



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION - *RIN number* 3046-AB02

Comment to the Equal Employment Opportunity Commission (EEOC) regarding a proposed rule that would amend the regulations implementing Title II of the Genetic Information Nondiscrimination Act of 2008 as they relate to employer wellness programs.

Thank you for the opportunity to submit comments regarding the proposed rule which the EEOC published on October 30, 2015.

The National Association to Advance Fat Acceptance (NAAFA) is a non-profit civil rights organization dedicated to ending size discrimination in all of its forms. We advocate for size diversity and NAAFA's goal is to help build a society in which people of every size are accepted with dignity and equality in all aspects of life.

GENES AND THEIR INFLUENCE ON BODY SIZE

A significant number of studies have demonstrated that genetics plays a large role in both your body size and body chemistry. The following are four examples of such studies, which demonstrate evidence of the genetic influence in body size:

A twin study of human obesity. This study, which was conducted in 1986, determined that height, weight, and body mass index (BMI) were highly correlated across time. Additionally, a path analysis suggested that the major part of that covariation was genetic. These results were comparable to other similar twin studies and suggest that human fatness is under substantial genetic control. [doi:10.1001/jama.1986.03380010055024]

The Body-Mass Index of Twins Who Have Been Reared Apart. This study concluded that genetic influences on body-mass index are substantial, whereas childhood environments have little or no influence. These findings were also corroborated and extended through results of earlier studies of twins and adoptees. [doi: 10.1056/NEJM199005243222102]

Obesity—still highly heritable after all these years. In this study, which was one of the first to focus on BMI and abdominal adiposity in children, researchers concluded that BMIs and abdominal adiposity could be predicted based on hereditary factors. [ajcn.nutrition.org/content/87/2/275.full]

Study Finds Strong Genetic Component to Obesity. In 2015, this study, which was conducted by the Genetic Investigation of Anthropometric Traits, or GIANT, consortium, identified 97 gene regions associated with obesity. This

amount tripled the number of genes previously known to impact obesity. [doi: 10.1093/hmg/ddv379]

Evidence showing the innate differences in body chemistry has been reported, as stated in an article of the November 24, 2015 Washington Post. Israeli researchers observed that different people's bodies respond to eating the same meal very differently. "There are profound differences between individuals — in some cases, individuals have opposite responses to one another," Segal explained. We are complex creatures and no one is absolutely sure why a person is naturally fat or thin. It's not a failure of moral character or a matter of intake and output. We are all unique individuals and this is something that we should all appreciate and embrace.

[doi: <http://dx.doi.org/10.1016/j.cell.2015.11.001>]

Despite the strong genetic component connected to a person's body size, a 2012 series of studies across five countries on three continents found that people mainly believed either that obesity is caused by a lack of exercise or that it is caused by a poor diet.

[doi: 10.1177/0956797612473121]

Since employer wellness programs have expanded to include families of employees, collection of genetic information and assumptions based on genetic-related physical characteristics, such as body size, are of great concern to NAAFA.

THE EXPANSION OF EMPLOYER CONTROL

Employers' control over their employees' actions has been expanding into the employees' private lives. Examples of this are not only in the scope of employer wellness programs to include their spouse and family but also into other off-duty or "lifestyle" practices such as their use of social media. There needs to be a balance between activities that directly affect employers and the privacy of employees and their families to ensure that employees will not be discriminated against for those activities.¹

BALANCING WORK AND FAMILY RESPONSIBILITIES

Issues of absenteeism connected to family issues and illness is of major concern to employers due to the costs associated with unplanned absences. A 2014 survey on the

¹ Sharona Hoffman, *Preplacement Examinations and Job-Relatedness: How to Enhance Privacy and Diminish Discrimination in the Workplace*, 49 U. KAN. L. REV. 517 (2001) (arguing that employers should not have access to medical information of potential employees when that information does not relate to the employee's job); Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671 (1996) (contending that an employer's right to employment-at-will must be curtailed to protect employee privacy rights); Joan T.A. Gabel & Nancy R. Mansfield, *The Information Revolution and Its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L.J. 301 (2003) (analyzing the impact of the internet on employee fights in the cyberspace workplace).

Total Financial Impact of Employee Absences in the U.S. by the Society for Human Resource Management (SHRM) and Kronos² found that:

- 75% of respondents perceived employee absences have a moderate to large impact on productivity and revenue
- 69% indicated unplanned absences add to the workload
- 61% said these types of absences increase stress
- 59% said these absences disrupt the work of others
- 48% reported unplanned absences hurt morale

The perceptions of employers around these types of absences may lead to “family responsibilities discrimination”, also called “caregiver discrimination”. According to workplacefairness.org, “Family responsibilities discrimination (“FRD”) is employment discrimination that is based on workers’ responsibilities to care for their family members. This type of discrimination may happen to pregnant employees, employees caring for aging parents, parents with young children or workers who have a family member with a disability. If these employees face unfair discrimination in the workplace based on responsibilities such as this, they may be experiencing FRD.”³

Allowing employers access to private health and genetic information for employees’ family members WILL most certainly influence their employment decisions; if not overtly, subconsciously, when considering the potential costs of absences. Extreme care needs to be taken when allowing employers access to this type of confidential information.

