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Wellness Program Updates

New developments have arisen in the wellness area recently. One recent court case challenges the validity of the final regulations, and another alleges that Macy's failed to comply with the final rules. The final rules establish how a wellness program should be structured to avoid violating nondiscrimination rules under HIPAA, the Americans with Disabilities Act (ADA), and the Genetic Information Nondiscrimination Act (GINA). There are no big changes here—at least not yet. Our general advice is to stay the course with your wellness programs and monitor the developments. None of the recent news requires immediate changes, but the court decisions discussed in more detail below could lead to changes in the future.

BACKGROUND

Exceptions to the nondiscrimination rules set forth under HIPAA, the ADA, and GINA allow wellness programs to provide incentives (or impose penalties) based on factors such as health status or medical testing, so long as certain requirements are met.

HIPAA RULES

Under HIPAA nondiscrimination rules, **a wellness program that affects the group health plan** (e.g., reductions in medical premiums or cost-sharing) must meet the following requirements:

- If the program is merely participatory (i.e., not tied to achieving any particular outcome and not activity-related), the only requirement is that it be made available to all similarly situated individuals.
- If the program is health-contingent (i.e., tied to an activity or a particular standard/outcome, which would include tobacco use), the following requirements apply:
  - » Participants must be given an annual opportunity to qualify for the reward;
  - » The maximum reward (or penalty) cannot exceed 30% of the total cost of coverage, or 50% for tobacco-related programs;
  - » The program must be reasonably designed to promote health or prevent disease, and must not be overly burdensome or a subterfuge for violating discrimination laws;
  - » The reward must be available to all similarly situated individuals and to individuals who qualify by satisfying a reasonable alternative standard; and
  - » The program must disclose the availability of a reasonable alternative standard in all plan materials describing the terms of the wellness program.

EEOC RULES

Separately, to avoid violating ADA or GINA rules, **a wellness program that requires medical testing or disability-related questions (or asks about the current or past health status of the spouse)** must comply with the following requirements set forth by the EEOC:

- Those choosing not to participate cannot be denied employer group health plan coverage or be subjected to any adverse employment action, coercion, or intimidation;

- The maximum reward (or penalty) cannot exceed 30% of the total cost of employee-only coverage;
- The program must be reasonably designed to promote health or prevent disease, and must not be overly burdensome or a subterfuge for violating discrimination laws;
- Participants must be provided with a notice that includes a description of the medical information collected, who will have access to it, and how it will be used and kept confidential (signatures of acknowledgement must be obtained from spouses asked to participate);
- Information collected may generally be provided only in aggregate form that is unlikely to disclose the identity of specific individuals, except as necessary to administer the plan. Information must be collected on separate forms, maintained in separate files, and treated as a confidential medical record;
- A reasonable accommodation is required if a disability or medical condition prevents individuals from participating or earning an incentive; and
- The plan may not compel participants to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information (except as permitted to carry out activities related to the wellness program), or to waive confidentiality protections in place under the ADA or GINA as a condition for participating or receiving an incentive.

COURT CASES

STRANGE ADVERSARIES – EEOC AND AARP

The headline "AARP sues EEOC" takes a little time to digest. That's because the American Association of Retired Persons (AARP) and the EEOC usually take the same position in litigation against alleged age discrimination. This case, however, was about the AARP's opposition to final wellness rules issued by the EEOC that allow an incentive of up to 30% of the employee-only cost of coverage.

The statute generally says that employers can offer "voluntary" wellness programs. The gist of the AARP's claim is that such large incentives make these programs involuntary. In a judicial opinion that's best left for legal scholars to parse, the court essentially told the EEOC to go back to the drawing board and consider comments they received during the rule-making process. Notably, the court did not rule that the regulations are invalid. The decision itself may be found at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2016cv2113-47.

Again, for reasons best left to the lawyers, this matter could see more life—perhaps in the form of a new set of rules issued by the EEOC that involve adjusting maximum incentive limits or an appeal to a higher court. Predictions beyond this are really just guesswork.

DEPARTMENT OF LABOR AND MACY'S

In a related development, the Department of Labor (DOL) has sued Macy's, alleging that their tobacco cessation program violated wellness rules. (The DOL action against Macy's involves other allegations that the health plan had changed their out-of-network reimbursement approach without disclosing the changes.) We can only speculate, but this has the feel of a routine health plan audit that ended up in a bad place.

Regarding the tobacco cessation program, the lawsuit alleges violations of wellness rules requiring a "reasonable alternative" for avoiding the tobacco surcharge and a notice for the same *(Acosta v. Macy's Inc., S.D. Ohio, No. 1:17-cv-00541)*. It appears that Macy's had a plan that simply violated the HIPAA wellness rules. This litigation is just beginning, and it will be instructive to see how it ends.

ADVICE FOR PLAN SPONSORS

We have two recent developments in the wellness area. The court's decision in the AARP v. EEOC litigation suggests that

the EEOC final rules that apply when wellness programs use medical testing or disability-related questions may see more revisions, especially those rules related to incentive limits. But the court took careful steps to ensure that the regulations remain in place pending further review.

In the DOL's litigation against Macy's, we see the DOL enforcing what seem to be the pretty clear terms of the HIPAA wellness regulations. The DOL has routinely been including wellness questions in its health plan audits, and this litigation suggests that they will take action against wellness plans that are not in compliance.

Most healthcare experts agree that wellness plans are here to stay. Employers that have wellness plans in place now, or for 2018, should continue to comply with both the HIPAA and the EEOC final regulations while watching closely for more developments.

As always, should you have any questions, please contact your Parker, Smith & Feek Benefits Team. While every effort has been taken in compiling this information to ensure that its contents are totally accurate, neither the publisher nor the author can accept liability for any inaccuracies or changed circumstances of any information herein or for the consequences of any reliance placed upon it.