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Employers Face Major Uncertainties in Designing Incentives to Participate in Wellness Programs

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INTRODUCTION

Employer wellness programs that provide incentives for employees to participate may be subject to the Americans with Disabilities Act (ADA) or the Genetic Information Nondiscrimination Act (GINA). Both the ADA and GINA are within the interpretive and enforcement jurisdiction of the Equal Employment Opportunity Commission (EEOC). As explained in this article, litigation that successfully challenged the EEOC's regulation of incentives to participate in wellness programs, and unfilled vacancies at the EEOC that hamper its ability to respond, mean that employers must design their programs for 2019 without guidance on the incentives to participate they may offer without violating the ADA and GINA.

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BACKGROUND

Which Wellness Programs Are Subject to the ADA and GINA?

The ADA applies to wellness programs maintained by ''covered employers'' — generally, employers with 15 or more employees[1] — that make disability-related inquiries or require a medical examination, but provides an exception for ''voluntary'' wellness programs.[2] Title II of GINA generally restricts employers and other entities covered by GINA from requesting, requiring, or purchasing genetic information, unless an exception applies.[3] 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 is carefully limited.[4] Thus, under both the ADA and GINA, a key requirement for the statutory exceptions for wellness programs is that the programs be ''voluntary.''

EEOC Final Regulations on Wellness Program Incentives

On May 17, 2016, the EEOC published final regulations under the ADA and GINA that included limits

[1] Specifically, Title I of the ADA applies, with exceptions for the U.S. government, to wholly-owned U.S. government corporations, Indian tribes, and certain private clubs, to employers with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. 42 U.S.C. §12111(5).

[2] 42 U.S.C. §12112(d)(4).

[3] 42 U.S.C. §2000ff-1(b).

[4] 42 U.S.C. §2000ff-1(b)(2). Under the EEOC's final GINA regulations, the limits in the regulations on wellness program incentives apply if the employee's spouse provides information about the spouse's manifestation of disease or disorder as part of a health risk assessment in connection with a wellness program. 29 C.F.R. §1635.8(b)(2)(iii).

on permissible incentives under wellness programs.[5] Under the regulations, the maximum permissible incentive for a wellness program that is subject to the ADA or GINA is 30% of the cost of self-only coverage under the plan. The EEOC took the position that higher incentives would render the wellness program involuntary. The final regulations became effective for plan years beginning in 2017.

Litigation Challenging the EEOC Regulations

AARP and various employers have separately challenged the EEOC position. In an article published in September 2017, I briefly summarized the EEOC regulations and described the status at that time of the litigation over the regulations.[6]

As explained in that article, in litigation under the ADA, various employers have challenged both the EEOC's authority to impose limits on permissible incentives under wellness programs and the specific limits imposed by the EEOC.[7] One basis for the employers' challenge to the EEOC's authority to limit incentives is the statutory "insurance safe harbor" in the ADA, 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."[8]

The EEOC emphatically rejected the employers' position and inserted an explicit provision in the ADA final regulations stating that the ADA insurance safe harbor does not apply to wellness programs.[9]

By contrast to these employers, AARP did not challenge EEOC's ability to regulate wellness program incentives but claimed that the limits imposed by the EEOC were too high to provide the protection for employees and their families intended by the ADA and GINA. On August 22, 2017, the district court held that the EEOC failed to provide a reasoned explanation for the limits on permissible wellness program incentives in the regulations.[10] At that time, the court remanded the case to the EEOC for further consideration but did not vacate the regulations. In addition to remanding the regulations to the EEOC, the district court directed the EEOC to file a proposed schedule during which the Commission would review its rules.[11]

Subsequently, AARP filed a motion for reconsideration, requesting that the court vacate the EEOC regulations as of January 2018, and the EEOC filed a proposed schedule under which it would issue new proposed regulations in August 2018 and new final regulations in October 2019, with the new final regulations to be effective in 2021.[12] Dissatisfied with this proposed schedule, the court granted AARP's motion to vacate the specific provisions of the regulations that relate to limits on wellness incentives but made the vacatur effective January 1, 2019.[13] Accordingly, the EEOC's entire final regulations remain in effect through the end of 2018. The provisions relating to wellness program incentives will become void as of January 1, 2019, but the remainder of the ADA and GINA regulations remain in effect.[14]

Notably, the court did not vacate the provision of the EEOC's final ADA regulations that provides that the ADA insurance safe harbor does not apply to wellness program incentives.[15] Accordingly, that provision will remain in effect indefinitely and will potentially receive *Chevron* deference.

New ADA and GINA Regulations Will Probably Not Be in Place for at least Several Years

Although, in 2017, the EEOC proposed to the court to issue new proposed regulations in August 2018,

[5] 81 Fed. Reg. 31,126 (May 17, 2016); 81 Fed. Reg. 31,143 (May 17, 2016).

