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The Sky is not Falling on Wellness Programs

There has been a flurry of recent legal newsletters and blog entries about the changes to wellness programs effective on January 1, 2019. The consistent theme of these articles is that wellness programs will be significantly impacted by way of the removal of the incentive limits under the ADA and GINA final wellness rules. The constant drumbeat of bad news will only increase now that the EEOC today issued final rules officially removing the ADA and GINA incentive limits for voluntary wellness programs. (The final rules will be published in the Federal Register tomorrow, December 20th.)

By way of background, today's EEOC action as well as the *AARP v. EEOC* lawsuit only invalidates the 30% incentive limits of the ADA and GINA final wellness program rules. All other aspects of the final rules remain in effect, including the notice and consent provisions. (If you would like to know the tortured history of the ADA and GINA incentive limits, please see our prior blog post here.

Despite these changes, I am here to say that the sky is not falling on wellness programs. Prior to the final ADA and GINA wellness program rules, wellness program incentives existed in all shapes and sizes for decades. During that time, very few challenges were raised regarding the incentive limits under the ADA or GINA. The one court decision that directly addressed incentives prior to the final rules was *Seff v. Broward County*. In that case, the court indicated that the wellness program incentive was voluntary under the ADA, based on the bona fide benefit plan exception to the ADA.

If wellness program sponsors continue to satisfy the HIPAA wellness program incentive limits (on which the ADA and GINA incentive limits were based), any legal risks regarding wellness programs should not be materially increased because of the removal of the ADA and GINA incentive limits. Any legal challenge from the EEOC is unlikely given its history and certainly unlikely given the current administrative climate. The only potential legal challenge regarding wellness program incentive limits under the ADA and/or GINA would come from employees and/or wellness program participants. While the removal of the regulatory incentive limit on its face appears to increase this likelihood, the fact remains that employee and participants could have sued wellness program sponsors even when the regulatory limits existed (similar to what occurred in the *Broward County* case). The success of any case akin to *Broward County* is not materially increased due to the lack of a regulatory incentive limit.

There is certainly more to come with respect to the ADA and GINA wellness program incentive limit issue. However, at this time, there is no reason to think that a wellness program that satisfies the HIPAA, ADA and GINA final regulations will face more legal risks in 2019 than it did in 2018.