IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AARP, Plaintiff, v. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendant.	Case No. 16-cv-2113 (JDB) Hon. John D. Bates

AARP'S REPLY
SUPPORTING RULE 59(E) MOTION TO ALTER OR AMEND ORDER
AND RESPONSE TO DEFENDANT'S STATUS REPORT

INTRODUCTION

The Equal Employment Opportunity Commission (EEOC) tentatively proposes to issue new final wellness regulations by October 2019, which it represents would likely not apply until the beginning of 2021. Defendant's Status Report [ECF No. 50] at 1. Moreover, the EEOC identifies several factors each of which may very well extend the length of the rulemaking process beyond this tentative schedule: the Commission's changing composition, the possibility of a stay pending appeal, and other necessary administrative processes. *Id.* at 1-2. Thus, the EEOC proposes to permit employers to violate workers' civil rights for at least three more years. AARP agrees that this proposed schedule reflects the complexity of the

task that the agency must undertake to correct the Rules found wanting in this Court's August 22, 2017 Order.

Yet, the EEOC's proposed schedule clashes with a key premise of the Court's decision to remand without vacatur: that the agency can "address the rules' failings in a timely manner." Memorandum Opinion (Mem. Op.) [ECF No. 47] at 47. In particular, the agency's acknowledgement that newly issued rules will be unlikely to apply before 2021 is far from a "timely" resolution of the defects in the current rules identified by this Court. Defendant's Status Report [ECF No. 50] at 1 n.1. Given this lengthy and admittedly unavoidable delay, employees will be financially pressured into irrevocably disclosing their medical and genetic information as permitted by the current, invalid rules for three more years—in the most expeditious scenario. While the agency surely needs time to complete a new rulemaking, employees and their families must not suffer the consequences in the interim.

Instead, as discussed in AARP's Rule 59(e) motion [ECF No. 48], in light of the infeasibility of a prompt revision of the Rules, the most just and practical remedy is for the Court to vacate (or prospectively enjoin enforcement of) the Rules, with an appropriate delay to minimize disruption. In light of the Defendant's Status Report, AARP reaffirms its position that vacating the Rules as of January 2018 would not create undue disruption for employers or employees.[1] However, if the

[1] The government argues that AARP ought to have argued that vacatur was appropriate in its summary judgment briefing. EEOC Opposition to AARP's Rule 59(e) Motion (EEOC Opp.) at 7 [ECF No. 49]. But AARP's Complaint requested that

Court is persuaded that a longer implementation period beyond January 2018 is required, then at the latest, vacatur as of mid-2018 would further confine any disruptive consequences, and the Court's serious concerns about the agency's reasoning would surely outweigh that disruption.

ARGUMENT

I. The EEOC Exaggerates the Disruptive Consequences of Delayed Vacatur and Ignores the Harm to Employees While the Agency's New Rulemaking is in Progress.

The EEOC's prognostication of "extraordinarily disruptive consequences" and "chaos" resulting from even delayed vacatur of the Rules, EEOC Opp. at 1, 6 [ECF No. 49], is a serious overstatement. As a preliminary matter, the agency has no response to AARP's argument about the Court's primary concern regarding disruption, i.e., the Court's view that it would be impossible to restore the status quo ante because employers and employees would be obligated to pay back penalties and incentives paid in reliance on the 2016 Rules. Mem. Op. at 35 [ECF No. 47]. AARP explained that due to fundamental fairness concerns, it is exceedingly unlikely that any court would award retroactive relief, so no irremediable reliance concerns are presented. Memorandum of Law in Support of Rule 59(e) Motion

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the Court vacate the challenged portions of the Rules, Compl. at 27 [ECF No. 1]. Furthermore, vacatur is the ordinary remedy for a regulation's lack of reasoned explanation. *Advocates for Highway & Auto Safety v. F. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005). Because the EEOC never argued that the more unusual remedy of remand without vacatur might be appropriate in the event its Rules were invalidated, AARP never had occasion to argue until the summary judgment hearing that the ordinary remedy of vacatur was appropriate in this case.

(AARP Mot.) at 8; *contra*, *e.g.*, *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 97-98 (D.C. Cir. 2002) (finding it impossible to restore the status quo ante because crops had already been irrevocably destroyed pursuant to invalidated rule, so "the egg [could not] be unscrambled"). The EEOC's opposition does not address this point at all.[2]

More specifically, in responding to AARP's request for delayed vacatur, the EEOC overstates the difficulty that employers will face in adjusting wellness penalties/incentives for the 2018 plan year. Both the EEOC and the portions of the administrative record on which it relies discuss the relatively long lead time needed for employers to finalize their health insurance plans, including designing their wellness programs. EEOC Opp. at 3-5 [ECF No. 49]. However, these excerpts are taken from comments about the date by which employers would need to comply with the 2016 Rules *as a whole*. The Rules covered a great many aspects of wellness program design having nothing to do with penalties/incentives (such as, inter alia, other discriminatory practices and confidentiality). AARP only challenged—and the Court only found unlawful—the narrow portions of the Rules that permit employers to apply financial penalties to employees who refuse to submit to medical and genetic examinations and inquiries. *See* Compl. at 27 [ECF No. 1] (requesting

