Supporting Statement for Notice requirement under Title I of the ADA

A. Justification

1. The Equal Employment Opportunity Commission (EEOC) enforces Title I of the Americans with Disabilities Act (ADA), which prohibits discrimination on the basis of disability and restricts employers from obtaining medical information from employees by generally prohibiting them from making disability-related inquiries or requiring medical examinations. The statute provides an exception to this rule by stating that "[a] covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site."[1] Employee health programs include workplace wellness programs. Many employers encourage participation in wellness programs by offering rewards to employees who provide their medical information or penalizing those who do not. Neither the statute nor the EEOC's current regulations, however, address the extent to which financial and other incentives affect the voluntary nature of a wellness program. The final rule requiring the third-party disclosure outlines the circumstances under which employee participation in a workplace wellness program may be deemed voluntary.

2. Where a wellness program requires employees to provide medical information (for example, by completing a health risk assessment or undergoing biometric screening), a covered entity must provide a notice clearly explaining what medical information will be obtained, how the medical information will be used, who will receive the medical information, the restrictions on disclosure of the medical information, and the methods the covered entity uses to prevent improper disclosure of medical information. Some employers and group health plans already may have notices that comply with these requirements.

3. This collection of information does not specify a mandatory format for the third-party disclosure; as such, covered entities may elect to comply with the notice requirement through use of information technology.

4. Other agencies may require entities they regulate to disclose to third parties the manner in which they may use medical information (e.g., the Department of Health and Human Services requires certain covered entities to provide a notice to individuals explaining how their medical information will be used pursuant to the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule). Thus, we assume that some employers and group health plans may already have notices created for other purposes that would satisfy the third-party disclosure requirements in the EEOC's final rule and can use those notices for all of its

[1] 42 U.S.C. 12112(d)(4)(B).

wellness programs that ask employees to respond to disability-related inquiries and/or undergo medical examinations.

5. Small businesses with 15 or more employees that offer wellness programs as part of group health plans are subject to this proposed third-party disclosure requirement. This requirement will not have a significant economic impact on a substantial number of small entities because it imposes no reporting burdens and only minimal costs on such firms. We estimate that small businesses will need to dedicate, at most, four hours to develop a notice that would comply with the final rule's requirement. According to data from the Bureau of Labor Statistics, the average hourly compensation for employees in "management, professional, and related" occupations was $55.56 as of December 2014, and the average hourly compensation for employees working in "office and administrative support" was $23.98.[2] Assuming that 50 percent of the time required to develop an appropriate notice is attributable to employees working in management, professional, and related occupations and that 50 percent of the time is attributable to employees working in office and administrative support, the Commission estimates that the one-time cost per entity of complying with the notice requirement will be approximately $42,296,190.

6. The information collection is needed to ensure covered entities' compliance with the ADA by establishing that employees voluntarily participate in wellness programs that require them to respond to disability-related inquiries or undergo medical examinations. Without such a notice, employees may be asked to complete a health risk assessment or undergo a biometric screening without knowing how the medical information they provide will be used, who will receive it, and the steps the employer will take to restrict disclosure. The notice will ensure that employees either choose to voluntarily disclose medical information that employers would otherwise generally be prohibited from obtaining or decline to do so.

7. There are no special circumstances.

8. As required by 5 C.F.R. § 1320.11, EEOC published a notice in the Federal Register on Monday, April 20, 2015 at pages 21659-21670 soliciting comments on the proposed notice requirement. See FR Volume 80, Number 75. Pursuant to 5 C.F.R. § 1320.8(d)(1), the public was specifically invited to comment on burden; however, no comments were received in response to the questions in Section 1320.8(d)(1).

   Over the years, the EEOC has received many inquiries from the public asking questions about what makes a wellness program "voluntary" and whether an employer can condition the provision of health insurance on an employee's participation in a wellness program. The EEOC also held a Commission meeting

[2] *See* Bureau of Labor Statistics, Employer Costs for Employee Compensation – December 2014 (March 11, 2015), available at www.bls.gov/news.release/pdf/ecec.pdf.

in May 2013 to seek input from stakeholders on what kind of guidance was needed on how Title I of the ADA and the other nondiscrimination statutes EEOC enforces apply to workplace wellness programs that include disability-related inquiries and medical examinations.

