
# ACA, HIPAA AND FEDERAL HEALTH BENEFIT MANDATES: Practical Q&A

*The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.*

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# Wellness Program Incentives and Recent Litigation

The *AARP v. EEOC* case heated up again prior to the end of 2017. If you recall, the AARP filed suit in the District Court of D.C. in October of 2016 to dispute the EEOC's conclusion in its 2016 final regulations that a 30% incentive limit for wellness programs was "voluntary" for purposes of the ADA and GINA.

The AARP also disputed the EEOC's conclusion that incentives provided in exchange for the medical history of the employee's spouse, but not the medical history of the employee's children, did not violate GINA. Under the ADA and GINA, wellness programs that ask certain questions or require medical exams must be voluntary; however, neither the ADA nor GINA define "voluntary." In addition, GINA prohibits requesting, requiring or purchasing the medical history of an employee's family, including but not limited to the employee's spouse.

The District Court found that the EEOC failed to adequately explain its conclusion that incentives and surcharges equal to or less than 30% are voluntary and decided to remand to the EEOC for reconsideration without vacating the portions of the rule challenged by AARP—indicating that vacatur would cause too much disruption for existing wellness programs. In a surprising reversal, the Court changed its mind in December and vacated the rules challenged by the AARP effective January 1, 2019.

Since late December, various benefit pundits have predicted the Court's vacatur of the 30% rule will be the demise of incentive based wellness programs. But is the end really near for such programs?

The EEOC has indicated that it plans to issue a new regulation in late 2019 that will be effective in 2021 at the earliest—so there will likely be a period of time without the final rule. Those opposed to the EEOC's rules will say that the Court's decision in the AARP case to vacate the 30% rule means that employers may not offer any incentives or impose any surcharges in connection with disability related inquiries and/or medical exams. But history tells us something quite different.

The term "voluntary" in the ADA is largely undefined and the EEOC's pre-final rule enforcement guidance was best described as ambiguous.

Ambiguity has a way of breeding flexibility and so it was not uncommon for employers to offer incentives or impose surcharges in connection with disability related inquiries or medical exams that would far exceed the 30% standard established by the EEOC in the final rule—and to do so with impunity.

By way of illustration, the court held *EEOC vs. Orion Energy Systems* that Orion's 100% surcharge imposed on non-participating employees was voluntary because the employee could choose whether to participate. Once the vacatur goes into effect, the post 30% landscape should look very similar to the pre-30% landscape where incentives and surcharges connected to disability related inquiries and/or medical exams existed in abundance.

That is not to say that there is no risk if incentives are provided or surcharges are imposed—even ones that are equal to or less than 30%. There is still risk without that final rule that the incentive or surcharge is coercive and the risk may have increased slightly due to the fact that a federal judge has actually vacated that 30% rule --but history gives no indication that incentive based wellness programs will die January 1, 2019.

The impact the vacatur will have on incentives or surcharges for a spouse's medical history remains unclear but like incentives and surcharges in connection with disability related inquiries and medical exams, pre-final rule wellness programs did provide incentives or impose surcharges in connection with a spouse's medical history.

More importantly, the literal language of the statute does seem to permit an employer's program to acquire a spouse's medical history so long as it is done through a wellness program and the employer obtains the employee's consent in advance of collecting the information.

The future of wellness program incentives undoubtedly will undergo changes in the very near future with or without further EEOC guidance. Employers should work with counsel to carefully review their programs and program incentives in this period of change. ■