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Designing a Wellness Program: Recent Guidance from the IRS and EEOC

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INTRODUCTION

Properly designed wellness programs get special treatment under various nondiscrimination rules and can provide benefits to employees that are excludable from income and FICA and FUTA wages. This article discusses some recent developments in the courts and at the Internal Revenue Service that may affect the design of wellness programs.

Two Chief Counsel Advice Memoranda[1] (CCAs), issued this year and last by the IRS, highlight some of the limits on wellness programs and the pitfalls of which employers should be aware. A CCA issued earlier this year — CCA 201719025 — dealt with two related sham arrangements that were designed to disguise payments of regular compensation to employees as tax-free proceeds of health coverage. By contrast, a CCA issued last year — CCA 201622031 — dealt with legitimate wellness programs but explained some of the limitations on benefits that can be provided tax-free to employees under those arrangements.

In addition to the limits on benefits that can be provided on a tax-free basis to employees under a wellness program, other limitations on incentives may apply. Specifically, wellness programs may need to abide by limitations on benefits (and other restrictions) to avoid running afoul of the prohibition in the Affordable Care Act[2] (ACA) on discrimination based on a health factor, the prohibition on discrimination based on a disability in the Americans with Disabilities Act (ADA), and the limits on the use of genetic information in the Genetic Information Nondiscrimination Act (GINA). The Departments of the Treasury, Labor, and Health and Human Services (HHS) have issued final regulations interpreting the ACA nondiscrimination provisions, while the EEOC has issued final regulations interpreting the ADA and GINA. The limits on benefits under a wellness programs contained in the final regulations issued by these agencies are discussed briefly in the final section of this article.

The provisions of the final EEOC regulations under the ADA and GINA that limit incentives under wellness programs are applicable to plan years beginning in 2017.[3] The EEOC's regulations have been challenged both by employers and by AARP. Employers have filed lawsuits challenging the EEOC's authority to impose limitations on permissible incentives under wellness programs and have also questioned the specifics of the limitations. Conversely, AARP has filed suit claiming that the limitations imposed by the EEOC fail to provide the protection for employees and their families intended to be provided by the ADA and GINA.

On August 22, 2017, in a ruling on AARP's challenge to the ADA and GINA regulations, the U.S. District Court for the District of Columbia ruled that the EEOC had failed to provide a reasoned explanation for the regulations and remanded the case to the

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[1] Chief Counsel Advice memoranda are not published guidance but indicate the position of the subject-matter experts in the National Office of IRS Chief Counsel on an issue. While not binding on the IRS or taxpayers, and not citable as precedent, CCAs provide a helpful indication of the position the IRS is likely to take on examination and in litigation on that issue.

[2] References in this article to the Affordable Care Act refer to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-152.

[3] 81 Fed. Reg. 31,125, 31,129–31,130 (May 17, 2016).

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agency for further consideration.[4] The court did not, however, vacate the regulations, so they remain in effect during the EEOC's consideration on remand. The court's August 22 ruling, and recent decisions on challenges by employers to the EEOC's authority to issue the regulations, are summarized in the final section of this article.

TAX TREATMENT OF WELLNESS PROGRAMS

While wellness programs receive special treatment under various nondiscrimination provisions, they do not receive special exclusions from tax. Instead, for benefits under a wellness program to be excludable from income, and FICA and FUTA wages, the benefit must fit into a specific exclusion provided under the Internal Revenue Code[5] and must satisfy all of the conditions for that exclusion.

The most important exclusions that may apply to wellness programs are the exclusions related to health coverage and reimbursements generally. The sources of the exclusions relating to health benefits, and consequently the conditions for qualifying for each exclusion, vary depending on who is paying for the benefits — the employer, the employee with after-tax dollars, or the employee with pre-tax dollars under a cafeteria plan — and on whether the exclusion is sought for the value of coverage (such as an insurance premium), the value of reimbursements paid to, or on behalf of, the employee (such as payment of the cost of a doctor's visit), or the amount paid for the coverage (such as pre-tax salary reduction contributions under a cafeteria plan).

