven Wojcik, Vice President of Public Policy, at 202.558.3012 if you have questions or would like to discuss our concerns in further detail.

Sincerely,

A handwritten signature in black ink, appearing to read "Helen Darling". The signature is fluid and cursive, with the first name "Helen" written in a larger, more prominent script than the last name "Darling".

Helen Darling
President and CEO