**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| AARP,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,<br><br>Defendant. | Case No. 1:16-cv-02113 (JDB)<br>Hon. John D. Bates |

**DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S**
**RULE 59(E) MOTION TO ALTER OR AMEND ORDER**

On August 22, 2017, this Court remanded the wellness rules challenged in this case to the Equal Employment Opportunity Commission ("EEOC") for further consideration. *See* ECF No. 46 ("Order"); ECF No. 47 ("Mem. Op."). Recognizing the "significant disruptive consequences" that would occur if the Court immediately vacated the rules, however, the Court exercised its discretion to remand without vacatur. *See* Mem. Op. at 36. The Court directed Defendant to file a status report by September 21, 2017, proposing a schedule for its review of the rules. *See* Order at 2.

Without waiting for Defendant to file that status report — and without conferring with Defendant, *contra* LCvR 7(m) — Plaintiff has now filed a motion to alter or amend the Court's order, requesting that the Court vacate the challenged rules as of January 1, 2018. *See* ECF No. 48-1 ("Pl's Mot.").[1] Because employers have generally already negotiated their health insurance

[1] While the EEOC has not yet determined what proceedings it intends to conduct on remand, or how long those proceedings will take, it agrees with AARP that under any scenario, it is not feasible for the EEOC to complete remand proceedings before 2018. *See* Pl's Mot. at 1.

plans for 2018 and are preparing to commence open enrollment in a matter of weeks, vacating the rules at this late date would be extraordinarily disruptive to employers and employees alike. The Court should therefore deny Plaintiff's motion.

## STANDARD OF REVIEW

"A Rule 59(e) motion is discretionary and need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). "The standard of proving manifest injustice is . . . high," *In re Motion of Burlodge Ltd.*, No. 08-525, 2009 WL 2868756, at *7 (D.D.C. Sept. 3, 2009), and a "Rule 59(e) motion is not a second opportunity to present argument upon which the Court has already ruled, nor is it a means to bring before the Court theories or arguments that could have been advanced earlier." *W.C. & A.N. Miller Co. v. United States*, 173 F.R.D. 1, 3 (D.D.C. 1997), *aff'd sub nom. Hicks v. United States*, No. 99-5010, 1999 WL 414253 (D.C. Cir. May 17, 1999).

## ARGUMENT

As the Court has explained, the two relevant factors in determining whether vacatur should accompany remand are the disruptive consequences of vacatur and the seriousness of the rules' deficiencies. *See* Mem. Op. at 34. The Court's conclusion that these factors weighed against vacatur does not come close to meeting the high bar of "manifest injustice."

### I. Vacating The Rules For 2018 Would Be Extraordinarily Disruptive, As Employers Have Already Negotiated Insurance Plans For 2018 And Will Be Commencing Open Enrollment In A Matter Of Weeks.

Plaintiff's motion proceeds from the premise that if the Court immediately ordered the challenged rules vacated as of January 1, 2018, such an order would give employers sufficient time to bring their plans into compliance and provide employers and employees with certainty. As the administrative record reveals, however, that premise is flatly incorrect: while employers' open

enrollment periods do not typically commence until sometime in the fall (*i.e.*, mere weeks from now), *see* Lacie Glover, Open Enrollment for 2018 Health Insurance (July 25, 2017), https://www.nerdwallet.com/blog/health/health-insurance-open-enrollment (cited in Pl's Mot. at 9 n.3), employers begin the process of negotiating insurance contracts and preparing plan materials long before open enrollment begins. Thus, if the Court were to vacate the rules for purposes of 2018 at this late date, "widespread disruption and confusion," *see* Mem. Op. at 35, would still result.

After the EEOC published the proposed rules at issue here, numerous commenters stressed the need for employers to have a lengthy period of time to prepare for the new regime. As the ERISA Industry Committee put it, it "is not practical, or sometimes even possible, to change the design of wellness programs *after July* for the following calendar year." A.R. 2863 (emphasis added);[2] *accord*, *e.g.*, A.R. 2576 (Kentucky Employee's Health Plan ("KEHP")) ("[L]arge employers ordinarily finalize the design of their group health plans in June or July for the next calendar year.").

The record explains why that amount of time is necessary. As KEHP explained, "[i]t is necessary to finalize the design well before the beginning of the next plan year so that the employer can communicate the plan coverage provisions to the plans' third-party administrators: once the third-party administrators receive the final plan design, they must program software systems, revise administrative manuals, and train customer service representatives to administer the benefits properly." *Id.* It further noted that "[i]n advance of open enrollment, employers must prepare participant communications and open enrollment materials, and must create internet-based tools,

[2] Attached as Exhibit A to this Memorandum is a Supplemental Appendix containing all comments cited herein.

to help employees understand the new benefit options and make appropriate choices concerning their family's health coverage for the upcoming year. Before the Commonwealth's open enrollment begins, 170,000 enrollment guides must be printed for distribution." A.R. at 2577.[3]

Other commenters forcefully expressed the same sentiment:[4]

- **Alston & Bird LLP** (A.R. 3379): "[E]mployers often rely on wellness program vendors to design and implement wellness programs, and must finalize such programs well in advance of their effective date to allow for the calculation of premiums and annual enrollment in the health plan. Thus, we respectfully request that any final regulations allow an adequate time for plan design, communication and implementation. *Since plan decisions are often made 6 months prior to a new plan year, we would suggest that any final regulations be effective prospectively, as of the first plan year occurring 6 month[s] after publication*."

