AARP Challenges EEOC Rules on Wellness Programs and Incentives

1.13.2017

Does offering incentives to disclose medical information violate the ADA and GINA?

Many companies have jumped on the "wellness" bandwagon, offering programs in varying forms to their employees and employees' families to promote health and prevent disease. These programs support companies' legitimate interests in managing health coverage costs, encouraging employees to take a more active role in their health care coverage and promoting employee satisfaction. To induce participants, companies often offer incentives in the form of health coverage premium discounts.

Recently, the U.S. Equal Employment Opportunity Commission (EEOC) analyzed questions regarding wellness programs that involve disclosure of private medical information. More specifically, the EEOC considered whether offering incentives to participate in these programs violates The Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA), federal laws described further below. The EEOC final rule issued on May 17, 2016 determined that employers may offer limited incentives to employees and their family members to participate in wellness programs that require disclosure of medical information (see links to prior Butzel Long client alerts at: Rules Change for Wellness Programs and EEOC Issues Proposed Guidance as to Wellness Plan Incentives)

In response, the American Association of Retired Persons (AARP) filed a lawsuit in federal court in Washington D.C. challenging the rule as a violation of employee privacy.

Both the ADA and GINA prevent employers from requiring participation in wellness programs. All participation by employees must be "voluntary." However, according to AARP, because the EEOC's rule allows for discounts of up to 30 percent

Related Services

Employee Benefits

Health Care

Health Care Industry Team

Labor and Employment

of the full cost of individual health coverage premiums, the rule permits a penalty for declining to participate, which renders the employee effectively no choice over whether to voluntarily participate.

Generally, the intent of the ADA and GINA is to prevent against disability-based workplace discrimination. The ADA prevents employers from requiring employees to take part in medical examinations and prohibits employers from inquiring into an employee's disability status. The law does, however, allow employers to offer voluntary medical examinations, which could include voluntary disclosure of medical histories. Similarly, GINA prevents employers from requesting, requiring or purchasing "genetic information" from an employee, which includes medical information regarding an employee's family members. Again, under this law, an employer may attain the information through *voluntary* participation in wellness programs.

As a result of the AARP suit, the federal court will determine whether wellness programs that offer incentives of up to thirty percent allow employees to voluntarily participate or instead coercively induce employees into providing private medical information in violation of the ADA and GINA. On December 29, 2016, the judge declined to issue a preliminary injunction to prevent the EEOC's new regulations from taking effect, and in doing so, he determined the AARP had not shown it is likely to prevail on its claim as the litigation progresses.

The outcome of this lawsuit may be a reminder to employers to review their wellness programs to ensure that they are designed to comply with the ADA, GINA, and other affirmative obligations. Butzel Long has considerable experience in designing and reviewing wellness plans and programs, as well as other employment and employee benefits matters. For more information, please contact your Butzel Long attorney, the authors listed below, or a member of our Employment Law Practice Group.

Lynn McGuire
734.213.3261
mcguire@butzel.com

Thomas Shaevsky
248.258.7858
shaevsky@butzel.com