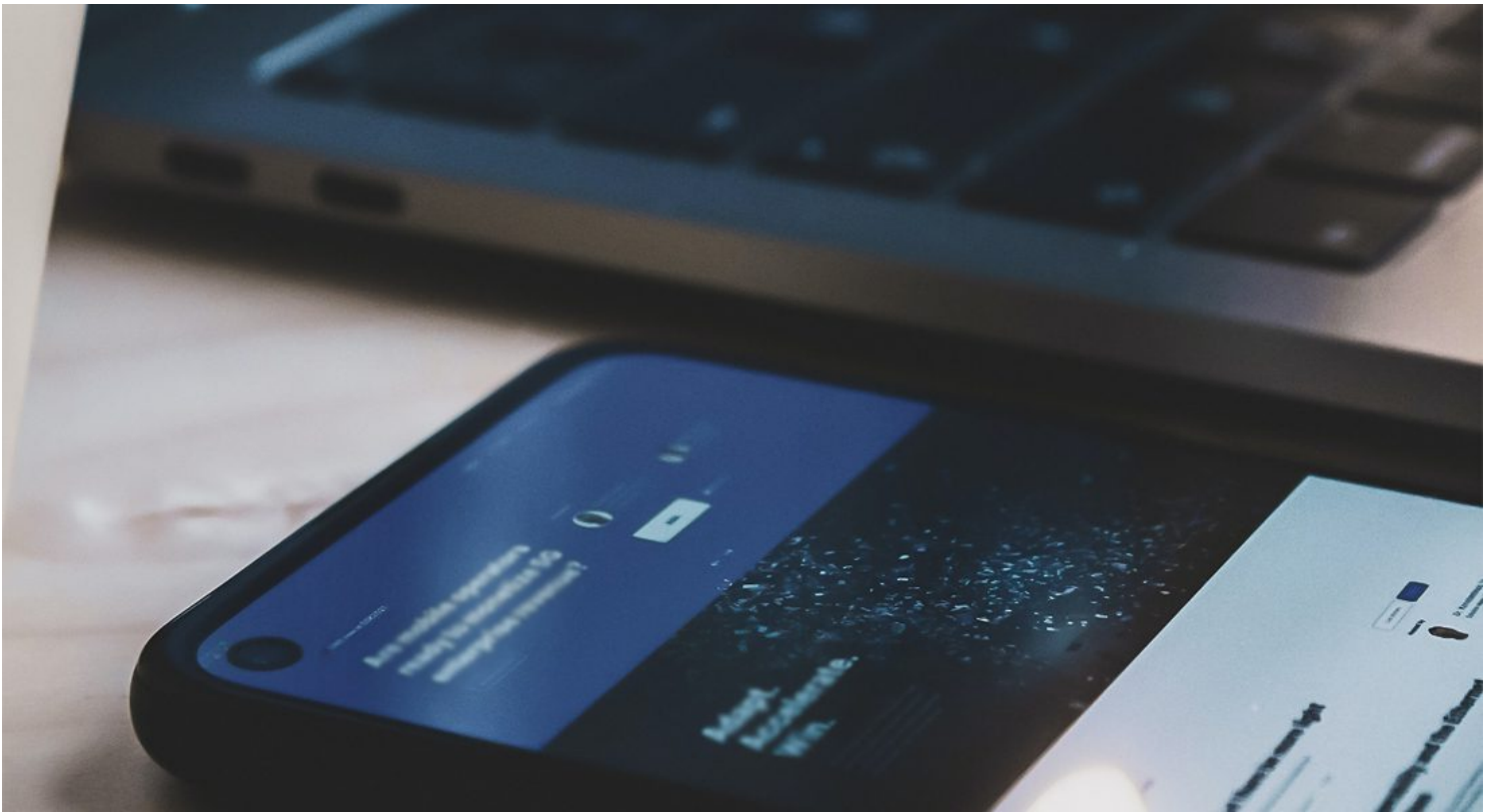


NEWS & INSIGHTS

EEOC Wellness Regulations Still Uncertain - Employers Should Exercise Caution

[INSIGHTSLEGAL UPDATE](#)

FEBRUARY 13, 2019



The U.S. District Court for the District of Columbia vacated the Equal Employment Opportunity Commission's (EEOC) regulations governing wellness programs incentives effective January 1, 2019. The federal court order nixed regulations that permitted voluntary disclosures of employee health information, leaving uncertainty around what information employers can request without risking lawsuits.

Both the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) serve to prohibit employers from inquiring as to the health of employees. However, both laws contain an exception allowing for collection of this information pursuant to employer wellness plans, as long as an employee provides such information voluntarily. The definition of “voluntary” disclosure became increasingly important to employers when the Affordable Care Act (ACA) amended the Health Insurance Portability and Accountability Act (HIPAA), allowing employers to raise or lower the cost of employees’ insurance premiums by 30 percent conditioned upon the employees’ participation in a wellness program.

To assist employers in determining what information they could request, the EEOC issued regulations effective January 2017. The rule provided that employers could apply penalties or rewards of up to 30 percent of the cost of coverage to encourage employees to disclose protected information, and such incentive or penalty would not render the disclosure involuntary. However, the regulations were never implemented as a lawsuit was brought by AARP contending that the regulations were invalid. AARP contended that a 30 percent incentive/penalty made an employee’s disclosure of protected health information involuntary.

The EEOC aims to have new proposed rules issued in June 2019, but it remains unclear whether or when new regulatory guidance will be released. In the interim, without any real guidance on the issue of what constitutes a “voluntary” inquiry and response to health-related information, employers may have exposure to private suits. However, even if suit is brought, potential damages would likely be limited to recouping incentive amounts.

Saxton & Stump’s attorneys [Richard Hackman](#) or [Morgan Hays](#) are available to discuss how your business may be impacted by this developing issue and how our [Labor & Employment Law Group](#) can help devise an appropriate plan for your organization’s wellness program as new regulations unfold.

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