Compliance Alert

Think Again: Court Directs EEOC to Reconsider Wellness Regulations

September 1, 2017

Quick Facts:

- A federal court has ordered the Equal Employment Opportunity Commission (EEOC) to reconsider its wellness program final rules regarding incentive conditions for voluntary plans.
- The final rules generally conclude for Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA) purposes that a wellness program is voluntary as long as, among other things, any incentive for participation is limited to 30 percent of the cost of self-only group health coverage.
- The court's order stems from a lawsuit that sought to stop the EEOC from enforcing the final rules.
- The court determined that the EEOC needed to more thoroughly justify its reasoning behind the final rules, including the 30% incentive limit.
- The rules remain in full effect, but the EEOC is likely to alter them going forward.

The U.S. District Court for the District of Columbia recently ruled that the U.S. Equal Employment Opportunity Commission (EEOC) failed to properly explain its reasoning behind final wellness regulations under which it deemed that a 30% incentive limit makes a wellness program voluntary. The court sent the final rules, which became effective January 1, 2017, back to the EEOC for reconsideration. The rules remain in full effect, but the EEOC is likely to alter them going forward. Employers will need to keep an eye out for revised rules that might lead to even tighter restrictions on wellness programs.

Background

Employers use wellness programs to encourage employees to actively manage their health risks, develop more healthy lifestyles and help reduce group health plan costs. Many program sponsors find it difficult to get enough employees to engage to see meaningful results, so they include a reward or incentive (such as a lower insurance premium) for participating.

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Wellness incentives first came under scrutiny because basing them on achieving a wellness goal could violate the Health Insurance Portability and Accountability Act (HIPAA), which generally prohibits health plans from discriminating due to a health-status-related factor. HIPAA included an exception to its general prohibition for bona fide wellness program incentives, and Affordable Care Act (ACA) amendments to HIPAA generally limit incentives to 30% (50% for smoking cessation) of the cost of group health coverage for participating in a program based on rewarding health-related goals. HIPAA applied no limits on incentives under wellness programs based purely on participating.

Though HIPAA allows wellness incentives, a typical program requires collecting participants' sensitive health information through biometric tests or health questionnaires. These practices implicate the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). These provisions generally prohibit an employer from requiring medical exams or inquiring about an individual's disability, and from collecting genetic information from employees or family members. Both the ADA and GINA allow an exception for a wellness program that asks participants for this type of information as long as the program is "voluntary." Unfortunately, neither law defines that critical term.

The EEOC enforces the ADA and GINA, and originally held that a wellness program is voluntary if it does not condition receiving an incentive on an employee disclosing protected information. However, in 2016 the EEOC revised its position and said that a wellness penalty or incentive of up to 30% of the cost of self-only health coverage will not make a program involuntary under either law, even if it requires disclosing otherwise protected information.

These new wellness rules differ from HIPAA's rules because they apply equally to participation-based wellness programs, are calculated on single-only coverage as opposed to the cost of coverage that an individual actually has, and do not recognize a higher incentive limit for smoking cessation. Thus, two different sets of rules now apply to wellness programs, and many employers have had to opt for more conservative plan designs to comply with both.

Court case

Responding to the EEOC's new wellness rules, the American Association of Retired Persons (AARP) filed a lawsuit in which it argued that the rules are inconsistent with voluntariness under the ADA and GINA, and that the EEOC failed to adequately explain why it altered its previous position on incentives.
The EEOC argued that it had reasonably interpreted the term "voluntary" in setting a 30% incentive threshold, and that it reversed its position to harmonize its regulations with existing HIPAA regulations and to induce more people to participate in wellness programs. AARP countered that 30% is inconsistent with the plain meaning of "voluntary" because it is too high to give employees a meaningful choice as to whether or not to participate in a program that calls for disclosing protected information.

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The court found nothing to support the EEOC's conclusion that 30% incentives are the right measure of voluntariness. The court rejected the argument that the EEOC's rules harmonize with HIPAA wellness regulations, stating that the EEOC's rules actually conflict with HIPAA. The court noted that most wellness programs are participatory – a type of plan with no HIPAA incentive limits – and HIPAA calculates the incentive using the total cost of coverage (including family coverage), not the cost of single coverage the EEOC uses.

The court also found the EEOC's argument based on insurance rates to be "utterly lacking in substance," and found that the EEOC failed to explain why it relied on one comment letter supporting the limit while ignoring the majority of comment letters it received that opposed the limit.

Finally, the court said the EEOC failed to demonstrate that it considered any factors relevant to the financial and economic impact the rules likely have on individuals affected by them. The court pointed out that, using recent average annual health care premium costs, a 30% incentive equals several months' worth of food, two months of child care or two months of rent for an average family. The court added that the EEOC had not adequately responded to comments that raised significant problems with the incentive limits, including the disproportionate harm they could visit on the very group the ADA aims to protect.

Key takeaways

Employers should continue to comply with current EEOC rules. However, the court harshly admonished the EEOC for unreasonably interpreting the ADA's and GINA's voluntariness requirement. This harsh criticism is likely to prompt the EEOC to modify its rules and could result in even lower permissible wellness program incentives. EPIC will continue to monitor regulatory developments and provide updates and action steps for voluntary wellness program sponsors.

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