Center for Health and Wellness Law, LLC

AUGUST 23, 2017 SPECIAL ALERT
What the Wellness Industry Needs to Know about the AARP v. EEOC Decision

By Barbara J. Zabawa, JD, MPH
Center for Health and Wellness Law, LLC

In October last year, the AARP filed a complaint against the Equal Employment Opportunity Commission (EEOC) about the EEOC's wellness rules under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). Specifically, the AARP complained that the EEOC went against Congress' intent by allowing a 30% incentive maximum under the ADA and GINA for purposes of gathering employee or family health information through workplace wellness programs. The AARP argued that the EEOC's incentive maximum was arbitrary and unjustified.

Yesterday, the U.S. District Court in the District of Columbia issued an order agreeing with the AARP's argument. The court refused to defer to the EEOC's judgment in interpreting what is meant by a "voluntary" wellness program that seeks health or genetic information from employees or their family members. Instead, the court questioned whether the EEOC had truly evaluated the incentive limit in light of the purposes of the ADA and GINA, which are to prevent discrimination against employees on the basis of a disability or genetic precondition. The court noted that the EEOC failed to provide a convincing rationale for its incentive limit and seemed to ignore the data and concerns provided by other stakeholders. The court highlighted a significant concern expressed by some stakeholders that a 30% incentive level "was likely to be far more coercive for employees with lower incomes, and was likely to disproportionately affect people with disabilities specifically, who on average have lower incomes than those without disabilities." Opinion at 26.

As a result, the court ordered the EEOC to go back to the drawing board, evaluate the evidence about what incentive limit constitutes the dividing line between voluntariness and coercion, evaluate the impact of its decision on various groups, and then adequately explain its decision on what a "voluntary" incentive limit may be. Importantly, the court did not vacate the current incentive limits under the ADA and GINA rules – the 30% maximum incentives are still intact. However, those who work in the workplace wellness industry may be wondering what to expect in light of this court decision. Here are a few insights:

1. **The current ADA and GINA incentive limits of 30% of the total cost of self-only coverage are still intact**. The court deliberately considered the disruption it would cause if it struck down the current EEOC rules. So, it left the current incentive limits in place while it asked the EEOC to reconsider its decision about making 30% the incentive maximum.

2. **The EEOC may appeal the decision**. The court's decision was a "final" decision in the case, granting summary judgment in favor of the AARP and denying the EEOC's

summary judgment motion. This means the court's decision is ripe for appeal. It will be up to the EEOC to decide whether to appeal the decision to the District of Columbia Court of Appeals.

3. **An EEOC appeal may face an uphill battle.** Although I was surprised that the court did not defer to the EEOC's judgment, like so many courts do when a federal agency is charged with interpreting laws (a legal doctrine called "Chevron deference"), the tide may be turning on a court's willingness to "trust the judgment" of the federal agency. This court in the AARP case spent a lot of time discussing the evidence and comments brought forth by various stakeholders about the validity of a 30% incentive maximum under the ADA and GINA. In a way, the court was showing the EEOC all of the comments and data that it failed to consider when writing the ADA and GINA final rules last May. The court criticized the EEOC's rationale for settling on a 30% maximum incentive, which the EEOC explained was to "harmonize" the ADA and GINA rules with the HIPAA/Affordable Care Act incentive rules. Upon a closer look, the court concluded that the ADA and GINA incentive maximum did not harmonize with the HIPAA/ACA rules, but in fact made the incentive limits more confusing. The court's willingness to closely examine the EEOC's rule making process and rationale may reflect a new view of the judiciary's role in evaluating agency rules. The newest appointee to the U.S. Supreme Court, Justice Neil Gorsuch, appointed just this year by President Trump, has been openly critical of judicial deference to agency rules. In a past opinion, Judge Gorsuch denounced agency deference as "a judge-made doctrine for the abdication of the judicial duty." See this article for an interesting take on Justice Gorsuch's stance on this issue. Justice Gorsuch's view may be setting the tone for the lower courts when reviewing federal agency rules.

4. **The EEOC may end up lowering the incentive maximum under the ADA and GINA.** The court in the AARP case gave the EEOC until September 21, 2017 to come up with a timeline during which it would review the ADA and GINA wellness incentive rules. If the EEOC decides against appealing the decision, it must start reviewing its rules in light of all the comments and data pointed out by the court. Using this information, the EEOC must decide whether the 30% maximum incentive makes sense. The court was certainly not persuaded that a 30% maximum made sense because that is what the HIPAA/ACA rules use. As a result, the EEOC may end up lowering the incentive maximum incentive, perhaps below 20%. An incentive maximum below 20% may be possible because the court pointed out in its opinion that a RAND study found that "high powered" incentives of 20% or more might place a disproportionate burden on lower-paid workers. Opinion at 26.

What Should You Do Now?

Until the EEOC changes its rules, you should continue to abide by the ADA and GINA wellness incentive rules as currently written. By September 21st, we should have a better idea of when the EEOC might change its rules. We may also know whether it intends to appeal the court's decision. The Center for Health and Wellness Law will continue to monitor any developments in wellness law. As always, if you need compliance assistance with workplace wellness program development or implementation, contact us. We are here to help you.