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 MEMORANDUM OF LAW IN SUPPORT OF RULE 59(e) MOTION TO ALTER OR AMEND THE COURT'S AUGUST 22, 2017 ORDER

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INTRODUCTION

On August 22, 2017, the Court denied Defendant's Motion for Summary Judgment, granted Plaintiff's Cross-Motion for Summary Judgment, and remanded the EEOC's Regulations Under the Americans with Disabilities Act ("ADA"), 81 Fed. Reg. 31,126 (May 17, 2016), and Regulations Under the Genetic Information Nondiscrimination Act ("GINA"), 81 Fed. Reg. 31,143 (May 17, 2016) to the agency without vacatur.[1] for further consideration consistent with the court's opinion. ECF Nos. 46 ("Order"), and 47 ("Mem. Op."). To avoid manifest injustice, AARP asks the Court to reconsider and modify its decision on the appropriate remedy in this case by ensuring that the Rules, as currently drafted, do not remain in effect as of January 1, 2018, past health insurance plan year 2017.

AARP proposes herein adoption of either of two possible ways to achieve this result: (1) vacating the Rules and staying the mandate until 2018; or (2) issuing a prospective injunction against the Rules' enforcement, effective January 1, 2018, pending the agency's reconsideration. Both approaches would prevent further harm to employees who will otherwise face involuntary disclosure through wellness programs in 2018, and would give employers certainty about the status of the Rules as they finalize their 2018 plans. Finally, these options reflect the infeasibility of the agency amending its Rules, on remand, in time for employers to implement new Rules in 2018.

[1] This memorandum uses "Rules" to refer to the portions of the EEOC's ADA and GINA regulations challenged in this lawsuit, not the regulations in their entirety.

ARGUMENT

I. STANDARD OF REVIEW

Fed. R. Civ. P. 59(e) grants district courts considerable discretion to alter or to amend prior judgments. *Fresh Kist Produce, LLC v. Choi Corp.,* 251 F. Supp. 2d 138, 140 (D.D.C. 2003) (citing *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (per curiam)). Courts may grant Rule 59(e) motions, among other things, to "prevent manifest injustice." *Messina v. Krakower*, 439 F.3d 755, 758 (D.C. Cir. 2006) (internal quotation marks omitted)). While a motion to alter or amend is not "a vehicle for presenting theories and arguments that could have been advanced earlier," *Fresh Kist*, 251 F. Supp. 2d at 140, as the Court noted, the parties did not previously brief the issue of remedies, Mem. Op. [ECF No. 47] at 34, and the Court's decision to remand without vacatur raises important issues that must be addressed now.

To prevent the manifest injustice that will result if additional employees are forced to choose between disclosing their private health information and paying heavy financial penalties, under Rules held to be arbitrary and capricious, and to reduce employers' confusion about the coming plan year, the Court should amend its decision on the appropriate remedy by ensuring that the Rules are not in effect for 2018. Such a remedy will, in effect, restore the status quo ante, minimizing disruption while protecting employees from further harm.

II. THE COURT SHOULD ENSURE THAT THE RULES ARE NOT IN EFFECT AS OF 2018 TO PREVENT MANIFEST INJUSTICE TO EMPLOYEES AND REDUCE CONFUSION AND UNCERTAINTY FOR EMPLOYERS.

This Court's brief survey of law governing selection of an appropriate remedy in this case was sound, yet left important issues unexplored. For instance, the Court properly recognized that it has considerable "discretion" to craft a remedy for the EEOC's "failure to provide a reasoned explanation for its decision[s]" in promulgating the Rules. Mem. Op. [ECF No. 47] at 33-34 (quoting *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005)). The Court also correctly observed that the *Advocates* decision of the Court of Appeals declares that "unsupported agency action normally requires vacatur." Mem. Op. [ECF No. 47] at 34 (quoting *Advocates*, 429 F.3d at 1151). And, the Court justifiably added that in some circumstances, a different remedy, such as "remand [to the agency] without vacating," may be best. *Id.* Nevertheless, the Court has not yet explored cases involving more nuanced, hybrid remedial steps, which cases AARP respectfully submits are more akin to the case at bar and whose hybrid remedies would be warranted in this instance.

