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Wellness Programs and 2018 EEOC Update

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Topics of Discussion

- Wellness Programs
  - Impact of AARP v. EEOC

- 2018 EEOC Update
  - What to expect from the EEOC in FY 2018-2022

Wellness Programs

AARP v. EEOC

United States District Court for the District of Columbia,
Case 1:16-cv-02113-JDB

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Summary of Case Background:

Regulatory

&

Statutory Framework

Health Insurance Portability and Accountability Act & Affordable Care Act

- Wellness programs are regulated in part by HIPAA, as amended by the ACA, as well as by HIPAA's implementing regulations.
- HIPAA prohibits health plans and insurers from discriminating on the basis of "any health status related factor."
- However, covered entities may offer "premium discounts or rebates" on a plan participant's copayments or deductibles in return for that individual's compliance with a wellness program.
- 29 U.S.C. § 1182(b)(2)(B); 26 U.S.C. § 9802(b); 42 U.S.C. § 300gg-4(b).

HIPAA & ACA (continued)

- A “reward” or incentive may include a discount on insurance costs or a penalty that increases the plan participant’s costs because of non-participation in the wellness program.
  - 26 C.F.R. § 54.9802-1(f)(1)(i).

HIPAA & ACA (continued)

- The ACA's amendments to HIPAA, and related regulations, allow plans and insurers to offer incentives of up to 30% of the cost of coverage in exchange for an employee's participation in a "health-contingent wellness program."
  - A wellness program in which the reward is based on an insured individual's satisfaction of a particular health-related factor.
- Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 78 Fed. Reg. 33,158, 33,180 ("2013 HIPAA regulations).

HIPAA & ACA (continued)

- The ACA and the 2013 HIPAA regulations do not impose a cap on incentives that may be offered in connection with a "participatory wellness programs."

  - Programs that do not condition receipt of the incentive on satisfaction of a health factor.

Wellness Programs: Medical Information Collection

- Wellness programs typically involve the collection of medical information.
  - May be information regarding a disability; and/or
  - Genetic information.

Americans With Disabilities Act

- ADA prohibits discrimination against employees and job applicants in employment-related decisions such as hiring, promotion, or termination relating to their disability or perceived disability.

- ADA generally applies to employers with 15 or more employees for each working day in each of 20 or more working weeks in the current or preceding calendar year.

ADA Limits Collection of Medical Information

- A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.
  - 42 U.S.C. §12112(d)(4)(A); 29 C.F.R. §1630.14(c)

ADA Exception Which Allows Collection

- The ADA provides that an employer may conduct medical examinations and collect employee medical history as part of an "employee health program," as long as the employee's participation in the program is "voluntary".
  - 42 U.S.C. § 12112(d)(4)(B).

- "Voluntary" is not defined by the ADA.

Genetic Information Nondiscrimination Act

- GINA generally restricts the acquisition and disclosure of genetic information and prohibits the use of genetic information in making employment decisions, including discrimination against an employee or applicant because of genetic information.

- Applies to employers with 15 or more employees.

GINA Limits Collection of Genetic Information

- GINA prohibits employers from requesting, requiring, or purchasing “genetic information” from employees or their family members.
  - 42 U.S.C. § 2000ff-1(b).
- Genetic information includes an individual’s genetic tests, the genetic tests of family members such as children and spouses, and the manifestation of a disease or disorder of a family member.
  - 42 U.S.C. § 2000ff(4)(A).

GINA Exception Which Allows Collection

- Employers are permitted to collect this information as part of a wellness program, as long as the employee's provision of the information is voluntary.
  - 42 U.S.C. §§ 2000ff-1(b)(2)(A)–(B).

- "Voluntary" is not defined by GINA.

Equal Employment Opportunity Commission

- EEOC enforces the provisions of the ADA and GINA.
- For that reason, wellness programs fall within the purview of the EEOC.

