IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AARP,	)	
	)	
Plaintiff,	)	
	)	**Case No. 16-cv-2113**
v.	)	
	)	
UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	)	
	)	
Defendant.	)	
	)	

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT

Steven P. Lehotsky
D.C. Bar No. 992725
Warren Postman
D.C. Bar No. 995083
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Lawrence Z. Lorber
D.C. Bar No. 103127
Edward V. Arnold
D.C. Bar No. 1010273
SEYFARTH SHAW LLP
975 F Street, NW
Washington, DC 20006
(202) 828-5341

Camille A. Olson
Ill. Bar No. 6191835
Benjamin J. Conley
Ill. Bar No. 6296118
SEYFARTH SHAW LLP
131 S. Dearborn, Suite 2400
Chicago, Illinois 60603
(312) 460-5000

Counsel for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") respectfully files this brief as *amicus curiae* in support of Defendant United States Equal Employment Commission's ("EEOC") Memorandum in Opposition to AARP's Motion for a Preliminary Injunction. The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of three million professional organizations of every size, in every industry sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community, including its employees.

Workplace wellness programs serve the dual purpose of promoting better health amongst employees while controlling health care costs. Such programs can be a win-win for both employers and employees. The Chamber and its members have a longstanding interest in the design and implementation of health promotion initiatives, including workplace wellness programs. The Chamber has conducted workshops and seminars on wellness programs, and has published discussions and descriptions of best practices for wellness programs.[2] For example, in 2016, the Chamber published *Winning with Wellness*,[3] an inclusive discussion of the current

---

[1] Counsel for the Chamber notified counsel for both parties of the Chamber's intent to file this brief and neither party opposed the filing. Counsel for the Chamber certifies that no counsel for a party authored this brief in whole or in part and that no person, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] *See Winning With Wellness*, U.S. Chamber of Commerce, *available at* https://www.uschamber.com/sites/default/files/022436_labr_wellness_report_opt.pdf (last visited November 17, 2016).

[3] *Id.*

composition of wellness plans, and the benefits employees and employers derive from properly structured and implemented programs.

However, wellness programs can deliver on the two goals of promoting better health and lowering costs only if employees actually participate. To that end, it is well-accepted that appropriate participation incentives as authorized by existing federal statutes and regulations are a critical element in encouraging participation.[4]

As noted in its comment letters in response to EEOC's regulations,[5] the Chamber believes that EEOC's regulations are in many ways too restrictive of wellness programs. However, if the AARP's position were to prevail in this case and employers were further restricted in their use of wellness programs, the benefits of those programs would be threatened. Accordingly, the question of whether incentives are permissible under the ADA[6] and GINA[7] is extremely important to the business community and to the continued viability and utilization of wellness plans for the benefit of employers and employees.

SUMMARY OF ARGUMENT

Wellness programs are an effective and valuable tool for promoting wellness in the workplace, which benefits both employers and employees. AARP claims, however, that voluntary incentives for employees to participate in wellness programs are "financial penalties"[8]

---

[4] *See* Soeren Mattke, et. al., *Workplace Wellness Programs Study*, Rand Corporation (2013) *available at* http://www.rand.org/pubs/research_reports/RR254.html (noting that participation for wellness programs offering incentives increases by a median of 20% above wellness programs that do not use incentives).

[5] *See* Letter from U.S. Chamber of Commerce to EEOC (June 19, 2015) (commenting on proposed regulations under the ADA); Letter from U.S. Chamber of Commerce to EEOC (Jan. 28, 2016) (commenting on proposed regulations under GINA).

[6] Americans with Disabilities Act, 42 U.S.C. §§ 12101 et. seq. (2012).

[7] Genetic Information Nondiscrimination Act, 42 U.S.C. §§ 2000ff, et. seq. (2012).

[8] Complaint of Plaintiff, *supra* note 6, at 1.

that are necessarily "coercive."[9] And AARP argues[10] that the EEOC's regulations under the ADA[11] and GINA[12] therefore misinterpret the definition of "voluntary" by allowing incentives that do not exceed a specified level. That claim is wrong as both a factual and legal matter.

As a factual matter, while wellness incentives of course motivate employees and their family members to participate in voluntary wellness programs, that does not make participation in wellness programs mandatory; indeed, if the wellness programs were actually "coercive", there would be no need for incentives to encourage participation.

As a legal matter, Congress, the EEOC, the Internal Revenue Service, the Department of Labor, and the Department of Health and Human Services have long endorsed employer-sponsored wellness programs that include incentives to participating employees and their dependents. This broad-based recognition of the appropriate implementation of wellness incentives by the various government agencies with recognized expertise, and, of course, Congress, further confirms that the ADA and GINA were never intended to prevent the sort of incentives allowed under the EEOC's regulations. Indeed, the AARP's position would effectively end the use of wellness programs notwithstanding the longstanding legislative and regulatory support for these programs.

