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Settlement Reached in Case Alleging Wellness Program Coercion

March 14, 2022

On March 4, 2022, Yale University agreed to settle a class action lawsuit filed in 2019 by participants in Yale's "Health Expectations" wellness program (the "Program"). The $1.29 million settlement is currently awaiting court approval. This case illustrates the pitfalls that can arise in wellness program design and the importance of closely monitoring and updating wellness programs in a rapidly changing regulatory environment.

Wellness Programs

A wellness program is an employee benefit that is designed to incentivize its participants to voluntarily improve their health and fitness, so that the improvements in healthy behaviors reduce the cost of healthcare claims over time. Wellness programs come in many different forms and, depending on their design, can be subject to a complex variety of federal laws, including the Employee Retirement Income Security Act of 1974 ("ERISA"), the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the Genetic Information Nondiscrimination Act of 2008 ("GINA"), and the Americans with Disabilities Act of 1990 ("ADA"). The Yale case involved the ADA and GINA, which allow employers to obtain medical or genetic information from employees if employees voluntarily participate in a wellness program.

Yale's Health Expectations Program

Yale's collectively bargained Program required certain union employees and their spouses to either (a) submit to medical inquiries and exams (including mammograms, diabetes screenings, and colonoscopies), or (b) pay $25 per week ($1,300 a year) to opt out of the Program. If a participant elected to opt out, the fee was deducted directly from the participant's paycheck.

Current and former Program participants, with support from the AARP, sued Yale, alleging that this "unusually punitive" Program violated the ADA and GINA because the amount of the opt out fee made participation in the Program involuntary. The AARP successfully used this argument in a 2016 lawsuit against the U.S. Equal Employment Opportunity Commission ("EEOC") to invalidate ADA regulations that established limits on the reward amount a wellness program could offer and still be considered "voluntary." However, Yale did not modify its opt out program in response to the EEOC litigation and subsequent regulatory changes.

Program participants also alleged that Yale violated HIPAA when it shared the results of the medical exams with its outside wellness vendors without prior authorization. Yale partnered with an outside vendor to review Program participant testing and claims data, which was then shared with a second vendor that paired Program participants

with a health coach. The vendor conducting data review was a business associate of Yale's and subject to HIPAA, but the second entity was not. Participants were asked to sign a form waiving their HIPAA rights so that information could be shared with the second vendor, but data was still shared in some instances where the Program participant did not sign the waiver.

The Settlement

Several of the settlement terms should be of interest to plan fiduciaries:

- Yale will pay $1.29 million, which will be distributed to employees who were covered by the Program and to cover plaintiffs' attorneys' fees and costs if approved by the Court.
- Yale may continue to offer the Program, but will not charge opt-out fees for four years.
- Yale will change its practices regarding the transfer of health information in connection with the Program and will require its affiliated vendors to purge data improperly received. Information will no longer be shared absent a proper HIPAA authorization. Participants actively receiving coaching will have the option to continue receiving coaching (or not) and have their records retained or purged, with no penalty.

Next Steps

Following the *Yale* settlement, employers should consider taking the following actions:

- Employers should review their wellness program design and governing documents to ensure compliance with HIPAA, GINA, the ADA, and other laws that govern wellness programs.
- Employers should review the types and amounts of incentives their wellness programs offer. The EEOC has not finalized new wellness program regulations under the ADA or GINA to replace the rescinded 2016 regulations. The EEOC preliminarily released proposed regulations in early January 2021, but they were never formally published and were withdrawn by the Biden administration. Those unpublished January 2021 regulations would have limited certain wellness program incentives to a minimal amount—such as a "water bottle or gift card of modest value."
- Employers should review their service agreements and business associate agreements with wellness program vendors to ensure they properly address HIPAA compliance.

The absence of regulatory guidance under the ADA and GINA makes it challenging to determine the appropriate limit for wellness program rewards. If you have any questions regarding wellness programs or need assistance in reviewing or revising your wellness program documents, please contact a member Kutak Rock's Employee Benefits Practice Group. For more information regarding our employee benefits practice, please visit www.KutakRock.com.

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