A Second Bite At The Apple: EEOC Releases Plan For New Wellness Program Rule

Insights
6.16.20

Is the EEOC finally ready to replace its invalidated rule allowing employers to incentivize participation in employer-sponsored wellness programs? Just maybe. Late last week, the EEOC voted 2-1 to send a notice of proposed rulemaking to the Office of Management and Budget (OMB). Despite the June 11 vote, the EEOC has not yet set a timeframe for sending the proposed new rule to the White House's budget office. Once the OMB receives the proposed new rule from the EEOC – and assuming that it is approved – the proposed new rule will then be shared publicly for comment. What do employers need to know about this latest development?

Why Are We Getting A New Proposed Rule?
Talk about a winding road. As employers may recall, back in 2017, a federal district court vacated parts of the EEOC's final rules about incentivizing participation in employer-sponsored wellness programs under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). The court directed the EEOC to revise its rules relating to incentive limits by January 1, 2018, but just as that deadline was set to expire, the agency just up and abandoned this portion of its final rules.

Several months later, in the EEOC's regulatory agenda published in Fall 2018, the agency stated that it would publish new rules by June 2019. Since then, the EEOC kicked this can down the road multiple times, but with last week's announcement, it seems that the agency is now finally ready to take the next steps. At least as far as the ADA is concerned that is. The EEOC's new proposed rule does nothing to replace the similar invalidated rule relating to the GINA, and last week, the agency declined to comment on any plan for replacing it.

What Is In The New Proposed ADA Wellness Program Rule?
The purpose of the new proposed ADA wellness program rule is to try to achieve consistency between the ADA and the Affordable Care Act (ACA). As a refresher, the ACA allows employers to provide incentives to employees who participate in employer-sponsored wellness programs and to penalize those who do not. The ADA permits employers to screen or solicit the health data of employees in connection with such programs, but only if their participation is considered "voluntary," which is basically undefined by the ADA. According to the EEOC, the new proposed ADA wellness program rule was prepared with the belief that any incentives should be minimal because otherwise employees will feel coerced to participate in employer-sponsored wellness programs.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

The Proposed Limit – De Minimis

According to the EEOC's brief summary of the new proposed ADA wellness program rule, employer-sponsored wellness programs must meet "certain requirements" in order to comply with the ADA. To do so, employers may offer only *de minimis* incentives in order to encourage participation in programs that contain disability-related inquiries or medical examinations. However, the EEOC noted that there will be an exception for "certain wellness programs" which will be permitted to offer the maximum incentive or penalty allowed under the 2013 HIPAA regulations (i.e., 30%).

What Should Employers Do Now?

Most employers, in the absence of guidance from the EEOC, previously set this year's wellness program incentives based upon their appetite for risk. Moving forward, you should be aware of this new development and monitor for the publication of the new proposed rule.

We are not out of limbo yet and there are still many steps to go in the rulemaking process. Additionally, given that many employers are currently planning their wellness programs for next year, you should consult with experts about incentive and penalty strategies in light of this new development.

We will continue to monitor further developments and provide updates on these efforts, including strategies for developing or adapting compliant wellness programs, so make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific regulatory development. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Service Focus

Employee Benefits and Tax

Employment Discrimination and Harassment

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.