

January 22, 2016

RIN 3046-AB02
Bernadette B. Wilson
Acting Executive Officer, Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, D.C. 20507

Submitted via Federal eRulemaking Portal: www.regulations.gov

The Retail Industry Leaders Association (RILA) welcomes the opportunity to provide comments to the U.S. Equal Employment Opportunity Commission (EEOC) regarding RIN 3046-AB02: a proposed rule to amend regulations under Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA) regarding employer wellness programs. RILA appreciates the EEOC's recognition that employer wellness programs are an important part of the benefits that millions of American employers offer their employees and families.

RILA, the trade association of the world's largest and most innovative retail companies, product manufacturers, and service suppliers, promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

Employer-sponsored coverage is the crown jewel of the American healthcare system. RILA is committed to ensuring employer-sponsored health coverage remains a viable option for the nearly 170 million Americans receiving coverage today. For decades, retailers have offered quality and affordable health care to their employees and families, and are leaders in benefits design by customizing plans to meet their workforces' specific needs. There is no standard workforce population or standard employer plan in the self-insured market – and no one-size-fits-all employer health plan. Retailers tailor benefits offerings to meet the needs of their employees as a result of specific input from those employees. Self-insured retail plans reflect the uniqueness of plan benefit design and covered population.

Long before the enactment of the Affordable Care Act (ACA) and its employer requirements, retailers embraced the concept that investing in a healthy workforce today not only lays the foundation for a healthier society but also ensures the development of a more productive workforce which is able to enjoy a higher quality of life. Employers have been actively engaged in developing innovative approaches to encourage preventive health care to improve health outcomes, and to lower health care costs and premiums. Under the ACA, Congress and the President recognized that improving the health of Americans and encouraging employers to do so through financial incentives went hand-in-hand. Through improved health and a focus on healthy behaviors, overall health care expenses across the delivery system can be reduced.

Many retail employers encourage their employees to participate in voluntary wellness programs, and appreciate that a foundation of healthy habits can last a lifetime. For years, retail employers have offered employees robust wellness benefits that include programs such as: weight loss; smoking cessation; incentives to see a primary care physician; maternity wellness; diabetes control; nutritional/healthy eating; store discounts on healthy foods; gym discounts; group counseling sessions; and store gift card incentives for enrolling and participating in wellness programs.

One component of a wellness program that is common to many employer-sponsored plans is a health risk assessment completed by the plan participant. As you are aware, the health risk assessment asks a series of questions aimed at discovering information regarding the plan participant's lifestyle and habits. Based on the results of the health risk assessment, the participant may be paired with a health coach, who works with him/her periodically to address a specific health area. In return for completing the health risk assessment and participating in the coaching, the participant may receive a discounted premium, lower co-pays or other reduced expenses. The health risk assessment often includes a medical examination and/or biometric screening. Reduced expenses are based on the results of those examinations or screenings, or on a participant achieving a particular result (e.g. a particular BMI range).

Other wellness programs offered by retailers include both participation and/or outcomes-related goal achievement for rewards, incentives, disincentives, or access to higher levels of benefit coverage. These programs are designed to engage employees and their adult family members in regular activities focused on health, wellness, and consumerism in order to maintain or improve the quality and cost of their health care. Employers also see great value in working with private and public partners, like the Centers for Disease Control and Prevention and the U.S. Preventive Services Task Force, to access databases of evidence and practice-based research, and collaborate with clinicians and care delivery professionals to assist in wellness program design and implementation.

Additionally, retailers have been leaders in establishing and operating on-site and in-store clinics, which provide conveniently accessible care not only to their own employees and families but also their customers and the community. At in-store clinics, highly trained medical clinicians, such as physician assistants and nurse practitioners who are licensed in many states, dispense basic medications, administer vaccines and treat common non-emergency illnesses and ailments such as influenza and sprains.

These clinics provide many advantages for individuals and the health care system itself such as: providing affordable and accessible, non-emergency health care to individuals who otherwise may have to wait for appointments with a traditional primary care physician or provider; reducing emergency room visits; improving primary care access by providing easy, affordable options for frontline patient care, especially in medically underserved areas; providing convenient, one-stop shopping for patients who can fill needed prescriptions easily and begin treatment for their diagnosis without delay; reducing the need for specialized, expensive equipment because clinics offer standard care for common ailments; and streamlining costs and passing savings along to patients.

Health Policy Development Process

Implementing the various employer requirements under the ACA has been a very complex process, involving years of extensive policy and operational conversations between the federal government and employers. Since enactment of the ACA five years ago, RILA has provided comprehensive policy recommendations to the White House, Departments of the Treasury, Health and Human Services (HHS), and Labor, and Internal Revenue Service (IRS) (Tri-Departments) on the numerous employer requirements under the ACA. RILA greatly values the time that regulators have spent with our member companies on the telephone and in-person regarding various operational issues and policy ideas that directly impact employers, especially retailers who have large variable hour workforces.

RILA is very concerned that EEOC proposed policies may run counter to the intent of the ACA and various final rules developed over several years as a result of extensive communication with stakeholders, including retail employers. We are also concerned that the proposed policies go beyond the EEOC's agency scope, reaching into the realm of health policy development, which is the jurisdiction of Treasury, HHS, Labor, and the IRS.