The undisputed starting point in formulating a remedy for a lack of reasoned decisionmaking underlying a federal agency rule is to examine two factors:

> "[1] the seriousness of the [challenged rule's deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed."

Id. at 34 (quoting *Comcast Corp. v. F.C.C.,* 579 F.3d 1, 8 (D.C. Cir. 2009)); *accord Advocate*s, 429 F.3d at 1151 (quoting *Allied-Signal Inc. v. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993)). In this instance, both factors weigh heavily in favor of vacatur, with limits to mitigate temporary "disruptive consequences," or, in the alternative, a permanent injunction to begin January 1, 2018.

A. The Court Correctly Recognized the Seriousness of the Rules' Deficiencies.

The Court correctly recognized that the Rules' serious deficiencies weighed in favor of vacatur. Mem. Op. [ECF No. 47] at 34. The Court criticized the EEOC's failure to: (1) adequately explains its interpretation of the term "voluntary;" (2) provide a reasoned response to comments raising significant problems; and (3) include any substantial evidence in the administrative record supporting the Rules. *Id.* at 33. The EEOC's failure to provide reasoned explanation for its interpretation of the term "voluntary"—supported by actual analysis of the factors that might be relevant to the economic coerciveness of the 30% incentive level—renders the process by which the agency reached this result illogical and irrational. *Id.* at 28 (citing *Tripoli Rocketry Ass'n, Inc. v. ATF*, 437 F.3d 75, 77 (D.C. Cir. 2006)).

Not only did the EEOC fail to confront the comments raising one of the Rules' most significant problems—the possibility that the 30% Rule could disproportionately harm the very group of people that the ADA is meant to protect—but the agency also failed to meaningfully engage with the purpose of the ADA itself. Mem. Op. [ECF No. 47] at 26 (citing *Covad v. Commc'ns Co. v. FCC*, 450

F.3d 528, 550 (D.C. Cir. 2006)). The administrative record is devoid of "concrete data, studies, or analysis that would support any particular incentive level as the threshold past which an incentive becomes involuntary in violation of the ADA and GINA," *id.* at 33, which underscores the arbitrariness of the agency's decision making process. Indeed, the agency's cumulative failings left the Court doubting "'whether the agency chose correctly' in making its decision," which "suggests that the agency's decision may very well be different on remand." Mem. Op. [ECF No. 47] at 34 (citing *Am. Petrol. Inst. v. Johnson*, 541 F. Supp. 2d 165, 185 (D.D.C. 2008) (quoting *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967) (D.C Cir. 1990)).

These serious failings stand in stark contrast to those of the regulations at issue in many of the decisions cited by the Court in justifying its decision to remand without vacatur. Those decisions describe the agency rule at issue as likely redeemable, if only the agency will apply itself. *See Advocates*, 429 F.3d at 1151 (remanding, where plaintiffs "raise[d] no objection to. . . leaving the current rule in place" and "conceded . . . that [it] w[ou]l[d] do no affirmative harm, arguing only that it does not go far enough"); *Int'l Union*, 920 F.2d at 967 ("the record affords us no basis for concluding that the deficiencies of the order will prove substantively fatal."); *Allied-Signal, Inc.*, 988 F.2d at 151 (finding "at least a serious possibility that the Commission will be able to substantiate its decision on remand"). The exact opposite is the case here, and the Court rightly concluded that this factor weighs in favor of vacatur. Mem. Op. [ECF No. 47] at 34.

B. The Court Should Alter Its Remedial Decision By Leaving The Rules In Place During 2017 To Prevent Disruption, But Ensuring That The Invalidated Rules Are Not Applicable Beginning In 2018.

