COMPLIANCE BULLETIN

Court Orders EEOC to Reconsider Wellness Rules

The U.S. District Court for the District of Columbia has issued a ruling affecting the Equal Employment Opportunity Commission's (EEOC) final wellness rules. In *AARP v. EEOC*, the court directed the EEOC to reconsider its final wellness rules under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).

The final rules allow employers to offer wellness incentives of up to 30 percent of the cost of health plan coverage. The court held that the EEOC failed to provide a reasoned explanation for adopting the incentive limit. Rather than vacating the final rules, the court sent them back to the EEOC for reconsideration.

ACTION STEPS

It is unclear how the EEOC will respond to the court's decision—the EEOC may appeal the ruling or reduce the amount of permitted incentives. For now, the EEOC's final wellness rules remain in place.

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 sent the final wellness rules back to the EEOC for reconsideration.
- The court concluded that the EEOC did not provide a reasoned explanation for its 30 percent incentive limit.
- It is unclear how the EEOC will respond to the court's ruling.

IMPORTANT DATES

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

August 22, 2017
District court remands final wellness rules to the EEOC for reconsideration.

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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 ADA and GINA.

- 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**.

The court rejected the 30 percent incentive limit adopted by the EEOC's final wellness rules, concluding that it was not well reasoned, and sent the rules back to the EEOC for reconsideration.

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 long-awaited 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 Decision

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 EEOC identified numerous reasons for why it adopted the 30 percent incentive limit. However, 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, however, the court remanded them to the EEOC for reconsideration.