EEOC & The Definition of "Voluntary"

- Prior to EEOC regulations, employer uncertainty as to whether the "voluntary" provisions of the ADA and GINA permit the use of incentives in those wellness programs that implicate ADA or GINA protected information.

- EEOC originally took the position that a wellness program was not "voluntary" if the receipt of incentives were conditioned on the employee's disclosure of ADA or GINA protected information.
  - EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations, No. 915.002 (July 27, 2000)

EEOC & The Definition of Voluntary (continued)

- EEOC promulgated new rules reversing this position in 2016.

- 2016 ADA rule: the use of a penalty or incentive of up to 30% of the cost of self-only coverage will not render “involuntary” a wellness program that seeks the disclosure of ADA protected information.
  - 81 Fed. Reg. at 31,133–34.

EEOC & The Definition of Voluntary (continued)

- 2016 GINA rule: permits employer sponsored wellness programs to offer incentives of up to 30% of the cost of self-only coverage for disclosure of information about a spouse's manifestation of disease or disorder which falls within the definition of the employee's "genetic information" under GINA.
  - 81 Fed. Reg. at 31,144.

EEOC Rules v. HIPAA Regulations

- 2013 HIPAA regulations place caps on incentives only in health-contingent wellness programs.
- However, the incentive limits in the 2016 GINA rule and ADA rule apply both to participatory and health-contingent wellness programs.
  - Rules apply to wellness programs which include disability related inquiries and/or medical examinations (ADA rule) and genetic information inquiries (GINA rule).

AARP v. EEOC:
December 2017 Ruling

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AARP v. EEOC 12/20/17 Memorandum Opinion

- The District Court vacated the incentive limits established by the EEOC in the 2016 GINA Rule and ADA Rule effective January 1, 2019.
- Court found that the rules were arbitrary and capricious; the EEOC failed to give a reasoned explanation for the decision to define “voluntary” as a 30% incentive cap.

AARP v. EEOC 12/20/17 Ruling (continued)

- Court ordered the EEOC to submit a status report on a redraft of the wellness incentive rules by March, 2018.
- Court also ordered the EEOC to propose new rules by August 31, 2018.
  - This portion was later vacated by the Court, meaning there is no pending deadline for proposed new rules.

March 30, 2018 EEOC Status Report

- The EEOC advised the Court that the EEOC "does not currently have plans to issue a Notice of Proposed Rulemaking addressing incentives for participation in employee wellness programs by a particular date certain, but it also has not ruled out the possibility that it may issue such a Notice in the future."

Where are we now?

Wellness Programs Subject to the ADA & GINA

- Uncertainty as to the definition of “voluntary” under the ADA and GINA.
- Uncertainty as to what actions, if any, EEOC will take regarding the permissibility of incentives tied to wellness programs that are subject to the ADA and GINA.
  - Will the EEOC take the position that such incentives are impermissible?
  - Will the EEOC leave alone those programs that are designed to comply with the 30% cap under the soon to be vacated rules?

Alternative Courses of Action

- Continue to follow the 2016 EEOC limits on incentives until the EEOC issues new rules.
  - Assumes the EEOC is unlikely to challenge a program which voluntarily complies with the vacated 2016 ADA rule and GINA rule.
- Evaluate existing wellness programs and work with legal counsel to determine what would comply with the now undefined “voluntary” requirement.
  - Do employees feel compelled to participate in a program which requires the disclosure of medical information because of the amount of the incentive?

Alternative Courses of Action (continued)

- Eliminate medical inquiries and medical exams, removing the wellness program from being subject to the ADA and GINA.
- Eliminate incentives and penalties, making the wellness program purely voluntary, when offering health risk assessments or biometric screenings.
  - Does the AARP v. EEOC decision mean that a voluntary program cannot include any incentives or penalties?
    - Court considered vacatur commenting "Employers who adopted incentives would be faced with the possibility that their current health plans are illegal."
      - December 20, 2017 Memorandum Opinion at page 35.

