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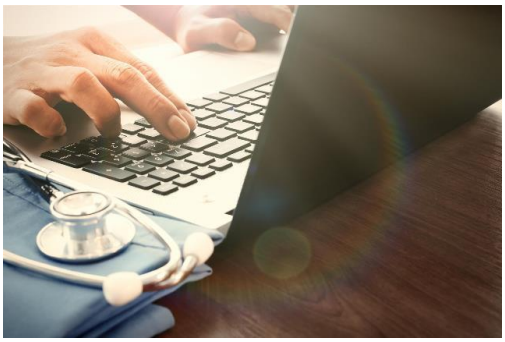
Litigation Update – Wellness Programs

Employer-provided wellness programs continue to be the subject of attention. A federal court has concluded that the EEOC's final ADA and GINA regulations permitting an incentive of up to 30% of the cost of self-only coverage are arbitrary and capricious. However, concerned that nullifying the rules would have a negative impact on employers and employees, the court held that the rules would remain in place while the EEOC reconsiders them (which the EEOC has said will take about a year). Additionally, the DOL brought a lawsuit against a large retail employer, alleging that its wellness program violated the HIPAA nondiscrimination rules. While neither case has an immediate impact on employer wellness programs, they signal that legal action involving those programs is likely to continue.

Background

HIPAA generally prohibits a group health plan from discriminating against individual participants and beneficiaries with respect to eligibility, benefits or premiums based on a health factor. Previously established HIPAA nondiscrimination rules include a limited exception for wellness programs that meet specific requirements and otherwise promote health and prevent disease. Those rules permit "health contingent" wellness programs (i.e., programs that require an individual to satisfy a standard related to a health factor to obtain a reward) to provide up to a 30% incentive (generally based on the total cost of coverage). An additional 20% incentive (i.e., up to a 50% incentive) is permitted for programs designed to prevent or reduce tobacco use. Similarly situated individuals unable to meet the health standard (like being tobacco free) must be offered a reasonable alternative standard so they can equally receive the incentive (or avoid a penalty). For background on the HIPAA nondiscrimination rules, see our December 9, 2015 *FYI In-Depth*.



In 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 screenings) or inquiring about either the existence of, or the nature or severity of, an employee's disability (e.g., a health risk assessment, or HRA) unless the requirement or inquiry is job-related or unless such exams or inquiries are part of either a "bona fide benefit plan" or a "voluntary employee health program." GINA prohibits discrimination on the basis of an individual's "genetic information" by group health plans, insurers and employers. Among other things, it prohibits employers from requesting, requiring or purchasing information about the current or past health status of a spouse or other family member. Information about the medical conditions of an employee's spouse is considered genetic information of the employee (even though the employee and spouse do not share any genetic material).

Both the ADA and GINA provide exceptions for wellness programs under certain circumstances and generally limit incentive amounts involving a medical exam and/or disability-related or genetic inquiry to 30% of the cost of self-only coverage. For background on those rules, see our June 17, 2016 *FYI In-Depth*.

Challenge to the ADA and GINA Wellness Regulations

In October 2016, AARP filed suit against the EEOC on behalf of its members, alleging that the 30% incentive permitted under the ADA and GINA regulations is "arbitrary, capricious, an abuse of discretion and contrary to the law." One argument AARP advanced was that the incentive limits established in the regulations are coercive because employees who do not participate in the wellness program could face heavy financial penalties, and arbitrary because the 30% standard is not based on any facts in record, economic analysis or other legal requirement. AARP maintained that requiring 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 and asked the federal district court for the District of Columbia to invalidate the regulations. (See our December 1, 2016 *For Your Information.*)

EEOC to Reconsider Regulations

The trial court found in favor of AARP. The court determined that the EEOC had not provided in its regulations an adequate basis (e.g., justification) for concluding that the 30% incentive limit is a reasonable interpretation of voluntariness (as required by the statute). The court rejected the EEOC's argument that a 30% incentive is appropriate because it harmonizes the regulations with the HIPAA nondiscrimination provisions.

The court stated that HIPAA's 30% incentive limit is not intended to serve as an interpretation of the term "voluntary" since voluntariness is not a requirement under HIPAA. Furthermore, the court pointed out other inconsistencies with the HIPAA regulations. The court was also troubled by the EEOC's justification for allowing incentives in exchange for information about a spouse's medical history under GINA. Based on these and other failings, the court held that EEOC reached the 30% standard arbitrarily. Nevertheless, the court noted that the regulations had been applicable for eight months and expressed concerns about widespread disruption and confusion if they were vacated. For the time being, then, the final regulations stand and will be enforced by the EEOC.

In its order, the court asked the EEOC to provide a timeline for its review and revision of the regulations. The EEOC has indicated that it intends to propose regulations by August 2018 and issue final regulations by October 2019. It anticipates that the new rules would not become effective until the beginning of 2021. Asserting that employees need relief sooner, AARP has asked the court to vacate and disallow enforcement of the regulations effective January 1, 2018.

For now, employers should continue to comply with the EEOC's regulations, but those maintaining and implementing wellness programs should also consult with counsel and trusted advisors to assess current plan design and administration in terms of compliance and any associated risk.