In 2014, the EEOC informally submitted various drafts of the proposed regulation to other agencies and, in April 2015, formally provided copies of its proposed Federal Register notice to the following, inviting them to review the proposed regulatory change and provide comments:

U.S. Department of Labor
Office of the Solicitor

Office of Health Plan Standards and Compliance Assistance
U.S. Department of Labor
Employee Benefits Security Administration

U.S. Department of Health and Human Services
Office for Civil Rights

Disability Rights Section
U. S. Department of Justice
Civil Rights Division

Office of the Chief Counsel
U.S. Department of the Treasury
Internal Revenue Service

9. The EEOC does not provide payments or gifts to respondents.

10. The EEOC does not provide an assurance of confidentiality to employers who make the third-party disclosures, as the proposed regulations do not require employers to disclose any information to the agency.

11. The proposed information collection does not involve any sensitive questions; it is a third-party disclosure requirement that does not pose questions to recipients of the notice.

12. The requirement contained in the proposed information collection is limited to a third-party disclosure to be made by covered employers. This requirement does not ask these employers to provide any records to the EEOC. In order to estimate the hour burden for compliance with this third-party disclosure requirement we made some assumptions.

    We estimate that there are approximately 782,000 employers with 15 or more employees subject to the ADA and, of that number, one half to two thirds

(391,000 to 521,333) offer some type of wellness program.[3] Of those employers, 32 percent to 51 percent require employees to complete a health risk assessment (HRA) that likely contains disability-related questions.[4] Using the highest estimates, we assume that 265,880 employers (51 percent of 521,333 employers) would be covered by this requirement.

Some employers and group health plans already may use forms that comply with the proposed notice requirement; therefore, the burden only will be on employers and group health plans that would incur a one-time burden to develop an appropriate notice to ensure that employees who provide medical information pursuant to a wellness program do so voluntarily. This notice may be included on or attached to any HRA employees are asked to complete and should explain what medical information will be obtained, how it will be used, who will receive it, and the restrictions on disclosure. Assuming that creation of such a document would take four hours, and assuming that 265,880 employers would be covered by the proposed regulation, this one-time burden would be 1,063,520 hours. Because employers would not have to develop a new form unless they chose to collect medical information for a different purpose than that described on the notice or changed the type or amount of medical information collected, they would be able to annually redistribute the same notice to all relevant employees. We believe any burden associated with redistribution of the notice would be negligible.

13. There is no additional annual cost to the employers as a result of this third-party disclosure requirement. No capital or operational expenses are expected as a result of this collection of information. As noted above, once an employer has incurred the one-time burden of creating a notice that would comply with the requirements in the proposed information collection, we believe any further burden or cost incurred by the employer would be negligible.

14. There is no cost to the Federal Government because the requirement in this proposed information collection concerns only disclosures to third parties and not reporting to the government.

15. This is a new information collection; therefore, there are no program changes to report at this time.

16. No results will be published.

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[3] According to the RAND Final Report (RAND Health, Workplace Programs Study: Final Report xx (2013), http://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR254/RAND_RR254.pdf), "approximately half of U.S. employers offer wellness promotion initiatives." By contrast, the Kaiser Survey (Employer Health Benefits Survey, Kaiser Family Foundation (2014), http://kff.org/health-costs/report/2014-employer-health-benefits-survey/) found that "[s]eventy-four percent of employers offering health benefits" offer at least one wellness program.

[4] The Kaiser Survey reports that 51 percent of large employers versus 32 percent of small employers ask employees to complete a HRA.

17. The EEOC is not seeking approval for non-display of the OMB approval date for this proposed information collection.

18. There are no exceptions to the EEOC's certification statement.