Center for Health and Wellness Law, LLC

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Did the AARP Just Shoot Itself in the Foot? Back to the Wild West in Wellness Program Incentives

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As I wrote in a recent blog post, the district court in the *AARP v. EEOC* case ordered the EEOC on December 20, 2017, to go back to the drawing board with regard to its wellness incentive rules under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). Recall that those rules, released in May 2016, allow employers to impose incentives of up to 30% of the total cost of self-only coverage to encourage employees to participate in health risk assessments, and spouses to participate in biometric screens and health risk assessments.

In the wake of this court order, there have been numerous articles and comments effectively saying to the EEOC "I told you so." That is, the EEOC overstepped its authority in ruling that a 30% of total cost of self-only coverage incentive limit still fell within the ADA's requirement that any medical inquiries by "voluntary."

What these commentators may fail to realize, however, is that what might happen next is a scrapping of the entire wellness incentive rule under the ADA and GINA. The EEOC may decide that it can't pick an incentive limit number that all employees would consider "voluntary" when being asked to divulge their personal health information. As a result, we may go back to the EEOC Enforcement Guidance days when all the guidance we had from the EEOC about the meaning of "voluntary" was that incentives could not "require participation nor penalize employees who do not participate." For many of those who work in workplace wellness, that guidance was not very helpful.

I understand that the hope of these commentators in light of the AARP order is that employers will no longer use incentives for workplace wellness programs. That is certainly a viable option for many employers. But I have heard too many professionals testify that incentives work for their organization, so I don't know if incentives will now miraculously disappear.

With that prospect in mind, what could happen in the world of workplace wellness incentives for "participatory" programs, such as incentivizing employees to take a health risk assessment? ("Participatory" wellness programs are those programs that do not condition the obtaining of a wellness reward on the participant's health status. See https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/caghipaaandaca.pdf.)

One real possibility is that without the ADA incentive limit rules, employers may feel free to raise participatory program incentives to 100% of the employee's premium cost, as was the case in the EEOC v. Flambeau and EEOC v. Orion Energy cases. In particular, the court in the Flambeau case adopted the reasoning in Seff v. Broward County that the ADA safe harbor applied to the employer's wellness program, effectively insulating the program from the ADA's voluntary requirement. Recall that the ADA safe harbor permits employers who have wellness programs tied to their health insurance plan to conduct medical examinations of employees to administer and underwrite insurance risks associated with an employer's health plan. 42 USC § 12201(c)(2).

The EEOC's wellness incentive rules under the ADA tried to decimate the safe harbor's applicability to workplace wellness programs by claiming that under no circumstances, regardless of whether the wellness program was offered as part of an employer's health plan, did the ADA safe harbor apply. The EEOC's wellness incentive rules also clarified that the 30% incentive limit applied to both participatory and health contingent wellness programs; under the HIPAA wellness incentive rules, incentive limits do not apply to participatory programs.

Thus, without the EEOC wellness incentive limit rules, employers with wellness programs embedded within their health plan may rely on the ADA safe harbor when establishing incentives. Even though the court in the *Orion Energy* case concluded that the ADA safe harbor did not apply to that employer's wellness program, careful planning by employer benefit plans could address the concerns expressed by the *Orion Energy* court. Specifically, employers could more deliberately weave their wellness program into their health benefit plan to make a stronger case that the ADA safe harbor indeed applies for their wellness program, which would align with the rationale offered by the *Flambeau* and *Seff* courts.

It remains to be seen what the EEOC will propose with regard to its wellness incentive rules, and how the workplace wellness community will respond. But, I think it is premature to declare that workplace wellness incentives are dead.