ALTERNATIVE TO DISCLOSING HEALTH INFORMATION

With regard to the issue of an employee’s spouse’s choice for nondisclosure of current or past health information, NAAFA believes that it is absolutely necessary to provide an alternative to those that may choose to not disclose their personal information. The Genetic Information Nondiscrimination Act of 2008(GINA) was created to protect individuals from genetic discrimination in health insurance and employment. This can be accomplished by allowing them to provide certification from a medical professional of their care and treatment.

REQUIRED FOR ALL WELLNESS PROGRAMS?

Here, the Commission is asking if the proposed authorization requirement should apply only to wellness programs that offer more than “*de minimis*” rewards or penalties for providing information about current or past health status as part of a health risk assessment (HRA). NAAFA believes that all health information is confidential and should be protected, thereby requiring signed authorization for ALL employer wellness

² *Executive Summary: Total Financial Impact of Employee Absences in the U.S.* (2014)

http://www.shrm.org/Research/SurveyFindings/Documents/Kronos_US_Executive_Summary_Final.pdf

³ *Your Rights: Family Responsibilities Discrimination*, <http://www.workplacefairness.org/family-responsibilities-discrimination>

programs, mandatory or voluntary. Additionally, said programs should be prohibited from accessing health and genetic information from sources other than voluntarily submitted health risk assessment and biometric screenings.

HEALTH PROMOTION OR COST SHIFTING?

Cost-shifting within employer wellness programs is very concerning to NAAFA. The 2013 study, *Wellness Incentives In The Workplace: Cost Savings Through Cost Shifting To Unhealthy Workers*, states “Recognizing the risk that unhealthy employees might be punished rather than helped by such programs, the [Affordable Care] act also forbids health-based discrimination.” Additionally, it finds: “Although there may be other valid reasons, beyond lowering costs, to institute workplace wellness programs, we found little evidence that such programs can easily save costs through health improvement without being discriminatory. Our evidence suggests that savings to employers may come from cost shifting, with the most vulnerable employees—those from lower socioeconomic strata with the most health risks—probably bearing greater costs that in effect subsidize their healthier colleagues.” [doi: 10.1377/hlthaff.2012.0683]

In the 2013 study, *Incentivizing Wellness in the Workplace: Sticks (Not Carrots) Send Stigmatizing Signals*, researchers state:

Companies often provide incentives for employees to maintain healthy lifestyles. These incentives can take the form of either discounted premiums for healthy-weight employees (“carrot” policies) or increased premiums for overweight employees (“stick” policies). In the three studies reported here, we demonstrated that even when stick and carrot policies are formally equivalent, they do not necessarily convey the same information to employees. Stick but not carrot policies were viewed as reflecting negative company attitudes toward overweight employees and were evaluated especially negatively by overweight participants. This was true even when overweight employees paid less money under the stick than under the carrot policy. When acting as policymakers, participants with high levels of implicit overweight bias were especially likely to choose stick policies—often on the grounds that such policies were cost-effective—even when doing so was more costly to the company. Policymakers should realize that the framing of incentive programs can convey tacit, and sometimes stigmatizing, messages. [doi: 10.1177/0956797612474471]

BEST PRACTICES

From the 2013 *Report to Congress on Workplace Wellness*, “A wellness program is defined in section 2705(j)(1)(A) of the Public Health Service Act, as amended by the Affordable Care Act, as a program offered by an employer designed to **promote health** [emphasis added] or prevent disease.”⁴

⁴ *Report to Congress on Workplace Wellness*, <https://aspe.hhs.gov/basic-report/report-congress-workplace-wellness>

Best practices to ensure that employer wellness programs are unbiased and, in fact, **promote health** need to be based on the evidence-based principles of Health at Every Size (HAES) in working to improve the physical, emotional and mental health of all employees and their families. These principles are aligned with the intent of the Affordable Care Act and NAAFA's mission. Instead of focusing on weight or BMI as a measurement of health, the HAES approach removes weight from the equation and replaces it with a focus on overall well-being, which includes the full range of body shapes and sizes. For information on HAES principles, go to <https://www.sizediversityandhealth.org/content.asp?id=152>.

Respectfully submitted:

NAAFA Board of Directors

Darliene Howell, Chair of the Board/Secretary

Peggy Howell, Vice-Chair/Public Relations Director

Tony Harrell, Treasurer

Tigress Osborn, Social Media Director