

Publications

Labor and Employment Alert: More Uncertainty for Wellness Programs

Related Attorneys

Jennifer Bibart Dunsizer

Christine M. Poth

Related Services

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The judge in a recent court case ordered the Equal Employment Opportunity Commission (EEOC) to develop the administrative record supporting rewards of up to 30% of the cost of health coverage for participation in wellness programs. If the EEOC is unable to defend the size of the reward, the EEOC may have to change its wellness program rules.

Employers were both relieved and frustrated when the EEOC published wellness program rules in May 2016.

- Employers were relieved that the EEOC had finally clarified its position on the application of the Americans with Disabilities Act (ADA) and Genetic Information and Nondiscrimination Act (GINA) to wellness programs.
- Employers were frustrated because, while the EEOC rules were superficially similar to the IRS and DOL rules on wellness programs, the EEOC rules differed in significant respects that made compliance with both sets of rules unusually complex. For example, both sets of rules allow a wellness program to offer a reward of up to 30% of the cost of coverage. However, the calculation of the amount of the reward and conditions for offering the reward differ.

While the EEOC wellness program rules got mixed reviews from employers, the reaction from the American Association for Retired People (AARP) was decidedly negative. In October 2016, the AARP sued the EEOC, alleging that the size of the permissible reward (30% of the cost of single coverage) coerces participation in wellness programs in violation of the ADA and GINA. The Court found this persuasive; the court held that the administrative record did not adequately support the EEOC's rule as to the size of the permissible reward. On August 22, 2017, the court ordered the EEOC to "reconsider" its regulations. *AARP v. EEOC*, No. 16-2113 2017 BL 293605 (D.D.C. Aug. 22, 2017).

Now employers are left to wonder what the EEOC will do, when the EEOC will do it, and how to design their wellness programs in the interim.

In the meantime:

- The EEOC wellness program rules remain in effect. The AARP had asked the court to immediately vacate the EEOC wellness program rules but the court declined that request. We will monitor developments and notify you of actionable items in future client alerts.
- The IRS and DOL wellness program rules remain in effect. **WARNING:** The DOL is auditing compliance and will follow up on participant complaints. Please be sure that your wellness program meets each and every requirement, both in design and in implementation.

If you have questions about compliance, please contact us. We have charts, a webinar, and other materials to assist you.

New Massachusetts Pay or Play Law

If you have employees in Massachusetts, you should know about a state law that goes into effect January 1, 2018. Employers will be assessed up to \$750 for each employee who works in Massachusetts, who waives (or is not eligible for) the employer's group health coverage and who then enrolls in Medicaid or federally subsidized individual health insurance. The Massachusetts Department of Unemployment Assistance is expected to publish rules on the mechanics.