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Employer Wellness Planning 2019 - Part I of II

Employers who sponsor wellness programs that offer incentives once again face legal uncertainty. On December 20, 2017, in *AARP v. United States Equal Employment Opportunity Commission*, the United States District Court for the District of Columbia issued an order setting aside, effective January 1, 2019, the portion of the EEOC's final wellness program rules relating to the incentives that may be offered as part of an employer-sponsored wellness program without violating the ADA and GINA. As employers begin to plan for 2019, they must consider what plan design changes, if any, to make to their wellness programs in light of the court's order.

AARP Litigation

On May 17, 2016, the EEOC published final rules under the ADA and Title II of GINA regarding the application of those laws to employer-sponsored wellness programs. The final rules address the extent to which an employer can offer an incentive for an employee's or spouse's completion of a health screening, biometric screening and/or a health risk assessment that includes disability-related inquiries (collectively, a "Screening") as part of a voluntary wellness program. Generally, these rules allow employers to provide an incentive for completing a Screening, and the total incentive for the year cannot exceed 30% of the premium for employee-only coverage.

On October 24, 2016, the American Association of Retired Persons (AARP) filed suit against the EEOC seeking to block the implementation of the ADA/GINA final wellness program rules. The AARP argued that the level of permitted incentives under those rules is too high for the program to be "voluntary" under the ADA and GINA and that the EEOC failed to adequately explain and support its decision regarding the appropriate incentive level. In a decision issued on August 22, 2017, the United States District Court for the District of Columbia granted the AARP's motion for summary judgment, concluding that the EEOC failed to provide a reasoned explanation of why 30% was the appropriate percentage to apply when determining whether a wellness program that offers incentives is voluntary under the ADA and GINA. According to the court, "this would likely be a different case if the administrative record had contained support for and an explanation of the agency's decision, given the deference courts must give in this context. But, 'deference' does not mean that courts act as a rubber stamp for agency policies." The court considered setting aside the rules, but decided that it was not appropriate to do so during the middle of the year. Instead, the court elected to leave the rules in place but remand them to the EEOC for further consideration, which could include rewriting the rules or providing additional justification for the permitted level of incentives.

EEOC Response

On September 21, 2017, the EEOC filed a status report with the court indicating that it expected to issue new proposed rules by August 2018 and final rules by October 2019, and that it anticipated that employers would

have until 2021 to comply with the new rules. Displeased with the slow timetable proposed by the EEOC and in response to a motion filed by AARP, the court revisited the issue of the appropriate remedy for the deficiencies in the wellness program rules. By order dated December 20, 2017, the court elected instead to set aside the challenged portions of the rules effective January 1, 2019. This means that the 30% incentive limitation will be invalid starting January 1, 2019, while the remainder of the ADA and GINA final regulations remain applicable and valid.

In Part II of our blog post we will discuss what this means for employers when they are planning for 2019 wellness programs.