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Key Legislative Developments Affecting Your Human Resources

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Wellness Program Rules: Challenged and Challenging

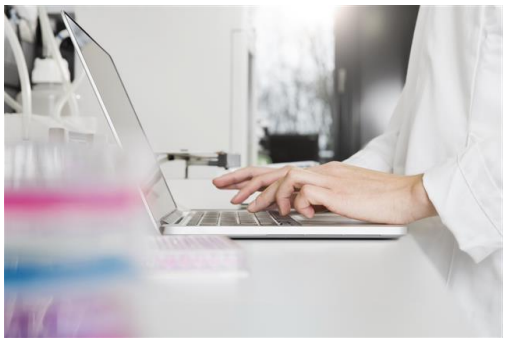
Election campaigns remain the primary focus during the extended congressional recess that will end during the week of November 14. In the meantime, as preparations continue for the lame-duck session, employer-sponsored wellness programs rules are in the spotlight with litigation seeking to block them.

Wellness Rules Challenged

Many employers have implemented wellness programs despite the uncertainty as to whether they are designed to fit squarely within the rules. A lawsuit filed last week by AARP challenging the EEOC's final wellness regulations under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) did nothing to quell those concerns.

Background

Subject to narrow exceptions, the ADA and GINA generally prohibit employers from soliciting medical information that is likely to reveal disability-related or genetic information. As such, the ADA and GINA provide rules that affect health risk assessments and/or biometric screenings from employees (and spouses and dependents, in the case of GINA). In May 2016, the EEOC released two final rules, under the ADA and GINA, outlining the exception for wellness programs. (Please see our June 17 *FYI In-Depth* for a comprehensive review of the laws and rules affecting wellness programs.) The rules address the extent to which employers may use incentives to encourage employees and their spouses to participate in certain wellness programs. The provisions discussing the maximum allowable incentives generally apply to plan years beginning on or after January 1, 2017. In addition to the ADA and GINA, the Affordable Care Act (ACA) also provides rules regulating employer wellness programs.



Lawsuit

AARP brought suit on behalf of its members, seeking to invalidate the provisions of the EEOC's final ADA and GINA rules that permit the use of incentives (financial or in-kind) in an employee wellness program. The AARP complaint focuses on privacy issues arising out of wellness programs, essentially alleging that the ADA and GINA wellness rules wrongly permit employers to penalize workers who want to keep health

information private. The suit — seeking a preliminary injunction to stop the rules from going into effect — lays out AARP's supposition that individuals' privacy rights are invaded when wellness programs, in compliance with the final rules, permit employers to impose "heavy penalties" on employees who do not participate in programs that involve collecting medical and/or genetic information through questionnaires and/or biometric testing.

> **Comment.** The AARP lawsuit is notably different from other pending suits involving wellness programs. First, AARP is a special interest group suing the EEOC; an employer is not a party to the suit. Second, the rules themselves are being targeted. The litigation does not target a specific aspect of a wellness program, but questions the validity of the maximum allowable incentive rules under the ADA or GINA. Third, although privacy is in issue, the focus is not on protected health information (PHI) and the privacy provisions of the Health Insurance Portability and Accountability Act (HIPAA). The basis for the lawsuit is that a disproportionate number of older workers have health issues or disabilities and that these permitted incentives pressure employees to divulge confidential health information about themselves or their spouses. The suit does not assert that the final rules violate the HIPAA privacy rules by allowing employers to improperly gain access to PHI. (See our April 8 *For Your Information* for background on the HHS' Office for Civil Rights current enforcement efforts related to HIPAA compliance.)

Congressional Efforts

Independent from the litigation, there are pending congressional efforts to address the EEOC's final ADA and GINA regulations on wellness programs.

Resolutions to Block Rules. Earlier this year, Sen. Lamar Alexander (R-TN), chairman of the Senate Health, Education, Labor and Pensions (HELP) Committee, and Sen. Johnny Isakson (R-GA), a HELP Committee member, introduced two joint resolutions (S.J. Res. 37 and S.J. Res. 38) under the Congressional Review Act to block the rules. Although passage of these resolutions on a stand-alone basis is highly unlikely, it is possible that they could be attached to a funding bill taken up by Congress during the lame-duck session. (For additional information on the upcoming lame-duck session, as well as Congress' need to pass legislation to provide funding for government operations after December 9, please see our October 24 *Legislate*.)

Bills to Fix Rules. In addition to efforts to block the final rules, pending legislation would resolve the differences between the reward/penalty limits under the ADA, GINA and HIPAA (as provided by the ACA). Specifically, in an effort to reduce uncertainty and litigation risk created by the current regulatory environment, the House and Senate introduced identical bills — the Preserving Employee Wellness Programs Act (H.R. 1189 and S. 620). These bills would deem rewards under HIPAA-compliant wellness programs to be compliant with the EEOC's regulations under the ADA or GINA. (For background, please see our June 17 *FYI In-Depth* and our March 27, 2015 and March 6, 2015 issues of *Legislate*.)

House GOP Views. Earlier this year, Speaker Paul Ryan's (R-WI) House Republican task force released a report "A Better Way." The Task Force on Health Care Reform's portion of the report includes preserving employee wellness programs as one of its eight recommendations. Indeed, the report encourages the continuation of wellness programs while calling for clarification of the various financial incentive/penalty rules that apply to such programs. Likewise, following the release of the EEOC's final rules, Sen. Alexander issued a statement that the rules "contradict the law and continue the confusion."

House Democrats' Response. Although it is not specifically mentioned in the Democratic Party platform or any similar policy blueprint — as employer-sponsored wellness programs are an integral part of the ACA — it is safe to

say that the party stands behind the continuation of such programs. However, some Democrats have misgivings with the EEOC's final rules. Indeed, Rep. Bobby Scott (D-VA) and Rep. Frederica Wilson (D-FL), ranking members of the House Education and the Workforce Committee, issued a statement indicating that the EEOC has fallen short of its goals to ensure employees who participate in wellness programs voluntarily provide health information and employers have "adequate safeguards" to protect the information.

Looking Ahead

As employers consider their 2018 health and wellness strategies, they should keep an eye on the AARP litigation as well as legislative and regulatory changes in the employer-sponsored wellness program space.

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