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EEOC Rescinds Wellness Regulations

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The Equal Employment Opportunity Commission ("EEOC") has rescinded Wellness Regulations it originally issued in May 2016. The change, which took effect on Jan. 1, 2019, has created uncertainty for employers who collect employee health information as part of their voluntary wellness plans.

On May 16, 2016, the EEOC issued two final rules regarding employer wellness plans (hereinafter "Wellness Regulations"): the first to amend existing regulations under the Genetic Information and Non-Discrimination Act ("GINA") and the second to create new regulations under the Americans with Disabilities Act ("ADA"). In general, GINA prohibits discrimination against employees based on their genetic information and strictly limits the disclosure of such information. Under the applicable provisions of the ADA, medical examinations and disability-related inquiries are required to be job-related and consistent with business necessity. There is an exception to this rule for "voluntary" employee health programs, which includes employee wellness programs if appropriately designed. One of the key issues in the May 2016 EEOC rules was the definition of "voluntary." These rules stated that the analysis of whether a wellness plan was "voluntary" would depend upon the degree of incentives offered to employees for their participation in the plan. Significantly, both the GINA and ADA rules allowed plans and insurers to offer incentives of up to 30 percent of the total cost of self-only coverage to employees in exchange for participation in voluntary employee wellness programs.

The recent rescission of the EEOC's Wellness Regulations regarding GINA and the ADA is in response to the August 2017 decision of D.C. Federal District Court Judge John Bates, who held that the EEOC failed to adequately explain how the 30 percent incentive cap adopted in both the GINA and ADA rules renders participation in wellness programs "voluntary." Stated alternatively, the EEOC has failed to adequately explain how an incentive in excess of 30 percent of the total cost would render the participation to be "involuntary." Specifically, the court held that, "Neither the final rules nor the administrative record contain any concrete data, studies or analysis that would support any particular incentive level as the threshold past which an incentive becomes involuntary in violation of the ADA and GINA."

However, the court also cautioned that immediately vacating the rules would be "likely to have significant disruptive consequences" and cause "potentially widespread disruption and confusion." On this basis, Judge Bates remanded the rules back to the EEOC for reconsideration. Later, in December 2017, the same court stayed vacatur of the rules until January 2019 despite the objections of the EEOC, which claimed that it would be unable to have new rules ready until 2021. It is unclear at this time if the EEOC will be implementing new rules to replace those vacated at the direction of the federal court.

What does this mean for employers?

Employers now enter a period of uncertainty with regard to the collection of employee health information for the purposes of voluntary health plans under the EEOC's Wellness Regulations. Employers should also keep in mind the wellness program regulations jointly finalized in 2013 by the Internal Revenue Service, Department of Labor, and Department of Health and Human Services pursuant to the Patient Protection and Affordable Care Act remain in effect and continue to serve as a baseline for designing and administering wellness programs offered in connection with group health plans. Employers with questions about how to proceed in the absence of EEOC guidance or how to structure their wellness programs in a legally compliant manner should contact their Miller Canfield attorney.