eBenefits Alert: Wellness Requirements in Upheaval… Again

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Last year, we got some solid guidance, in the form of final rules from the EEOC, on what kind of reward can be provided under an employer's wellness plan. Now, a federal judge has found that guidance to be arbitrary and capricious. The rules remain in place pending EEOC efforts to remedy the problems the court identified, so employers offering wellness plan incentives under those rules do not need to make changes… yet. We at Gray Plant Mooty recommend that employers take care and consult the news as they adjust wellness programs for open enrollment and 2018.

A Little Background

Recall that wellness incentives are governed by an alphabet soup of federal laws: the Health Insurance Portability and Accountability Act (HIPAA), the Americans with Disabilities Act (ADA), and the Genetic Information Nondiscrimination Act (GINA). The rules issued by different agencies charged with implementing different laws and policies have not always made it clear what employers can and cannot do—particularly how much of a reward can be offered for undertaking wellness activities or achieving wellness goals. The HIPAA rules were clear for a long time—the incentive could be worth no more than 30% of the cost of coverage, and that limit didn't apply if it was merely a question of participating, as opposed to achieving an outcome. The ADA and GINA rules were not so clear. In May 2016, the EEOC issued final rules that made an effort to align the ADA and GINA requirements to the HIPAA requirements. In particular the rules limited the reward for wellness activities to 30% of the cost of coverage, although the cost of coverage is measured differently.

AARP filed suit in October 2016, arguing that a participant's choice to participate in a program in exchange for a 30% reward is not a real choice at all—that the cost of choosing not to participate is so high as to render participation coercive. The court determined that the EEOC had not adequately explained its decision to use the 30% limit, and therefore that the decision to use that limit was arbitrary. Our colleague Tara Adams of The Modern Workplace has an excellent blog post discussing the decision: http://www.themodernworkplace.com/.

What to do Next?

As with so many things related to employer health plans these days, the answer is "Hurry Up and Wait." The court did not vacate the rules, because that would be too "disruptive." So if your plan complies with the EEOC rules, don't make any changes yet. The court did tell the EEOC to reconsider the rules. The EEOC could appeal this decision. Or it could go back to the drawing board and revise the rules.

If you have questions about your plans, give us a call to discuss the potential legal risks.