AARP's position not only lacks factual and legal support, but also fails to further the anti-discrimination goals of the ADA. Various existing laws, including, but not limited to, HIPAA,[13] GINA and the ADA protect sensitive, individually-identifiable medical information and prevent employers or other employees from accessing that information in a way that could lead to actual

[9] *Id.*
[10] *See* Complaint of Plaintiff, AARP v. EEOC, No. 16 Civ. 2113 (D. C. Cir. Oct. 24, 2016).
[11] Regulations Under the Americans with Disabilities Act, 81 Fed. Reg. 31,125 (May 17, 2016).
[12] Regulations Under the Genetic Information Nondiscrimination Act, 81 Fed. Reg. 31,143 (May 17, 2016).
[13] 45 C.F.R. §§ 160, 162, 164 (2013).

discrimination. AARP's complaint offers no basis to assume that there will be a wholesale disregard of these statutory protections and that the EEOC will be derelict in its responsibility to enforce the privacy restrictions inherent in the ADA and GINA.

ARGUMENT

I. WELLNESS PROGRAMS PROVIDE VALUABLE BENEFITS TO EMPLOYERS AND PARTICIPANTS.

As set forth in the Chamber's various publications and as noted in its comments submitted in response to EEOC's ADA and GINA wellness rulemakings, wellness programs are effective in promoting better health and wellness of participants while decreasing health costs.[14] With health care costs continuing to rise, along with rates for obesity and other chronic diseases, workplace wellness programs have served as meaningful mechanisms for encouraging and rewarding positive behavior and healthy life choices.[15] Moreover, wellness programs make health insurance more affordable by reducing overall health costs of an employer population, and they provide health plans with valuable information they can use to provide high-risk participants with customized care intended to address their needs in a more targeted fashion.

Congress recognized the benefit of wellness programs in passing the Affordable Care Act,[16] which codified prior agency guidance on wellness programs and even expanded the scope

[14] *See* Katherine Baiker, et. al., *Workplace Wellness Programs Can Generate Savings*, HEALTH AFFAIRS, January 14, 2010, *available at* http://content.healthaffairs.org/content/29/2/304.full.

[15] Wellness programs generally fall into two categories: participation-only wellness programs and health-contingent wellness programs. Participation-only wellness programs encourage participants to take part in a wellness initiative, but to the extent the program offers a reward, the reward is available regardless of the outcome. Examples of a participation-only wellness program include a biometric screening, a health risk assessment, or a smoking cessation program. Health-contingent wellness programs require participants to achieve a particular standard to achieve a reward. Examples of a health-contingent wellness program include a screening to confirm the participant meets certain nicotine, BMI or cholesterol targets.

[16] Patient Protection and Affordable Care Act of 2010, 42 U.S.C. § 18001 et seq. (2010).

of permissible incentives under such programs.[17] In fact, in the highly charged debate over the Affordable Care Act, the recognition of the benefits of wellness programs was one of the few areas of near-universal agreement. Similarly, the tri-agency[18] regulations implementing the law addressed the value of wellness programs directly, noting "[t]he Departments believe that appropriately designed wellness programs have the potential to contribute importantly to promoting health and preventing disease."[19] Further, the Administration has also expressed support for wellness programs, noting that "we know that wellness programs are good for both employers and employees."[20]

Most importantly, wellness programs work. According to a RAND survey,[21] participants in wellness programs benefitted from "statistically significant and clinically meaningful improvements in exercise frequency, smoking behavior, and weight control." RAND concluded that wellness programs have positive effects on a wide variety of health-related behavior and health risks, including reduction in smoker rates, increasing physical activity, increasing fruit and vegetable consumption, decreasing fat intake, and reducing body weight, cholesterol levels, and blood pressure. They also provide big benefits for cardiovascular health, diabetes, emotional health, and longevity.[22] The effectiveness of these programs is driven in large part by

[17] Prior to the Affordable Care Act, regulations under HIPAA limited the value of wellness incentives to 20% of the overall cost of health insurance coverage. The Affordable Care Act permits incentives of up to 30% of the cost of coverage (increasing to 50% for wellness programs relating to smoking cessation). Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 78 Fed. Reg. 33,158, 33,191 (June 3, 2013).
[18] The Departments of Labor, Health and Human Services, and the Treasury published joint final regulations implementing the HIPAA nondiscrimination and wellness provisions.
[19] Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 78 Fed. Reg. at 33,191.
[20] Josh Earnest, White House Press Secretary, White House Press Briefing, December 3, 2014.
[21] *Workplace Wellness Programs Study*, *supra* note 3.
[22] *See Winning With Wellness*, *supra* note 1.

participation though, and participation increases by a median of 20 percent when the program includes incentives.[23]

Accordingly, we strongly encourage the Court to refrain from granting AARP's motion for a preliminary injunction, which would have the effect of significantly undercutting the effectiveness of wellness programs.

