Update: EEOC/AARP Case

By Jim Pshock, *Bravo Founder and CEO*

On January 30, 2018, Bravo hosted a webinar with Conduent HR Service's Global Practice Leader Tami Simon, expert practice leader and Partner from Alston and Bird John Hickman and Jim Pshock, Founder and CEO of Bravo.

WATCH WEBINAR

There are dozens of opinions in the market about what the recent court decision on the American Association of Retired Persons (AARP) lawsuit of the Equal Employment Opportunity Commission (EEOC) means. I've personally seen many statements that are based more in fear and misinformed understandings of the current landscape of federal wellness regulations.

At Bravo, we believe the best decisions come from a clear understanding of what the regulations actually state today and what those precedents mean for employers and their employees. Clearly nobody has a crystal ball and nothing is final but it's always prudent to start thinking about your next move based on the most likely scenarios. The following pages detail our perspective and recommendations given what we know as of March 1, 2018.

Jim Pshock
Bravo Founder and CEO

What's Happened So Far

On December 20, 2017, U.S. District Judge John Bates ruled that the 30% portion of the EEOC regulations (and only this portion) shall be vacated as of 1/1/2019.

After decades of providing little guidance regarding the level of incentive or penalty that may cause the EEOC to view a health inquiry or exam "involuntary" under the Americans with Disabilities Act (ADA), the EEOC provided guidance in 2016 and tried to somewhat harmonize permitted values with other applicable regulations including the Affordable Care Act (ACA) and the Health Insurance Portability and Accountability Act (HIPAA). In addition to privacy and security requirements, accommodations for those with medical issues or disabilities, reasonable alternatives for those who cannot achieve a goal and minimum requirements for a wellness program to be considered "reasonably designed" — the EEOC created a safe harbor for incentives, allowing up to 30% of the cost of employee-only coverage to be used.

EEOC's wellness regulations were established in 2016, responding to pressure from earlier court decisions and lack of clarity around what the EEOC deemed "allowable".

The EEOC's definition of 30% is actually more restrictive than the ACA and HIPAA definitions. It includes both participatory and health-contingent incentives within the 30% and is based on the least expensive coverage option instead of the plan an individual enrolled in. Still, it was viewed by some as far more liberal than ACA and HIPAA because it permitted cash incentives or penalties to be imposed upon "employees", regardless of whether they are on their voluntary health plan or not.

continue →

What's Happened So Far

AARP v EEOC: 2017

The AARP took exception with the rules and sued the EEOC, arguing that the 30% limit could be a significant cost to employees (particularly for those with rich employee benefits). In response to the suit, the court asked the EEOC to support the justification for selecting the 30% limit, but their response did not satisfy the judge. The limit was viewed as "arbitrary and capricious".

John Hickman, partner at Alston & Bird, raised an interesting point regarding this: an employer or health plan business group could have just have easily argued that the 30% allowed by the EEOC was arbitrary and capricious because it was **too low** (rather than too high).

For those participating in their employer's voluntary health plan, Hickman's comment is especially true. Numerous regulations already govern the minimum coverage and affordability requirements an employer must offer, regardless of a person's choice to participate in the wellness program. Under those pre-established rules, an employer could make a good case that use of 30% of premium for wellness incentives is well within what is already allowed. Interestingly, the AARP didn't seem to have a problem with those rules impacting health plan participants for the eight years prior to the EEOC regulations.

2018-2019

At this point, the court has indicated that the 30% portion of the EEOC regulations (and only this portion) shall be vacated as of 1/1/2019.

The EEOC has indicated that they may do one of the following:

- Nothing
- Issue new guidance
- Take a wait-and-see approach, choosing to study the issue further or await the resolution of potential appellate proceedings

Insight

What does "Vacating the 30%" even mean?

First, it's important to note that this does not impact all wellness programs, nor all incentives. The potential risk applies only to incentives that require the completion of an exam and/or the response to disability-related health inquiries.

If your program does require the completion of an exam and/or a response to a disability-related health inquiry, and currently complies with the regulations, you shouldn't be concerned with enforcement action this year. You should, however, start thinking about the potential need to eventually offer all non-participants and individuals who did not receive all the incentives a chance to earn the amounts they missed by completing other activities that don't require an exam or them answering the disability-related questions. While this will lessen the focus of the program on inspiring personal achievement and incenting individuals to work with their doctor on personal improvement—it might be the right course depending on the risk-tolerance of the employer.

I am personally aware of several large insurers and business groups that feel vacating the 30% rule gives them greater flexibility and basically would backfire on the AARP. What's the logic for that position?