The purpose and intention of the Americans with Disabilities Act (ADA) and GINA were primarily to protect individuals with a disability or genetic-related health conditions from discrimination in employment – not to prohibit health plans from obtaining information necessary to underwriting, classifying, or administering risks, or from providing employees with incentives for better health. Interpreting GINA and the ADA in a manner consistent with the Health Insurance Portability and Accountability Act (HIPAA) benefits both plan sponsors and participants. Wellness programs and related incentives that comply with HIPAA should be deemed to comply with GINA's and the ADA's wellness program provisions (subject to any reasonable accommodation requirement). The EEOC's proposals run counter to the intent of the ACA, undermines the rules established by the Tri-Departments, and weakens the overall effectiveness of wellness programs.

Financial and Non-financial Incentives/Inducements

Under the ACA, Congress and the President recognized the value of employer wellness programs to improve employees' health and provide cost-savings to the overall health delivery system, by expanding already-allowed financial incentives under federal law. These changes were developed with direct input from retailers, who are innovative leaders in the area of wellness programs. As early as the summer of 2012, RILA has engaged in an on-going dialogue with senior White House and federal department officials about the development of federal rules for the implementation of the ACA's wellness incentives, and the importance of employer wellness programs to retail employees and their families.

The final rules issued by the Tri-Departments took into consideration the importance of enabling employers to offer wellness incentives of up to 30 percent of premiums for health-contingent programs, incentives of up to 50 percent of premiums for tobacco cessation programs, and limitless credits for participatory programs. In order to ensure that employers are able to continue providing comprehensive wellness programs, as well as incentivize employers to establish new

wellness offerings, it is critical that the requirements of GINA, ADA, and HIPAA be interpreted in a consistent manner.

RILA is very concerned that the EEOC's proposed rules run counter to the intent of Congress, the President, and the Tri-Departments to expand financial incentives for the establishment of employer wellness programs. Specifically, RILA is concerned that the EEOC proposes to change the nomenclature from the ACA term "financial incentives" to "financial inducements" and expand the calculation to include non-financial rewards.

Employers of all sizes use various separate software programs and IT systems, and third-party vendors to administer such things as benefits programs and health plan enrollment, and track hours worked and paid leave. One employer could have upwards of a dozen separate IT systems, in-house and through third-party vendors, to track various aspects of their human resources and payroll departments. There is no one software program or vendor that administers all the tasks required under a human resource department or a payroll department.

Requiring employers to track non-financial incentives such as time-off, a free lunch, a raffled prize, or a gift card to a local movie theater in conjunction with a wellness program and health plan premium calculation would be an extremely daunting and mindboggling task and has nothing to do with GINA. A calculation such as time-off coupled with a wellness benefit and premium calculation would differ from employee to employee, as wages and time-off balances are computed on an individual-by-individual basis. The administrative complexities to capture and track time-off balances in conjunction with participation in a wellness program would go beyond current IT capabilities and far beyond the intent of GINA.

It is hard to comprehend the EEOC's rationale for linking time-off balances, a raffled prize, a free lunch or movie tickets with the metrics currently in practice for developing and implementing wellness programs designed to improve individuals' health and well-being. The correlation of these non-financial incentives with the original intent of GINA makes no sense and runs counter to the intent of the ACA to enable employers to incentivize their employees to participate in wellness programs. The EEOC's proposal to link non-financial incentives in the calculation of premium differentials and GINA is an extreme policy overreach, on which there is no regulatory authority.

Calculating Employee and Spousal Participation

The development and implementation of wellness programs by employers encourage healthier lifestyles for employees and their families, and provide important outreach to individuals whose health conditions may make them more likely to experience significant health events and related expenses. Retailers have made a significant investment in encouraging their employees to make more informed decisions and be better consumers of their own health care.

An important component of encouraging individuals to lead healthier lifestyles is having a support system at home – active participation from other family members such as a spouse – and many retailers extend the offer of participation in a wellness program to an employee's spouse. However, there are many retail employees enrolled in family coverage, for themselves and their

dependents, who do not have a spouse or their spouse is enrolled in separate coverage under his or her own employer.

The EEOC's proposed policy of basing the 30 percent premium differential first on self-only coverage for an employee's participation and then factoring family coverage for spousal participation, at a higher rate, is not an appropriate calculation and administratively complicated. The proposal stands to create multiple tiers of participation values based on whether an employee has a spouse or not. It is important to note that there is no one plan value under every employer health plan. Under a multi-state employer's health plan offerings, there may be several plan choices through different insurance carriers offering multiple tiers and plan choices based on self-only, self plus one dependent, self plus two dependents, and so forth. As such, calculating participation becomes even more complex when you factor in a self-only plan then a more-than-self-only plan. A more appropriate and less burdensome premium differential calculation should be based on individual participation within the scope of the health plan for which they are enrolled.

Conclusion

As our nation's health care delivery system continues to evolve, we believe wellness programs will become an increasingly important component of the workforce environment. Retailers have a vested interest in encouraging healthy lifestyles among their workforces and support efforts to establish and expand wellness programs. It is important that federal regulations, and the interpretation and enforcement of the laws, do not stifle employers' ability to continue to be innovative and forward-thinking in plan design and implementation.

Further, RILA would like to note to the Commission that it submitted additional comments through a joint letter filed with other employer trade associations.

Please direct questions or requests for further information about this comment letter to Christine Pollack, Vice President of Government Affairs, with the Retail Industry Leaders Association (RILA) at Christine.pollack@rila.org or 703-600-2021.