

# Lyons Companies: Compliance Alert

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## AARP vs. EEOC LAWSUIT UPDATE – STILL NO CLARITY

*Issue Date: April, 2018*

On Friday, March 30<sup>th</sup>, just hours before a deadline imposed by the U.S. District Court of D.C., the EEOC filed a required status update with the court stating that, at this time, it has no plans to issue new wellness regulations by a specific date as instructed by the court. The decision by the EEOC to take no action leaves employers in limbo regarding the future of current employer wellness arrangements that are subject to existing EEOC regulations.

### *Background*

In 2016, the EEOC issued rules to clarify its position on how employer wellness programs could be offered in compliance with the Americans with Disabilities Act (ADA) and The Genetic Information Nondiscrimination Act (GINA). One important aspect of these regulations was that they allowed employers to include incentives of up to 30% of premiums for wellness programs subject to the ADA and GINA. Note that only wellness programs where the incentive is tied to medical questions (e.g., a health risk assessment) or medical testing (e.g., biometric tests) are subject to the EEOC wellness rules.

Soon after the rules were released, the American Association of Retired Persons (AARP) sued the EEOC. AARP argued that the rules violated ADA and GINA. In particular, AARP argued that the 30% incentive meant that the programs were not “voluntary,” as required by the ADA.

The court initially ruled for the AARP, stating that the EEOC did not show that wellness plan participation could be considered voluntary when it is subject to a 30% incentive (or “penalty,” as AARP calls it). The court ordered the EEOC to rewrite the rules or provide additional justification to the court. The court then went on to vacate the rules entirely, effective January 1, 2019, unless the EEOC issued new rules satisfactory to the court. At the time, the court required the EEOC to submit a status update by March 30, 2018.

### *A “Status Report”?*

In the status report, the EEOC said that it has no plans to issue new rules at this time. Specifically, the EEOC stated: “[The EEOC] does not currently have plans to issue a Notice of Proposed Rulemaking addressing incentives for participation in employee wellness programs by a particular date certain, but it also has not ruled out the possibility that it may issue such a Notice in the future.” The EEOC added that it may wait until new agency leaders, recently nominated by President Trump, are confirmed before taking any action.

### *What’s Next*

By taking no action, the EEOC has forced the court, and AARP, to make the next move. In the meantime, employers are left to wonder what they should do with existing wellness programs. If the current court order stands, wellness programs may not be allowed to tie incentives to wellness initiatives subject to the ADA or GINA.

What is the risk to employers? At this point, there are more questions than answers. Some have argued that since the EEOC disputes the court's findings, it would not enforce the ban on incentives. Although that may be the case, there is also the possibility that employees could file private lawsuits. And finally, what will AARP do? Will it continue to push the case forward to try to force some kind of action by the EEOC?

### *Summary*

It is possible that there will be no clear resolution of this dispute in time for employers to plan their 2019 benefits and wellness strategy. In that case, employers will need to make a decision. Should they continue with current programs, considering the risk of EEOC enforcement or private legal action; or should affected employers come up with a plan B? Employers with wellness incentives tied to programs subject to the ADA and GINA may want to think about a backup plan in case these incentive rules are vacated 1/1/2019. One option would be to tie all incentives to other wellness initiatives that are not subject to EEOC rules (e.g., tobacco surcharges with no medical testing, participatory programs such as gym use, outcome-based programs with no medical tests such as a walking program).

The court is likely to respond to the EEOC "status report" soon. At that point, employers may have a clearer idea of what to do by January 2019. So stay tuned!

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