Yale Deal Shows Pitfalls Of Penalty-Based Wellness Programs

By **Chad DeGroot** (March 15, 2022)

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In 2019, a class action — Kwesell v. Yale University — was filed in the U.S. District Court for the District of Connecticut by current and former employees who were offered the opportunity to participate in Yale's health expectation program. The health expectation program required medical screenings the results of which were shared with the wellness vendors to facilitate health coaching.

An employee's or his or her spouse's failure to complete the screening would trigger a penalty of $25 per paycheck, or $1,300 annually for many employees. The lawsuit accused Yale of, among other things, violating the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act, or GINA.

On March 4, 2022, a motion to grant approval of a settlement of that class action was filed, under which Yale would agree to

- Pay $1.29 million to employees subject to the health expectation program and their attorneys;

- Cease collection of the fees at issue for a period of four years or until there is a change in the law that permits such collection; and

- Make changes related to the transfer of health data related to the health expectation program.

This settlement primarily highlights the ongoing risks associated with wellness programs that penalize failures to participate that will continue to exist until the U.S. Equal Employment Opportunity Commission issues regulations establishing what exactly is permitted under the ADA, if anything, with respect to wellness programs.

History of Rules and Current Guidance

Wellness programs are regulated in part by the Health Insurance Portability and Accountability Act and in part by the ADA and GINA. The HIPAA wellness rules have been well settled and were codified, in part, under the Affordable Care Act.

However, the EEOC has yet to issue new rules under the ADA and GINA as to how wellness programs with rewards or penalties can coexist with the statutory protections of the ADA and GINA.

The ADA generally prohibits an employer from requiring employees to undergo physical examinations or respond to medical inquiries.[1]

However, the ADA provides an exception for voluntary medical examinations and inquiries that are part of a health program, such as a wellness program, so long as participation in the program is voluntary, the information is kept confidential in accordance with the ADA and the information is not used to discriminate against the employee.[2]

GINA prohibits an employer from requesting genetic information from its employees.[3] In addition to genetic tests, "genetic information" for this purpose includes information about a disease or disorder in an individual's family member, including spouses.[4] However, GINA, like the ADA, provides an exception to these prohibitions in the case of a voluntary disclosure as part of a wellness program.[5]

It is this question of what constitutes voluntary requests or inquiries that has been the source of confusion among wellness programs and lawsuits against wellness programs when a participation penalty or incentive is involved.

In 2016, the EEOC issued final regulations under the ADA and GINA setting forth the extent to which an employer could offer a wellness program with incentives or penalties while maintaining a voluntary program that would not run afoul of the ADA and GINA.[6]

The 2016 ADA regulations effectively offered a safe harbor by providing that wellness programs, which are part of a group health plan and ask questions about employees' health or include medical examinations, may offer incentives of up to 30% of the total cost of self-only coverage.

The 2016 GINA regulations provided that the value of the maximum incentive attributable to a spouse's participation may not exceed 30% of the total cost of self-only coverage — the same incentive allowed for the employee.

These thresholds seemingly were intended to harmonize with the HIPAA thresholds, but the ADA and GINA limits related to the total cost of employee-only coverage as opposed to the total cost of any coverage, and the HIPAA limit only applies to health-contingent wellness programs, as opposed to all wellness programs. Thus, there was confusion and inconsistency among the federal regulations in that regard.

In 2016, AARP — the organization also representing the employees in the Yale case — sued the EEOC alleging that the 2016 regulations, including the 30% limits on penalties, would render the wellness programs involuntary and were contrary to the protections of the ADA and GINA.

In 2017, the U.S. District Court for the District of Columbia vacated these safe harbor incentive percentages.[7] On Dec. 20, 2018, consistent with the court's order, the EEOC withdrew the incentive percentage aspects of the 2016 regulations.

In January 2021, the EEOC issued and later withdrew further proposed rules. As a result, employers are still without guidance from the EEOC as to what might constitute an acceptable penalty or incentive under a wellness program while maintaining compliance with the ADA and GINA.

Unlike the EEOC regulations described above, the guidance pertaining to wellness programs under HIPAA and the ACA has remained largely unchallenged and is well settled. The HIPAA wellness program regulations essentially provide an exception to the HIPAA prohibition on discriminating based on a health factor, which is of similar intent to that underlying the ADA

and GINA wellness rules — i.e., to permit something in part that is prohibited by statute.

This may be due to the fact that those statutes provide for private causes of action, after certain administrative procedural steps are exhausted, while HIPAA generally does not.

Where Things Stand

Any penalties or incentives associated with an employee's or his or her spouse's failure to participate in or comply with a wellness program will carry risk for the sponsoring employer. That risk is mitigated as the penalties or incentives are reduced.

But, absent defensible EEOC regulations specifically permitting a particular threshold of penalty, employees and organizations will continue to bring lawsuits where a penalty is considered to be too high, as even a nominal penalty arguably could render a program involuntary.

As that penalty increases so too does the risk of upsetting employees or unions to the point that litigation could result.

As a result, employers sponsoring wellness programs should review any wellness program offered, especially those with any monetary incentives or surcharges attached to it, and weigh the potential risks against the potential benefits of the program.

As suggested above, those potential risks will increase as the penalties for noncompliance with a wellness program are increased and have a greater financial impact on the employees. The potential or theoretical benefits of wellness programs are obvious, but over the years, opponents have questioned the efficacy of wellness programs, arguing that there are no proven or significant benefits.

All of these factors should be taken into account when considering implementing a wellness program or continuing to maintain such a program. After all, the relative success of AARP in challenging Yale's wellness program likely will encourage it and other attorneys and unions or other organizations to challenge wellness programs that contain similar penalties.

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[1] 42 U.S.C. 12112(d)(4)(A).

[2] Id. at 12112(d)(4).

[3] 42 U.S.C. 2000ff-1(b).

[4] 42 U.S.C. 2000ff.

[5] 42 U.S.C. 2000ff-1(b)(2).

[6] 81 Fed. Reg. 31143 (May 17, 2016).

[7] AARP v. United States EEOC , 267 F. Supp. 3d 14 (D.D.C., 2017).