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More Action in the AARP v. EEOC Case on Wellness Incentive Rules
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As noted in a previous blog post, on December 20, 2017, the District Court of the District of Columbia vacated the wellness incentive rules under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) starting January 1, 2019. The court also ordered the EEOC, the federal agency that wrote those rules, to propose new rules by the end of August 2018.

On Tuesday, January 16, 2018, the EEOC asked the court to withdraw itself from the case, to close the case and, most importantly for this blog post, "remove any requirement that the EEOC file status reports or engage in any rulemaking on any schedule." *AARP v. EEOC*, 16-cv-2113, dkt. #56 (Jan. 16, 2018). According to the EEOC's court filing, the AARP does not oppose this request by EEOC.

Because the EEOC's request is unopposed, there is a good chance that the court may agree to it. What that means for workplace wellness is that there may not be proposed rules coming out in August this year. In fact, the EEOC hints in its court filing that it may not draft any new rules regarding wellness incentives under the ADA and GINA.

If that becomes the case, what will the ADA and GINA regulatory landscape look like next January, 2019? Well, it is important to remember that the AARP v. EEOC case focused solely on the wellness incentive limit under the ADA and GINA, which the rules set at 30% of the total cost of self-only coverage. The case left alone the requirements under the ADA that a wellness program that collects employee health information through health risk assessments or biometric screens, for example:

- Be voluntary
- Be part of a program reasonably designed to promote health or prevent disease
- Provide employees with notice
- Not share individually identifiable employee health information with employers unless needed for administration of the health plan
- Prohibit employers from requiring employees to agree to the sale, exchange, sharing, transfer or other disclosure of their health information
- To comply with other laws affecting workplace wellness programs
- To not rely on the ADA "safe harbor" provision, even if the wellness program is part of the employer's health plan.

29 CFR § 1630.14.

These provisions will remain intact, even after January 1, 2018. What will be uncertain, once again, is what incentive amount, if any, would still make the wellness program that collects employee health information "voluntary." The 30% incentive limit that will be struck from the rules as of next January acted as a "safe harbor" for employers when imposing incentives to encourage employees to participate in health risk assessments or biometric screens. If the EEOC decides to let the current rules expire without replacing them with another incentive limit, employers will need to guess whether an incentive amount would still be considered "voluntary" by their employees.

The bottom line is that without clear guidance from the EEOC, imposing any incentive amount on employees who provide their health information will carry some legal risk. This is not entirely unfamiliar territory, however, as this was the case before the EEOC issued its final rules in May 2016. Since then, we have also had some court cases opine on the ADA and wellness incentives. My previous blog posts mention the *EEOC v. Flambeau and Seff v. Broward County* cases, which explore the use of the ADA safe harbor. Assuming the EEOC leaves the rule that the safe harbor does not apply to workplace wellness programs intact, employers may also look to is the EEOC v. Orion Energy case for some guidance.

In that case, the court found that Orion Energy's program did not violate the ADA because ultimately, the wellness program was voluntary. The court reasons that even though employees who refused to participate in the health risk assessment had to pay 100% of their health insurance premium, it was still a choice they could make. According to the court, employers are not required to offer health insurance and therefore if an employee chooses not to participate in the wellness program and instead pay 100% of their premium, that is still offering the employee more than an employer is required to offer under the law. As stated by the court, "a hard choice is not the same as no choice." Because the employee had a choice, albeit a "hard choice," the wellness program was still voluntary and therefore not in violation of the ADA.

So, case law may become even more important in the years ahead when planning whether to offer employee incentives in workplace wellness programs. It is possible that the EEOC may also re-write its incentive rules. Only time will tell. The Center for Health and Wellness Law, LLC will keep you updated as further developments occur.