[2] Instead, the agency argues that the Court's declaration of invalidity cannot have a retrospective effect because such a conclusion would effectively bar all remand without vacatur. That is not the case. Rather, regardless of vacatur, where a regulation, like the 2016 Rules, gives permission to third parties (here employers) to take some action, declaring those rules invalid may inherently expose those third parties to collateral litigation for taking those actions. Declining to vacate cannot avoid this possibility.

vacatur of only 29 C.F.R. §§ 1630.14(d)(3) and 1635.8(b)(2)(iii)). These penalties/incentives are merely one, relatively independent component of employee wellness programs, and adjusting those penalties/incentives is not nearly as difficult, complicated, or time-consuming as ensuring that all aspects of wellness programs comply with the full range of requirements set by the 2016 Rules. Especially when open enrollment has not yet begun, and employees have not yet submitted to health risk assessments and biometric testing, it is not too late to ask employers to reconsider one purely prospective, monetary aspect of their wellness programs. Otherwise, nothing in employers' wellness programs, let alone their health insurance plans as a whole, will need to change. Requiring some employers to reprint pamphlets, EEOC Opp. at 4 (citing Chamber of Commerce comment, AR 3485), cannot be so disruptive as to require that unlawful Rules remain in place for years.[3]

Indeed, the EEOC's reasoning itself indicates that a change in the employers' wellness penalties/incentives would not be difficult, complicated, or confusing at all. The agency suggests that because the Rules permit, but do not *require*, employers to use financial penalties/incentives, cautious employers uncertain about the lawful status of the 2016 Rules may simply choose not to offer financial incentives in the upcoming year. EEOC Opp. at 6 [ECF No. 49]. If the EEOC is correct, these same employers are equally capable of making the same choice in response to an order

[3] In all practicality, employers need not even reprint documents, but could issue addenda regarding any changes made after initial production of enrollment materials.

vacating the Rules as of 2018, if they determine that to be the least risky option. The EEOC's proposed solution for employers undercuts the agency's argument that it is too late for those same employers to change wellness programs' financial penalties.

Finally, and most fundamentally, the EEOC does not even acknowledge the most problematic consequence of leaving the Rules in place while the agency attempts to remedy their fatal flaws: the irreversible harm to employees that succumb to intense financial pressure by disclosing confidential medical and genetic information. In contrast to the EEOC's speculation about unfairness to employers who could potentially be exposed to future liability, EEOC Opp. at 6 [ECF No. 49], the agency has proposed no solution for employees—the individuals whom it is charged with protecting under the ADA and GINA—who will definitely suffer irreparable harm in the absence of vacatur. The Court rightly noted that it is too late to protect these individuals from disclosing their private information in 2017, Mem. Op. at 35, [ECF No. 47], but it is not too late to protect them during the three years in which the agency proposes to fix what it broke.

II. The Court's Serious Concerns About the Agency's Reasoning Outweigh the Limited Consequences Likely to Occur from Vacatur Or an Injunction as of Some Point in 2018.

In the penultimate paragraph of its August 22 decision, the Court concluded that vacatur "is not the required remedy" and "would indeed be inappropriate" based on a critical assumption: "that the agency can address the rules' failings in a timely manner." Mem. Op. at 36 [ECF No. 47]. Further expressing the temporal

contingency of its conclusions, the Court stated that vacatur was "inappropriate *at this time*," *id.* at 36 (emphasis supplied) and further, that the Court would remand without vacatur "for the present." *Id.* Given the minimum three-year time period during which the agency's proposed schedule would leave the current, unlawful Rules in place, it is now clear that such a timely result is, unfortunately, impossible. Accordingly, the balance has tipped sharply in favor of delayed vacatur (or, at least, a prospective injunction).

For the reasons discussed in AARP's Rule 59(e) Motion and in Section I, AARP believes that employers will be fully able to respond to vacatur of the Rules effective on January 1, 2018. Nevertheless, that is not the only alternative other than declining entirely to vacate the Rules. If the Court is concerned about employers' ability to adjust their plans by the beginning of 2018, it may further delay vacatur's effect, mitigating at least some harm to employees.

The government's Status Report, following the lead of the government's Opposition to AARP's Rule 59(e) Motion, states that employers require a six-month compliance period to adjust their plans. Defendant's Status Report at 1 n.1 [ECF No. 50]. As discussed above, that conclusion rests on dubious grounds and suggests far more comprehensive changes than simply adjusting financial penalties/incentives in wellness programs. However, even assuming *arguendo* that some longer compliance period is required, such that vacatur as of January 2018 would be impractical, the Court could issue a remedial order applying to wellness programs in plans that begin later during calendar year 2018. As the EEOC notes,

not all plans track the calendar year, *id.*, so the Court could, for example, issue an order applying only to plans that begin six months after the first day of the month following the order's issuance. In other words, if the Court issues a decision in October, the order could apply to plans that begin six months or more after November 1, 2017, i.e., on May 1, 2018.

In short, AARP supports and believes to be fully feasible an order of vacatur as of January 1, 2018. In the alternative, should the Court determine the potential disruptive consequences, if any, of such an order to outweigh the dangers to employee privacy and the burdens of subsequently offered incentives and imposed penalties, AARP submits that the Court should issue an order of vacatur effective as soon as practicable after January in 2018.

CONCLUSION

Because the agency cannot realistically complete a rulemaking in time to avoid irreparable harm to employees for at least three more years, a more immediate solution is necessary.

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Respectfully Submitted,

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