Among the most significant exclusions from income that may be available for health benefits provided to a current or former employee (and the employee's spouse, child under 27, or dependent) if all of the requirements for the exclusion are met, are the following:

- Section 104(a)(3) applies to amounts received through accident or health insurance for personal injuries or sickness, where the premiums are paid by the employee on an after-tax basis. This is an exclusion for payments made to or on behalf of the employee. (There would ordinarily not be an issue as to the value of the coverage because the employee is paying for it with after-tax dollars.) The §104(a)(3) exclusion is not available if coverage is paid for by the employer or with contributions by the employer.[6]
- Section 105(b) and §105(e) exclude reimbursements of medical expenses under employer-provided health insurance or an employer accident and health plan. This exclusion also applies to the value of reimbursements received, rather than the value of the coverage.
- Section 106(a) excludes the value of an employer-provided health plan. This exclusion applies to the value of the coverage, not the reimbursements.
- Amounts paid to reimburse expenses incurred by the employee for medical care for personal injuries or sickness (including any amount paid by the employer for insurance) are excepted from wages for FICA and FUTA tax purposes under §3121(a)(2) and §3306(b)(2).
- Section 125 excludes from income amounts applied to purchase non-taxable benefits, such as health benefits, under a cafeteria plan. These amounts are excluded from FICA and FUTA wages under §3121(a)(5)(G) and §3306(b)(5)(G).

Although both §104 and §105 provide exclusions for payments under an accident or health plan, there is an important difference in the scope of the exclusion. Section 104 may provide an exclusion for payments that exceed the amount paid by an employee for medical expenses. For example, if a fixed indemnity plan paid for by an employee with after-tax dollars provides a fixed payment to the employee for each doctor's visit, §104 may exclude the amount of the reimbursement even if the payments exceed the amount paid by the employee for the visit.[7] By contrast, §105 does not provide an exclusion for payments from an employer plan that exceed the amount paid by the employee.[8]

A single arrangement often will be designed to utilize more than one of these exclusions. For example, when an employee purchases coverage under an employer-provided health plan with pre-tax dollars under a cafeteria plan, the employee will ordinarily exclude from income the salary reduction contribution under the cafeteria plan, the value of the coverage provided by the employer, and any reimbursements received under the plan for medical expenses incurred by the employee or members of the employee's family. To achieve this result, the cafeteria plan must satisfy §125 and the employer coverage must satisfy the requirements of §105 and §106.

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[4] *AARP v. EEOC*, No. 16-2113 (JDB), 2017 BL 293605 (D.D.C. Aug. 22, 2017).

[5] All section references in this article are to sections of the Internal Revenue Code of 1986, as amended, and the regulations thereunder, unless otherwise specified.

[6] Reg. §1.104-1(d).

[7] Rev. Rul. 69-154, 1969-1 C.B. 46. *See* CCA 201703013.

[8] *Id.*

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IRS GUIDANCE ON WELLNESS PROGRAMS

2017 CCA: Sham Wellness Programs

CCA 201719025 deals with two related sham arrangements that attempted to convert payments of regular compensation to employees into tax-free proceeds of health coverage. The arrangements attempted to dress up the payments as either being reimbursements under coverage paid for by the employees with after-tax dollars (the §104(a)(3) exclusion described above) or as a wellness program. As noted above, wellness programs do not receive special tax benefits, so, to be excludable, the payments would have to fit into one of the exclusions described above. The IRS explained why the arrangements failed to do so.

In one of the arrangements described in the CCA, the employees paid a small amount each month — the CCA gives an example of $60 a month — on an after-tax basis, as a ''premium'' for an employer self-funded health plan. In return, the employees obtained a much larger amount — such as $1,425 — each month in return for participating in some wellness-related activity, such as completing a questionnaire or attending a seminar. The promoter claimed that these payments would be excluded from the employee's income (and FICA and FUTA wages).

The second, somewhat more elaborate, arrangement described in the CCA also included a small after-tax premium paid by the employees to a self-funded employer plan. In addition, the second arrangement provided for employees to elect into a wellness program by making a large salary reduction contribution (such as $1,500 a month). Employees who elected into the wellness program were allowed to participate in a wellness-related activity each month and (as in the first arrangement) obtain a payment, such as $1,425 a month, for their participation.[9] Thus, the amount paid by the employer with respect to the employee each month would be slightly lower for employees who elected the wellness program because, each month, $1,500 would be withheld as a salary reduction payment but $1,425 would be paid out for participation in the wellness activity.

