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2019 OUTLOOK FOR WELLNESS STRATEGIES

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Employer-sponsored wellness programs warrant a fresh look in light of the uncertainty about permissible financial incentives for some programs and heightened Department of Labor (DOL) scrutiny for compliance with the Health Insurance Portability and Accountability Act (HIPAA) rules. As of Jan. 1, employers can no longer rely on the Equal Employment Opportunity Commission (EEOC) rules to ensure a wellness program's financial incentives comply with the American with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA). However, all other ADA and GINA standards for employer-sponsored wellness programs — such as EEOC's notice and consent requirements — remain in place.

COURT NIXES EEOC'S WELLNESS FINANCIAL INCENTIVE LIMITS

Under the ADA and GINA, wellness programs with health screenings (such as employee or spousal health risk assessments or biometric screenings) must ensure participation is strictly voluntary and not coerced in any way. Under the EEOC rules first effective in 2017, a program met this voluntary-participation standard as long as any financial incentives didn't exceed 30% of the cost of self-only coverage. As of Jan. 1, 2019, however, the 30% rule has been vacated by a court ruling (*AARP v. EEOC* (D.D.C., Dec. 20, 2017)).

Employers offering wellness programs with health screenings now face the same uncertainty that existed before 2017: Just how much of a financial incentive, if any, is too much and would cause the program to be deemed involuntary and impermissible under the ADA or GINA? The EEOC is not expected to issue new guidelines before vacancies in its leadership are filled. In the meantime, EEOC field offices can take enforcement action if they believe an employer has a noncompliant wellness program.

HIPAA WELLNESS PROGRAM RULES STILL IN EFFECT

Wellness programs linked to a group health plan must also comply with HIPAA rules, which have financial incentive limits and other requirements — such as reasonable design, disclosure and confidentiality provisions — for programs contingent on health-related factors or outcomes. The DOL has been especially active in enforcing these rules, particularly the reasonable alternative standard and notice requirements that are meant to protect participants from discrimination based on a health factor. The agency has brought complaints against employers for failure to offer a reasonable alternative to a premium surcharge for participants who use tobacco or don't meet certain biometric targets. Careful compliance with HIPAA's wellness program requirements is essential for employers looking to avoid DOL scrutiny.

ACTION STEPS

Employers should work to comply with all existing legal requirements for wellness programs and revisit financial incentives for health screenings now that the EEOC's 30% rule is no longer a sanctioned benchmark for ADA or GINA compliance. In addition, employers should ensure that their wellness programs are meeting HIPAA requirements — especially the rules regarding reasonable alternative

standards for health-contingent programs. New legal challenges under HIPAA are likely throughout 2019, and challenges under ADA and GINA are possible too.

RELATED RESOURCES

Non-Mercer Resources

- Removal of Final ADA Wellness Rule and GINA Wellness Rule Vacated by Court (Federal Register, Dec. 20, 2018)
- Decision in *AARP v. EEOC* (D.D.C., Dec. 20, 2017)

Related Mercer Content

- What Do the EEOC and Well-Being Have in Common? (Jan. 16, 2019)
- Are You Investing in the Right Well-Being Initiatives? Find Out Now (Jan. 11, 2019)
- Taking the Pulse of Employee Wellness Programs (July 12, 2018)

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