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Take Note: EEOC Vacates the Incentive Sections of its Final Wellness Regulations

By Mark Casciari and Joy Sellstrom

Seyfarth Synopsis: *The EEOC has withdrawn the incentive provisions in its ADA and GINA wellness program regulations. The remaining provisions have less bite as a consequence, especially in the ADA context. But HIPAA wellness regulations remain unaffected by this agency action.*

Effective January 1, 2019, the federal Equal Employment Opportunity Commission (EEOC) has removed the incentive sections in its final regulations on wellness programs under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). The incentive sections can be found at 29 C.F.R. § 1630(d)(3) and 29 C.F.R. § 1635.8(b)(2)(iii).

The reason for this removal has its genesis in litigation. If you are interested in the history, please see our prior Alert on this topic. As a result of the EEOC modifications, private sector covered employers—employers with 15 or more employees—are no longer subject to (and can no longer rely on) EEOC-approved incentives. Now, the only agency-approved incentives in the wellness context can be found in regulations issued under HIPAA, the Health Insurance Portability and Accountability Act.

The question then becomes: What is left in the EEOC ADA and GINA wellness regulations, and is it legally binding?

As to the ADA, the EEOC regulation still provides that wellness programs that include disability-related inquiries or medical exams must be "voluntary" and "have a reasonable chance of improving the health of, or preventing disease in, participating employees, and [ ] is not overly burdensome." In order to be "voluntary," programs must still comply with the remaining requirements set forth in the regulations. (See our prior Management Alert.)

The rule also still includes the EEOC position that the benefit plan safe harbor provisions in the statute "do not apply to wellness programs, even if such plans are part of a covered entity's health plan." Courts that have addressed the ADA safe harbor provisions, however, have not endorsed the attempted EEOC invalidation of the provisions in the wellness context. See *EEOC v. Flambeau, Inc.*, 131 F. Supp. 3d 849 (W.D. Wisc. 2015), aff'd on other grounds; *Seff v. Broward County*, 691 F.3d 1221 (11th Cir. 2012). (See our blog post Is EEOC Regulation of Wellness Plans Legal?—Seventh Circuit Declines to Say Yes.) So, employers have a strong argument that, regardless of how the EEOC defines its amorphous verbiage of "reasonable" and "not overly burdensome," the safe harbor trumps all, and protects wellness programs that are part of a formal benefit plan from challenges under the ADA.

As to GINA, there is no statutory benefit plan safe harbor. So, employers must grapple with the meaning of what is left in the regulation, including terms like "reasonable" and "not overly burdensome," if the wellness program requests participant genetic information.

The Trump Administration also seems to have cut back on EEOC enforcement of what is left in the EEOC wellness regulations, but that may change over time. For now, employers who want to establish and maintain incentive-based wellness programs have stronger defense arguments, as long as they comply with the ADA benefit plan safe harbor, HIPAA regulations and authorizing statutes, and GINA.

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