The promoters claimed that both the $1,500 salary reduction contribution and the $1,425 payments were excluded from employees' income (and from FICA and FUTA wages). As a result of these claimed exclusions, the net amount available after taxes were withheld was somewhat higher if employees participated in the arrangement than if they did not. In the arrangement described in the CCA, this higher amount was provided to the employee in the form of flex credits in the cafeteria plan.

The promoters of these arrangements tried to make them look like insurance by charging the small after-tax ''premium'' and, in the second arrangement, by requiring a salary reduction contribution in order to receive the payments. The promoters also tried to give the arrangements the appearance of a wellness program by requiring the employees to do some wellness-related activity to get the large payment each month.

By requiring the employees to pay a small after-tax monthly premium, the promoters appeared to be attempting to fit the payments into the exclusion under §104(a)(3). As noted above, §104(a) can, in some circumstances, exclude payments that exceed the costs incurred by employees. However, the §104(a)(3) exclusion only applies to payments from insurance or an arrangement having the effect of insurance.

CCA 201719025 provides that, under *Helvering v. Le Gierse*,[10] and subsequent cases, an arrangement does not constitute insurance unless it transfers the risk of economic loss and the risk involves the fortuitous occurrence of a stated contingency. In the arrangements at issue, the only requirement for the employees to obtain the monthly payment was to engage in the wellness activity for that month. Whether to engage in the wellness activity was in the control of the employee and did not involve a fortuitous event. Moreover, because there was no risk of economic loss to the employees and therefore no risk and no risk shifting, the arrangement was not insurance and therefore the §104(a)(3) exclusion did not apply. Additionally, as the IRS noted, the actuarial value of the expected payments to employees greatly exceeded the small after-tax contributions by employees and thus were primarily paid for by the employer. For both of these reasons, the exclusion in §104(a)(3) did not apply.

The more limited exclusion in §105 for payments under an employer plan can apply even where the premiums are paid with pre-tax dollars or through other employer contributions. However, like §104(a)(3), the §105 exclusion only applies if the arrangement constitutes insurance. Because there was no risk or risk shifting involved, the §105 exclusion did not apply, even to the second arrangement where the pre-tax payments by employees exceeded the amount of the monthly wellness payment.

Employer Beware: This CCA highlights how important it is for an employer to evaluate the substance

[9] From the description in the CCA, it is not clear what benefits the small after-tax premium would pay for if the employee did not elect to participate in the wellness program.

[10] 312 U.S. 531 (1941).

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of an arrangement that is being marketed before signing on. Despite the surface appearance of a wellness program or employee-paid coverage, the real purpose of the arrangements discussed in the CCA was to try to convert a large portion of the employees' regular taxable compensation into tax-free proceeds of insurance. The IRS had little difficulty in seeing through these arrangements and declaring the amounts paid to the employees to be taxable.

CCA 201622031: When Are Payments by Employers Under a Wellness Program Taxable?

By contrast to the abusive arrangement described in CCA 201719025, CCA 201622031 dealt with legitimate wellness programs. Wellness programs vary widely in the incentives, if any, they provide to employees to participate in the program or to meet goals established as part of the program. Some employers do not provide incentives for participation or provide only minor incentives, such as T-shirts or small cash amounts. Others may provide more valuable incentives, such as subsidized gym memberships, but do not penalize those who do not join the gym and do not otherwise participate in the wellness program.

By contrast, some employers provide substantial incentives for participating in screening programs or lifestyle management programs or for meeting certain goals established as part of the wellness program. These incentives may take the form of significant reductions in the employee share of premiums for the employer's group health plan for employees who satisfy the requirements of the wellness program, or large increases in the employee share of the premiums for those who do not.