3 Previous Landmark Court Cases

Three court cases (Seff, Orion, Flambeau) were asked to answer the question of "voluntariness" prior to the EEOC providing the 30% guidance. In two cases, the court ruled that the question was irrelevant because the ADA already included a safe harbor for health plans to make health inquiries in an effort to predict and reduce future claims costs. In the third case (Orion), the court concluded that even 100% of plan premium as an incentive would be viewed as "voluntary" because an employer-sponsored health plan itself is voluntary and even a hard choice is still a choice. Note: this argument wouldn't be applicable for those offering cash incentives or penalties to individuals not enrolled in the health plan.

continue →

Insight

What does "Vacating the 30%" even mean?

Again, within the health plan, it's difficult to argue that the authors of the ADA, while trying to protect the rights of disabled individuals, intended to prevent a health plan from offering a discount to people who proactively take part in recommended age/gender screenings or make steady improvements in their well-being. I certainly agree that protecting the rights of the disabled, keeping health records private, keeping health records completely separate from employment records and applying tight security requirements regarding health information are crucial elements that should be paramount. They already are (within the health plan) and therefore should be permitted regardless of the ADA.

It's difficult to argue that the authors of the ADA intended to prevent a health plan from offering a discount to people who proactively take part in recommended age/gender specific screenings or make steady improvements in their well-being.

Others believe that vacating the rules means that no incentive can be offered at all in conjunction with a health exam or disability related inquiry. While it's difficult to predict the enforcement actions of particular EEOC offices, most experts close to the issue concur that the EEOC would be unlikely to bring enforcement action against an employer who stayed under the 30% level it had previously provided as a safe harbor. That said, even a highly winnable case brings expense, distraction and PR implications that many employers may simply choose to avoid.

Closing Thoughts

Although some employers may choose to eliminate incentives for health screenings, far too many of our employer-group clients have seen tremendous results through the early detection of serious issues.

Those employers have created a positive cultural movement by rewarding even modest improvement as individuals take meaningful actions. So to me, this is simple: either you believe that identifying and reducing health risks is important or you don't.

Like most things, if you don't measure it, people don't really think you value it. The key for being compliant, if you want to eliminate virtually all risk from an ADA standpoint, is to make sure you are also offering alternate ways that employees (who prefer to not participate in the screening) can still earn the full incentive being offered. Bravo already offers many of these alternative options (including online health courses, group challenges, etc.) and we still typically see the vast majority of employees choose the screening instead of those alternatives.

Bravo has long advocated that these are great "and" programs, not "or" programs. Saying you only need to focus on your culture, health education or stress reduction instead of physical health risks is like saying you don't need a hat and coat for the cold weather, you only need boots.

Yes, you need boots—but it's an "and" not an "or".

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Share Your Story!

There are plenty of critics and articles with examples of poorly designed wellness programs that didn't produce the results someone thought they should have. I've never seen one example that I was surprised by. Typically, the incentives are too low and they are tied to a very simple activity that may or may not motivate someone to actually change behaviors. Conversely, we've seen many examples where a meaningful reward, associated with realistic and achievable improvement goals determined by a person's own physician and combined with tools, resources and programs for total well-being that help people succeed result in high engagement, positive morale, measurable health improvement and cost reduction that meets or exceeds program goals.

There are thousands of intelligent wellness plans in the market today, the challenge is we don't focus on sharing them publicly. Consider sharing your story! We'd be happy to support your application for recognition and/or your efforts to educate lawmakers and regulators regarding the success you're experiencing.

SHARE YOUR STORY

Fight For Your Employees!

I applaud the AARP's efforts to protect older workers from coercive tactics an employer may use to gather sensitive health or genetic information about them. This can easily be accomplished by limiting the use of incentives to cost-sharing adjustments within a health plan that already has:

- Affordability requirements
- Minimum coverage requirements and
- Strict privacy and security requirements

The vast majority of employees earning rewards for things like being tobacco free, controlling blood pressure, managing glucose and A1C levels and avoiding metabolic syndrome should be rewarded for their achievements! How is the elimination of their rewards (which will simply serve to raise the cost and lower the take-home pay for the majority of program participants) a good thing?

It is not safe to assume that tying employer hands on incentives will mean that everyone who previously failed will now just get free money. In many cases, the only place that money will come from will be the pockets of the employees who had been earning large incentives. I'm not sure this unintended consequence has been anticipatied by AARP in its suit, but I believe it is an inevitable decision that many employers will be forced to make.

Summary

Inspire people to achieve their personal best.

There is obviously a lot to digest and there is still a great deal of speculation. Our advice is to at least take steps to make sure your program is well designed in its blend of incentives, achievable goals and tools and resources that increase the likelihood of success for each person. Keep incentives within your group health plan and don't extend them to individuals outside of the health plan (unless nomimal, de minimis).

Stay tuned for updates as we learn more. We welcome your questions and will do our best to respond.

Take good care,

Jim Pshock
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