Federal Court Strikes Down Certain EEOC Wellness Program Regulations, Effective January 1, 2019

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In a recent decision with a nation-wide effect, the U.S. District Court for the District of Columbia struck down certain provisions of the EEOC's Wellness Program regulations.

As we have previously discussed, workplace wellness programs generally provide certain incentives to employees as part of programs intended to prevent illness and encourage healthier lifestyles. But these programs can run afoul of various federal and state anti-discrimination laws, particularly the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"), if the programs require employees to disclose private medical information under circumstances that are not truly "voluntary."

The inherent difficulty with wellness program incentives is the notion that, at some point, a reward or penalty becomes so great that it becomes impossible to refuse. At that point, the incentives are so coercive that the wellness program can no longer be considered voluntary under the ADA and GINA.

To assist employers with implementing ADA and GINA-compliant wellness programs, the EEOC issued regulations in May 2016 that set an upper limit on incentives (which can take the form of rewards or penalties) linked to wellness program participation of 30% of the cost of employee-only health care coverage. Under the regulations, the EEOC considered wellness programs that complied with the 30% incentive threshold as falling within the definition of "voluntary."

In August 2017, however, the D.C. district court ruled that the 30% incentive regulations were improper. The main shortcoming of the regulations, as identified by the court, is that the EEOC apparently set the 30% threshold without any concrete data or reasoning to support the proposition that an incentive crosses the line from voluntary to involuntary at 30% of the cost of health insurance. Instead of striking down the regulations entirely at that time, the court gave the EEOC the opportunity to modify the regulations.

In the closing days of 2017, the court revisited the issue and determined that the EEOC was not moving quickly enough to correct the regulations on its own, and the court vacated the 30% incentive regulations—but did so with an effective date of January 1, 2019, in order to minimize disruptions to existing wellness programs and to allow employers sufficient time to modify their wellness programs in the future.

The court also noted that the effective date of January 1, 2019, was intended in part to provide the EEOC additional time to issue new regulations. Prior to the December ruling, the EEOC told the court that the EEOC intended to issue proposed regulations by August 2018, but that final regulations would not go into effect until 2021. The court's response was that 2021 is "unacceptable," and the court "strongly encouraged" the EEOC to accelerate its timeline.

With all of that in mind, the bottom line is that until the EEOC issues new regulations, employers must consider structuring wellness program incentives with an eye toward documenting, with concrete data and analysis, that the program's incentives are not so great–and, therefore, not so coercive—that the program becomes involuntary. Stay tuned, as we will closely monitor any further action and guidance from the EEOC on this issue.