II. WELLNESS PROGRAM INCENTIVES ENJOY WELL-ESTABLISHED STATUTORY SUPPORT AND DO NOT RENDER THE PROGRAMS DISCRIMINATORY

AARP's complaint alleges that incentives render wellness programs "involuntary," thereby allowing employers to discriminate on the basis of disability.[24] This argument is without merit for a number of reasons.

A. The ADA's Safe Harbor Insulates Certain Wellness Programs From the "Voluntariness" Inquiry

First, the ADA contains a safe harbor for bona fide benefit plans, exempting those plans from the law's voluntariness standard.[25] The Eleventh Circuit has upheld the applicability of this safe harbor in the context of an employer-sponsored wellness program that included incentives.[26] AARP cannot simply ignore this provision of the ADA and its potentially preclusive effect on the question of voluntariness.

---

[23] *Workplace Wellness Programs Study*, *supra* note 3.
[24] Complaint of Plaintiff, *supra* note 6, at 22.
[25] *See* Americans with Disabilities Act 42 U.S.C. § 12201(c) ("this Act shall not be construed to prohibit or restrict . . . a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law").
[26] *See* Seff v. Broward County, 778 F. Supp. 2d 1370 (S.D. Fla. 2011), *affirmed*, 691 F.3d 1221 (11th Cir. 2012). Following the Eleventh Circuit's decision, the EEOC's final regulations under the ADA rejected the applicability of the safe harbor in the context of wellness programs but still endorsed the use of incentives, as long as those incentives do not render the program "involuntary". The Chamber disagrees with the EEOC's rejection of that safe harbor.

B. AARP Ignores the Express Congressional Endorsement of Incentives in Wellness Plans

Moreover, AARP's position that all incentives are involuntary is directly contrary to clear congressional intent and the reasoned analysis by the agencies with direct responsibility for the implementation of the statutes which authorize wellness programs and the necessary incentives. Specifically, Congress codified the HIPAA wellness program regulations in the Affordable Care Act – and by doing so, explicitly permitted employers to offer incentives that AARP claims are prohibited by statute. In this action AARP creates an alternative universe where it disregards and misstates congressional approval of wellness incentives. As noted above, the Affordable Care Act permits incentives of up to 30% of the cost of coverage (or, in the context of wellness programs designed to address tobacco use, up to 50% of the cost of coverage). Congress passed the Affordable Care Act *after* it passed the ADA, the ADA Amendments Act and GINA. Thus, Congress was certainly aware of the "voluntariness" concerns inherent in those statutes when it approved the use of wellness program incentives in the ACA

AARP appears to argue the ADA and GINA should be read to further restrict the provisions under Affordable Care Act permitting use of incentives in wellness programs.[27] Yet the AARP offers no explanation for how the ACA provisions allowing incentives would have any effect if such incentives were unlawful under the ADA. It is an elementary principle of statutory interpretation that statutes must be read in harmony, and that is precisely what the tri-agency and EEOC regulations did in authorizing wellness program incentives. Instead, the Court should view HIPAA, GINA and the ADA as complementary rather than conflicting statutes. Any other interpretation would undermine Congress's clear intent in endorsing wellness

[27] *See, generally,* Complaint of Plaintiff, *supra* note 6.

programs and create incongruity and uncertainty among employers attempting to determine whether incentives are permissible.

C. Judicial Precedent Supports Upholding the Voluntariness of Incentives in Wellness Programs

A recent decision in the Eastern District of Wisconsin reaffirms that wellness incentives satisfy the ADA's voluntariness standard, and that the limitations on incentives imposed by the EEOC may be too strict, rather than too lax (as AARP suggests).[28] In *EEOC v. Orion Energy Systems, Inc.*, employees who completed a health risk assessment ("HRA") were offered the opportunity to enroll in health coverage at no cost. Employees who failed to complete the health risk assessment were required to pay 100% of the cost of coverage.

The court found that such a program – despite an incentive that exceeded the cap found in the EEOC's new regulations – was in fact voluntary. "Even a strong incentive," in the court's words, "is still no more than an incentive; it is not compulsion. Orion's wellness initiative is voluntary in the sense that it is optional."[29] The court went on to explain that "[a]n employee is not required to participate in the program and is instead given a choice: either elect to complete the HRA as part of the health program or pay the full amount of the health benefit premium."[30] "There may be strong reasons to comply with an employer's wellness initiative, and the employee must balance the considerations in deciding whether to participate or not. But a 'hard choice is not the same as no choice.'"[31]

[28] *See* EEOC v. Orion Energy Systems, Inc., No. 14 Civ. 1019 (E.D. Wi. Sept. 19, 2016) (granting in part and denying in part cross-motions for summary judgment).
[29] *Id.* at 18.
[30] *Id.*
[31] *Id. quoting* U.S. v. Martinez-Salazar, 528 U.S. 304, 315 (2000).

