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## Court Requires EEOC to Substantiate 30% Limit on Wellness Program Incentives

On August 22, 2017, a federal court in the District of Columbia ordered the Equal Employment Opportunity Commission (EEOC) to reconsider the limits it placed on wellness program incentives under final regulations the agency issued last year under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). As part of the final regulations, the EEOC set a limit on incentives under wellness programs equal to 30% of the total cost of self-only coverage under the employer's group health plan. The court found that the EEOC did not properly consider whether the 30% limit on incentives would ensure the program remained "voluntary" as required by the ADA and GINA and sent the regulations back to the EEOC for reconsideration.

In the meantime, to avoid "potentially widespread disruption and confusion" the court decided that the final regulations would remain in place while the EEOC determines how it will proceed (e.g., provide support for its regulations, appeal the decision, or change the regulations). As background, under the ADA, wellness programs that involve a disability-related inquiry or a medical examination must be "voluntary." Similar requirements exist under GINA when there are requests for an employee's family medical history (typically as part of a health risk assessment). For years, the EEOC had declined to provide specific guidance on the level of incentive that may be provided under the ADA, and their informal guidance suggested that any incentive could render a program "involuntary." In 2016, after years of uncertainty on the issue, the agency released rules on wellness incentives that resemble, but do not mirror, the 30% limit established under U.S. Department of Labor (DOL) regulations applicable to health-contingent employer-sponsored wellness programs. While the regulations appeared to be a departure from the EEOC's previous position on incentives, they were welcomed by employers as providing a level of certainty.

However, the American Association for Retired Persons (AARP) sued the EEOC in 2016, alleging that the final regulations were inconsistent with the meaning of "voluntary" as that term was used in ADA and GINA. AARP asked the court for injunctive relief, which would have prohibited the rule from taking effect in 2017. The court denied AARP's request in December 2016, finding that AARP failed to demonstrate that its members would suffer irreparable harm from either the ADA or the GINA rule, and that AARP was unlikely to succeed on the merits. This was due in part to the fact that the administrative record was not then available for the court's review.

In its recent decision, the court reviewed the administrative record and found the EEOC's regulations were arbitrary and capricious, in that the EEOC failed to provide a reasoned explanation for its decision to interpret the term "voluntary" to permit a 30% incentive level. As part of its analysis, the court evaluated numerous reasons the EEOC gave for choosing the 30% level and noted that, having chosen to define "voluntary" in financial terms (30% of the cost of self-only coverage), the EEOC "does not appear to have considered any factors relevant to the financial and economic impact the rule is likely to have on individuals who will be affected by the rule."

The court has allowed the final regulations to remain in place while the EEOC determines how it will proceed, to avoid disruption to employers and others who have relied on them. If the court had vacated the regulations, employers would have been at risk of violating the ADA despite having designed their wellness programs to comply with the 30% limit on incentives.

***Next Steps and Impact on Employers***

It is unknown at this time how the EEOC will respond to the court's decision. If the EEOC wishes to continue its application of the rule, it will need to supplement the administrative record with some evidence that participation in a wellness program remains "voluntary" even when an employer can penalize employees 30% of the total cost of coverage if they don't participate. However, the EEOC may decide, instead, to withdraw its rule or promulgate new rules lowering the incentive limit (further distancing it from the HIPAA limits). It is likely that any new rules would provide for a transition period during which employers would be able to review and revise their wellness programs so that they comply. Given that the Trump Administration's nomination for EEOC Commission Chair awaits Senate confirmation, it may be a considerable amount of time until the EEOC decides how to proceed, leaving employers without the clarity they desire on this issue.

It is also possible, though given other priorities unlikely, that Congress may intervene to pass legislation harmonizing the ADA with the HIPAA/ACA rules, which would render the court's decision moot.

In the short term, employers may continue to rely on the EEOC's final regulations. Wellness programs designed to comply with existing rules, specifically the 30% cap, are unlikely to be challenged by the federal governmental agencies. However, it is possible the court's decision may open the door for employees to bring a private lawsuit against an employer challenging under the ADA the "voluntariness" of a wellness program that includes an incentive up to the 30% limit. One would expect that any employer facing such an action would defend it arguing its good faith reliance on the EEOC's regulation.

In the longer term, employers are again faced with uncertainty as to their wellness program incentives. Employers designing and maintaining wellness programs should continue to monitor developments and work with employee benefits counsel to ensure their wellness programs comply with all applicable laws.

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