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Wellness Rules Unchanged – For Now

Late last year the Equal Employment Opportunity Commission (EEOC) was ordered to reconsider rules issued in 2016 regarding wellness programs, and the decision was made to vacate the rules as of January 1, 2019. This means the current wellness rules basically remain in effect for 2018 until the EEOC issues new guidance. So for now, employers can continue to rely on current wellness rules and can continue to take advantage of the associated incentives. However, for 2019 and beyond, employers may again be faced with uncertainty as to their wellness program incentives.

Wellness Rules in General

The Health Insurance Portability and Accountability Act (HIPAA) and the Affordable Care Act (ACA) clearly define a safe harbor that allows health plans to offer premium discounts or other changes to cost-sharing mechanisms in a health plan (deductibles, co-pays, HSA deposits, etc.) based on an individual's participation and achievement of various goals within a wellness program. But these rules do not automatically provide employers with assurances under the Americans with Disabilities Act (ADA) or the Genetic Information Non-Discrimination Act (GINA). These various laws each have their own set of legal rules for acceptable wellness program design, which are not always consistent with one another, and in addition, state laws and other federal laws may also apply. The ADA and GINA protect against the disclosure of an employee's health and genetic-related information. However, both laws contain an exception, permitting the collection of such information as part of employer wellness plans, as long as an employee provides such information voluntarily. Under the ADA, for example, employers may offer wellness screenings/examinations and make health-related inquiries in conjunction with a wellness program, so long as the program is "voluntary." Similar requirements exist under GINA if requests are made for an employee's family medical history (for example, as part of a health risk assessment).

The 2016 EEOC Rules

Employers had long asked the EEOC to indicate what, if any, financial incentives offered in conjunction with a wellness program could render a program involuntary. In 2016, after years of uncertainty on the issue, EEOC issued rules on wellness incentives under the ADA and GINA that were welcomed by employers as they established incentive limit guidance and finally provided a measure of certainty. See our Update, New EEOC Rules - Implications for Wellness Programs. The ADA rule stated that employers could implement penalties or incentives of up to 30 percent of the cost of self-only coverage in exchange for participation in a bona fide wellness program in order to encourage employees to disclose ADA-protected information, without causing the disclosure to be involuntary. The GINA rule similarly stated that offering a 30 percent incentive to

an employee to disclose certain genetic information would not render the disclosure involuntary. The rules took effect January 1, 2017. After a series of court battles, the 2016 rules are now vacated, effective January 1, 2019.

Next Steps for Employers

Employers offering wellness programs must continue to comply with existing EEOC regulations as applicable to their programs through the end of 2018. These impose a maximum 30 percent limit on wellness programs subject to the ADA and to GINA. In the meantime, EEOC has been ordered to provide a status report no later than March 30, 2018, and new guidance is expected by no later than August 2018. It is expected that this new guidance may lower the current 30 percent limit, or possibly even prohibit employers from offering incentives for participation in programs collecting medical information (unless legislation is passed allowing this under the ADA and GINA). Other types of wellness programs that do not obtain medical information are not subject to the EEOC rules, but are only subject to the HIPAA and ACA limits which will continue to allow the 30 percent maximum incentive amount (50% for tobacco cessation programs).

Employers who sponsor wellness programs that are subject to the ADA and/or GINA may need to make changes in program design and/or incentives after 2018. Employers are encouraged to carefully monitor developments and confer with legal counsel to assess any risks associated with their wellness program designs. We will continue to provide alerts and updates for employers and plan sponsors as new information is issued on these important topics. In the meantime, should you have questions about this or any aspect of federal health insurance reform, contact your Conner Strong & Buckelew account representative toll free at 1-877-861-3220. For a complete list of Legislative Updates issued by Conner Strong & Buckelew, visit our online Resource Center.