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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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June 19, 2015

VIA ELECTRONIC SUBMISSION: <http://www.regulations.gov>

Ms. Bernadette B. Wilson
Acting Executive Director, Executive Secretariat
U.S. Equal Employment Opportunity Commission (EEOC)
131 M Street NE
Washington, DC 20507

**Re: Proposed Amendments to Regulations under the Americans with Disabilities Act
(RIN 3046-AB01)**

Dear Ms. Wilson:

On behalf of the Associated General Contractors of America (hereinafter “AGC”), thank you for the opportunity to submit the following comments on the U.S. Equal Employment Opportunity Commission’s (hereinafter “EEOC” or “the Commission”) notice of proposed rulemaking (hereinafter “NPRM” or “proposed rule”) that would amend the regulations and interpretive guidance implementing Title I of the Americans with Disabilities Act (ADA) as they relate to employer wellness programs. The NPRM was published in the Federal Register on April 20, 2015.

AGC is the leading association for the construction industry, representing more than 25,000 firms, including over 6,500 of America’s leading general contractors and over 8,800 specialty contracting firms. In addition, more than 10,400 service providers and suppliers are associated with AGC through a nationwide network of chapters. These firms, both union and open shop, engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property. Many of these firms use wellness programs as an essential tool for lowering escalating health care costs by encouraging healthy lifestyles for employees and their families. Clearly, both industry and employees benefit greatly from such programs.

AGC is concerned that some of the provisions proposed in the NPRM, if implemented, will discourage employers from including wellness programs as part of their overall health care management system, eliminating valuable employee financial incentives and increasing the cost of company-provided health insurance. AGC, therefore, makes the following recommendations:

- 1. The EEOC should align the total reward incentive of health-contingent plans with that of the Health Insurance Portability and Accountability Act (HIPAA) and the Affordable Care Act (ACA).**

The proposed rule would allow employers to offer incentives for employee participation in health-contingent wellness programs as long as the total reward does not exceed 30% of the total cost of employee-only coverage under the plan. As noted in the NPRM, HIPAA and the ACA generally provide for the same maximum allowable incentive. However, while HIPAA, as amended by the ACA, raises the incentive limit to 50% for tobacco prevention or reduction, the EEOC's proposed rule maintains a 30% limit for tobacco-related programs that include disability-related inquiries or medical examinations. AGC recommends extending that limit to align with HIPAA. AGC believes that, as a general rule, rewards should be linked to the health-related activity or outcome they are intended to promote rather than the type of program offered. For example, an employer's ability to offer a 50% reward for participation in a smoking cessation program with testing versus a 30% reward for participating in a general tobacco education program could substantially motivate an employee to quit smoking. Additionally, consistency between the EEOC's rule and HIPAA will help eliminate confusion among plan administrators and potential violations by well-intentioned employers.

2. The EEOC should address wellness plans that cover dependents, including how the percentage limitation would be calculated under such plans.

The NPRM does not, in any way, address wellness plans that cover dependents. AGC recommends that the EEOC not only address this issue, but allow wellness plans to extend to family members since many employees elect to obtain employer-provided health insurance for their families. Because more people are covered, often this expense is significant for employers and employees alike. Allowing employee incentives for family participation in company wellness programs will undoubtedly encourage employees to promote healthier lifestyles within their households.

3. The EEOC should allow employers to decide, on a case-by-case basis whether or not to offer a full incentive to an employee after he/she declines to participate in a wellness program.

The NPRM seeks comments on whether individuals should be eligible to receive a full incentive – even if they decline to participate in a wellness program – if a medical professional certifies that the employee is under a physician's care and any medical risks are under active treatment. AGC believes that blanket exceptions to the requirements of a wellness program for employees who refuse to participate will prevent employers from actively promoting healthy lifestyles for its employees and may allow employees a means of personally avoiding the necessary steps to address any existing health risks. Therefore, AGC asks the EEOC to withdraw this requirement from consideration in a final rule.

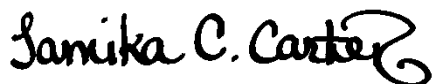
4. The EEOC should reduce the burdensome requirements for employers associated with proving that participating in a wellness plan is “voluntary.”

If implemented, the proposed rule would require employers to provide a notice to employees that clearly explains what medical information will be obtained, how it will be used, who will receive it, and the restrictions on disclosure when participating in the company's voluntary wellness plan. Additionally, employers may be required to obtain from employees prior written confirmation that their participation is voluntary. AGC is not aware of any wellness plan administered by its members that is not voluntary. As such, additional administrative requirements, such as the requirement to provide an employee notice, will not only detract from the overall objective of promoting employee wellness programs, but will also add unnecessary time and cost burdens for employers. Those costs could, instead, be applied toward incentives for promoting healthy living among employees.

Also with regard to the employee notice, the NPRM is seeking comments on whether the notice requirement should be waived if wellness programs only offer a *de minimis* incentive. Again, while AGC believes that the notice requirement is burdensome, costly, and unnecessary, should the Commission decline to accept AGC's recommendation to eliminate the notice requirement, AGC further recommends that the Commission expressly define the *de minimis* reward amount as 20% or less of the total cost of coverage premium. The 20% standard is currently being used by other government agencies in its enforcement of other employment-related regulations and it is familiar to employers.

AGC appreciates the opportunity to engage in the rulemaking process and looks forward to working with the EEOC as it continues to develop and/or amend regulations that impact construction employers. If we can offer assistance in any way, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Tamika C. Carter" with a stylized flourish at the end.

Tamika C. Carter
Director, Construction HR