3 Options For Providing Wellness Program Incentives In 2019... And Beyond

Insights
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Employers are about to enter into limbo when it comes to maintaining wellness programs, and you will soon need to make a decision about how you will implement any such programs at your workplace. As of January 1, 2019, the federal rules that had been put into place to govern wellness program incentives will be officially invalid, meaning that you will be somewhat in the wilderness when it comes to creating and enforcing a voluntary wellness program. Here's a quick summary of how we got to this point, and three options for you to consider in light of the impending absence of rules.

Recap Of The Soon-To-Be "Old" Wellness Program Rules

The EEOC's final rules published in May 2016 provided that employers could use an incentive or penalty of up to 30 percent of the cost of self-only coverage to encourage participation in an employer-sponsored wellness program without rendering the program "involuntary" in violation of the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). Put a bit differently, they allowed employers to discount insurance costs for participants and increase them for non-participants.

These rules were set to take effect on January 1, 2017, but they were blocked by a federal court as the result of a lawsuit filed by the AARP. The association argued that such an incentive (or penalty) was so great as to force employees to participate in the wellness programs, removing them from the realm of voluntary. A federal court in Washington, D.C. agreed with the AARP and struck down the regulations in December 2017, asking the EEOC to take another stab at them.

However, the court didn't strike them down immediately. After hearing further arguments about how many businesses had already implemented wellness programs in reliance upon the EEOC rules, the court provided a long lead-up time before the rules would become invalid. The date for them to be officially off the books: January 1, 2019.

So What Are Employers To Do Now? 3 Options

Heading into 2019 and beyond, until the EEOC proposes new rules, employers will need to decide their level of risk tolerance when it comes to implementing wellness program rules. Your three best options for wellness programs that are subject to the ADA or GINA generally are:

- **Highest Risk Option:** Keep in place any wellness incentive and penalty program that is equal to 30 percent of the total cost of employee-only group health plan coverage. The obvious risk: a federal court has already concluded that such a high reward/punishment could render your program involuntary and therefore in violation of the ADA and GINA.
- **Moderate Risk Option:** Significantly reduce the incentive/penalty to an amount that, regardless of an employee's income, could be viewed as small enough for the employee's participation to be considered voluntary. The EEOC's guidance provides that an incentive/penalty is generally permissible under the ADA and GINA, and for 2019 and beyond, the big question that remains is the amount. Based on the wellness programs we have reviewed, the majority of the incentives are relatively small and do not come close to 30 percent of the total cost of employee-only coverage. This approach could decrease the risk of challenge by the EEOC, given that the agency generally will only challenge practices that it considers non-compliant.

  However, even if the EEOC is not inclined to challenge an incentive/penalty, individual employees or organizations could still pursue legal challenges against your organization if they believe your program violates federal law. In general, those lawsuits have not been successful unless they were challenging a particularly aggressive incentive (such as a program that prevented an employee from enrolling in coverage until health information was provided).

- **Lowest Risk Option:** Eliminate any wellness incentive/penalty altogether and wait for further guidance from the EEOC. It is tough to say when we will see new rules from the agency. It originally indicated that we could expect a revised set of rules by 2021, but the federal court chided the EEOC for such a long delay and could have spurred it into earlier action.

Importantly, you should keep in mind that the *AARP v. EEOC* ruling only impacts wellness program components that are subject to the ADA and GINA. For example, this would include any program that requests health information like a health risk assessment or biometric screening. Thus, while waiting for further guidance from the EEOC, you are still free to provide incentives/penalties for other programs for promoting healthier habits and awareness that are not subject to the ADA or GINA, such as a gym membership or lunch-and-learn programs. These, of course, could be subject to the Health Insurance Portability and Accountability Act (HIPAA) and the Affordable Care Act (ACA) or be considered taxable fringe benefits.

Assess And Consult Counsel

In light of the absence of guidance from the EEOC, you should assess your current incentives and penalties, as well as the amount of risk you are willing to assume while waiting for the EEOC to issue new rules—which could be years from now. You should discuss these options with legal counsel when planning your wellness strategies for the next few years to come.

Fisher Phillips will continue to monitor new developments on wellness programs, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date

information. For help with compliance steps or to answer questions, please contact your Fisher Phillips attorney or the authors of this Alert.

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