



Commemorating 40 Years
Of Disability Advocacy
1973-2013

May 23, 2013

Chair Jacqueline Berrien
Commissioner Constance Barker
Commissioner Chai Feldblum
Commissioner Victoria Lipnic
Commissioner Jenny Yang
Equal Employment Opportunity Commission
131 M Street, NE
Washington DC 20507

Chair Berrien and Commissioners Barker, Feldblum, Lipnic and Yang:

The Consortium of Citizens with Disabilities Rights Task Force submits these brief comments for the record following the Commission's May 8, 2013 public meeting concerning employer-based wellness programs.

Much of this meeting focused on whether the provisions of the Health Insurance Portability and Accountability Act (HIPAA) and the Affordable Care Act (ACA) permitting certain penalties for the failure to participate in a wellness program (or incentives for doing so) define what types of penalties the ADA permits for failure to answer disability-related questions in a wellness program. The ADA requires that such questions, if not job-related, must be voluntary. The cited provisions of HIPAA and the ACA do not define what is voluntary under the ADA.

The 2006 HIPAA regulations permitting incentives and penalties of up to 20% of the cost of insurance coverage for satisfaction of a health standard nowhere state that the 20% limit is based on a determination that 20% is the point at which employees cease to have a choice whether to meet the health standard and participate in the wellness program. Nor do the statutory provisions of the Affordable Care Act (ACA) that increase this threshold to 30% – and up to 50% if the Secretaries of Labor, HHS, and Treasury “determine that such an increase is appropriate”¹ – mention voluntariness. The same is true of the proposed regulations implementing these provisions of the ACA.

¹ 42 U.S.C. § 300gg-4(j)(3).

Indeed, if the penalty level permitted by HIPAA and the ACA clearly defined the point below which there is “voluntary” participation in a wellness program, this definition of “voluntary” would not keep changing over time, suddenly increasing from 20% to 30%, with the potential to increase to 50%.² The changing nature of the wellness program penalty levels permitted by HIPAA and ACA demonstrates that these percentages do not constitute a determination of the level at which voluntary participation becomes involuntary, but simply policy decisions about where to draw a line balancing employee and employer interests.

As Commissioner Lipnic noted at the May 8th meeting, the preamble to the 2006 HIPAA regulations stated that the purpose of the 20% penalty limit was “to avoid a reward or penalty being so large as to have the effect of denying coverage or creating too heavy a financial penalty on individuals who do not satisfy an initial wellness program standard that is related to a health factor.”³ Penalties so steep as to deny access to health insurance may indeed render participation in a wellness program involuntary. But the mere fact that an employee may be able to keep his health insurance despite being penalized up to 20%, 30%, or 50% of the cost of insurance for refusing to answer disability-related questions does not mean that answering those questions is voluntary. Common sense dictates that answering a question is not voluntary if an employee’s failure to answer results in adverse treatment -- financial penalties being exacted in every paycheck that the employee receives.

The ADA prohibits medical examinations and disability-related inquiries of employees unless they are job-related and consistent with business necessity, with a narrow exception for “*voluntary* medical examinations, including *voluntary* medical histories, which are part of an employee health program available to employees at that work site.”⁴ The reason that Congress felt it important to ban such inquiries, with that narrow exception, is that:

An inquiry or medical examination that is not job-related serves no legitimate employer purpose, but simply serves to stigmatize the person with a disability. For example, if an employee starts to lose a significant amount of hair, the employer should not be able to require the person to be tested for cancer unless such testing is job-related. Testimony before the Committee indicated that there still exists widespread irrational prejudice against persons with cancer. While the employer might argue that it does not intend to penalize the individual, the individual with cancer may object merely to being identified, independent of the consequences. As was abundantly clear before the

² While the November 2012 proposed regulations to implement the ACA’s wellness program provisions proposed permitting penalties of up to 50% only for failure to meet health standards related to tobacco use, the statute authorizes the Secretaries of Labor, HHS and Treasury to authorize penalties up to 50% for failure to meet any *other* health standard if and when they determine it is appropriate to do so.

³ 71 Fed. Reg. 75014, 75018 (Dec. 13, 2006).

⁴ 42 U.S.C. § 12112(4).

Committee, being identified as disabled often carries both blatant and subtle stigma. An employer's legitimate needs will be met by allowing the medical inquiries and examinations which are job-related.⁵

Permitting the imposition of financial penalties on employees who refuse to answer medical questions that are not job-related would thwart Congress's clear intent in enacting the ADA's medical inquiries provisions.

Finally, the fact that the wellness program penalty provisions of HIPAA and the ACA address discrimination does not mean that they must parallel the ADA's wellness program exception to its ban on disability-related questions simply because the ADA is also a non-discrimination law. The wellness program penalties in HIPAA and the ACA address discrimination *in wellness programs*. In contrast, the ADA's requirements concerning medical examinations and inquiries are designed to prevent discrimination *in the workplace* – that is, discrimination that may occur when employees are asked for disability-related information that bears no relation to their ability to perform the job.

⁵ S. Rep. 101-116, at 39-40 (1989).