At this time, the EEOC's board is going through some changes. While the Democrats currently hold a majority on the board, President Trump has nominated two appointees to the five-member commission. Confirmation of these nominees will swing the commission to a 3-2 GOP majority. In the status report to the district court, the EEOC mentions that its intentions could change "as a result of changes in its composition."

> **Comment.** It seems reasonable that the EEOC chair will wait until her fellow Republican commissioners are confirmed before moving forward with any significant rulemaking. Alternatively, Congress could act to resolve this issue with the regulations. In late October, the Senate's committee on Health Education Labor and Pension (HELP) held a hearing to discuss how wellness programs encourage healthy lifestyle choices to help prevent serious illnesses and reduce health care cost. The Preserving Employee Wellness Programs Act (H.R. 1313), approved by the House Education and the Workforce Committee in March, would make HIPAA-compliant wellness programs automatically compliant with the ADA and GINA, while also applying the HIPAA premium variation limits to participatory wellness programs. If, this fall, Congress successfully passes legislation amending the ADA, the court's ruling would become moot.

ERISA and HIPAA Nondiscrimination

As discussed above, HIPAA prohibits a plan sponsor from discriminating against individuals and beneficiaries because of their health status. In certain situations, the DOL may bring an action against an employer under ERISA (the HIPAA nondiscrimination rules are part of ERISA) if, upon audit, it finds issues of noncompliance and the employer fails to adequately respond.

DOL Complaint

The DOL has sued a large retail employer and its health plan, alleging HIPAA and ERISA violations, for among other things, mismanaging the wellness program (as well as the employer group health plan – see related text box). In *Acosta v. Macy's Inc*., the DOL says that the employer and its group health plan discriminated against individuals based on their health status.

HIPAA Nondiscrimination. In its complaint, the DOL challenged the tobacco cessation program and tobacco-use surcharge implemented as part of the employer's wellness program. The complaint generally asserts that the employer's wellness program failed to offer a reasonable alternative that would allow employees who could not meet the non-tobacco-use standard to avoid a penalty (a premium surcharge) under the plan. Tobacco-using participants also paid the surcharge even when they participated in the tobacco cessation program offered under the plan. Additionally, the plan

Plan Practices Must Align With Written Documents

In separate counts, the DOL's complaint also alleged that the parties breached their fiduciary duty under ERISA because plan operations were not consistent with plan documentation. The DOL claims that the method for determining reimbursement rates for out-of-network claims changed, but that plan documentation was not updated and participants were not notified of the change.

ERISA requires that plans operate in accordance with written documentation, employees be informed of plan provisions, and that documentation be kept up-to-date with any plan changes. Failure to comply with ERISA requirements, even the mundane task of updating plan documentation, can be costly, resulting in DOL enforcement actions and penalty assessments, and/or employee lawsuits.

required participants in the tobacco-cessation program to show they were tobacco free for six consecutive months during the plan year.

The DOL alleges that the failure to offer and disclose the availability of a reasonable alternative standard was a breach of the employer's fiduciary duties under ERISA, a prohibited transaction, and a violation of the HIPAA wellness rules. The DOL asks the court to order the employer to reimburse all participants who paid the tobacco surcharge, with interest, and to enjoin the employer from collecting any tobacco surcharge until the wellness program is revised to comply with the HIPAA nondiscrimination requirements (e.g., provides a compliant reasonable alternative standard and uniform reward). The complaint also asks that the parties be disgorged of "all unjust enrichment or profits received as a result of fiduciary breaches…."

> **Comment.** The complaint asserts HIPAA nondiscrimination violations dating from 2011 to present. This suit may signal an increased focus by the DOL on wellness programs. It's a poignant reminder that plan sponsors and service providers should remain attentive to wellness program compliance and review current designs and administrative procedures to ensure adherence to current law and guidance.

Lessons Learned

The DOL's allegations provide some takeaways for sponsors of wellness programs.

- Those individuals meeting a reasonable alternative standard must have the opportunity to earn the full wellness program reward. Note: the plan has the flexibility to determine how to provide the reward (e.g., through retroactive or *pro rata* payments), as long as the method is reasonable and the individual is made whole (e.g., receives the full amount of the reward).
- If the reasonable alternative standard is an outcome-based program (e.g., requires the individual to be tobacco-free for six months), the plan must provide a second alternative to anyone who fails the standard or allow the individual to follow his or her doctor's recommendations to earn the reward.
- Regular compliance audits will help avoid these and other pitfalls.

Regulations Provide Safe Harbor

In the preamble to the HIPAA wellness regulations, the departments state that the rules provide "criteria for an affirmative defense that can be used by plans and issuers in response to a claim that the plan or issuer discriminated under the HIPAA nondiscrimination provisions." Regular self-audits and adherence to the regulations can help a plan sponsor avoid costly claims.

In Closing

Often described as similar to a game of whack-a-mole, regulatory compliance for group health plans and wellness programs can be challenging. Expect these programs to continue to garner attention from all stakeholders, in and out of the courts. It's important for employers be aware of any risks associated with their welfare benefit plans and to continue to seek advice from compliance experts and trusted advisors when designing and maintaining such programs.

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