

# Center for Health and Wellness Law, LLC

April 2018 Newsletter

## EEOC Submits Update in AARP Case on ADA/GINA Wellness Incentive Rules

On March 30, 2018, the EEOC filed its much anticipated update in the AARP v. EEOC case (“AARP case”). The court in that case asked the EEOC to file a status report regarding its plan for the wellness incentive rules under the Americans with Disabilities Act (ADA) and the Genetic Information and Nondiscrimination Act (GINA).

As discussed in previous [blog posts](#), the court in the AARP case vacated the ADA and GINA incentive rules as not meeting the ADA and GINA “voluntary” requirement. The ADA and GINA incentive rules created a safe harbor for workplace wellness incentive amounts at 30% of the total cost of self-only coverage. Those incentive limits applied only to workplace wellness programs that collected employee health or genetic information.

As suspected, the EEOC did not commit to rewriting the ADA and GINA incentive rules. Specifically, the court filing from the EEOC states that the EEOC has not made a final choice from the following policy choices:

1. Promulgate new regulations
2. Leave the regulations as they stand
3. Study the issue further before committing to either of the above options.

The EEOC revealed that it does not have plans to issue a Notice of Proposed Rulemaking addressing incentives for participation in employee wellness programs by a particular date, but it has not ruled out that possibility either. The EEOC also mentioned that it was still awaiting Senate confirmation of the President’s nominee for Chair of the EEOC – Janet Dhillon – and for one other vacancy. Presumably, these two new commissioners, once appointed to the EEOC, may have some say in the EEOC’s priorities and direction.

Given this information, it is almost certain that the workplace wellness community will not see any new incentive rules under the ADA or GINA any time this year. Thus, the current incentive limits will expire on January 1, 2019 and employers will be left to navigate less certain waters with regard to incentivizing the collection of employee health or genetic information. It will be important for employers to work with legal counsel to navigate these waters and mitigate risk as much as possible.

---

**Frequently Asked Workplace Wellness Compliance Questions**

# Center for Health and Wellness Law, LLC

***An employee completes a reasonable alternative standard during the plan year and therefore earns a reward through the wellness program, which is a reduction in premium. Is an employer with a section 125 plan prohibited from making premium changes during the year?***

Perhaps prospectively. Under 26 CFR s. 1.125-4(f)(2), “if the cost of a qualified benefits plan increases or decreases during a period of coverage and, under the terms of the plan, employees are required to make a corresponding change in their payments, the cafeteria plan may, on a reasonable and consistent basis, automatically make a prospective increase or decrease in affected employees’ elective contributions for the plan.” Thus, prospective changes to an employee’s premium payment seem to be allowed. As for retroactive rewards/premium reductions, IRS Memorandum No. 201622031 states that employers may reimburse employees for all or a portion of the premiums paid by salary reduction, however that reimbursement from the employer is taxable and must be included in the employee’s gross income.

---

## **Tips for Providers to Navigate License Disputes**

*By Gladys Gonzalez, UW Milwaukee MHA Student and Intern for Center for Health and Wellness Law, LLC*

As a health or wellness professional, you may find yourself at some point in your career facing an inquiry into your license or certification because of a consumer complaint. Should this occur, the following list are suggested steps and expectations to successfully navigate the dispute:

- ✓ Contact legal counsel immediately; at times, you will be functioning under specific time frames in which you must act, and report. Responding without assistance from legal counsel may lead to your response revealing too much or too little information. Lawyers with expertise in responding to license complaints can guide you in crafting an optional response that will not lead to further questioning by the government. Failure to no respond at all could lead to other legal actions. Also, not being informed about the law or missing deadlines is not an excuse.
- ✓ Communications from the Wisconsin Department of Safety and Professional Services (DSPS) may take different methods: letters, written complaint forms from members of the public, telephone calls, newspaper articles, e-mails, and memos from staff. Communication may be labeled as "informal complaints" and are given a case number by clerical staff on the Intake Team. The licensee or the “respondent” receives a copy of the complaint along with the request for the adequate records and is asked to respond to the complaint.

