Court Vacates EEOC's Wellness Program Incentives Rules Effective January 1, 2019

In an opinion dated December 20, 2017, in *American Association for Retired Persons (AARP) v. EEOC*, the federal court in the District of Columbia vacated, effective January 1, 2019, the portions of the final regulations that the EEOC issued last year under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) addressing wellness program incentives. The current regulations will remain effective for 2018 while the EEOC reconsiders and promulgates new rules.

Background

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 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 August 2017, the court ordered the EEOC to reconsider the limits it placed on wellness program incentives under final regulations under the ADA and 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. To avoid

"potentially widespread disruption and confusion," the court decided at that time that the final regulations would remain in place while the EEOC determined how it would proceed.

In September 2017, the EEOC filed a status report with the court stating that the EEOC did not intend to issue new proposed regulations until August 2018, did not intend to issue final rules until August 2019, and did not expect the new rules to take effect until early 2021.

Current Decision

In its recent decision, the court found that the EEOC's proposed timetable to reissue new regulations was not timely enough. The court was concerned about the slow timeframe that the EEOC proposed for devising a replacement rule. "If left to its own devices, … EEOC will not have a new rule ready to take effect for over three years—not what the Court envisioned when it assumed that the Commission could address its errors 'in a timely manner.'"

The court thought that vacating the rule for a 2018 effective date would be disruptive. But "there is plenty of time for employers to develop their 2019 wellness plans with knowledge that the Rules have been vacated." In addition, the court reasoned, "[i]t is far from clear that EEOC will view a 30% incentive level as sufficiently voluntary upon reexamination of the evidence presented to it."

In a separate order (also issued on December 20, 2017), the court ordered the EEOC to provide a status report to the court and to the AARP no later than March 30, 2018. In its opinion, the court said it would "hold EEOC to its intended deadline of August 2018 for the issuance of a notice of proposed rulemaking. But an agency process that will not generate applicable rules until 2021 is unacceptable. Therefore, EEOC is strongly encouraged to move up its deadline for issuing the notice of proposed rulemaking, and to engage in any other measures necessary to ensure that its new rules can be applied well before the current estimate of sometime in 2021."

Impact on Employers

For 2018, 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.

For 2019 and beyond, employers are again faced with uncertainty as to their wellness program incentives. Employers designing and maintaining wellness programs should continue to monitor developments, including the issuance of any new wellness program regulations, and work with employee benefits counsel to ensure their wellness programs comply with all applicable laws.

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