

**Comment Regarding the Use of Biometric Targets in Wellness Programs and the Resulting Impact on the Civil Rights of Individuals at the Highest End of the Weight Spectrum**

**TO:** US Equal Employment Opportunity Commission

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Thank you for the opportunity to comment on the implications of using biometric targets or measures in wellness programs and the resulting potential for violation of EEO laws. This comment focuses on the unique situation faced by people at the highest end of the weight spectrum who are disabled by their weight and covered by the Americans with Disabilities Act (ADA). This group includes a higher percent of women than men and a disproportionate representation of certain racial and ethnic minority members. Wellness Programs that use biometrics based on body size, weight or proportions target members of this group for discrimination **because** of the condition that brings them under the protection of the ADA.

Jim Sacher, Equal Employment Opportunities Commission (EEOC) regional attorney, clearly explains the EEOC's position when discussing *EEOC vs. Resources for Human Development* which was settled on April 10, 2012: "[S]everely obese people who can do their jobs are every bit as protected by the ADA as people with any other qualifying disability. Any notion that these individuals are not protected, based on the wrongheaded idea that their condition is self-inflicted, is simply wrong and without any legal basis." (See U.S. EEOC press release, "*Resources for Human Development Settles EEOC Disability Suit for \$125,000: Court Upholds Severe Obesity as an ADA-Protected Impairment*", April 2012) In that case decided in December, 2011, the U.S. District Court for the Eastern District of Louisiana held that severe obesity is an impairment within the meaning of the ADA. "A careful reading of the EEOC guidelines and the ADA reveals that the requirement for a physiological cause is only required when a charging party's weight is within the normal range. 29 C.F.R. 1630.2(h)." *EEOC vs. Resources for Human Development*, No. 10-3322 (E.D.La. Dec. 7, 2011 at 11.

Attempts to change body size, weight or proportions are not without risk. For the average person on the highest end of the weight spectrum to meet a "normal" biological marker related to body size, weight or proportions is undoable. Some try via surgery, but risks related to surgical interventions are significant. Of 16,155 Medicare beneficiaries who had weight-loss surgery, one-year mortality rates were nearly 5%. "The risk of early death after bariatric surgery is considerably higher than previously suggested." (See, David R. Flum, MD, MPH, Leon Salen, MD, Jo Ann Broeckel Elrod, PhD, E. Patchen Dellinger, MD, Allen Cheadle, PhD, Leighton Chan, MD, MPH, "*Early Mortality Among Medicare Beneficiaries Undergoing Bariatric Surgical Procedures*," JAMA, 294(15), 1903-1908, 2005.) Even people who undergo weight-loss surgery and survive may see only temporary improvement, with a return and worsening of illness after three years. (See, Mary DiGiorgi, MS, MPH, Daniel J. Rosen, MD, Jenny J. Choi, MD, et al., "*Re-emergence of Diabetes After Gastric Bypass in Patients with Mid- to Long-term Follow-up*," *Surgery for Obesity and Related Diseases*, 6, 3, 249-253, May/June 2010.) Suicide rates among 16,683 studied weight loss surgery patients were "substantially higher" than among the general age-matched population. (See, Hilary M. Tindle, MD, Bennet Omalu, MD, ed al., "*Risk of Suicide After Long-term Follow-up from Bariatric Surgery*," *American Journal of Medicine*, 123(11), 1036-1042, September, 2010.)

Coercing a person with a disability to undergo such risks in order to receive equal protection contradicts the broad purpose of disability law. Balancing the risks and benefits is a personal decision to be made in consultation with one's physician; it should not be made in order to prevent economic discrimination in the workplace. Disabled individuals should never be manipulated into procedures that risk their lives because the legal avenue to secure their civil rights is denied.

To the extent that biometric targets related to body size, weight or proportions are used to award benefits or impose penalties, alternative options must be available as an accommodation in the Wellness Plan that enable this group of individuals to receive the same benefits of employment (or to have the same ability to avoid workplace penalties) as their non-disabled peers.

Additionally, guidance should include directives that Wellness Plans refrain from creating or contributing to a hostile work environment for people based on body size, weight, or proportions since weight-related harassment would run afoul of ADA protections for people disabled by their weight.

The Commission is welcome to contact us if further information about this subgroup would be useful in the guidance process. Thank you for your consideration.