Yale Case Reminds Employers Of Key Wellness Program Risk

By **Chad DeGroot**

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While employee wellness programs have grown in popularity over the past several years, so too have the legal challenges they face. Lisa Kwesell et al. v. Yale University, a class action in the U.S. District Court for the District of Connecticut, was filed in reaction to a wellness program implemented by the university. The case highlights a key risk employers face in utilizing wellness programs that include financial penalties or rewards: that they will not be considered voluntary, and therefore possibly violate the Americans with Disabilities Act and/or Genetic Information Nondiscrimination Act.

Until the U.S. Equal Employment Opportunity Commission issues revised regulations describing what is an acceptable wellness program incentive/penalty that will avoid violating the ADA and GINA, employers implementing such incentives/penalties as part of their wellness programs are operating very much in the dark and these lawsuits likely will persist.

Wellness programs are regulated in part by the Health Insurance Portability and Accountability Act (to protect against discrimination based on health factors) and by the ADA and GINA (to protect sensitive health information of employees). While the HIPAA wellness rules have been well settled and were codified, in part, under the Affordable Care Act, the legal landscape related to the ADA and GINA in the context of wellness programs has been less clear as to how wellness programs with rewards/penalties can coexist with the statutory protections of the ADA and GINA.

The ADA and GINA both permit employers to implement wellness programs that may require certain medical tests or disclosures but only so long as those programs remain voluntary. 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 or requiring genetic information from its employees.[3] Genetic information for this purpose includes information about the genetic tests of an individual or her family members, or information about the manifestation of a disease or disorder in an individual's family member.[4] Family member for this purpose includes an individual's spouse, which is why a wellness program that inquires about a spouse's medical history can be subject to GINA, even where it seems that no genetic information is being transmitted or requested. However, GINA also provides an exception to these prohibitions in the case of a voluntary disclosure as part of a wellness program.[5]

The issue with the ADA and GINA prohibitions that often create problems for wellness programs, the EEOC and the courts is what constitutes a voluntary request or inquiry when a penalty is involved for not complying. An argument surely can be made that any penalty for noncompliance would render a wellness program not entirely voluntary. However, the realities of wellness programs require some leeway in that regard.

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 incentive/impose a penalty while maintaining the voluntary nature of the wellness program.[6] The 2016 ADA regulations offered what essentially was 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 — including either a penalty or reward — 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 were set at 30% in an effort to harmonize the regulations with the HIPAA regulations; however, such harmony was not achieved since 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.

In 2016, the AARP sued the EEOC alleging that the EEOC's 2016 wellness program regulations, specifically including the 30% limits on penalties, were arbitrary, capricious, an abuse of discretion and not in accordance with law. The AARP challenged those safe harbor percentages arguing that they rendered the programs involuntary.

In 2017, the U.S. District Court for the District of Columbia vacated these safe harbor incentive percentages.[7] On Dec. 20, 2017, consistent with the court's order, the EEOC withdrew the incentive percentages of the 2016 regulations. No further guidance has been issued by the EEOC as to what employers can do to encourage participation in a wellness program through incentives or surcharges without violating the requirement that participation must be voluntary, thus leaving employers and employees with no guidance as to what would be acceptable under the ADA and/or GINA and render a wellness program voluntary.

In July 2019, a class action was filed against Yale University by current and former employees who are or were offered the opportunity to participate in Yale's health expectation program, or HEP, to avoid paying a penalty of $25 from each paycheck, or $1,300 annually. The lawsuit accuses Yale of not only reducing employees' expected income, but also of violating their civil rights.

It notes that the ADA and GINA prohibit employers from extracting medical or genetic information from employees unless that information is provided voluntarily. The lawsuit goes on to claim that the $1,300 annual penalty makes the HEP anything but voluntary. Much of the complaint focuses on the impact that $1,300 per year has on lower-paid workers, alleging that, among other things, such amount on average is the equivalent of nearly one full month of housing costs for a local resident.

In addition to meeting the requirements of the ADA and GINA, wellness programs must also comply with the HIPAA and the ACA. However, unlike the EEOC regulations described above, the guidance pertaining to wellness programs under HIPAA and the ACA is largely unchallenged and well settled. Unfortunately, due to the recent upheaval surrounding the EEOC's guidance, an employer's wellness program could easily comply with HIPAA and the ACA, but may not be considered voluntary under, and thus risk violating the ADA or GINA.

As highlighted by the lawsuit against Yale, penalties for failure to participate in or comply with a wellness program often are not well received by employees who do not or cannot meet a wellness program's requirements, or those who simply disagree with an employer

getting so involved in an employee's health care. Therefore, if a wellness program adopts a structure whereby it is impacting employees financially, those programs may always face legal risks and challenges under the ADA and GINA until the EEOC issues defensible guidance as to what will be considered a voluntary wellness program under those statutes.

While a weekly or monthly penalty or incentive may not seem like much to some employers, when looked at in terms of the annual impact on employees, particularly those who are not highly compensated, the "voluntariness" of a program starts to not be so clear. As a result, employers sponsoring wellness programs should consult with their legal counsel to review any wellness program offered, especially those with any monetary incentives or surcharges attached to it.

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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).