



COMPLIANCE SERVICES **ALERT** LOCKTON BENEFIT GROUP



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Federal Court Keeps EEOC Wellness Rules in Place but Demands EEOC Reconsider its Reasoning

A lower federal court ruled this week that the Equal Employment Opportunity Commission (EEOC) must try again to justify its controversial wellness program rules, or will need to change them. The court left the rules in force for now, but the decision raises the possibility that, over the coming months, the rules may be withdrawn or modified in ways that could make wellness program administration even more challenging.

Last year, the EEOC issued long-awaited final regulations interpreting how the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA) apply to wellness programs. Those rules are more fully discussed in this [Alert](#). In general, the ADA and GINA permit employer wellness programs that include common features like biometric screenings and health questionnaires only if, in addition to other conditions, the program is voluntary. The final rules generally conclude that participation in a wellness program subject to the ADA or GINA is voluntary as long as, among other things, any incentive for participation is limited to 30 percent of the lowest cost self-only coverage option.

Lockton comment: Employers have largely been critical of the EEOC rules, arguing that they diverge from other wellness rules included in the Affordable Care Act (ACA) and Health Insurance Portability and Accountability Act (HIPAA). The ACA/HIPAA rules also limit the size of incentives to 30 percent in many cases (50 percent for tobacco-related programs), but that limit is calculated differently than under the EEOC's final rules.

Late last year, the American Association of Retired Persons (AARP) filed a lawsuit (discussed in our [blog](#)) asking the court to stop the EEOC from enforcing the final rules. As part of its challenge, the AARP argued that the EEOC did not sufficiently justify how a wellness program with a 30 percent incentive could be viewed as voluntary.

In yesterday's ruling, the court agreed with the AARP that the EEOC needed to provide additional justification or rewrite its rules; however, the court made it clear that the EEOC could continue to enforce the 30 percent incentive limit for now.

The Impact on Employers Sponsoring Wellness Programs

The ruling has little practical effect in the near term. ***The EEOC can still enforce the final rules, so wellness program sponsors are encouraged to continue complying with those rules.*** The real impact will be in what happens next.

Lockton comment: We note that the court's ruling is restricted to the 30 percent incentive limit. The court did not consider, and therefore did not find a problem with, other portions of the final rules including the notice or consent requirements and the rule prohibiting employers from limiting access to certain health plan options only to wellness program participants.

The 30 percent limit may survive if the EEOC appeals and wins, or if it reevaluates the final rules and finds enough support for its original conclusion. Alternatively, the EEOC could reexamine the rule and lower the maximum incentive, creating an even bigger disconnect between the ADA/GINA rules and the ACA/HIPAA rules and more headaches for employers. The EEOC could even withdraw the final rules altogether. Despite the controversy surrounding the final rules, the EEOC did provide clarity as to how a wellness program can comply with the ADA and GINA, so withdrawing those rules would create uncertainty for employers.

An additional wrinkle is that the EEOC board is currently in transition. President Donald Trump's chairperson nominee is currently waiting Senate confirmation while another current EEOC board member's term is about to expire. As such, optimists among us will view this as an opportunity for a "new" EEOC to reevaluate the final rules and reform them, in whole or in part, to better align with the ACA/HIPAA rules.

Lockton comment: Lockton will continue to work with the EEOC to reform the final rules in just this way. We will also point to this case when speaking to members of Congress about the need to pass federal legislation that synchronizes the ADA/GINA wellness program rules with the ACA/HIPAA wellness program rules.

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