February 23, 2018

Will Your Company's Wellness Programs Be Compliant In 2019?

Most companies are genuinely concerned about their employees' health and well-being. In an effort to incentivize employees to share in that concern, many companies have instituted wellness programs. Significantly, due to a recent federal court decision, your company's wellness program may be out of compliance beginning in 2019.

What Did the Court Say?

In *AARP v. EEOC*, a federal trial court vacated wellness regulations that had been issued by the U.S. Equal Employment Opportunity Commission ("EEOC") under the American Disability Act of 1990 ("ADA") and the Genetic Information Nondiscrimination Act of 2008 ("GINA").[1] The rules are vacated effective Jan. 1, 2019. It remains unclear whether the EEOC will issue new regulations before Jan. 1, 2019.

Employers should closely monitor this issue to ensure their ongoing or future wellness programs comply with federal law.

Who Is Impacted?

This ruling affects wellness programs that offer incentives related to disability-related inquiries or medical examinations or that otherwise ask employees or their dependents to provide family medical history or other genetic information. The court has ruled that providing incentives connected to the disclosure of ADA-protected information or genetic information under GINA is inconsistent with the "voluntary" requirements of ADA and GINA.

Wellness programs that provide incentives to participate in a program that does not require disclosure of this information, such as nutrition, weight-loss or smoking-cessation classes, are not affected by the ruling.

Case Background

In July 2016, the EEOC issued wellness program rules under ADA and GINA. The ADA rule allowed employers to implement penalties or incentives of up to 30 percent of the cost of self-only coverage for disclosure of ADA-protected information. Similarly, the GINA rule allowed offering a 30 percent incentive to disclose certain genetic information. AARP filed suit arguing that the regulations were invalid, contending that a 30 percent incentive or penalty rendered an employee's disclosure of ADA- and GINA-protected information involuntary and therefore prohibited.

In August 2017, the court agreed with AARP, holding that the EEOC's rulemaking did not offer a valid reason to justify the proposed incentive levels. The court initially remanded the regulations to the EEOC for reconsideration. However, because the EEOC reported that any new rule would go into effect in 2021, the court concluded that this was too long and therefore vacated the regulations.

What's Next and What Should Employers Do?

The EEOC will report to the court before the end of March on its schedule for rulemaking. The court asked the EEOC to issue proposed rules by Aug. 31, 2018.

Wellness programs should be evaluated for compliance with new rules once issued. However, since the timing for new regulations remains unclear, employers should be prepared to revise or terminate wellness programs that

[1] *AARP v. EEOC*, 2017 WL 6542014 (D.D.C. 2017).

offer incentives for ADA- or GINA- protected information on or before Dec. 31, 2018. As always, if you have any questions about whether your wellness program is complaint, we encourage you to contact your Brownstein attorney or the attorneys listed below.

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This memorandum is intended to provide you with general information about the ruling in AARP v. EEOC *and its effects on certain wellness programs. This memorandum is not intended to provide specific legal or tax advice. If you have any questions or if you need legal advice as to a specific benefit plan or employment law issue, please contact one of the following members of the Brownstein Hyatt Farber Schreck Employee Benefits Executive Compensation Group or Employment Law Group:*