CCA 201622031 focused on three types of benefits that are provided under various wellness programs, and explained the tax treatment of each type of benefit. The *first* type consisted of benefits that qualify as ''medical care'' under §213(d). The IRS explained that benefits under a wellness program that qualify as medical care, such as health screenings, are excludable from income by the employee. Health screenings are probably the most common type of medical care provided under a wellness program, but other expenses that qualify as medical care, such as the fees to attend a smoking cessation program, would also be excludable. (Note, however, that the cost of non-prescription drugs that are helpful in quitting smoking, such as nicotine patches, are not excludable by employees.)[11]

A *second* type of benefit discussed in the CCA consisted of payments that the employer makes with respect to employees that participate in a wellness program. These payments may be either direct cash payments to employees or payments by the employer of other amounts, such as the cost of gym memberships. These types of payments, which do not qualify as ''medical care'' under the Code, are taxable to employees even when provided under a wellness program. The employer must report these amounts on Form W-2, and withhold for employment taxes, just as it does for other compensation it pays to its employees.

There is a minor exception to the rule that incentives under a wellness program must qualify as expenses for medical care in order to be excludable. If the incentive qualifies as a ''de minimis fringe benefit,'' such as a T-shirt that is given to employees who participate in a wellness activity, it is excludable from income by the employee even though it is not a medical care expense. Cash payments, however, even if they are small, are generally not considered de minimis fringe benefits.

A *third* type of benefit discussed in the CCA consisted of refunds of part of the employee premiums. In the example discussed by the IRS, the employees had paid the premiums on a pre-tax basis under the employer's cafeteria plan. If they participated in the wellness program, the employer refunded part of the payments to them in cash.

The IRS stated that, because the employees paid for the premiums on a pre-tax basis, and thus had never been taxed on those amounts, the refund of part of the premiums to them by the employer was taxable. This means that if an employer health plan offers lower premiums to employees who satisfy the requirements under a wellness program, the effect on an employee's taxable income is the same regardless of whether the employee initially pays a higher premium and is refunded the amount of the discount or the employee is given the discount up front and pays only the lower premium.

For example, suppose a group health plan charges a premium of $500 a month for employees who do not participate in the plan's wellness program and $400 a month for employees that participate in the wellness program, and that the employee share of premiums is paid on a pre-tax basis under a cafeteria plan. Employees who participate in the group health plan but do not participate in the wellness program will have their taxable income reduced by $6,000 per year by their premium payments through the cafeteria plan. If employees who participate in the wellness program initially pay the higher premium and then have $100 a month refunded to them, then, under the CCA, their taxable income will be increased by $1,200 a year for a net reduction of taxable income due to premium payments of $4,800. Similarly, if employees partici-

[11] §106(f).

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pating in the wellness program initially pay only $400 a month in premiums (and thus do not receive any refund), their net reduction in taxable income for their share of the premiums under the plan will be $4,800.

Employers should keep these distinctions in the tax treatment of benefits in mind in designing incentives under their wellness programs. While the tax considerations are important, they are not always dispositive. After consideration, an employer may decide that providing a taxable incentive offers the best way to achieve the goals of its wellness program.

NONDISCRIMINATION ISSUES

While the decision of whether to offer only tax-free rewards under a wellness program is a design choice for the employer, severe penalties may be imposed on employers that run afoul of the nondiscrimination requirements of the ACA or ADA. Not all wellness programs are subject to these limitations and the characteristics that subject a wellness program to the limitations in each statute are different. It is therefore essential for employers to determine whether their wellness programs must comply with applicable limitations on benefits (and other restrictions) in each set of regulations in order to qualify for an exception to the nondiscrimination provisions.

Restrictions on Rewards Under the ACA, ADA, and GINA

ACA Regulations on Incentives in Wellness Programs

Under mostly parallel regulations interpreting the ACA issued by the Departments of the Treasury, Labor, and HHS, the total reward that may be offered to an individual for participating in a ''health-contingent wellness program'' generally is limited to 30% of the total cost of coverage under the plan.[12] A program to prevent or reduce tobacco use, however, may provide a reward of up to 50% of the cost of coverage.[13] For this purpose, a health-contingent wellness program is generally a program under which an individual must satisfy a standard related to a health factor to obtain a reward or must undertake more than a similarly situated individual based on a health factor in order to obtain the same reward.[14] Various additional requirements also apply under the regulations to health-contingent wellness programs.

