COMPLIANCE BULLETIN

Court Vacates EEOC's Wellness Rules for 2019

On Dec. 20, 2017, the U.S. District Court for the District of Columbia vacated key provisions of the Equal Employment Opportunity Commission's (EEOC) final rules for employer-sponsored wellness plans. However, to avoid disruption to employers, the court stayed its ruling until **Jan. 1, 2019**.

The EEOC's final rules allow employers to offer wellness incentives of up to 30 percent of the cost of health plan coverage. In an earlier ruling, the court held that the EEOC failed to provide a reasoned explanation for the incentive limit and sent the final rules back to the EEOC for reconsideration.

In its latest ruling, the court vacated the final rules' incentive limits, stating that the EEOC's unhurried approach for issuing new wellness rules is unacceptable. The court also strongly encouraged the EEOC to speed up its rule-making process for wellness programs.

ACTION STEPS

For now, the EEOC's final wellness rules remain in place. However, beginning Jan. 1, 2019, the final rules' guidance on permissible incentive limits for voluntary wellness programs will no longer apply. Due to this new legal uncertainty, employers should carefully consider the level of incentives they use with their wellness programs. Employers should also monitor any developments related to the EEOC's rules.

HIGHLIGHTS

- A federal district court vacated key provisions of the EEOC's wellness program rules, effective Jan. 1, 2019.
- Employers should be careful about structuring incentives for wellness programs that ask for health information or involve medical exams.
- It is possible that the EEOC will issue new wellness rules prior to 2019.

IMPORTANT DATES

January 1, 2017
EEOC's final wellness rules under ADA and GINA became effective.

January 1, 2019
District court's ruling to vacate incentive limits under the EEOC's final wellness rules takes effect.

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Final Wellness Rules

Federal laws affect the design of wellness programs, including two laws that are enforced by the EEOC—the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).

Before the EEOC issued its final wellness program rules, it was unclear whether incentives to participate in a wellness program were permissible and, if so, in what amount.

- Under the ADA, an employer may make disability-related inquiries and require medical examinations after employment begins only if they are job-related and consistent with business necessity. However, these inquiries and exams are permitted if they are part of a **voluntary wellness program**.
- Under GINA, employers cannot request, require or purchase genetic information. This includes information about an employee's genetic tests, the genetic tests of family members and the manifestation of a disease or disorder of a family member. Like the ADA, GINA includes an exception that permits employers to collect this information as part of a wellness program, as long as the provision of information is **voluntary**.

Neither the ADA nor GINA define the term "voluntary" in the context of wellness programs. For many years, the EEOC did not definitively address whether incentives to participate in wellness programs are permissible under the ADA and, if so, in what amount. On May 16, 2016, the EEOC issued final rules that describe how the ADA and GINA apply to employer-sponsored wellness programs. These rules became effective on **Jan. 1, 2017**.

- ✓ The **final ADA rule** provides that incentives offered to an employee who answers disability-related questions or undergoes medical examinations as part of a wellness program may not exceed **30 percent** of the total cost for self-only health plan coverage.
- ✓ The **final GINA rule** clarifies that an employer may offer an incentive of up to **30 percent** of the total cost of self-only coverage to an employee whose spouse provides information about his or her current or past health status as part of the employer's wellness program.

Court Decisions

First Decision – Incentive Limit is Arbitrary

On Aug. 22, 2017, the U.S. District Court for the District of Columbia ruled against the EEOC and remanded the final wellness rules back to the agency for reconsideration. In this case, the AARP argued that the 30 percent incentive limit is inconsistent with the voluntary requirements of the ADA and GINA, and that employees who cannot afford to pay a 30 percent increase in premiums will be forced to disclose their protected information when they would otherwise choose not to do so.

The court concluded that the EEOC's basis for establishing this incentive level was not well reasoned and not entitled to deference from the court. Rather than vacating the rules altogether and risking potential disruption for employers, however, the court remanded them to the EEOC for reconsideration.

Second Decision – EEOC's Rules are Vacated on Jan. 1, 2019

In its most recent ruling from Dec. 20, 2017, the court stated that the EEOC's unhurried approach for reconsidering its final wellness rule is not what the court envisioned when it remanded the rules. The EEOC indicated that it would issue a new final wellness rule in October 2019 that would be applicable, at the earliest, in 2021. This lengthy timeline, according to the court, is unacceptable.

Thus, the court vacated the EEOC's limits on wellness incentives, but stayed its ruling until Jan. 1, 2019, to avoid disruption for employer-sponsored wellness plans. According to the court, this extended deadline will give employers the time they need to structure their wellness plans for 2019, knowing that the EEOC's incentive limits have been thrown out. The court also encouraged the EEOC to speed up its timeline for issuing new rules on wellness program incentives.