# Center for Health and Wellness Law, LLC

- ✓ Do not discuss your legal situation with the media, friends or family, the board, or the complainant. Only discuss with your lawyer and let them speak for and with you.
- ✓ Review with your professional liability insurance policy or agent to see if defending the complaint is covered under your policy, and what your limits are. The coverage may include paying for a lawyer to help you.
- ✓ Notify your liability carrier and other parties to whom you have similar obligations as soon as possible” (Devji I., 2013). Most carriers and many employers and medical service contracts require timely disclosure of any complaint (Devji I., 2013). Failure to notify your liability carrier could affect your insurance coverage and may lead in serious penalties such as fees and violation of your contracts.
- ✓ Ask your lawyer to represent you. Gather all of your documents that involve the case in the complaint to give to your lawyer and make copies for reference. Additionally, depending on the legal situation there are lawyers that specialize in representing these kinds of complaints and licensure proceedings (Devji I., 2013). It is important that you seek help immediately with a lawyer because they will be familiar with the people and procedures of the board, your rights and obligations and can help you determine the limits of your disclosure and reporting obligations (Devji I., 2013). Be complete and forthright in your disclosures and discussions with your lawyer and share both the good information on what you did and the standard of care delivered and on anything that was not perfect or deficient (Devji I., 2013). Communicate with your lawyer in detail so there are no surprises by anything that is concealed.
- ✓ During the process, investigators can and do seek the advice of the prosecuting attorney assigned and the case advisor. The investigators may conduct undercover operations where they may contact clients or patients. The Department may issue investigative subpoenas under Wis. Stat. § 440.03(4). Administrative search warrants are also available in Pharmacy Examining Board cases, under Wis. Stat. § 961.52, but are very rarely used. Some boards may request their licensees to cooperate with investigations others may not. The Medical Examining Board has authority to order its licensees to submit to physical, mental, and professional competency examinations during the investigative stage, Wis. Stat. § 448.02(3)(a). The investigators do not have traditional law enforcement powers such as arrest, although those assigned to Pharmacy Examining Board cases could be granted such powers under Wis. Stat. § 961.51(1), if that board chooses. The Division's investigators carry with them official photo identification cards, and police-style badges whenever they go out into the field, and have business cards.
- ✓ The decision whether discipline will be pursued or not can occur at any time. A memo is prepared summarizing the file, and the prosecutor is asked for a recommendation. Then

# Center for Health and Wellness Law, LLC

the memo and file materials are sent to the case advisor. If the determination is “close the case,” the case is put on the agenda for the next board meeting. These portions of the meetings are conducted in closed session. In most cases, the boards accept these recommendations and vote to “close” the case. In a few cases, more information is requested, or the matter is referred for prosecution.

- ✓ If the DSPS files a formal complaint, the complaint is opened for investigation, but it may not always mean that it will lead to discipline. However, if the case proceeds to the prosecution stage, the file is sent to the prosecuting attorney assigned. In most cases, there will be a discussion between the prosecuting attorney and case advisor of what outcome should be adequate. If an expert witness will be required to establish a prima facie case, the case advisor will be asked for some names of appropriate professionals. This is something that is found to be done in quality of care case in health professions, as well as in business professions.
- ✓ After this, an agreement is proposed to the respondent. If you do not agree with the first offer, discuss alternatives with the prosecutor. Nonetheless, if an agreement is reached the board will send a disciplinary order without formal proceedings and 90% of all disciplinary orders are issued.
- ✓ You will then receive a form of a Final Decision and Order (settlement reached). It will contain a standard form signed by the respondent and the attorney and the prosecutor, presented to the board’s legal counsel and presented in closed session. Direct regulation cases, signed agreement and order are sent to the Secretary with the file. Once it is accepted, the Final Decision and Order are signed and issued. However, if rejected there will be informal guidance from the board’s chair or legal counsel. Depending on the board, there is an average of 5-10% terms that are rejected the first time. The board or Secretary must accept or reject the final decision.
- ✓ Keep your records in the case. Do not change or destroy any paperwork as this could lead to further trouble. Keep a log of the events, including when, how, any witnesses that were present in testimony. Additionally, keep track of any interaction with the complainant, verify that you have a way to prove the interaction and share all this information with your lawyer.
- ✓ Do not initiate contact with the complainant. After the complainant files their complaint with the government work through your lawyer only in responding to the allegations. If the complainant contacts you, direct them to your lawyer for all communications regarding the complaint.

Resources Available

# Center for Health and Wellness Law, LLC

Center for Health & Wellness Law, LCC

Phone: 608.579.1267

<http://www.wellnesslaw.com/>

References:

Devji, Ike. (2013, April 23). Responding to Medical Board Complaints. Retrieved June 01, 2017, from <http://www.physicianspractice.com/responding-medical-board-complaints>

Thexton, Arthur. *Review of Disciplinary Process of the Wisconsin Department of Safety and Professional Services*. July 2016.

---

## CMS Issues Final Rule on Essential Health Benefit Structure

*By Joe Forward, Forward Law Services, LLC and Center for Health and Wellness Law, LLC Affiliate*

Are you a health or wellness professional whose services are included as an essential health benefit under Affordable Care Act (ACA) compliant plans or part of a state “benchmark plan” that states use for their health insurance marketplace to determine which health benefits to offer in the individual and small group market? If so, you might want to pay attention to new rules issued by the Centers for Medicare and Medicaid Services in April 2018.

