Back To The Drawing Board? Court Tells EEOC To Reconsider Wellness Program Rules

Insights
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A federal court in the District of Columbia recently told the Equal Employment Opportunity Commission (EEOC) to reconsider two of its recent regulations surrounding incentivizing participation in employer-sponsored wellness programs. Despite the decision against the EEOC, employers should be aware that the rules will be kept in place for the time being to avoid "disruption and confusion." While you should keep the status quo for now, this situation bears monitoring in the near future to see whether a wholesale change takes place at some point in the near future.

Recap Of The New Wellness Program Rules

Last May, the EEOC published its final rules on incentives and employer-sponsored wellness programs. Those new rules, which went into effect on January 1, 2017, allowed employers to use a penalty or incentive of up to 30% of the cost of self-only coverage to encourage participation in an employer-sponsored wellness program without rendering them "involuntary" in violation of the American's with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). In other words, the new rules allowed employers to offer a discount on insurance costs for participants, or to increase insurance costs for non-participants.

The AARP Challenges The New Rules

On behalf of its members, the American Association of Retired Persons (AARP) filed suit in October 2016 seeking to stop the two new rules from taking effect. The AARP argued that the 30% incentive was inconsistent with the "voluntary" requirements of the ADA and GINA in that employees who could not afford to pay a 30% penalty would be forced to disclose their protected information when they would otherwise not be required to do so. In essence, the AARP questioned whether such an arrangement was truly "voluntary." The AARP also argued that the EEOC never adequately explained its reasoning behind the new rules.

District Court: "EEOC Did Not Consider Voluntariness Factor"

The parties agreed that the EEOC's interpretation of the term "voluntary" in the ADA and GINA should be reviewed under what is known as the two-step *Chevron* analysis. Under this framework, a court first looks at whether Congress has directly answered the question at issue. Since neither the ADA nor GINA defines "voluntary" participation, the court said it would simply defer to the EEOC's interpretation of this term if the agency could offer a reasonable explanation for its interpretation. The interpretation need not be the only possible interpretation or even the most reasonable one – it

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just has to be rooted in some facts connected to the determination.
After reviewing a developed administrative record, the District Court for the District of Columbia found that the EEOC failed to make that critical showing. The court concluded the EEOC's basis for establishing this rules was "not well-reasoned" and therefore not entitled to *Chevron* deference. Despite this critique of the agency's actions, in the 36-page opinion issued on August 22, District Court Judge John D. Bates did not scrap the rules altogether. Instead, he ordered the EEOC to propose a schedule for its review of the new rules, including any further administrative proceedings, and go back to the drawing board.

The EEOC is currently assessing the impact of the decision and its options with respect to these new rules going forward. One possible option is to appeal the court's decision to the D.C. Circuit Court, which could leave the future applicability of the new rules in limbo for some time to come. Or the agency could follow the judge's guidance and try to rework the rules in a revised frmat.

Should Employers Now Reconsider Incentives?
Many employers may now understandably question the future of any incentives provided under their wellness programs. Based upon the court's decision, it seems that you can continue as is with your company's wellness programs for 2017, but anything beyond that is uncertain.

As for 2018, it may be best to take a wait-and-see approach. It is unclear at this point whether and how the EEOC will act to correct the new rules or whether the agency will appeal the decision. If this issue is not resolved in time for 2018, you may want to consider being very conservative with any incentives offered after the turn of the new year.

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