

## Wellness Plans Suffer Setback in the Courts

Employer-sponsored wellness plans may be subject to various federal laws including the Health Insurance Portability and Accountability Act (“HIPAA”), Title I of the Americans with Disabilities Act (“ADA”), and Title II of the Genetic Information Nondiscrimination Act (“GINA”). Final HIPAA wellness plan rules (as amended by the Affordable Care Act) were issued in 2013, and the Equal Employment Opportunity Commission (“EEOC”) issued its final ADA and GINA wellness plan rules in May 2016 which became effective January 1, 2017.

In October 2016, the American Association of Retired Persons (“AARP”) sued the EEOC generally arguing that the 30% reward/penalty on health care wellness cost incentives was too high for employees needing to undergo a medical exam or provide a medical history to earn a wellness plan reward or prevent a penalty from being imposed. AARP argued that the 30% penalty/reward threshold is inconsistent with the ADA/GINA requirement that disclosure of certain information in a wellness program be “**voluntary**.”

On August 22, 2017, the US District Court for the District of Columbia agreed with AARP citing the EEOC “*failed to provide a reasoned explanation for its decision to adopt the 30% incentive levels in both the ADA and GINA rules.*” While the EEOC implemented the 30% reward/penalty allowance to better align with HIPAA/ACA wellness plan rules, the Court found this argument to be of no consequence as HIPAA/ADA does not contain a “voluntary” participation requirement with respect to wellness programs. Furthermore, the Court noted: “*the EEOC does not appear to have considered...the way in which the 30% incentive level operates in the context of the ADA. EEOC does not explain why it makes sense to adopt wholesale the 30% level in HIPAA which was adopted in a different statute based on different considerations and for different reasons, into the ADA context as a permissible interpretation of the term ‘voluntary’ – a term not included in the relevant provisions of HIPAA.*”

Finally, the Court ruled that vacating or disallowing the current ADA and GINA rules would have “significant disruptive consequences”, and therefore, will allow the current ADA and GINA rules to remain for the time being. The Court is remanding the ADA and GINA wellness plan rules back to the EEOC for reconsideration, on the assumption that the EEOC can address the rule’s failings in a timely manner.

Employers with fifteen or more employees who are subject to the ADA and GINA and who sponsor wellness programs (or are considering wellness programs) that have employees and/or spouses answer health questions as part of a Health Risk Assessment (“HRA”), or take a medical examination (such as some form of biometric screening) should pay close attention in the coming months to how the EEOC addresses the wellness plan rules and incentive allowances.

Wellness plans that don’t seek disability-related inquiries or include medical examinations are not affected. Plans that don’t offer incentives for spousal genetic information are also not impacted. Wellness programs such as those that provide educational information, nutrition classes, walking programs and weight loss programs, are also not subject to ADA and GINA.

More information about the ADA and GINA wellness provisions may be found in our [June 2016 UPDATE](#).

### ADDITIONAL INFORMATION

Information contained in this Update is not intended to render tax or legal advice. Employers should consult with qualified legal and/or tax counsel for guidance with respect to matters of law, tax and related regulation. Cherry Bekaert Benefits Consulting, LLC provides comprehensive consulting and administrative services with respect to all forms of employee benefits, risk management, qualified and non-qualified retirement plans, private client services, transaction services, and compensation and human resources.

**For additional information about our services, please contact Kyle Frigon at 404-733-3256 or via email at: [kfrigon@cherrybekaertbenefits.com](mailto:kfrigon@cherrybekaertbenefits.com).**