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Court Denies Motion to Block EEOC Wellness Program Regulations

Late last month, the federal district court for the District of Columbia denied the AARP's request for a preliminary injunction, thus allowing the EEOC's wellness program regulations to take effect January 1, 2017. The notice and incentive provisions of the final ADA regulations and the incentive provision of the final GINA regulations apply for the first day of the first plan year beginning on or after January 1, 2017.

Background

In May 2016, the EEOC issued final rules for wellness programs under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). The ADA generally prohibits employers from requiring a medical examination (e.g., biometric screening) or inquiring about either the existence of, or the nature or severity of, an employee's disability (e.g., through a health risk assessment, or HRA). A medical examination or inquiry is permitted if the requirement or inquiry is job-related, or if the exam or inquiry is part of either a "bona fide benefit plan" or a "voluntary employee health program." Among other things, GINA prohibits employers from requesting, requiring or purchasing information about the current or past health status of a spouse or other family member. Both rules provide an exception under certain circumstances and generally limit incentive amounts to 30 percent of the cost of self-only coverage. (For information on these concepts and the final regulations, please see our June 17, 2016 *FYI In-Depth*.)

In October, the AARP filed suit against the EEOC on behalf of its members, alleging that the 30 percent incentive limit under the ADA and GINA regulations is "arbitrary, capricious, an abuse of discretion and contrary to law." Among other things, the lawsuit states that the incentive limits are coercive because they impose heavy financial penalties on employees who do not participate in the wellness program, and arbitrary because they are not based on any facts in record, economic analysis or other legal requirement. The AARP contends that forcing employees to submit to medical examination or inquiries and reveal confidential medical and genetic information to employers controverts the statutory purpose of the ADA and GINA. The AARP asked the court to invalidate the regulations. (See our December 1, 2016, *For Your Information.*)

AARP v. EEOC

On December 29, 2016, the federal district court for the District of Columbia denied the AARP's request for a preliminary injunction that would have halted the implementation of the final ADA and GINA regulations. While finding that the AARP had standing to bring the suit, the court ruled that the organization failed to satisfy the requirements for granting a preliminary injunction.

To grant a preliminary injunction, a court must find that the plaintiff will suffer irreparable injury, the case is likely to succeed on its merits, the balance of hardships favors the plaintiff and that the injunction is in the public interest. The court disagreed with the AARP argument that implementation of the regulations would cause its members to suffer irreparable harm because the permissible wellness incentive would force individuals to disclose confidential medical information or lose the incentive. The court stated that the regulations themselves provide privacy and confidentiality safeguards for any information disclosed to the wellness program and that limiting the allowable incentive was a reasonable interpretation of "voluntary." The court found the AARP was not able to show a likelihood that irreparable harm would occur (individuals can be made whole through monetary damages), nor that it would succeed on the merits of this case based on the record at hand. Finally, the court stated that the disruption for employers and insurers in enjoining the rules outweighed the potential injury to the plaintiffs.

In Closing

Employers can continue to rely on the ADA and GINA regulations. Note that the ADA regulations created a notice obligation for employers beginning January 1, 2017. (See our June 17, 2016 *FYI In-Depth*.) Although the organization wasn't able to satisfy the high burden of proof necessary for granting a preliminary injunction, the AARP has indicated that it will move forward with the litigation. There's a chance we could see other litigation or possibly legislative or regulatory changes impact wellness programs in 2017. In the meantime, plan sponsors should continue to seek counsel of trusted advisors when planning and implementing their wellness programs.

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