[6] Alan Tawshunsky, *Designing a Wellness Program: Recent Guidance from the IRS and EEOC*, 45 Comp. Plan. J. 295 (Sept. 1, 2017). The article also described Chief Counsel Advice memoranda issued by the IRS relating to the requirements that a wellness program must satisfy to qualify for favorable tax treatment.

[7] *See EEOC v. Orion Energy Sys., Inc.*, 208 F. Supp. 3d 989 (E.D. Wis. 2016); *EEOC v. Flambeau, Inc.*, 131 F. Supp. 3d 849 (W.D. Wis. 2015), *aff'd on other grounds*, 846 F.3d 941 (7th Cir. 2017). *See also Seff v. Broward Cnty.*, 691 F.3d 1221 (11th Cir. 2012).

[8] 42 U.S.C. §12201(c)(2).

[9] 29 C.F.R. §1630.14(d)(6).

[10] *AARP v. EEOC*, 267 F. Supp. 3d 14 (D.D.C. 2017).

[11] *Id.* at 55.

[12] *AARP v. EEOC*, 292 F. Supp. 3d 238 (2017).

[13] *Id.* Initially, the court ordered the EEOC to publish any new proposed regulations no later than August 31, 2018, but, in a subsequent order, it removed this limitation. *AARP v. EEOC*, No. 16-2113 (JDB), 2018 BL 57832 (D.D.C. Jan. 18, 2018). Accordingly, there is no time limit for the EEOC to issue new proposed regulations, should it choose to do so.

[14] *Id.* at 245 (vacating "the portions of EEOC's 2016 Regulations Under the Americans with Disabilities Act, 81 Fed. Reg. 31,126 (May 17, 2016), and 2016 Regulations Under the Genetic Information Nondiscrimination Act, 81 Fed. Reg. 31,143–01 (May 17, 2016), which are currently codified at 29 C.F.R. §1630.14(d)(3) and §1635.8(b)(2)(iii)").

[15] The court's vacatur of the ADA regulation applied only to 29 C.F.R. §1630.14(d)*(3)*. *Id.* The provision governing the non-applicability of the insurance safe harbor is in 29 C.F.R. §1630.14(d)*(6)* and so is not being vacated.

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those regulations have not been issued and it is unlikely that the EEOC will actually release new proposed regulations any time soon. Vacancies on the Commission, and the inability of the Senate to agree to confirm nominees to fill those vacancies, are continuing to hamper the EEOC's ability to develop new regulations.[16] Moreover, even if the logjam in the Senate is resolved and new Commissioners are confirmed, they will need time to get up to speed on the issues and may have different perspectives that will need to be discussed and resolved.

Thus, it is virtually certain that will be no EEOC regulations in place for 2019 and it is likely to be several years at least before new final regulations can be issued. In the proposed schedule filed with the court, in which the EEOC projected it would have proposed regulations in place in August 2018, it did not expect final regulations to become effective until 2021. Given the likely significant delay in issuing proposed regulations, there is likely to be a corresponding delay before final regulations are issued and effective. Thus, it is likely that employers will have an extended period during which no EEOC regulations will be in place.

WELLNESS PROGRAMS MUST COMPLY IN 2019 WITH THE ACA REGULATIONS AND THE STATUTORY PROVISIONS OF THE ADA AND GINA

Although, beginning in 2019, the provisions of the EEOC regulations dealing with incentives in wellness programs will no longer apply, employers must continue to comply with the final regulations under the Affordable Care Act (ACA) issued by the Departments of the Treasury, Labor, and Health and Human Services. Generally, the ACA regulations limit the total reward that may be offered to an individual for participating in a ''health-contingent wellness program'' to 30% of the total cost of coverage under the plan.[17] 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.

Moreover, despite the lack of guidance, wellness programs that are subject to the statutory provisions of the ADA and GINA must comply with those provisions. Under the EEOC final regulations, the maximum permissible incentive for a wellness program that was subject to the ADA or GINA was 30% of the cost of self-only coverage under the plan. As explained in the September 2017 article, this is similar, but not identical to the standard for health-contingent wellness programs under the ACA regulations.

With the demise of the EEOC regulations in 2019, there is no way for an employer to be certain that any level of incentive will not run afoul of the ADA or GINA. The court's decision to invalidate the regulations was based purely on the EEOC's failure to adequately justify how it arrived at 30% of the cost of self-only coverage as the permissible maximum incentive and gave no indication as to what level of incentive should be permissible. The maximum permissible incentive will have to be worked out on a case-by-case basis in litigation until future guidance is implemented by the EEOC and could ultimately be higher, lower, or the same as the standard in the vacated EEOC regulations.

There also are likely to be further challenges by employers to the EEOC's ability to limit wellness program incentives under the ADA based upon the insurance safe harbor. The EEOC's final regulations providing that the insurance safe harbor does not apply, which remains in effect, could prove a formidable barrier to such a challenge, however.

