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EEOC's Wellness Program Incentive Regulations Rejected by the District Court

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On August 22, 2017, the U.S. District Court for the District of Columbia held that the U.S. Equal Employment Opportunity Commission's ("EEOC") regulations defining what incentives an employer may use to promote participation in a wellness program without running afoul of the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA") were arbitrary and capricious and sent them back to the EEOC's drawing board. [*AARP v. U.S. Equal Employment Opportunity Commission*, No. 1:16-cv-02113-JDB (August 22, 2017)] The AARP had challenged the incentives – which were deemed permissible under the EEOC's wellness regulations, promulgated in May 2016, took effect in July 2016, and became "applicable" on January 1, 2017. This decision creates great uncertainty as to what type of incentives employers lawfully may use to encourage wellness program participation and raises the prospect of private litigation over whether incentives may be coercive, rather than voluntary.

How the ADA, GINA, and Wellness Programs Interact

Employers have increasingly used wellness programs in recent years to promote the health of their employees and thus, over time, reduce health care expenditures. Kaiser Family Foundation's May 2016 "Workplace Wellness Programs Characteristics and Requirements" found that 50 percent of employers offering health benefits in 2015 also offered wellness programs, and 11 percent of such employers offered incentives for participation. RAND Corporation's "Incentives for Workplace Wellness Programs" study indicates that many employers report a reduction in health care cost trends because of wellness programs' effects. Some employers have sought to increase participation in wellness programs by using incentives, such as premium reductions or surcharges. RAND Corporation's study found that among employers with at least 50 employees, programs without incentives reported a median participation rate of 20 percent. Those using a reward incentive had a 40 percent median participation, and those with incentives framed as penalties had a dramatically higher 73 percent median participation. Therefore, it is clear that the use of incentives significantly increases wellness participation, and some employers have thus embraced the use of incentives.

The use of such incentives brings the EEOC into the picture because it enforces the ADA and GINA. The ADA generally prohibits employers from requiring medical exams or inquiring as to whether an individual has a disability unless the inquiry is both "job related" and "consistent with business necessity." The ADA, however, permits an employer to conduct medical examinations or collect employee medical history as part of an employee health program, so long as the employees' participation in the program is "voluntary." [42 U.S.C. §12112(d)(4)(B).] The ADA does not define "voluntary," thus – after years of uncertainty on the issue – the EEOC finally engaged in rulemaking concerning those incentives that are considered voluntary and promulgated final rules in 2016. GINA similarly prohibits employers from requesting, requiring, or purchasing genetic information from employees or their families. Such genetic information includes an individual's genetic tests, as well as those of family members and information on the manifestation of a disease or disorder of a family member. In 2016, the EEOC also promulgated final regulations under GINA on what wellness program incentives could be offered to obtain information other than genetic information.[1]

The Confluence of HIPAA, the ACA, and the EEOC's Wellness Regulations

Long-standing Health Insurance Affordability and Accountability Act ("HIPAA") regulations authorize covered entities to offer premium discounts or rebates for participants' copayments or deductibles in exchange for wellness program compliance. The Affordable Care Act ("ACA") amended HIPAA to expressly sanction and encourage the use of wellness programs as a tool to improve health and help control health care expenditures. Under ACA regulations promulgated in 2013 by the U.S. Departments of the Treasury, Labor, and Health and Human Services (known as the "Tri-Agency regulations"), an employer may lawfully offer up to a 30 percent incentive for participation in wellness programs that are so-called "health contingent," that is, programs where the reward is based on a covered individual's meeting a particular health-related factor.[2] Neither the ACA nor the 2013 Tri-Agency regulations imposed any limit on incentives that may be offered in connection with participatory wellness programs, which are programs that do not condition receipt of an incentive on satisfaction of any health factor.

The EEOC stated that it was seeking to harmonize its ADA and GINA wellness regulations with the Tri-Agency regulations. While this was true in some respects, it was not true as to several key items. For example, although the EEOC adopted the

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[1] *See* Regulations Under the Americans With Disabilities Act, A Rule by the Equal Employment Opportunity Commission 81 Fed. Reg. 31125 (May 17, 2016), available at https://www.federalregister.gov/articles/2016/05/17/2016-11558/regulations-under-the-americans-with-disabilities-act and Genetic Information Nondiscrimination Act, A Rule by the Equal Employment Opportunity Commission, 81 FR 31143 (May 17, 2016), *available at* https://www.federalregister.gov/articles/2016/05/17/2016-11557/genetic-information-nondiscrimination-act; For a detailed discussion of the final regulations, *see* Epstein Becker Green Employment, Labor & Workforce Management *Act Now* Advisory, "EEOC Issues Final Wellness Program Amendments to ADA and GINA Regulations" (May 23, 2016), *available at* http://www.ebglaw.com/news/eeoc-issues-final-wellness-program-amendments-to-ada-and-gina-regulations.

[2] 26 C.F.R. § 54-9802.1(f); 29 C.F.R § 2590.702(f); and 45 C.F.R. § 146.121(f).

same 30 percent incentive cap, its regulations applied this cap to both participatory and health-contingent wellness programs. In addition, the Tri-Agency regulations computed the 30 percent based on the costs of both employee and dependent coverage, where applicable, while the EEOC's wellness regulations base their 30 percent solely on the cost of employee-only coverage.

