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.

Attorneys John R. Hickman, Ashley Gillihan, Carolyn Smith, and Dan Taylor provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte and Washington, D.C. law firm. Ashley Gillihan, Carolyn Smith and Dan Taylor are members of the Health Benefits Practice. Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

Lawsuits are focused on Wellness Program compliance. Are you?

More and more employers are implementing wellness programs these days to help improve employees' health. Properly designed wellness programs provide value to both the employee and the employer. Employees' health improves and, in return, health plan costs go down and productivity goes up. It is a win-win for all involved.

But wellness programs are subject to a variety of complex and often ambiguous federal rules and regulations that make wellness program administration a challenge for even the most astute employer and put inattentive employers who sponsor such programs at risk of liability. Two recent lawsuits highlight the regulatory complexity surrounding wellness programs: *AARP v. EEOC* and *Acosta v. Macy's*.

Employers who sponsor wellness programs (or who are thinking about implementing a wellness program) and wellness program administrators should take note of these lawsuits. The *AARP* lawsuit could impact the future design of wellness programs that offer incentives. The *Macy's* lawsuit underscores the need to pay close attention to the wellness program requirements. We discuss both below.

AARP vs. EEOC

In July of 2016, the EEOC issued regulations under the Americans with Disabilities Act ("ADA") providing that wellness programs that make disability related inquiries or require an employee to take a medical exam can offer an incentive and still qualify as "voluntary" so long as the incentive does not exceed 30% of the cost of self only health coverage.

At the same time, the EEOC also issued regulations under the Generic Information Nondiscrimination Act ("GINA") providing that a similar 30% limitation on incentives for providing a spouse's medical history (i.e., an employee's genetic information) qualifies as voluntary under GINA. The EEOC's new regulations appeared to be a reversal of its prior position that anything other than a nominal incentive was generally not permitted by the ADA and GINA because wellness programs with more than nominal incentives were not "voluntary" as required by both statutes.

The AARP filed suit in October 2016 against the EEOC claiming that the 30% incentive limitation is inconsistent with the ADA's and GINA's voluntary requirements and that the EEOC failed to adequately justify its position that the 30% limitation means that a program is voluntary. AARP does not necessarily argue that the ADA and GINA do not permit incentives; however, AARP argues that the 30% limit is inconsistent with the ordinary meaning of the term "voluntary" because this incentive is too high to give employees a meaningful choice regarding whether or not to participate in wellness programs that require the disclosure of ADA/GINAprotected information.

After reviewing the reasoning provided in the preamble to the regulations and the administrative record, much of which cited to HIPAA's 30% limit as justification for the EEOC's 30% limit, the court issued a Memorandum of Opinion holding that that the EEOC failed to provide support for its determination that the 30% limit is voluntary as contemplated by the ADA and GINA. The court noted:

> *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. To be clear, this would likely be a different case if the administrative record had contained support for and an explanation of the agency's decision, given the deference courts must give in this context. But "deference" does not mean that courts act as a rubber stamp for agency policies. See Presley v. Etowah Cty. Comm'n,502 U.S. 491, 508 (1992) ("Deference does not mean acquiescence."). When choosing from a range of possible interpretations of a statutory term, the agency must give a reasoned explanation for its decision. Absent such reasoning or factual support here, the Court "must conclude" that the agency has made its decision arbitrarily. See Ass'n of Private Colls. & Univs. v. Duncan, 870 F.Supp. 2d 133, 154 (D.D.C. 2012) (citing U.S. Air. Tour Ass'n v. FAA, 298 F.3d 997, 1019 (D.C.Cir. 2002)). (Memorandum Opinion, Civil Action No. 16-2113 (JDB), Pg. 34).*

Having found that the EEOC acted arbitrarily, the court remanded the regulations back to the EEOC for reconsideration. AARP asked the court to vacate the regulations but the court rejected that request because doing so would cause significant disruption to existing wellness programs that are in operation based on the rules. Consequently, the EEOC's 2016 final ADA and GINA regulations are still in effect—for now.

So now what? Inquiring employers and wellness program administrators want to know what the court's decision means for them now and in the future. The good news is that no changes are required to your wellness program *at this time* so long as the wellness program complies with the EEOC's 2016 final ADA and GINA regulations.

It is business as usual until the AARP case reaches its final disposition. When that will occur is unknown. The EEOC could appeal the court's decision. In the meantime, the EEOC is required to file a status report with the court by September 21st with a proposed schedule for reviewing the rules and any additional administrative proceedings. We will have a better sense of timing after September 21. Absent a successful appeal, the court will eventually assess the EEOC's reasoning and make a decision.

