The ERISA Industry Committee

September 17, 2009

The Honorable Henry A. Waxman
Chairman
Committee On Energy & Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Joe Barton
Ranking Member
Committee On Energy & Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Re: Supporting Workplace Wellness Programs

Dear Chairman Waxman and Ranking Member Barton:

We are writing on behalf of the ERISA Industry Committee ("ERIC") to ask you to clarify the legal status of workplace wellness programs. As you know, wellness programs are key to controlling health costs and keeping Americans healthy. Although ERIC believes that voluntary wellness programs clearly comply with current law, we are concerned that upcoming federal regulations may restrict or prohibit the practices that make these programs effective, such as offering employees financial incentives to improve their health or conducting voluntary and confidential health risk assessments.

These restrictions would undermine Congress's efforts to bring health care costs under control, and would deprive millions of workers of a popular benefit that is vitally important in improving their health. If workplace wellness programs are to thrive, they need to operate within a clear and practical legal framework. We urge you to include a provision in the pending health care reform legislation confirming that existing laws do not prohibit employers from offering wellness programs that give individuals meaningful incentives to participate.

ERIC's Members Are Leaders in Workplace Wellness Initiatives

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, incentive, and welfare benefit plans of America's largest employers. ERIC's members sponsor group health plans that provide comprehensive health benefits directly to some 25 million active and retired workers and their families. Many ERIC members have taken the lead in developing voluntary wellness programs. These programs are an important part of the health benefit package ERIC's members offer to workers and their families.

Wellness programs often reward employees for taking steps to protect and improve their health. Some of the most effective programs are designed to address each participant's personal health needs. In many programs, each participant is encouraged to complete a health risk assessment that provides family medical history, evaluates the individual's health status, and identifies any conditions that merit observation or intervention. Based on the information in the health risk assessment, medical professionals retained by the employer design a program to address the individual's personal health needs. The information in the health risk assessment remains confidential: it is not shared with the employer. Employees value these programs, and they benefit from the programs' emphasis on identifying and addressing health problems before the problems become more serious and more costly to treat.

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Wellness Programs Help Control Health Costs and Improve Quality of Life

Chronic diseases are among the leading causes of death in the United States.[1] The U.S. Centers for Disease Control and Prevention reports that although these diseases "are among the most common and costly health problems, they are also among the most preventable."[2] The treatment of chronic diseases accounts for more than 75 percent of our nation's health care expenditures.[3] Workplace wellness programs address this issue by encouraging employees to take care of potential health problems before they develop into chronic diseases, and by promoting a healthy lifestyle that is less likely to lead to chronic disease.

Many independent sources have recognized the importance of workplace wellness programs in controlling health costs and keeping people healthy. The American Heart Association emphasizes that addressing health and wellness in the workplace "is imperative for helping the nation reach its 2010 goals, reducing the nation's health care bill, promoting health and wellness, and reducing chronic disease."[4] The Associate Director for Program Development for the National Center for Chronic Disease Prevention and Health Promotion points out that workplace wellness programs provide a unique opportunity to improve the health of workers and their families, since American workers spend more than a third of their day on the job.[5] A December 2007 report by the Commonwealth Fund Commission on a High Performance Health System concludes that using federal funds to encourage employers to create positive incentives for wellness and healthy behavior would save approximately $19 billion over ten years, with a net investment by the federal government of approximately $2 billion.[6] The report notes that even if the net savings were zero, encouraging workplace wellness programs would improve health outcomes and thus would increase the efficiency of the U.S. health care system.[7]

Workplace wellness programs have proved effective in containing health costs, reducing disability claims, and improving workers' productivity. The American Heart Association's Position Statement on Effective Worksite Wellness Programs cites data from a number of sources showing that workplace wellness programs produce, on average, a 26 percent reduction in health care costs; a 28 percent reduction in sick leave absenteeism; and a 30 percent average reduction in costs associated with workers' compensation and disability claims.[8] In addition to these measurable benefits, wellness programs improve the quality of life for American workers and their families by promoting healthy lifestyles.

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[1] Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, *Indicators for Chronic Disease Surveillance*, Morbidity and Mortality Weekly Report (Sept. 10, 2004), *http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5311a1.htm*.

[2] Id.

[3] Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Chronic Disease Overview, *http://www.cdc.gov/nccdphp/overview.htm*.

[4] American Heart Association, Position Statement on Effective Worksite Wellness Programs, *http://www.americanheart.org/downloadable/heart/1213386784466Worksite%20Wellness%20Policy%20Position%20Statement%20to%20NPAM%20and%20EPI.pdf*.