The Court declined to vacate the Rules because of valid concerns about the potential unfairness, disruption, and confusion that immediate vacatur might cause. *Id.* However, remanding the Rules for the agency's reconsideration at this time—at least without appropriate limits—is very likely to have additional, seriously disruptive consequences for both employees and employers. For this reason, the better course is for the Court to craft a remedy to ensure that the invalidated Rules will be ineffective as of 2018. Unlike cases in which courts have found that the "egg has been scrambled and there is no apparent way to restore the status quo ante," *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002), here, the Court can craft a remedy that will avoid further harm to employees and resolve significant confusion currently faced by employers finalizing their 2018 plans. *See AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 92 (D.D.C. 2007) ("the fact that vacatur preserves the status quo . . . favors rather than undermines, vacatur as a remedy").

1. Remanding the Rules without vacatur causes further disruption, including additional harm to employees in 2018 through new disclosure of medical information and confusion among employers about their 2018 plans.

First and foremost, if the current, invalid Rules remain in effect carrying into 2018, additional employees will be subject to the penalties permitted by those Rules, and many employees will likely disclose their personal and family health

information because of financial pressure. As the Court rightly recognized, once this information is disclosed, it "can never be made confidential again." Mem. Op. [ECF No. 47] at 35. Thus, these employees face irreparable harm from irrevocable disclosure. While employees who disclosed their information in 2017 may now have no effective means of redress, employees facing future disclosure in 2018 deserve the Court's protection from the harmful impact of the current, unlawful Rules. *See id.* at 25-26 (discussing comments raising concerns about excessive financial burden of currently-permitted penalties). Moreover, once 2018 begins, and expectations about premiums become settled again, it may again become extremely disruptive and problematic to change course before 2019. Thus, individuals who resist employers' financial pressure are likely to bear the heavy burden imposed by a 30% penalty for another year, despite the fact that the Court had already found grave deficiencies in the administrative regime that would have permitted such a penalty.

In addition, employers now face considerable uncertainty about the status of their wellness programs' legal validity going forward. *See*, *e.g.*, *Susan K. Lessack*, Pepper Hamilton, LLP, *EEOC Must Reconsider Its Workplace Wellness Program Rules* (August 23, 2017), http://www.pepperlaw.com/publications/eeoc-must-reconsider-its-workplace-wellness-program-rules-2017-08-23/ ("In light of the *AARP* decision, the landscape for employers implementing wellness programs has become murkier."). The Court expressed justifiable concern about the potential for an unfair retroactive impact on employees and employers who relied on the Rules. Mem. Op. [ECF No. 47] at 35. Unfortunately, irrespective of vacatur, the Rules' invalidity

itself creates the potential for this issue to arise. Because judicial decisions are presumptively retrospective, *Davis v. U.S. Dept. of Justice*, 610 F.3d 750, 754 (D.C. Cir. 2010), the Court's declaration of the Rules' invalidity inherently means that the Rules were *never* valid. Of course, because of the serious due process concerns that would be implicated by punishing either employees or employers for relying on a Rule before it was declared invalid, it is highly unlikely that any court would award retroactive relief. *Cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'") (internal citations omitted). Regardless, the Court's choice of remedy regarding the Rules cannot affect this result one way or the other as to past penalties/incentives, given the Rules' invalidity.

However, the possibility that the Rules will remain in place in 2018 exposes employers to potential *future* liability for continuing to rely on an administrative scheme that they now know to be unlawful. Indeed, law firms that represent employers are already warning that the Court's decision puts employers in a "difficult position," primarily because of the risk that private litigants will challenge employer wellness programs based on the Rules' invalidity. Frank C. Morris, Jr. & Brian W. Steinbach, *EEOC's Wellness Program Incentive Regulations Rejected by*