- **National Business Group on Health** (A.R. 3415-16): "[W]e recommend that in setting an effective date for final regulations, the EEOC consider the administrative requirements of large, self-insured group health plans. Most of our members implement plan design changes on a plan year basis, which may or may not coincide with the calendar year. In addition, because our members' plans (1) cover large populations, (2) often include different plan options and designs tailored to specific participant populations, and (3) often require coordination with multiple third-party administrators and vendors; *our members tend to finalize any plan design changes up to a year before their implementation.* Therefore, we recommend that any amendments to ADA regulations related to wellness programs become effective no earlier than the first day of the first plan year beginning 12 months after the issuance of final regulations, which would be consistent with other laws and regulations affecting employer plans."

- **Chamber of Commerce** (A.R. 3485): EEOC "must allow employers enough time to design and implement health plans, including wellness programs, in a reasonable manner. *For example, if a regulation is finalized in the summer months, then it is likely too late in the process for an employer to redesign its plan for the upcoming plan year to be ready for an open enrollment period in the fall.* Practically speaking, much of the design and marketing plan will have been submitted for printing well before open enrollment, and nearly be impossible to change, if enough time to implement the new regulations is not provided."

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[3] KEHP also pointed to certain additional requirements that apply to government-sponsored health plans. *See* A.R. at 2577 ("[G]overnment-sponsored health plans such as KEHP often confront unique challenges in implementing design changes to their plans. The Commonwealth is required by law to file the handbook describing the benefits for KEHP's upcoming plan year with Kentucky's Legislative Research Commission no later than September 15th. The handbook must contain 'at a minimum, the premiums, employee contributions, employer contributions, and a summary of benefits, copays, coinsurance, and deductibles' for the plan. Officials designing the benefit packages offered under KEHP must brief the governor's office and build legislative support for any changes to the plan design well before the filing date." (footnote omitted)).

[4] All emphasis is added.

- **College and University Professional Association for Human Resources** (A.R. 3559): "*Significant lead time* is necessary to implement changes in plans, including designing new systems and creating and printing materials in advance of a new plan year. Accordingly, the Commission should consider either a significant delay before the effective date or a phased-in effective date, requiring compliance with the start of a new plan year after an appropriate period of time, *such as one year*, to allow for revision of plans and system updates."

- **Epstein, Becker & Green** (A.R. 3649): As of June 19, 2015, "*the employer planning for this Fall's open season for the 2016 plan year is essentially complete*. An effective date before January 1, 2017 would likely require employers to drop their wellness programs because they would have insufficient time to bring them into compliance. . . . It would be impractical to have plans attempt to redesign their programs during or after the open enrollment period to comply with new rules from the EEOC. It would also be unfair to individuals who may have chosen health insurance providers based on available wellness programs that may become unavailable if they are forced to comply prematurely with the EEOC's final rule. Thus, the effective date for the EEOC final rule should be for benefit plan years beginning on or after January 1, 2017, at the earliest."

- **Society for Human Resource Management** (A.R. 7202): "Employers will need time to redesign health and wellness plans and create materials for employees several months before open enrollment. For this reason, *the final rule should provide employers with no less than 6 months of preparation time before a new plan year begins*."

These comments make abundantly clear that if the Court were to vacate the rules as of 2018, employers and employees would be subject to substantial disruption. The Court denied Plaintiff's motion for preliminary injunctive relief because the requested injunction would "likely cause considerable disruption for employers and insurers who designed their 2017 health plans around the fact that these rules would be implemented," ECF No. 27 at 27, and the exact same considerations now point to leaving the rules in place through 2018, since 2018 health plans have also already been "designed . . . around the fact that these rules would be implemented." At least as to 2018, this is a textbook case where the "egg has been scrambled." *Sugar Cane Growers Co-op. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002).