Under this final rule, "states may select a new essential health benefits (EHB) benchmark plan for plan years beginning on or after Jan. 1, 2020." The rule is intended to give states more flexibility in selecting EHB benchmark plans.

Currently, under the ACA, health insurers in the individual and small group markets must cover 10 EHBs in broad categories, including rehabilitative and habilitation services. States must choose an EHB benchmark plan from the following 10 plans operating in the state: the three largest small group plans, the three largest state employee health plans, the three largest federal employee health plan options, or the largest HMO offered in the state's commercial market in an applicable year.

For plan year 2017 and beyond, if the state did not select a benchmark plan, the default was the largest small group plan in the state. For example, in Wisconsin, the benchmark plan is United Healthcare's Small Group Market Choice Plus plan, which includes wellness services such as chiropractic care (short-term rehabilitative).

Under this final rule: states will have more flexibility in selecting a benchmark plan for plan years beginning in 2020. They can stick with the 2017 EHB-benchmark plan, or, they will have three options to select a new EHB-benchmark plan:

# Center for Health and Wellness Law, LLC

- 1) select another state's 2017 EHB-benchmark plan
- 2) replace one or more of its EHB categories using another state's 2017 EHB-benchmark plan;
- 3) select an entirely new EHB-benchmark plan.

Thus, as an example, Wisconsin can review EHB benchmark plans in other states, rather than looking at in-state plans only. Another state's benchmark plan may not include certain wellness services such as chiropractic care.

Under option 2, a state could also replace an EHB category "so long as the substituted benefit is actuarially equivalent to the benefit being replaced." That is, if a state decides it does not want certain wellness services to be covered, it could be replaced with another category that covers an essential health benefit such as rehabilitative or habilitation services.

Under the third option, the state could select an entirely new in-state EHB benchmark plan, and could do so annually.

There is a certain methodology that states must follow in comparing EHB plans. (see [CMS Publication](#), April 9, 2018).

The final rule also requires states to provide notice of an opportunity for public comment for changes to the EHB benchmark plan.

As one commentator noted, "the 523-page rule is long and complex." But this is a quick summary of the EHB provisions.

Health and wellness providers may want to lobby to make certain that any new benchmark plan retains the health and wellness services covered currently. Any new EHB benchmark plan would not apply until the 2020 plan year.

---

## Upcoming Speaking Engagements

The Center for Health and Wellness Law, LLC's founder, Barbara J. Zabawa, will be speaking on wellness law topics at the various upcoming events. If you plan to attend, stop by and say "hello!"

National Wellness Conference, June 18, St. Paul, MN:  
<http://www.nationalwellness.org/page/NWC2018>

National Association of Health Underwriters 2018 Annual Convention, Saturday, June 23, Kansas City, MO: <https://nahu.org/events/recurring-events/2018-annual-convention>

# Center for Health and Wellness Law, LLC

2018 WELCOA Summit, August 16, San Diego, CA: <https://www.welcoa.org/2018-welcoa-summit-registration/>

---

## Barbara J. Zabawa earns Certification in Healthcare Compliance Credential!

The Center for Health and Wellness Law, LLC is proud to announce that its founder, Barbara J. Zabawa, JD, MPH, earned the Certification in Healthcare Compliance (CHC) credential earlier this year from the Compliance Certification Board and the Health Care Compliance Association. This credential further strengthens the Center's ability to offer superior healthcare and wellness compliance services to its clients. Please contact the Center for your compliance evaluation today!

Contact [www.wellnesslaw.com](http://www.wellnesslaw.com) to learn more.

---

## Center for Health and Wellness Law Now Offering Healthcare Mediation Services

Do you have a health or wellness dispute that you would like to resolve short of litigation? If so, the Center for Health and Wellness Law, LLC is now offering mediation services to help parties settle disputes before spending large amounts of time and resources on fighting battles in court or through arbitration. If you would like a knowledgeable mediator to help you and an opposing party find a path forward, contact the Center today through the website at [www.wellnesslaw.com](http://www.wellnesslaw.com).

---

## Have you ordered Rule the Rules of Workplace Wellness Programs yet?



The first comprehensive book regarding workplace wellness program compliance is now available for purchase. Order online at [www.wellnesslaw.com](http://www.wellnesslaw.com)!

---

# Center for Health and Wellness Law, LLC

Are you looking for a speaker who knows wellness laws inside and out? Contact the Center for Health and Wellness Law, LLC to book your speaking engagement today! Visit our Facebook page to listen to some of our speaking reviews

<https://www.facebook.com/CenterforHealthandWellnessLaw/>.

---