Alternative Courses of Action (continued)

- Provide incentives to activities that are not subject to the ADA and GINA.
  - Tobacco user surcharges with no medical testing;
  - Participatory programs such as health seminars or gym use that do not contain disability-related inquiries; and
  - Activity-based programs with no medical tests such as walking challenges.
  - Such incentives would need to comply with HIPAA and other applicable rules.
- JA Counter.com, Legal Alert: EEOC's Status Report in AARP v. EEOC Creates Uncertainty for Wellness Programs, 4/17/18.

Practical Considerations

- For the time being, no one can say how the “voluntary” requirements under the ADA and GINA will be defined.
- EEOC has no set schedule to issue new proposed rules.
- EEOC has indicated in the past that it might not issue new proposed rules until 2021.

Practical Considerations (continued)

- Compliance is still required for the other EEOC wellness regulations, for example:
  - Notice requirements;
  - Nondiscrimination rules;
  - Prohibition of requiring employees to agree to the sale, exchange, transfer or sharing or other disclosure of medical information; and
  - Confidentiality requirements.
- Monitor EEOC announcements and work closely with legal counsel.

2018 EEOC Update

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Sexual Harassment

- In FY 2018, the EEOC filed 66 lawsuits challenging workplace harassment, 41 of which alleged sexual harassment. This is more than a 50 percent increase in lawsuits challenging sexual harassment over FY 2017.
- For charges alleging harassment, EEOC announced reasonable cause findings increased by 23.6 percent to nearly 1,200 in FY 2018.
- EEOC announced obtaining nearly $70 million for victims of sexual harassment through administrative enforcement and litigation in FY 2018, up from $47.5 million in FY 2017.
- EEOC.gov: What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment

Sexual Harassment (continued)

- The law is the same, but prudent employers will:
  - Review and update policies;
  - Provide periodic training to management and staff; and
  - Routinely make clear to employees that the company has zero tolerance for behavior that violates anti-harassment policies.
    - Staff meetings;
    - Newsletters;
    - Letters from the president.

EEO-1 Pay Data Collection

- In August, 2017, Trump Administration stayed implementation of EEO-1 form which added certain payroll data.
- In 2018, nominated commissioners have indicated that the payroll data portion of the form will be reworked to collect data the EEOC needs to enforce the equal pay laws.
- It is likely that some form of payroll data will be added to the EEO-1 in the future.

New Priority in Strategic Plan for FY2018-2022

- EEOC will focus on addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern, or South Asia descent.

- This focus will be on protecting members of these groups from backlash following tragic events in the United States and the rest of the world.

New Priorities: Strategic Plan for FY2018-2022 (continued)

- EEOC will work to clarify the application of anti-discrimination laws as employment relationships evolve including temporary workers, staffing agencies, independent contractors, and gig economy businesses (short-term contracts or freelance work as opposed to permanent jobs).
- This continues to be an important initiative to other federal agencies and state agencies.

ADA Initiative Revised

- ADA charges have been aggressively pursued for the last several years.
- In the FY2018-2022 Strategic Plan, the ADA priorities are more narrow and focus on qualification standards and inflexible leave policies that discriminate against individuals with disabilities.
  - June 5, 2018 $3.5 million settlement and consent decree entered in *EEOC v. Nevada Restaurant Services Inc.* is a recent EEOC victory in its campaign to target employer "maximum-leave" and "100-percent-healed" policies.

Equal Pay

- In its FY2018-2022 Strategic Plan, the EEOC indicates that it intends to expand its priority on equal pay to go beyond sex discrimination and address compensation systems and practices that discriminate based on race, ethnicity, age, individuals with disabilities, and other protected groups.
- This seems to indicate that EEO-1 form will eventually include some level of pay data.

Access to the Legal System

- EEOC will focus on challenging practices that the EEOC perceives to limit employees' substantive rights or impede the EEOC's investigative or enforcement efforts.
- This includes waivers, releases of claims and mandatory arbitration provisions that the EEOC determines to be overly broad.

Q & A

Thank you for your time and attention.

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