Wellness programs that are not health-contingent wellness programs — ''participatory'' wellness programs — are not subject to the limitation on the size of the reward or most of the other requirements of the ACA regulations. For example, a wellness program that requires an employee to complete a health risk assessment (HRA) questionnaire or submit to a medical examination to obtain a reward, but does not vary the reward based on the answers to the questionnaire or the results of the examination, would be a participatory wellness program and would not be subject to the limitations on the size of the reward under the ACA regulations.[15]

ADA and GINA Regulations on Incentives in Wellness Programs

The ADA generally prohibits covered employers from making disability-related inquiries or requiring medical examinations, unless the examination or inquiry is shown to be job-related and consistent with business necessity,[16] but provides an exception to this prohibition for voluntary employee health programs.[17] Under final regulations issued by the EEOC, effective for plan years beginning in 2017, the maximum reward for a wellness program that either is a health-contingent wellness program or involves disability-related inquiries or requires a medical examination is limited to 30% of the cost of self-only coverage under the plan.[18] The EEOC concluded that any larger incentive would render the wellness program involuntary, which would violate the ADA.

Title II of GINA prohibits the use of genetic information in making employment decisions in all circumstances and strictly limits the disclosure of genetic information by GINA-covered entities. It also restricts employers and other entities covered by GINA from requesting, requiring, or purchasing genetic information, unless an exception applies.[19] One of the exceptions is for wellness programs that offer health or genetic services, but only if the employee provides prior, knowing, voluntary, and written authorization and the disclosure of the genetic information

[12] Reg. §54.9802-1(f)(3)(ii), Reg. §54.9802-1(f)(4)(ii), Reg. §54.9802-1(f)(5); 29 C.F.R. §2590.702(f)(3)(ii), 29 C.F.R. §2590.702(f)(4)(ii), 29 C.F.R. §2590.702(f)(5); 45 C.F.R. §146.121(f)(3)(ii), 45 C.F.R. §146.121(f)(4)(ii), 45 C.F.R. §146.121(f)(5).

[13] *Id.*

[14] Reg. §54.9802-1(f)(1)(iii); 29 C.F.R. §2590.702(f)(1)(iii); 45 C.F.R. §146.121(f)(1)(iii).

[15] *See* Reg. §54.9802-1(f)(1)(ii)(B); 29 C.F.R. 2590.702(f)(1)(ii)(B); 45 C.F.R. 146.121(f)(1)(ii)(B).

[16] 42 U.S.C. §12112(d)(4)(A).

[17] 42 U.S.C. §12112(d)(4)(B).

[18] 29 C.F.R. §1630.14(d)(3).

[19] 42 U.S.C. §2000ff-1(b).

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is carefully limited.[20] Under final regulations issued by the EEOC, effective for plan years beginning in 2017, the maximum incentive that an employer may provide to an employee whose spouse provides information about the spouse's manifestation of disease or disorder as part of an HRA in connection with a wellness program is limited to 30% of the cost of self-only coverage under the plan.[21]

Under the ADA and GINA regulations, unlike the ACA regulations, the 30% limitation is always based on the cost of self-only coverage, even if the employee is enrolled in family coverage, and there is no higher limitation for tobacco cessation programs. Moreover, under the ADA and GINA regulations, if a wellness program involves disability-related inquiries or requires a medical examination, or involves disclosure by an employee's spouse of the spouse's manifestation of a disease or disorder, it is subject to the 30% limitation without regard to whether it is a health-contingent wellness program. For example, a wellness program that requires an employee to complete an HRA questionnaire that involves disability-related inquiries or submit to a medical examination to obtain a reward would be subject to the limitations on the size of the reward under the ADA regulations even if it does not vary the reward based on the answers to the questionnaire or the results of the examination.[22]

Challenges by Employers to the ADA Regulation

The EEOC's authority to regulate incentives under wellness programs has been challenged by employers. One basis for such a challenge is a statutory "insurance safe harbor," which provides that Titles I through IV of the ADA "shall not be construed to prohibit or restrict . . . a person or organization covered by [the ADA] from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law."[23]

Two courts have held that this safe harbor applies to terms of wellness programs. In *Seff v. Broward Cnty.*,[24] the wellness program consisted of biometric screening and completion of an online HRA questionnaire. Employees who enrolled in the employer's health plan but did not complete the screening and questionnaire were charged an additional $20 for every bi-weekly pay period for their coverage. The Eleventh Circuit held for the employer, finding that the wellness program was a term of the plan and thus covered by the insurance safe harbor. The EEOC was not a party to the case.