[5] Elizabeth Majestic, "Public Health's Inconvenient Truth: The Need to Create Partnerships With the Business Sector," *Preventing Chronic Disease*, vol. 6: no. 2 (April 2009), *http://www.cdc.give/pcd/issues/2009/apr/08_0236.htm*.

[6] Cathy Schoen et al., *Bending the Curve: Options for Achieving Savings and Improving Value in U.S. Health Spending*, at 29-30 (December 2007), *http://www.commonwealthfund.org/usr_doc/Schoen_bendingthecurve_1080.pdf*.

[7] *Id*. at 30-31.

[8] American Heart Association, Position Statement on Effective Worksite Wellness Programs, *http://www.americanheart.org/downloadable/heart/1213386784466Worksite%20Wellness%20Policy%20Position%20Statement%20to%20NPAM%20and%20EPI.pdf*.

Agency Interpretations Put Wellness Programs At Risk

Three federal statutes potentially apply to workplace wellness programs: the Health Insurance Portability and Accountability Act ("HIPAA"), which prohibits employer-sponsored group health plans from discriminating against an employee on the basis of the employee's (or a family member's) adverse health factors; the Americans with Disabilities Act ("ADA"), which prohibits discrimination against a qualified individual with a disability in any aspect of employment; and the Genetic Information Nondiscrimination Act ("GINA"), which prohibits health plans, health insurers, and employers from discriminating on the basis of genetic information.

HIPAA. Regulations issued in 2006[9] make clear that a workplace wellness program will not violate HIPAA's nondiscrimination requirement as long as the program meets certain conditions. Among other requirements, the program must ensure that the incentive for meeting a health-related standard does not exceed 20% of the total annual cost of coverage. HIPAA does not prohibit an employer from providing incentives for its employees to complete health risk assessments, although the employees' individual health information is protected by strict privacy standards and cannot be shared with the employer unless the employee consents. Employers have carefully designed their wellness programs to comply with the 20% limit on incentives and the other requirements of the HIPAA nondiscrimination regulations. The health information gathered under these programs is protected from improper disclosure by HIPAA's privacy standards.

ADA. The ADA imposes strict limits on the circumstances in which an employer may require medical examinations or gather medical information about current or prospective employees. The ADA permits employers to offer voluntary medical examinations or request voluntary medical histories as long as they keep the information confidential and do not use it for discriminatory purposes. The Equal Employment Opportunity Commission ("EEOC") issued enforcement guidance in 2000 stating that voluntary wellness programs can qualify for this exception; but the guidance did not tell employers how to determine whether their programs will be considered "voluntary."[10] The EEOC's Office of Legal Counsel issued an opinion letter in January 2009 confirming the common-sense view that programs designed to meet the HIPAA standard for voluntary wellness programs also will meet the ADA standard. In March, however, the EEOC's Office of Legal Counsel withdrew this portion of its opinion letter.[11] Members of the EEOC's legal staff now warn that a workplace wellness program might violate the ADA even if the program fully complies with the 20% limit on incentives and other HIPAA requirements.

GINA. GINA prohibits group health plans and insurers from requesting, requiring, or purchasing genetic information about an individual for purposes of underwriting. An individual's family medical history is considered to be "genetic information." The Labor Department, IRS, and HHS, which have joint responsibility for interpreting this title of GINA, have not yet issued regulations; agency staff have said informally, however, that a group health plan will violate GINA if it offers *any* incentive to an individual to provide genetic information. Agency staff also have indicated that "underwriting" will be defined much more broadly under GINA than the term is traditionally defined by the insurance industry. Accordingly, if a

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[9] Treas. Reg. § 54.9802-1(f); 29 C.F.R. § 2590.702(f); 45 C.F.R. § 146.121(f).

[10] EEOC Enforcement Guidance: *Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act*, 8 Fair Empl. Prac. Man. (BNA) 405:7701, Q&A-22 (July 27, 2000). The guidance explains that a wellness program is "voluntary" as long as an employer neither requires participation nor "penalizes" employees who do not participate; but the guidance does not explain whether withholding an incentive is viewed as a "penalty" for this purpose.

[11] Letter dated March 6, 2009, from Peggy R. Mastrioanni, Associate Legal Counsel, EEOC Office of Legal Counsel.

workplace wellness program rewards employees for completing a health risk assessment that includes family medical history, the program apparently will violate GINA even if the reward complies with HIPAA's 20% limit.

