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Management Alert

Court Directs EEOC to Reconsider Wellness Rules, Leaves Current Rules in Effect

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On Tuesday, August 22, the US District Court for the District of Columbia ordered the EEOC to revisit its controversial rules placing certain limits on employer-sponsored wellness programs under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). This seemingly consequential ruling could prove to be less significant than it sounds. As described in greater detail below, the Court's ruling permits the existing EEOC rules to stay in effect pending the review. The Court ordered the EEOC to file its timeline for the review and possible additional administrative action by September 21. We expect the redrafted rules will remain substantially the same, but we would note that there will most likely be two new Republican Commissioners to handle the review process, ensuring a different profile than the Commission that approved the original EEOC regulations.

Background

The ADA generally prohibits employers from making disability-related inquiries or requiring medical exams as part of a wellness program, unless the inquiry is "voluntary." As we previously reported, the EEOC issued final rules in 2016 that broadly interpreted the term "voluntary," imposing a number of standards on employer wellness programs. One notable standard was that wellness programs cannot provide incentives in excess of 30% of the cost of self-only coverage for an employee who participates in the program.

GINA generally limits employers from requesting or incentivizing employees to provide genetic information, for instance, in connection with a health risk assessment. Even so, the final rules under GINA permit limited incentives in connection with provision of genetic information, as long as they do not exceed 30% of the cost of self-only coverage.

The Court accepted the EEOC's determination that incentives to participate in employer-sponsored wellness programs do not violate the voluntariness standard, but the Court questioned the EEOC's selection of a 30% limitation on incentives.

It appeared the EEOC intended to mirror the existing wellness regulations under the Health Insurance Portability and Accountability Act (HIPAA), as codified by the Affordable Care Act and as promulgated in rules issued by the IRS, DOL and HHS. Even so, the EEOC guidelines were, in many respects, more restrictive than the HIPAA regulations. For instance, the HIPAA regulations generally permitted incentives for wellness programs that did not exceed 30% of the cost of coverage elected by the employee (including family coverage), while the EEOC rules only permit a 30% differential from the cost of self-only coverage, regardless of tier elected. Further, the HIPAA regulations imposed maximum incentives for health-contingent wellness programs (e.g., one where a specific outcome must be achieved), but not for participation-only programs.

AARP v. EEOC

Last year, the AARP filed suit seeking to enjoin the EEOC rules, which the AARP viewed as permitting employers to impose too harsh of sanctions or penalties against employees who decline to participate in a wellness program. The court denied the preliminary injunction request.

Last week, however, the court granted the AARP's motion for summary judgment and remanded the rule to the EEOC to provide a more reasoned explanation for its definition of a voluntary wellness program.

The court primarily took issue with the EEOC's 30% threshold. Notably, the court found that while the EEOC argued it was simply attempting to mirror the HIPAA regulations, it failed to adequately do so because (a) the HIPAA limits only apply to health-contingent wellness programs rather than participatory wellness programs, and (b) the HIPAA limits are measured against the overall cost of coverage elected, not just the cost of self-only coverage (regardless of the level elected by the employee). The court also found that the EEOC was unable to demonstrate that it had done a sufficient review to determine whether incentives at or above the 30% level would be coercive or voluntary.

As such, the court remanded the rules to the EEOC for review, with a directive that the next iteration should contain a more reasoned explanation for its definition of "voluntary." The court declined to vacate the existing rules pending the EEOC review, noting that it would cause too much confusion to do so and could actually harm employees who have already received wellness incentives.

Next Steps for Employers

Given the current uncertainty, there are a few key items to keep in mind:

- The Court did not vacate the EEOC's existing wellness rules, meaning employers are still subject to those rules, their limitations on incentives, and their notice and authorization requirements.
- Moreover, HIPAA regulations remain in effect (although those rules primarily impact health-contingent wellness programs).
- While the court granted the AARP's motion for summary judgment, this decision may lay the groundwork for new regulations that are less favorable to participants in wellness programs. The Court specifically held that incentives as such did not violate the ADA and GINA voluntariness requirements. And the court cited the rationale of many employers and employer groups in finding the 30% threshold to be arbitrary and capricious. Upon review, the newly composed EEOC could potentially adopt the employer comments and, for example, determine that participatory wellness programs are always voluntary, regardless of the level of incentive.
- As noted, the Court ordered the EEOC to submit its plan for reviewing the regulations and undertaking any additional administrative proceedings by September 21. We will monitor these developments and keep you apprised of future EEOC rulemaking.

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