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Employer Wellness Planning for 2019 - Part II of II

This is Part II of our blog post on employer wellness planning for 2019. Part I of our blog post explained the ongoing saga between AARP and the EEOC with respect to the ADA and GINA final regulations. We discussed that the district court judge elected to set aside the challenged portions of the ADA and GINA final regulations 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.

Considerations for Employers

It is clear that employers are unlikely to receive new proposed rules or any other guidance from the EEOC regarding wellness program incentives before the end of the year. Even if new proposed regulations were to be issued, it is almost certain that they would not be finalized before the court's order takes effect January 1, 2019. Further, there is no reason to believe that the court will withdraw its order vacating the rules or delay the effective date of the order. As a result, employers who are planning for 2019 must do so with the assumption that a portion of the final regulations dealing with the use of wellness program incentives under the ADA and GINA will not be in effect at the beginning of next year.

If no additional guidance is issued, employers must still comply with portions of the wellness program rules. The court's order struck only the portion of the wellness program rules that address the employer's ability to provide incentives or inducements to an employee or an employee's spouse under the ADA and GINA for completing screenings, health risk assessments and other events that are covered by ADA and GINA. This means that employers must continue to comply with the portions of the wellness program rules that were not impacted by the court's order. For example, the employer must still comply with the ADA and GINA notice and/or consent requirements.

Because the court's order set aside the portion of the wellness program rules dealing with incentives, we return in part to the legal landscape that existed before the rules were first proposed. At that time, it was generally accepted that under the ADA employers could offer some type of incentive for completing a health screening or asking disability related inquires (such as in a health risk assessment), but the amount of the permitted incentive was unclear. With regard to GINA, it was less clear that an employer could offer an incentive to an employee for the spouse's completion of a health risk assessment or health screening because the EEOC had indicated its view that spouse's medical information was considered to be genetic information as to the employee. In the past, the EEOC took the lead in challenging what it viewed as non-compliant wellness program incentives. Going forward, that is not likely to happen if the incentive complies with the wellness program rules because the EEOC would be challenging its own guidance.

Employer Options for 2019

Employers have several options as follows –

- ***Use the full 30% incentive.*** Employers could elect to use the full 30% incentive notwithstanding the court's order. Employers who adopt this approach may be challenged although arguments can be made as to why this amount would not render the program involuntary or is otherwise permitted. This challenge is not likely to come from the EEOC as long as the incentive complies with the wellness program rules, but instead from an individual employee or class of employees. There are a handful of court decisions on these issues, but only one that addressed the issue directly (*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.

- ***Use an incentive that is lower than 30%.*** Employers could elect to use an incentive that is based on a lower percentage (e.g., 10% or 20%). In court filings, AARP and the court acknowledge that some level of incentive may be permitted without violating the ADA or GINA. The risk of challenge is less with a lower percentage. At the same time, it is important to note that the court did not indicate that the 30% incentive level was per se incorrect under ADA and GINA, just that the EEOC failed to provide adequate evidence that the 30% level was the correct level.

- ***Eliminate the incentive.*** Employers who want to avoid any risk on this issue could elect to limit the use of incentives with respect to health screenings (which include associated lab tests, biometric screenings and physicals) and disability-related inquiries. Employers could continue to use incentives that reward employees or spouses who do not use tobacco (as long as blood tests are not used to determine tobacco use) or participate in certain health activities, like wellness educational programs and fitness challenges. These incentives would have to comply with other applicable laws, including the HIPAA nondiscrimination wellness program rules. This may not be an appealing option for employers who view the results of a health screening as the motivator for participating in these other activities.

Final Thoughts

Employers who elect to continue to offer an incentive (regardless of the amount) that is potentially subject to the ADA and or GINA must still comply with the non-incentive portions of the ADA and GINA final regulations (e.g., the notice and/or consent rules). Further, employers who offer an incentive that is potentially subject to the ADA will want to make certain that they have structured their wellness program documents to take advantage of the argument that the incentive is permitted under the ADA safe harbor for bona fide health plans. In the event the incentive is challenged, this will provide another avenue for the employer to argue that the program does not violate the ADA. In addition, given the uncertainty that exists with respect to the use of incentives, employers should make certain that any employee

communications describing the incentive reserve the right to change or terminate an incentive (even after it is earned).