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Recent Class Action Lawsuit Involving Yale University's Wellness Program Is A Cautionary Tale For Employers

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There is an increasing trend in legal challenges to an employer's administration of a wellness program and whether that program violates the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). Both the ADA and GINA allow for employers to conduct wellness programs and collect certain information as long as the programs are voluntary.

The recent legal challenges primarily focus on the "voluntariness" of the participation in wellness plans that impose a penalty or surcharge (which also could include what is characterized as a "discount" on health care premiums), when the employee does not participate in the wellness plan and/or fails to meet certain objectives. Many employers have implemented wellness programs with a variety of mechanisms to encourage participation through surcharges/penalties and/or discounts.

In July 2019, a class action lawsuit was filed against Yale University by current and former employees who are or were required to participate in Yale's Health Expectation Program (HEP) or pay a fine adding up to $1,300 annually. The lawsuit accuses Yale of not only reducing employees' expected income, but 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 say the $1,300 annual penalty makes the HEP anything but voluntary.

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The precursor leading up to the Yale litigation involved a court's invalidation of a portion of the Equal Employment Opportunity Commission's (EEOC) 2016 regulations, which govern employee wellness programs' compliance under the ADA and GINA. In 2017, the American Association of Retired Persons (AARP) sued the EEOC alleging that the EEOC's 2016 wellness program regulations were arbitrary, capricious, an abuse of discretion, and not in accordance with law.

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 that 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 regulations expressly defined "incentives" to include penalties or surcharges. The 2016 GINA regulations said 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. The AARP asked that the safe harbor percentages be invalidated.

In 2018, the U.S. District Court for the District of Columbia vacated the "safe harbor" incentive percentages of the wellness program regulations. On December 20, 2018, 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.

In addition to meeting the requirements of the ADA and GINA, wellness programs must also comply with the Health Insurance Portability and Accountability Act (HIPAA) and the Affordable Care Act (ACA). However, unlike the EEOC regulations described above, the guidance pertaining to wellness programs under HIPAA and the ACA is well-settled. Unfortunately, due to the recent upheaval surrounding the EEOC's guidance, an employer's wellness program could possibly comply with HIPAA and the ACA but may not be considered "voluntary" under the ADA or GINA.

To minimize any potential exposure that may exist, wellness programs should be scrutinized in light of these legal challenges. Employers sponsoring wellness programs should consult with their legal counsel to review any wellness program offered that has monetary incentives or surcharges attached to participating in the program.

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