Three other points bear emphasis. *First*, Plaintiff's suggestion that vacatur is necessary to "reduce employers' confusion about the coming plan year," Pl's Mot. at 2, is a red herring. Under the Court's existing order, there is no confusion: while the Court found that the agency failed to

articulate a sufficient justification for the rules, it declined to vacate them — *i.e.*, it left the rules in place. Absent a court order vacating them, the rules — like any legislative rules — "have the full force of law." *Joseph v. U.S. Civil Serv. Comm'n*, 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977). Plaintiff attempts to confuse this straightforward proposition by discussing the presumptive retroactivity of judicial decisions, *see* Pl's Mot. at 8, but the upshot of Plaintiff's theory would be that courts can never remand without vacatur, since the act of remanding would always imply invalidity *ab initio*. But it "is simply not the law" that a court must vacate an agency action found to be in violation of the APA. *Sugar Cane Growers*, 289 F.3d at 98. To the contrary, courts have discretion to remand for further explanation without vacating a rule where vacatur would unduly disturb settled expectations and cause chaos. *See A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995).

*Second*, Plaintiff's professed concern for employers — and specifically, for the possibility that employers offering wellness plans that comply with the challenged rules might be subject to "future liability for continuing to rely on an administrative scheme that they now know to be unlawful," Pl's Mot. at 8 — makes little sense. The rules challenged in this case do not require any employer to offer incentive-based wellness programs. If any employer shares Plaintiff's concern that offering such programs exposes it to potential liability, then neither the challenged rules nor the Court's order requires it to offer such programs. Plaintiff does not even attempt to explain why protecting employers from liability requires vacatur of rules that do not require employers to offer incentives. On the other hand, what clearly *would* expose employers to liability is vacating the rules upon which they have relied in designing their 2018 health plans, when it is now too late to change them. To pull the rug out from under employers at this late date would be manifestly unfair.

*Third* and finally, it bears emphasis that Plaintiff's current problem is significantly of its own making. Plaintiff received the administrative record on January 30, 2017, *see* ECF No. 28; it has been on notice since at least that date of the numerous comments explaining the amount of time that employers need to redesign their health insurance offerings around changed wellness regulations. Nonetheless, on March 1, 2017, Plaintiff agreed to a briefing schedule that included deadlines far longer than the default periods created by this Court's local rules, and pursuant to which briefing would not be complete until June 13, 2017. *See* ECF No. 30. Plaintiff also requested oral argument, *see* ECF No. 35 at 2, further ensuring that this case would not be ripe for adjudication until, at the earliest, the middle of the summer of 2017. Had Plaintiff wanted the Court to vacate the rules for 2018, it should have insisted upon the default briefing schedule, and perhaps even renewed its application for preliminary injunctive relief following the production of the administrative record. *Cf.* ECF No. 27 at 21 (denying Plaintiff's motion for preliminary injunction in part because of Plaintiff waited too long file its motion).

Plaintiff did not take any of these steps; indeed, its motion for summary judgment did not even request vacatur at all. *See* ECF No. 35. As noted above, Rule 59(e) "may not be used to . . . raise arguments or present evidence that could have been raised prior to the entry of judgment." *Slate v. Am. Broad. Companies, Inc.*, 12 F. Supp. 3d 30, 34 (D.D.C. 2013) (quoting *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008)); *see also, e.g.*, *Lightfoot v. Dist. of Col.*, 355 F. Supp. 2d 414, 421 (D.D.C. 2005). Plaintiff did not make appropriate efforts to obtain a Court ruling vacating the rules in time for employers to amend their plans for 2018, and it cannot now contend for the first time that the Court's order causes manifest injustice. *See, e.g., GSS Grp. v. Nat'l Port Auth.*, 680 F.3d 805, 812 (D.C. Cir. 2012) ("GSS Group could have made all three of the arguments identified above in its opposition to the Port Authority's motion to dismiss, but elected not to do

so. The arguments therefore are waived [for purposes of Rule 59(e)]." (citation omitted)); *see also* Wright & Miller, Federal Practice & Procedure § 2810.1 ("The Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." (footnotes omitted)).

## II. The Deficiencies Found By The Court Do Not Justify Barring The Use Of All Incentives, When Even Plaintiff Does Not Believe The Statutes Require That Result.

The second factor pertinent to the vacatur analysis is the seriousness of the rules' deficiencies. While Defendant respectfully disagrees that the rules are deficient in any respect, the key point at this juncture is that the deficiencies identified by the Court do not logically call for a ban on all incentives. Rather, as the Court found (and as Plaintiff has conceded), neither the ADA nor GINA precludes the use of incentives. *See* Mem. Op. at 16 ("[N]othing in either statute directly prohibits the use of incentives in connection with wellness programs; indeed, neither statute speaks to the level of permissible incentives at all."); *id.* at 18 ("AARP does not dispute that some level of incentives may be permissible under the statutes."). While AARP evidently would like the Court to vacate the rules and bar the use of incentives pending remand, its statutory theory does not call for such an outcome and AARP has identified no reason why the Court should bring it about.

## CONCLUSION

Defendant respectfully requests that Plaintiff's motion be denied.

Dated: September 11, 2017

Respectfully submitted,

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