K&L GATES

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Be Careful with Your Carrots and Sticks: Legal Pitfalls of Employer Wellness Incentives

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WELLNESS PROGRAMS' ADA ORIGINS

- ADA: Generally prohibits employers from requiring medical exams or making inquiries of an employee's disability.
- Exception for employee wellness programs if exams and inquiries are "voluntary."

EEOC'S ORIGINAL DEFINITION OF "VOLUNTARY" (2000)

- 2000: EEOC promulgated rule that held, for purposes of the ADA, a wellness program is "voluntary" as long as "an employer neither requires participation nor penalizes employees who do not participate."

GENETIC INFORMATION NONDISCRIMINATION ACT

- 2008: Congress enacted GINA. Prohibits discrimination based on genetic information and family medical history. (Includes dependents)
- Employer can request health services as part of a wellness program if the employee provides "voluntary" authorization.

2016: EEOC CHANGES DEFINITION OF "VOLUNTARY"

- 2016: EEOC issues rules applying to ADA and GINA regarding employer wellness programs
  - Rule only applies to programs that require employees to answer disability-related questions or undergo medical exams to earn a reward or avoid a penalty.
  - Exams and inquiries were "voluntary" as long as the incentive/penalty did not exceed 30% of the cost of the lowest cost individual medical plan.

AARP V. EEOC, 267 F.SUPP.3D 14 (D.D.C. 8/22/17)

- October 2016: AARP challenged EEOC's rule allowing plans to offer incentives up to 30%
  - AARP: 30% incentive is inconsistent with voluntary requirements of ADA and GINA
  - Employees who are forced to pay a 30% increase in premium are not "voluntarily" disclosing protected information.

AARP V. EEOC

- Standard of review: Courts must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.
- Chevron review:
  - (1) Parties agreed "voluntary" is ambiguous.
  - (2) Court would defer to agency's interpretation of "voluntary" if agency offered a reasoned explanation.

AARP V. EEOC

- Court rejected each of EEOC's 3 reasons for implementing incentives up to 30% of cost:
  1. ADA rule was not consistent with HIPPA regulations.
  2. 30% incentive level was not a reasonable interpretation of "voluntary" based on current insurance rates.
  3. EEOC's reliance on a comment letter from the American Heart Association was insufficient.

AARP V. EEOC

- EEOC failed to consider any factors relevant to the financial or economic impact of the rule
  - A 30% penalty would effectively double the cost of health insurance for most employees
  - 30% incentive level likely would be far more coercive for employees with lower incomes and disabilities.

AARP V. EEOC

- "[T]he Court can find nothing in the record that explains the agency's conclusion that the 30% incentive level is the appropriate level for voluntariness."
- Conclusion: Both of EEOC's rules (ADA and GINA) were arbitrary and capricious.

AARP V. EEOC

- What is the remedy?
  - If Court vacated Rules, it may well end up punishing employers and employees who relied upon the rules.
    - "Vacatur appears likely to cause potentially widespread disruption and confusion"
  - Instead, Court remanded the rules to EEOC for reconsideration.

AARP V. EEOC (II)

- AARP v. EEOC, 292 F.Supp.3d 238 (D.D.C. 12/20/17)
  - EEOC indicated that it intended to issue a final rule in October 2019 that would be applicable, at the earliest, in 2021.
  - AARP: Employers will easily be able to adjust to a vacatur that takes effect January 1, 2018.

AARP V. EEOC (II)

- "There is significant evidence in the record that **employers need to know the regulatory incentive structure for the following year by June or July, at the latest**, in order to have enough time to design their wellness plans."
- "[T]he Court cannot simply assume that employers will be able to adjust their wellness plans on the fly…."

AARP V. EEOC (II)

- EEOC's proposed timeline was "unacceptable" and "not what the Court envisioned when it assumed that the Commission could address its errors 'in a timely manner.'"
- Court vacated the EEOC's rules regarding ADA and GINA but stayed the effective date until January 1, 2019.
- "EEOC will thus have had a total of over sixteen months to come up with interim or new permanent rules by the time the vacatur takes place."

CURRENT STATUS OF EEOC'S RULES: IN LIMBO

- December 20, 2018: EEOC withdrew the "incentive" portions of the 2016 rules.
- Otherwise, EEOC's prior guidance and regulations (including original 2000 Rules) remain in place.
- Several proposed target dates for EEOC's promulgation of new rules have come and gone.

CURRENT PREVALENCE OF EMPLOYER WELLNESS INCENTIVES

- As of 2018, 62% of large employers (>200 people) offered a health risk assessment to employers.
  - 51% of those employers offered an incentive to encourage employees to complete assessment.
- 50% of large employers offer employees opportunity to complete a biometric screening.
  - 60% of those firms offered an incentive to encourage employees to complete biometric screening.
- Source: Kaiser Family Foundation 2018 Annual Survey “Employer Health Benefits”

KWESELL V. YALE UNIVERSITY, 3:19-CV-1098 (D. CONN.)

- July 16, 2019: AARP led a class action on behalf of all current and former employees of Yale University who were required to participate in Yale's employee wellness program
- Complaint alleges Yale employees must "adhere to a strict schedule of examinations, testing and vaccination[s]" or be considered "out of compliance."
- Consequence for being out of compliance: pay a $25 weekly fine ($1,300/year).

KWESELL V. YALE UNIVERSITY

- Complaint: Employees “can’t throw away $25 [per week] to keep [their] information private.”
- Remedies sought:
  - Class certification
  - Declaration that Yale’s conduct violates ADA and GINA
  - Injunction prohibiting Yale from imposing fines on employees who don’t submit to medical exams
  - Damages
  - Attorneys’ fees

DON'T FORGET ABOUT HIPPA

- HIPPA generally prohibits health plans from charging similarly situated individuals differently based on a health factor.
- Exception for wellness program
  - Distinction between "participatory" programs and "health-contingent" programs
    - 2 types of health-contingent programs: activity-only and outcome-based

https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/caghipaaandaca.pdf

HIPPA

- Health-contingent wellness programs must follow 5 standards related to non-discrimination:
  1. Eligible individuals must be able to qualify at least once per year
  2. Incentive or penalty can't exceed 30% of the cost of coverage (50% if related to tobacco use)
  3. Program must be reasonably designed to promote health and prevent disease
  4. Reward must be available to all similarly situated individuals
  5. Plan must disclose the terms of the program or a reasonable alternative standard.

YOUR PLAN'S RISK OF LEGAL CHALLENGE

High risk

- Plans with penalty/incentives greater than 30% of the cost of coverage

Uncertain risk

- An incentive that is more than *de minimis* but less than 30% of the cost of coverage

Low risk

- Keep wellness program, but eliminate incentives/penalties until EEOC issues new guidance
- Participatory instead of health-contingent programs

YOUR PLAN'S RISK OF LEGAL CHALLENGE

- Lodestar: Wellness incentive must be voluntary, not coercive

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THANK YOU

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