

## Court Case Creates Uncertainty For Wellness Programs

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In May 2016, the Equal Employment Opportunity Commission (EEOC) issued final rules under the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA). The Final Rules apply with respect to an employer wellness program that (1) makes “disability-related inquiries” or requires participants to undergo medical examinations (e.g., biometric screenings), and/or (2) asks an employee’s spouse to provide certain information about the spouse’s health. Specifically, the Final Rules clarified that a wellness program generally would be considered “voluntary” for these purposes even if it offered an incentive for an employee’s participation (or imposed a penalty if an employee chose not to participate) of up to 30% of the total cost for self-only coverage of the applicable health plan. Many employers relied on the Final Rules to design their wellness programs when those programs implicated the applicable ADA and GINA requirements.

However, in *AARP v. United States EEOC* (D.D.C., Aug. 22, 2017), the AARP argued that the Final Rules’ 30% incentive/penalty ceiling was too high for a wellness program to be considered voluntary. The D.C. District Court held that the EEOC “failed to adequately explain its decision to construe the term ‘voluntary’ in the ADA and GINA to permit the 30% incentive level adopted in both the ADA rule and the GINA rule.” Further, the Court remanded the Final Rules back to the EEOC for reconsideration, but left them in effect for the reconsideration period. However, the D.C. District Court ultimately ordered that the challenged incentive/penalty threshold portion of the Final Rules be vacated effective Jan. 1, 2019.

The removal of this portion of the Final Rules has had a significant impact on employer wellness programs. As employers design their wellness programs for 2019 and future years, they must take heed of the D.C. Court’s rulings. Now, the Final Rules’ 30% incentive/penalty ceiling is no longer valid. Instead, the D.C. District Court’s rulings create uncertainty as to what level of incentive/penalty threshold is permitted under the ADA and/or GINA. This hole in regulatory guidance will be a major consideration for employers and will likely remain an area of significant uncertainty until the EEOC issues new rules. Accordingly, employers should contact legal counsel to discuss their options for 2019 and later.

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