III. AARP'S POSITION DOES NOT FURTHER ANTI-DISCRIMINATION GOALS.

AARP asserts that allowing employers to offer incentives to employees in exchange for participating in wellness programs will result employment discrimination on the basis of disability or genetic information. In doing so, AARP repeatedly notes that, in enacting the ADA and GINA, Congress was concerned about the possibility of discrimination against employees with disabilities. Although AARP properly states the overriding purpose of the ADA and GINA, it then poses hypotheticals which suggest that notwithstanding the privacy protection in those statutes and HIPAA, voluntary disclosure of medical conditions to a third party wellness provider that does not share that information with the employer somehow invites violations of those statutes. This assertion is simply implausible. Existing protections under various laws preserve the integrity of individually-identifiable medical data—which is the only sort of medical or genetic information that can be used to discriminate against an employee—and impose harsh sanctions upon persons or employers who improperly access or use such data.

If the wellness program is offered as part of a group health plan, HIPAA privacy rules limit the use and/or disclosure of participant medical information.[32] Those rules further require that the health plan be treated as a separate entity from the employer and that the health plan create a wall between employment-related functions and health plan-related functions. Plans, employers, or other individuals who breach these safeguards face harsh sanctions, including both civil monetary and criminal penalties.[33]

---

[32] *See, generally*, HIPAA Admin. Simplification, 45 C.F.R. §§ 160, 162, 164 (2013).

[33] 45 C.F.R. § 160.404 (2013) (authorizing civil penalties ranging from $100 to more than $1,500,000, depending on the severity of the violation); Memorandum Opinion for the General Counsel Department of Health and Human Services and the Senior Counsel to the Deputy Attorney General (June 1, 2005) *available at* https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/17/hipaa_final.htm (authorizing criminal sanctions of more than $50,000 and imprisonment, depending on the severity of the violation).

Even if a wellness program is not part of a group health plan and thus not subject to HIPAA privacy rules (most wellness programs are subject to HIPAA privacy rules), the ADA and GINA already prohibit employers from discriminating against employees because of a disability or on the basis of genetic information.[34] The EEOC regulations under GINA and the ADA not only preserve, but enhance existing protections. In fact, the new ADA and GINA regulations arguably impose greater confidentiality protections than the HIPAA privacy rules, extending to information provided by employees (or their dependents) as part of an HRA or biometric screening. Adding incentives for providing that information is no more likely to lead to discrimination because the employer has no access to that information or can only access that information in the aggregate (in a de-identified form). And employees are well aware of this fact, given that HIPAA privacy rules[35] and the EEOC's ADA regulations[36] require that employers clearly communicate these confidentiality standards.

Given these existing protections, AARP's suggestion that the Court must inhibit the use of incentives to prevent discrimination is wholly unfounded.

CONCLUSION

Wellness programs serve a valuable purpose, empowering employees to take control of their health, and allowing employers to control costs and cater medical programs to their employees' needs. If employers are unable to incorporate incentives into their wellness programs, the value of these programs will be severely undercut (even more so than under existing EEOC guidance, which, in the Chamber's view, is already too restrictive). Moreover,

[34] 29 C.F.R. § 1630.14 (ADA); 29 C.F.R. § 1635.9 (GINA)
[35] Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 78 Fed. Reg. at 33,184.
[36] Regulations Under the Americans with Disabilities Act, 81 Fed. Reg. at 31,142.

adequate privacy protections already exist through a series of laws that permit offering incentives without compromising the confidentiality of personal medical data.

For the foregoing reasons, the Plaintiff's motion for a preliminary injunction should be denied.

DATED: November 18, 2016

Respectfully submitted,

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

By /s/ Lawrence Z. Lorber

Lawrence Z. Lorber
Edward V. Arnold
SEYFARTH SHAW LLP
975 F Street, NW
Washington, DC 20006
(202) 828-5341

Camille A. Olson
Benjamin J. Conley
SEYFARTH SHAW LLP
131 S. Dearborn St., Suite 2400
Chicago, Illinois 60603
(312) 460-5827

Steven P. Lehotsky
Warren Postman
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November, 2016, a true and exact copy of the foregoing was served by ECF to the following:

Steven A. Myers
U.S. Department of Justice, Civil Division
20 Massachusetts Avenue NW
Washington, DC 20530

Dara S Smith, Esquire
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049

/s/Lawrence Z. Lorber