The Court's Decision

The decisive point in the District Court's decision is the court's finding that the administrative record developed by the EEOC in the rulemaking process failed to show that the Commission "considered any factor that actually speaks to whether a given incentive level is voluntary or coercive." [Slip op. at 28-29.] The court also noted that, despite the EEOC's goal of harmonizing its wellness rules with the Tri-Agency regulations, "[n]owhere in the final rulemaking does the EEOC explain why or how the incentive level it adopted … is consistent with its stated goal of harmonizing its regulations with HIPAA, or conversely, why it ultimately concluded that a departure from the HIPAA regulations was necessary or appropriate." [Slip op. at 22.]

Based on these findings, the court concluded that, although the EEOC had administrative discretion to determine what level of incentive would be voluntary versus coercive, it had failed to put forward a principled basis to support the wellness regulations' 30 percent incentives even under the deferential *Chevron* standard of review of administrative regulations.

Having found the EEOC's wellness regulations failed to meet APA requirements, the court then faced the question of whether it should vacate the EEOC's wellness regulations. While the court was deeply troubled by what the EEOC had done and failed to do, it also recognized that "[e]mployer health plans for the year 2017 were undoubtedly designed in reliance on these rules, which have now been 'applicable' for eight months." Under such circumstances, employers that had adopted incentives "would be faced with the possibility that their current health plans are illegal; at best, employers would once again be left in limbo as to what is permitted and what is not with regard to incentives." [Slip op. at 35.] Thus, the court did not vacate the wellness regulations but instead issued an order remanding them to the EEOC for further consideration consistent with the court's decision. The court's order further directed the EEOC to file a status report by September 21, 2017, "proposing a schedule for review of the rules, including any further administrative proceedings" with pre-filing disclosure of the proposed schedule to AARP.

How May the EEOC and Congress Respond?

How the EEOC will respond to the remand is unknown, especially with Commissioner Victoria Lipnic serving only as Acting Chair while Janet Dhillon's nomination to be Commission Chair awaits Senate confirmation sometime after the August Congressional recess. Under these circumstances, it seems reasonable to expect that the EEOC may take some time to determine how it will proceed. Even then, the time needed to perform new rulemaking suggests it may be some considerable time before any new regulations are in place. At this point, it is also unclear what the court might do in response to any lengthy proposed schedule from the EEOC.

While Congress has many pending matters before it, including tax reform and a possible revisiting of health care, as well as raising the debt ceiling and passing a budget, the court's action could possibly trigger Congressional action. Proposed legislation (H.R. 1313) that the House Education and the Workforce Committee approved in March would have made wellness programs that met the requirements of the Tri-Agency regulations compliant with the ADA and GINA, but it appears to have stalled. (*See also,* S. J. Res. 38-114th Cong. (2015-16), which addressed barring enforcement of the EEOC's rules because of their inconsistency with the Tri-Agency regulations.) Were such legislation to be passed, the court's ruling on the EEOC's wellness regulations would become essentially moot. However, given the current Washington climate and numerous other matters already before the Congress, the prospects for passage of such legislation anytime soon are clearly uncertain.

What Employers Should Do Now

- **2017 and 2018 Benefit Plan Year Design:** The court's decision remanding the regulations back to the EEOC puts employers in a difficult position. In terms of the current 2017 benefits plan year, it appears that employers should keep in effect any current wellness programs that follow the Tri-Agency regulations and the EEOC's wellness regulations. The far bigger questions relate to the 2018 benefit year. It is almost a certainty that revised or new regulations will not be in place this fall when employers and wellness program providers will make 2018 plan design decisions. Thus, the current thinking is that employers that want to maintain their wellness programs should continue to design them to comply with both the Tri-Agency regulations and the EEOC's existing wellness regulations. Doing so likely means that the federal agencies would not challenge such programs. Moreover, if and when the EEOC does promulgate new rules, it is likely that it will provide a reasonable phase-in time for compliance as it did with the now remanded rules. Further, the court's reluctance to immediately vacate the existing regulations suggests that if it should eventually do so, it also might allow a phase-in time. In the meantime, employers may wish to consider carefully the level of incentives they use, especially if they look more like penalties than rewards. This is particularly true in light of the potential prospect of private litigation discussed below.

- **Anticipating Potential Private Litigation**: The real problem posed is a new threat of private litigation challenging the "voluntariness" of employer wellness programs with 30 percent or similar incentives, especially if the incentives are in the form of penalties. Plaintiffs may try to pursue new claims, even while the EEOC contemplates its next move, because the court found no proper basis for 30 percent incentives to be deemed "voluntary" and the wellness regulations have been remanded. Any such claims may well be framed as putative class actions, although individual decisions and circumstances affecting each employee's choice would present strong arguments against the commonality and typicality of such putative class claims. If faced with such claims, employers should, among other arguments, point to compliance with the Tri-Agency regulations and their good faith reliance on the EEOC's wellness regulations. It would be hoped that even if a court were to uphold a challenge to a wellness incentive program, it would do so only on a prospective basis with injunctive relief but without damages, given employers' good faith and detrimental reliance on the EEOC wellness regulations. Employers should also consider potentially presenting the issue to Congress for a legislative resolution.

Clearly, employers should closely monitor future developments as they, their program vendors and their counsel consider design decisions, options and risk assessments for 2018 and other future plan years.

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For additional information about the issues discussed in this Advisory, or if you have any questions concerning the final ADA and GINA rules or wellness programs in general, please contact the Epstein Becker Green attorney who regularly handles your legal matters or one of the authors:

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