GINA also prohibits employers from requesting, requiring, or purchasing genetic information about an individual, except for very limited purposes. One exception permits employers to offer health or genetic services as part of a wellness program. The EEOC has issued a proposed regulation indicating that the wellness program must be voluntary in order to qualify for this exception, and requesting comments on the standards that the program must meet in order to be considered "voluntary." EEOC staff have said informally that the standard of voluntariness is likely to be more restrictive than the HIPAA 20% limit on incentives,[12] and that the standard adopted in the final GINA regulations probably will apply under the ADA as well.

The provision of GINA that prohibits employers from acquiring genetic information becomes effective on November 21, 2009. Congress directed the EEOC to issue final regulations interpreting this provision no later than May 21, 2009, [13] so that employers would have time to understand and comply with the new rules. In spite of this direction, no final regulations have been issued,[14] and the proposed regulations do not provide employers with meaningful guidance as to how the rules apply to wellness programs. The Labor Department, IRS, and HHS, which also were directed to issue final regulations no later than May 21, 2009,[15] have not even published proposed regulations.

The Problem

Faced with these unclear and potentially conflicting legal standards, employers are reluctant to invest additional resources in workplace wellness programs. Experience has shown that these programs do not succeed unless employees are offered meaningful incentives to participate, a practice that is already restricted by the 20% limit in the HIPAA regulations and is in danger of being further restricted by federal agencies' interpretations of GINA and the ADA. In addition, the most effective wellness programs use health risk assessments as a basis for developing a program tailored to each individual's health needs, but health risk assessments also are in danger of being prohibited by the agencies' restrictive interpretation of GINA and the ADA. As a result, federal statutes that are designed to protect employees from misuse of medical information and from discrimination based on health conditions will have the unintended consequence of denying them access to effective workplace wellness programs that could help them stay healthy.

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[12] A recent report by the Congressional Research Service notes that the EEOC might interpret GINA to prohibit *any* financial incentive. Amanda K. Sarata, "Employer Wellness Programs: Health Reform and the Genetic Information Nondiscrimination Act," CRS Report R40791, at 4–5 (August 31, 2009).

[13] Pub. L. No. 110-233, § 211.

[14] The final regulations reportedly have been cleared by the EEOC and sent to the Office of Management and Budget for approval. *See* "EEOC Clears GINA Rule for OMB Review," *BNA Daily Labor Report* vol. 151, p. A-18 (Aug. 10, 2009).

[15] Pub. L. No. 110-233, §§ 101(f)(1), 102(d)(1), 103(f)(1).

The Need For Clear Legal Standards

The "America's Affordable Health Choices Act of 2009", HR 3200, emphasizes preventive care and the importance of keeping people healthy. Under your leadership, the bill recognizes that health reform must focus on wellness if it is to achieve meaningful cost savings.

ERIC is concerned that the Committee's objective to promote good health will be impaired if Congress does not clarify the status of workplace wellness programs under current law. The need for clarification is urgent, since conflicting guidance (or a lack of guidance) from the federal agencies threatens to disrupt existing wellness programs as well as to discourage employers from adopting or expanding these programs. Accordingly, we urge you to add a provision to the bill making clear that a wellness program will be considered "voluntary" for purposes of GINA and the ADA if the program complies with the applicable standards under HIPAA. If the program offers a financial incentive to satisfy a health-related standard, the incentive should satisfy GINA and the ADA as long as it does not exceed the applicable limit under HIPAA.[16] In addition, we urge you to make clear that a group health plan does not improperly request genetic information for the purpose of "underwriting" when it collects family medical histories as part of a health risk assessment that will provide the basis for a wellness program tailored to an individual's health needs.[17] Although we believe that these are the correct interpretations of existing law, clarification is necessary so that workplace wellness programs will not be constrained by conflicting and unduly restrictive legal standards.

Thank you for your consideration. If you would like to discuss this matter further, please contact me (mugoretz@eric.org) or Gretchen Young, ERIC's Vice President for Health Policy (gyoung@eric.org) at (202) 789-1400.

Very truly yours,

Mark J. Ugoretz
President

[16] ERIC strongly endorses an increase in the HIPAA limit on incentives from the current 20% of the annual cost of coverage to 30% or more.

[17] The recent CRS report states that an employer does not engage in prohibited "underwriting" when the employer merely uses the fact of an individual's participation in a wellness program to determine the individual's group health plan premiums. Sarata, *supra* note 12, at 6.