EEOC Wellness Rules – Incentive Limits Removed/Vacated

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The EEOC released final rules this week removing the incentive limits from the wellness program rules that must be followed to avoid violating the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). Consistent with a previous court ruling, the final rule removes the incentive limit effective January 1, 2019. Employers offering a wellness program involving medical testing or disability-related questions will need to determine how to handle incentives for such programs without clear guidance from the EEOC about what level of incentive, if any, is considered voluntary and not in violation of ADA or GINA rules.

Background
In 2016, the EEOC issued rules to clarify its position on how employer wellness programs could be offered in compliance with the ADA and GINA. For any programs involving medical testing or disability-related questions (e.g. biometric screenings or health risk assessments), one requirement was that incentives not exceed 30% of the medical premium for single coverage (total cost, including both employer and employee contributions).

Soon after the rules were released, the American Association of Retired Persons (AARP) sued the EEOC, arguing that the rules violated ADA and GINA. In particular, the AARP argued that the 30% incentive limit (or "penalty," as the AARP calls it) meant that the programs were not "voluntary," as required by the ADA. The court ruled in favor of the AARP, stating that the EEOC did not provide adequate justification in determining that an 30% incentive limit makes a wellness program voluntary. The court ordered the EEOC to rewrite the rules or provide additional justification to the court. When the EEOC responded with a proposed time frame that the court thought was unreasonably long, the court vacated the incentive limit rule completely, effective January 1, 2019, subject to the EEOC's issuing new rules that were satisfactory to the court prior to that time.

EEOC Rule Status
The EEOC suggested in its 2018 fall agenda that it intends to issue new rules in June 2019. However, in the meantime, the EEOC issued a final rule consistent with the court's order to vacate the incentive limits rule effective January 1, 2019. This does not change any of the other wellness rules previously issued by the EEOC, including the requirement to provide a confidentiality notice prior to participation in medical testing or answering disability-related questions. It does not change any of the HIPAA wellness rules either. You can find a list of the EEOC and HIPAA wellness program requirements in our previous issue brief - http://benefitcomply.com/compliance-alert-wellness-program-updates/.

What Does This Mean for Incentive Limits?
For now, if a wellness program provides incentives (or imposes penalties) related to participating in medical testing or answering disability-related questions, it is not clear whether such a program is considered voluntary for purposes of the ADA or GINA. Although there is no guidance indicating that such incentives are prohibited, there is also no guidance indicating that they are allowed, or to what extent.

What is the risk to employers? While the EEOC is in the process of writing new rules, it seems unlikely that there will be much enforcement by the EEOC. However, there is the possibility that employees could file private lawsuits.

Without clarity as to what is considered "voluntary," the most conservative approach would be to eliminate any incentive tied to medical testing or disability-related questions until further guidance is provided. However, some employers may feel comfortable continuing to comply with an incentive limit of 30% or less for participation (maintaining the status quo until we receive further guidance). Others may feel more comfortable lowering such incentive amounts (e.g. limiting such incentives to 10–15%). Another approach would be to continue to offer incentives for participating in medical testing or answering disability-related questions, but also to offer alternatives for earning the incentive that do not involve medical testing or disability-related questions (e.g. tobacco-related incentives, exercise/diet programs, educational courses) … basically a buffet of options to earn

the incentive, so that participants have an opportunity to earn the full incentive without participating in medical testing or disability-related questions.

Summary
Unfortunately, we are moving into 2019 without any resolution on what level of wellness incentive, if any, is considered voluntary for purposes of complying with the ADA and GINA. For 2019, employers should continue to comply with the other EEOC wellness rules and HIPAA wellness rules, as applicable. Employers will also need to decide whether to offer wellness incentives related to participation in medical testing or answering disability-related questions. While we wait for additional guidance from the EEOC, which hopefully will be provided by summer 2019, employers may choose to continue with current structures, or might choose to take a less aggressive approach by lowering such incentives or offering alternatives for earning such incentives. We would advise that such decisions are made after consulting legal advisers in regard to potential risks involved, alongside consideration of the employer's objectives for the wellness program itself.

EEOC Final Rule for ADA - https://www.federalregister.gov/documents/2018/12/20/2018-27539/removal-of-final-ada-wellness-rule-vacated-by-court
EEOC Final Rule for GINA - https://www.federalregister.gov/documents/2018/12/20/2018-27538/removal-of-final-gina-wellness-rule-vacated-by-court