In *EEOC v. Flambeau, Inc.*,[25] the wellness program also consisted of biometric screening and an HRA questionnaire, but the employer denied coverage to any employee who failed to complete the screening and questionnaire. The EEOC filed suit against the employer, contending that conditioning coverage on completion of the screening and HRA violated the ADA's prohibition on an employer requiring employees to undergo medical examinations. The U.S. District Court for the Western District of Wisconsin granted summary judgment to the employer on the grounds that the insurance safe harbor applied. At the time of the district court decision, the EEOC had only issued proposed regulations on wellness programs and the court declined to defer to the proposed regulations. The Seventh Circuit affirmed the grant of summary judgment on the grounds that the case was moot, without reaching the issue of whether the safe harbor applied.

EEOC Rejects Courts' Decisions

When it issued final regulations last year, the EEOC strongly rejected the position taken by the courts in *Seff* and *Flambeau*.[26] The EEOC included a specific provision in the final regulations that the insurance safe harbor does not apply to wellness programs and applied that provision retroactively.[27]

Following the issuance of the EEOC's final regulations in May 2016, a third court considered the applicability of the insurance safe harbor to wellness programs. In *EEOC v. Orion Energy Sys., Inc.*,[28] the district court gave *Chevron* deference to the EEOC's interpretation of the scope of the safe harbor, including the retroactive application of this interpretation, and held that the insurance safe harbor does not apply to wellness programs.

In *Orion*, an employee who opted out of the wellness program was required to pay the entire premium for coverage under the employer's group health plan. This penalty exceeds the maximum penalty permitted under the EEOC final regulations. However, the provisions of the final regulations governing the size of

[20] 42 U.S.C. §2000ff-1(b)(2).

[21] 29 C.F.R. §1635.8(b)(2)(iii).

[22] 29 C.F.R. §1630.14(d)(3); 81 Fed. Reg. 31,125, 31,140–31,141 (May 17, 2016).

[23] 42 U.S.C. §12201(c)(2).

[24] 691 F.3d 1221 (11th Cir. 2012).

[25] 131 F. Supp. 3d 849 (W.D. Wis. 2015), *aff'd on other grounds*, 846 F.3d 941 (7th Cir. 2017).

[26] 81 Fed. Reg. 31,125, 31,131.

[27] 29 C.F.R. §1630.14(d)(6); 81 Fed. Reg. 31,125, 31,129–31,130 (May 17, 2016).

[28] 208 F. Supp. 3d 989 (W.D. Wis. 2016).

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permitted incentives in wellness programs were not made retroactive and thus did not apply in *Orion*. The district court therefore made its own determination without regard to the regulations and concluded that, notwithstanding the size of the incentive, the wellness program was voluntary and permitted by the ADA. Accordingly, the court granted summary judgment to the defendant on the EEOC's claim that the wellness program violated the ADA.

AARP Challenge to 30% Standard in ADA and GINA Regulations

A challenge to the EEOC's final regulations from a very different perspective was brought by AARP in October 2016. AARP claimed that the 30% standard in the EEOC regulations is inconsistent with the requirement in the ADA and GINA that a wellness program be voluntary. AARP argued that the 30% penalty for failing to provide information or undergo a medical exam would be prohibitive for many employees and so wellness programs imposing penalties at that level are inherently coercive. AARP did not challenge the EEOC's authority to regulate incentives under wellness programs or to allow small incentives. In a decision at the end of last year, the court denied AARP's request for a preliminary injunction and so both sets of EEOC regulations became applicable for the 2017 plan year.[29]

In a decision on August 22, 2017,[30] the district court addressed the merits of AARP's claim. After finding that AARP had standing to sue, the court considered whether the EEOC regulations were entitled to *Chevron* deference. The court found that the definition of "voluntary" in the ADA and GINA is ambiguous and so the first prong of the *Chevron* test is met. The court then moved on to the second prong of the *Chevron* test and said that it would defer to the EEOC's interpretation if the agency provided a reasoned explanation of the 30% standard. The court concluded, however, that the EEOC had failed to provide one.