the District Court, Employment, Labor, and Mgmt. Act Now Advisory ("Act Now Advisory") (Aug. 25, 2017), at 4-5, http://www.ebglaw.com/content/uploads/2017/08/Act-Now-Advisory-EEOCs-Wellness-Program-Incentive-Regulations-Rejected-by-the-District-Court.pdf (explaining that employers' greatest risk is from private litigation challenging wellness programs with 30% incentive levels and opining that, while good faith compliance with rules will likely shield employers from damages, prospective injunctions may be ordered).[2] As these law firms explain, this problem is intensified by uncertainty about the state of the law in 2018. *Id.* In particular, as open enrollment for most plans approaches this fall,[3] this uncertainty creates difficult decisions for employers that are finalizing their plans. *Id.* at 4 ("It is almost a certainty that revised or new regulations will not be in place this fall when employers and wellness program providers will make 2018 plan design decisions."). They cannot safely rely on the existing Rules, nor can they reasonably presume that the EEOC's reconsideration will lead to a newly-validated 30% Rule, given the seriousness in the deficiency of this choice in the first instance (as discussed above).

Consequently, although some disruption and confusion is inevitable because the EEOC promulgated invalid Rules, the best way to minimize that disruption is to devise a remedy that will make clear to employees and employers that, while their plans need not be disturbed in 2017, the invalid Rules will not remain in effect as of

[2] The risk that this anticipated litigation could lead to inconsistent results throughout the country only compounds this potential disruption.

[3] *See*, *e.g.*, Lacie Glover, *Open Enrollment for 2018 Health Insurance* (July 25, 2017), https://www.nerdwallet.com/blog/health/health-insurance-open-enrollment/.

2018. Two potential remedies are: (1) the Court could vacate the Rules, but stay the mandate until January 1, 2018; or (2) the Court could issue an injunction with only prospective application, effective January 1, 2018.

2. The Court could vacate the Rules and stay the mandate until 2018.

Staying the mandate instead of immediately vacating would protect employees and create welcome certainty for 2018 without disrupting the 2017 plan year. As the U.S Court of Appeals for the D.C. Circuit has suggested, delaying the mandate's issuance to give an agency an opportunity to reevaluate its Rules can minimize the disruptive effect of vacating a Rule. *See Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 148 (D.C. Cir. 2006) (vacating rules but noting that "the parties may move to stay the district court's order on remand to give either the District of Columbia a reasonable opportunity to establish daily load limits or EPA a chance to amend its regulation"); *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001) ('Because this decision leaves EPA without standards . . . EPA . . . may file a motion to delay issuance of the mandate to request either that the current standards remain in place or that EPA be allowed reasonable time to develop interim standards."); *see also* Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur*, 80 N.Y.U. L. Rev. 278, 307 & n. 141 (2005) (recommending "vacating the agency rules upon remand, but delaying issuance of the mandate for a limited period of time").

Vacating the Rules and staying the mandate would also reduce potentially damaging delay. *Comcast Corp.*, 579 F.3d at 11 (Randolph, J., concurring) ("a stay

with reasonable time limits gives the agency an incentive to avoid unnecessary or prejudicial delay. A remand-only disposition leaves the unlawful rule in place and allows agencies to postpone responding to the court's merits decision. Agencies do not necessarily give remand-only decisions high priority and may delay action for lengthy periods."). Remand without vacatur can result in extended delays in resolving deficiencies in existing regulations. *See*, *e.g.*, *In re: People's Mojahedin Org. of Iran*, 680 F.3d 832, 838 (D.C. Cir. 2012) (granting writ of mandamus if the agency did not act within thirty days because the agency had failed to progress in administrative proceedings after two years); *In re: Core Commc'ns, Inc.*, 531 F.3d 849, 859-60 (D.C. Cir. 2008) (granting writ of mandamus when agency failed to articulate a valid justification for its invalid regulations for six years). Such a delay in this instance would cause a very serious injustice for employees and prolong employers' uncertainty about the status of the law indefinitely.[4] Staying the mandate pending any such resolution will avoid this uncertainty and unfairness as open enrollment and the 2018 plan year approach, while giving the EEOC a reasonable opportunity to rectify its Rules before the current, intractable situation recurs in 2018.[5]

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[4] Given the year-long process the agency went through to promulgate the 2016 Rules, the likely need for the agency to reopen the administrative record, and the present lack of a full complement of Commissioners at the EEOC, a multi-year process for reconsideration is not at all unrealistic.