There appears to be only one reported case that was decided under the legal standard that is likely to be in effect in 2019 — an effective final regulation that provides that the insurance safe harbor does not apply but no EEOC standard for the level of incentive that would render a wellness program involuntary. In *EEOC v. Orion Energy Sys., Inc.*,[18] an employee who refused to fill out the employer's health risk assessment (HRA) was required to pay the entire premium for coverage under the employer's group health plan. The U.S. District Court for the Eastern District of Wisconsin gave *Chevron* deference to the EEOC's interpretation of the scope of the insurance safe harbor and therefore held that the insurance safe harbor does not apply to wellness programs.

The district court then considered the substantive issue of whether the incentive provided by the employer was permissible under the ADA. The incentive — requiring an employee who declined to participate in the wellness program to pay the entire premium — exceeded the maximum penalty permitted under the EEOC final regulations. However, the case arose be-

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[16] Ben Penn and Tyrone Richardson, *Trump's EEOC Takeover Stalled by Senate Republicans*, Bloomberg Law Daily Labor Report (June 6, 2018).

[17] 26 C.F.R. §54.9802-1(f)(3)(ii), 26 C.F.R. §54.9802-1(f)(4)(ii), 26 C.F.R. §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). A program to prevent or reduce tobacco use, however, may provide a reward of up to 50% of the cost of coverage.

[18] 208 F. Supp. 3d 989 (E.D. Wis. 2016).

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fore provisions of the final regulations governing the size of permitted incentives in wellness programs became effective. 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 because it gave the employee a choice of whether to complete the HRA and did not exclude the employee from the employer's group health plan for refusing to complete the HRA. The district court granted summary judgment for the employer on the wellness incentive issue.

Orion concluded that the size of an incentive to participate in a wellness program generally does not matter in determining whether the program is voluntary, as long as the employee is given a choice and is not excluded from the employer's group health plan for refusing to participate in the wellness program. While this case was decided under the legal standard likely to be in effect for 2019, the caveats noted above should be kept in mind. The decision is not binding precedent anywhere and other courts may reach different conclusions.

STEPS FOR EMPLOYERS TO CONSIDER IN DETERMINING THEIR WELLNESS PROGRAM INCENTIVES FOR 2019

This section discusses steps that employers who provide incentives to employees to participate in wellness programs can follow to minimize the risk of violating the ADA or GINA.

Determine the Incentives that Are Permissible under the ACA Regulations

As noted above, the ACA regulations governing wellness programs remain in effect and set limits on the maximum incentives that can be provided by ''health-contingent wellness programs.'' As a first step, the employer should determine whether its wellness program is a health-contingent wellness program within the meaning of the ACA regulations. If so, the ACA will set an upper limit on the incentives that can be offered, while if the wellness program is not health-contingent, the ACA regulations will not set any limits. In either case, the employer should next determine the status of the wellness program under the ADA and GINA.

Determine if the Wellness Program Is Subject to the ADA or GINA

As explained above, if a wellness program is sponsored by a ''covered employer'' and involves disability-related inquiries or requires a medical examination, it is subject to the ADA and must ensure that participation in the wellness program is ''voluntary.'' Similar issues arise under GINA in a situation in which an employer provides an incentive 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. If the employer's wellness program does not involve any of these situations, the incentives provided are not subject to the ADA or GINA.

Are the Provisions that Subject the Wellness Program to the ADA or GINA Essential?

If the preliminary design of the wellness program would cause it to be subject to the ADA or GINA, the employer should consider whether the provisions that subject the program to one of these statutes are essential to the success of the wellness program. If those provisions can be eliminated, or replaced with provisions that would not subject the wellness program to the ADA or GINA, this would avoid the complexity and risk involved in determining the appropriate level of incentives in the absence of guidance.

Work Closely with Counsel and Other Advisers to Determine the Appropriate Level of Incentives

If the employer concludes that it is essential to the success of its wellness program to provide incentives to employees that will subject the plan to the ADA or GINA, it should work together with counsel and other advisers to determine the appropriate level of incentive to provide in 2019. In general, it can be expected that the lower the incentives provided, the lower the risk of a violation, but there are no fixed maximums and no safe harbors against violation. For example, with the EEOC regulations no longer in place, 30% of the cost of self-only coverage is no longer a fixed maximum and *Orion* indicates that any level of incentive is permissible, so long as participation is not required. On the other hand, compliance with the 30% standard does not necessarily protect the employer against violation of the ADA or GINA. Employers, and their counsel and advisers, will need to make difficult judgment calls, taking into account the objectives intended to be achieved by the wellness program, the incentives required to achieve those objectives, the employer's risk tolerance, and an assessment of the likely attitude of the courts in case of a challenge.

CONCLUSION

The invalidation of the EEOC regulations as they apply to incentives to participate in wellness pro-

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grams, and the EEOC's inability to proceed with new regulations, puts employers in the unenviable situation of having to design their wellness program incentives without knowing the rules. Unfortunately, this situation is likely to continue for an extended period. Employers should carefully consider the design of their wellness programs to limit their exposure while achieving the objectives of the programs, and pay close attention to further developments in the courts or at the EEOC.

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