The EEOC proffered three explanations for the 30% standard, none of which the court found persuasive. First, the EEOC said that it adopted the 30% standard to harmonize with the ACA regulations and thereby advance Congress's purpose to encourage employers to adopt wellness programs. The court rejected this, noting that the ADA and GINA serve different purposes than the ACA nondiscrimination provisions, that the word "voluntary" does not appear in the statutory provisions of the ACA, and that the scope of the provisions is different, in that the ACA, unlike the ADA and GINA, does not impose limits on incentives in participatory wellness programs. The court found that the EEOC had failed to consider the differences between the ACA, the ADA, and GINA and therefore had not shown a basis to conclude that the 30% standard in the ACA regulations was appropriate for the ADA and GINA. The court further noted that the EEOC standard is not the same as the ACA standard because, unlike the ACA standard, the ADA and GINA standard applies to participatory wellness programs and is always based on the cost of self-only coverage. The court therefore rejected the EEOC's first explanation.

The EEOC also said that it determined that 30% was appropriate based on current insurance rates and that it relied on comments supporting the 30% standard. The court, after examining the record, found no indication of any analysis of current insurance rates. The court also found that only one comment supported the 30% standard and that comment did not provide any analysis. It therefore rejected these explanations as well.

Finally, the EEOC pointed to Code §36B, which potentially subjects employers to a penalty for failing to offer affordable coverage, as a reason why the 30% standard would not result in excessively high costs to employees. The court rejected this, noting that many entities that are subject to the ADA are not subject to §36B and that §36B is merely an incentive for an employer to offer coverage, not a requirement.

The court therefore concluded that the 30% standard in the EEOC's ADA and GINA regulations was arbitrary and capricious because the EEOC had failed to offer a reasoned explanation for it. The court remanded the regulations to the EEOC for further consideration of the standard.

Despite the remand, the court did not vacate the EEOC's regulations and therefore they remain in effect. In concluding that it would be inappropriate to vacate the regulations, the court noted that the regulations had already gone into effect, that many employers had designed their wellness programs in reliance on the regulations, and that serious disruption would result from vacating them.

CONCLUSION

As is apparent from the foregoing discussion, the current status of the EEOC's 30% standard under the ADA and GINA is highly unsettled. The EEOC is being challenged on two fronts, by claims that it lacks the authority to regulate incentives in most wellness programs and claims that it should regulate those incentives more tightly. The EEOC also must further

[29] *AARP v. EEOC*, 226 F. Supp. 3d 7 (D.D.C. 2016).

[30] *AARP v. EEOC*, No. 16-2113 (JDB), 2017 BL 293605 (D.D.C. Aug. 22, 2017).

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consider the 30% standard and it remains to be seen if it will adhere to that standard or modify it.

It is noteworthy that none of the four courts that have addressed the EEOC's regulation have come out favorably for the agency. The *Seff* and *Flambeau* courts found that the insurance safe harbor applied, the *Orion* court found that the insurance safe harbor did not apply but that the incentives provided by the employer did not render the wellness program involuntary, and the *AARP* court found that the 30% standard was arbitrary and capricious.

Despite these setbacks for the EEOC, it would be risky for an employer not to follow the EEOC regulations at this point. The EEOC was not a party in *Seff* and did not have final regulations in place in *Flambeau*. The *Orion* court gave *Chevron* deference to the EEOC's determination that the insurance safe harbor did not apply and the *AARP* court left the final regulations in place and would have given the regulations *Chevron* deference if the EEOC had provided a reasoned explanation for the 30 percent standard. If the EEOC adheres to its 30% standard and provides a reasoned explanation for it, and if other courts agree with the *Orion* and *AARP* courts on the scope of *Chevron* deference, the agency would start with a significant advantage in future litigation.

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