[5] Notably, a post-judgment motion is an ideal opportunity to consider the benefits of vacatur with a stay pending the agency's reconsideration. *See Comcast Corp.*, 579 F.3d at 11 (Randolph, J., concurring). As Judge Randolph explained,

3. The Court could issue a prospective injunction effective 2018.

While vacatur with a short stay of the mandate is the most effective remedy, if the Court remains concerned that any vacatur would be undesirable notwithstanding a delayed implementation, the Court could instead issue an injunction on enforcement of the Rules, effective January 1, 2018. *See Salazar v. Buono*, 559 U.S. 700, 718 (citing *United States v. Swift & Co.,* 286 U.S. 106, 114 (1932)) (when issuing an injunction,"[a] court must find prospective relief that fits the remedy to the wrong or injury that has been established."); *Humane Soc'y v. Johanns*, 520 F. Supp. 2d 8, 12 (D.D.C. 2007) (among other things, issuing an injunction against future enforcement of an invalid regulation).

While injunctions against the government are not a typical remedy, where necessary to protect the public during the pendency of the agency's reconsideration, they are nonetheless appropriate. *Defenders of Wildlife v. Jackson*, 791 F. Supp. 2d 96, 110-11, 121 (D.D.C. 2011) (granting injunction against registration of

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> The briefs of the parties rarely discuss what remedy the court should impose if the agency loses. This is understandable. It may be impossible for petitioners, agencies, or intervenors to anticipate exactly how the court's decision will come out. There may be challenges to many rules or many aspects of one rule. The court may uphold some and reject others. Different consequences can result from different combinations. Besides, agencies do not relish anticipating a loss. No litigant does. To require the parties to address the subject in each case would waste their time and the court's in all cases in which the agency prevails. . . . The upshot is that remand-only decisions are being made without sufficient information, which is one of the main reasons the cases are so difficult to reconcile.

Id. (internal citations omitted).

rodenticide pending EPA consultation with the Fish and Wildlife Service under the Endangered Species Act); *accord Wash. Toxics Coalition v. EPA*, 413 F.3d 1024, 1035 (9th Cir. 2005) (pesticides); *Fla. Deer Key v. Paulison*, 522 F.3d 1133, 1147 (11th Cir. 2008) (also Endangered Species Act). Indeed, this Court has recognized its "broad power" to issue injunctive relief to prevent future harm. *Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 17 (D.D.C. 2004), *declared moot on other grounds in Doe v. Rumsfeld*, 172 F. App'x 327, 327-28 (D.C. Cir. 2008).

Here, given the unique circumstances of the case, such an injunction would be an effective solution because it would eliminate some uncertainty for employers and employees as of 2018, and it would also signal the purely prospective application that the Court rightly considers appropriate for its ruling. An injunction would clearly inform employers of the state of the law as of 2018, and it would be instrumental in avoiding inconsistent results in potential private litigation throughout the country, should employees challenge employers' wellness programs as involuntary. Given the unique circumstances in this case, in which employees will be irreparably harmed by disclosure of medical information in 2018 and employers remain uncertain as to how to finalize their wellness programs at a critical time, issuing a prospective injunction effective in 2018 is a practical way to avoid as much disruption as possible, increase clarity and certainty, and prevent future harm to employees.

CONCLUSION

While some disruption and confusion is inevitable whenever a regulation is declared invalid, in this case, the burden of that uncertainty should not fall on employees who will face either heavy financial penalties or unwanted disclosure of personal and family medical information in violation of the ADA and GINA. Vacating the Rules while staying the mandate until 2018 or issuing an injunction effective in 2018 pending the agency's reconsideration, will avoid the disruption and unfairness that most concerns the Court, while creating some certainty for employers in the short term and avoiding irreparable injury to an additional group of employees.

Respectfully submitted,

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