The EEOC has significant flexibility under the Administrative Practices Act and the *Chevron* case to interpret the term "voluntary" under the ADA and GINA but as noted in the court's memorandum, the EEOC must give a "reasoned explanation for its decision." Whether the EEOC will succeed remains to be seen. If the EEOC is not successful, then it is possible that wellness programs will not be permitted to offer any incentives in exchange for disability related information, taking a medical exam, or a spouse's medical history, absent a change in the law by Congress That would drastically change the look of today's wellness program.

Until then, the best we can recommend is to monitor the lawsuit so that you can make appropriate decisions regarding wellness program design when the time comes. If you have not recently reviewed your program to make sure it does comply with the regulations, this would also be a good time to do so.

Acosta v. Macy's:

On August 16, the Department of Labor ("DOL") filed a complaint against Macy's, Inc. (and others) regarding, in part, Macy's wellness program. Macy's wellness program in 2014 imposed a premium surcharge on employees who certified tobacco use unless they further certified that they completed the reasonable alternative during the plan year (presumably a tobacco cessation program) AND either were tobacco free or had stopped using tobacco products and were working towards being tobacco free. In other words, tobacco users could not avoid the surcharge simply by satisfying the reasonable alternative standard; they also had to stop using tobacco products. As described in court documents, Macy's plan further stated that the additional premiums resulting from the surcharge would be deposited in the health plan trust and used to pay benefits and plan administration expenses.

The complaint filed by the DOL is of particular interest, not so much because the DOL alleges the wellness program violates HIPAA's nondiscrimination rules, but more so because of the types of violations the DOL alleges Macy's committed. The DOL alleges, among other things that Macy's committed the following violations with respect to its wellness program:

a) The program did not satisfy HIPAA's nondiscrimination rules for wellness programs set forth in ERISA Section 702;

b) Macy's impermissibly used the plan assets for its own purpose in violation of the prohibited transaction rules in ERISA Section 406.

The HIPAA nondiscrimination violation allegation is interesting because it underscores the DOL's position reflected in the final HIPAA nondiscrimination rules that you cannot require participants to stop using tobacco products in order to avoid the surcharge. This may seem counterintuitive to many wellness program sponsors. What is the point of having a tobacco cessation program if you cannot require employees to stop using tobacco products, right?

But the final HIPAA nondiscrimination regulations, as amended to reflect the requirements of the Affordable Care Act, make it clear that you must offer all who fail to satisfy a health outcome based standard a reasonable alternative regardless of medical necessity. Consequently, if the employee uses tobacco products, he or she is entitled to a reasonable alternative without having to show that a medical condition prevents the employee from stopping.

The regulations further note that the reasonable alternative can require satisfaction of another outcome based standard so long as the program does not require satisfaction of a different level of the same standard without additional time to comply. The challenge with applying this rule to tobacco use programs is that there is not a different level of the same standard that is available. A person either uses tobacco products or they do not.

If the alternative standard requires them to stop using tobacco products, the alternative standard is not an alternative at all-it is simply requiring them to achieve the original condition. Perhaps it would be permissible for an employer wellness program to provide an alternative standard to a tobacco user that requires a reduction in tobacco use (smoker gets reward if they reduce the number of packs of cigarettes per day from 2 to

1)—we could debate that—but it doesn't appear under the rules—as evidenced by the DOL's complaint, that requiring them to stop using tobacco products to avoid the surcharge is permissible.

The prohibited transaction allegation is even more interesting, and somewhat surprising. The premiums paid by employees, including the additional premiums paid by tobacco users, qualify as plan assets. ERISA requires plan assets to be deposited into a trust (with a few notable exceptions) and used exclusively to pay benefits under the plan and to offset administrative expenses. Under no circumstance does ERISA allow a fiduciary, such as a plan sponsor, to use plan assets for its own personal benefit.

Macy's deposited the additional premiums into the trust and then used them to pay benefits. So how did Macy's use the plan assets for its own purpose in violation of ERISA Section 406? The DOL is not clear regarding its theory but the specific allegations they make reveal the fundamental elements of the theory. The plan indicated that all plan benefits were paid with employee contributions and if the contributions were insufficient, the employer contributed the difference.

The DOL alleges that Macy's impermissibly collected the additional premiums from tobacco users. When Macy's deposited the impermissibly collected additional contributions into the trust, it reduced its own contribution responsibility. Therefore, the act of administering the impermissible wellness program resulted in the use of plan assets (i.e. employee contributions) for its own purpose.

So what does this mean for employers and wellness program administrators? It means the DOL is taking wellness program compliance very seriously. We recommend that all sponsors and administrators of wellness programs revisit your existing programs to ensure that they strictly comply with HIPAA's nondiscrimination rules and to make any necessary changes. If you are considering adopting a wellness program, take the necessary steps to ensure that the program complies before you implement it. ■