KATZ, MARSHALL & BANKS, LLP

Court Sends EEOC Wellness Regulations Back to the Drawing Board

September 19, 2017

A recent decision by the U.S. District Court for the District of Columbia may eventually lead to a change in the rules on incentives employers may provide to persuade employees to participate in workplace wellness programs. On August 22, the court held in *AARP v. United States Equal Employment Opportunity Commission* that incentives and penalties up to 30 percent of employee health care costs could be coercive, and are inconsistent with the requirement under both the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA) that participation in such programs must be voluntary.

Background of ADA and GINA

Workplace wellness programs have gained popularity in recent years as a way of promoting employee health and wellness and reducing medical costs. These programs are often aimed at changing behaviors such as smoking or unhealthy eating. As an inducement for employees to participate, employers or insurance companies offer lowered premiums or other financial inducements or penalties.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) allows health plans and insurers to offer premium discounts or penalties to encourage participation in wellness programs, and the Affordable Care Act further promoted company use of health-contingent wellness programs by permitting incentives of up to 30 percent of the cost of coverage. The operation of these programs necessarily requires employees who participate to provide certain otherwise confidential medical information. It is that requirement that creates the potential for violations of the ADA and GINA.

The ADA and GINA generally prohibit employers from requiring medical examinations or asking any disability-related questions unless they are job-related and consistent with business necessity. The ADA has an exception that allows an employer to collect such information as part of the operation of a wellness program, so long as the employee's participation is "voluntary." Similarly, GINA permits employers to collect genetic information (which includes family medical history) as part of a wellness program if the employee's participation is "voluntary."

The Equal Employment Opportunity Commission (EEOC) administers and enforces the ADA and GINA and has rulemaking authority under both statutes. The agency has deliberated for some time about how to define the term "voluntary" in the context of employee wellness programs.

Background of *AARP v. United States Equal Employment Opportunity Commission*

In May 2016, the EEOC issued a final rule that codified employers' right to offer incentives, financial or otherwise, to encourage participation in wellness programs that would require employees to disclose health records or take medical examinations. The purpose of the rule was to clarify the term "voluntary" and what constituted a health program. The EEOC determined that a 30 percent incentive would be consistent with the notion of voluntary participation.

The AARP – the interest group that represents older Americans – sued the EEOC and asked the court to enter a preliminary injunction, which the court denied based on the incomplete administrative record before it at the time. AARP claimed that a 30 percent incentive is too high and would force employees to participate in wellness programs and disclose otherwise confidential medical information rather than lose out on this significant benefit.

The District Court's Decision

After deciding that AARP had standing to sue, the court analyzed the EEOC rules under the deference standard in *Chevron v. National Resources Defense Council*, which requires that a court defer to an agency rule only if the agency has offered a reasoned explanation for its rule. The court determined that the EEOC's ADA and GINA rules flunked this test. The court concluded that the EEOC's administrative record offered no justification for the conclusion that a 30 percent incentive is consistent with the notion of voluntary participation in such plans. The court asked rhetorically, why is 30 percent the magic cutoff between voluntary and involuntary?

The EEOC justified its choice by its desire to harmonize its regulations with HIPAA. The court rejected this reasoning because HIPAA's purpose is to prevent insurance discrimination, and its 30 percent incentive cap is unrelated to participation being voluntary. HIPAA does not seek to police coercion. In summary, using HIPAA regulations to influence the EEOC incentive cap in this way makes little sense as HIPAA and the ACA were adopted with different considerations and for different reasons.

The court also dismissed the EEOC's explanations of basing the 30 percent cap on insurance rates and recommendations from the American Heart Association as lacking substance. Both arguments still failed to demonstrate why the EEOC determined that 30 percent is an optimal number. The court also rejected the EEOC's argument that it had relied on stakeholder comments, since most comments in the record did not support the 30 percent rule the agency adopted.

In addition to rejecting the reasons the EEOC offered for adopting the 30 percent incentive rule, the court faulted the agency for providing no economic rationale for its judgment that an incentive of this size would not be coercive. The court noted that paying 30 percent more would double the premium for many individuals and that difference of around $1,800 would pay for several months of food for the average family, and roughly two months' rent and childcare in many states. The court found it unreasonable that the EEOC did not even attempt to explain its conclusion that an incentive or penalty of this size would not undercut an employee's "voluntary" choice to enroll in a wellness program.

The court thus found in favor of AARP on its challenge to the reasonableness of the EEOC's regulations. Judge John D. Bates, believing that vacating the rules would likely cause great disruption, simply remanded the rules and required the EEOC to reconsider. The decision does not indicate the timeline or procedure for further review of the next iteration of the rules.

Lessons from *AARP v. United States Equal Employment Opportunity Commission*

Although *Chevron* deference provides government agencies considerable latitude, they still must provide reasoned justifications for their decisions. The ADA, GINA, and HIPAA include strong protections for the privacy of medical information, but their exceptions, apparent contradictions, and overlapping objectives create some confusion. The court's decision left the EEOC incentive rules in place, but requires that the agency revisit its decision-making process and provide a better justification for thinking incentives of a particular level are consistent with voluntary participation in plans that require disclosing otherwise confidential information.