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Wellness Program Considerations for 2019

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Wellness programs have faced unique challenges and scrutiny in 2018. As the year winds down, it's important to review a few important areas as we launch into 2019. This article offers some updates on:

- The status of wellness program incentives when using medical exams, biometric testing, and health risk assessments; and
- The Department of Labor's enforcement activity on wellness programs tied to group health plans.

While this article is focused specifically on incentives and current litigation, there are additional requirements (e.g., reasonable alternatives, notification, and confidentiality) that may apply. This article is limited to a discussion on incentives and current litigation and does not address other important compliance issues.

ADA and GINA Incentive Rules Vacated

Beginning January 1, 2019, the incentive portions of the voluntary wellness program rules under the Americans with Disabilities Act ("ADA") and Genetic Information Nondiscrimination Act ("GINA") regulations are vacated. These rules generally apply to wellness programs that incentivize employees (or their spouses) to complete medical exams (e.g., get a physical or biometric testing) and/or answer disability-related inquiries (e.g., complete a health risk assessment).

It is important to note that the wellness program rules under HIPAA and the ACA are still in effect.

As a reminder, there are three sets of laws governing incentive limits and wellness programs currently in effect:

- **HIPAA/ACA rules.** When rewards are used in a group health plan to promote involvement in an activity (e.g., walking, diet, or exercise program) or are based on a certain outcome (e.g., not smoking or achieving certain results on biometric screenings), incentives cannot exceed 30% of the total cost of coverage under the group health plan (or 50% when the program is tobacco-related).
- **ADA rules.** A permissible reward in a wellness program involving an employee's medical test or disability-related inquiry cannot exceed 30% of the total cost of self-only coverage in the lowest cost plan option offered to an employee.

- **GINA rules.** Incentives related to a completion of a health risk assessment or medical exam are limited to 30% of the total cost of self-only coverage in the lowest cost plan offered by the employer. Incentives tied to participation of children are not permitted.

As a rule of thumb, if the incentive is set at generally no more than 30% of the total cost of coverage in the lowest cost self-only plan offered by the employer, the incentive would not violate the limit requirements under HIPAA/ACA, ADA and GINA rules.

However, as reported earlier, the decision in a recent lawsuit requires the Equal Employment Opportunity Commission ("EEOC") to re-issue regulations around the incentive limits under the ADA and GINA. The court indicated that the existing incentive limits would be vacated as of January 1, 2019 unless guidance is issued. In a status report to the court, the EEOC stated it did not anticipate regulations would be revised until 2020.

As a result, employers are in a state of confusion around these incentives for plan years beginning in 2019.

While no further guidance has been issued by the regulators, the following are some general comments that may be helpful as employers look to address wellness incentives for the upcoming year.

- The ADA and GINA rules only apply to wellness programs that reward employees (and/or their spouses) for:
  - annual physicals;
  - biometric screenings (e.g., blood draws);
  - completion of a health risk assessment; and
  - completion of a blood draw or mouth swab to determine smoker status.

To the extent a wellness program does not use incentives toward these activities, the challenged ADA and GINA incentive limits do not apply.

- To the extent the employer offers a wellness program that is subject to the ADA or GINA, the employer will want to determine what to do.
  - The most conservative approach would be to remove rewards associated with the completion of these activities. However, as many employers have been using incentives with these types of programs since before the 2016 EEOC rules were finalized, this may be an overly cautious tactic. Companies heavily invested in wellness, may be willing to ride out this time of uncertainty in favor of their wellness programs.
  - Many employers have decided to follow the "to be vacated" ADA/GINA guidelines on incentives (which are more restrictive than the existing rules under HIPAA) with respect to their wellness programs and take the risk that the EEOC will not challenge these arrangements until additional guidance is issued.
  - Employers should not take this opportunity to go more aggressive with their programs without consulting legal counsel.

Update on DOL Enforcement of Wellness Programs

Meanwhile, the Department of Labor ("DOL") has been actively pursuing cases involving group health plans with respect to HIPAA/ACA violations and breaches of fiduciary duty. The litigation primarily concerns outcome-based programs that fail to offer reasonable alternatives in line with the regulations. Following are some brief highlights from a few of the more interesting cases.

- **Acosta v. ChemStation International** (settled October 2018 for $59,189.90 - $53,122.00 in excess premiums withheld from participants and $6,067.90 in lost opportunity costs). The DOL alleged that the ChemStation wellness program required plan participants and beneficiaries who did not participate, or participated but did not achieve the specific number of health plan outcomes, to pay more in premiums than those who participated and achieved or maintained the outcomes. The DOL alleged the employer did not provide any alternative standard (reasonable or otherwise) by which plan participants and beneficiaries could obtain the discounted plan premiums offered to similarly-situated participants and beneficiaries who participated in the program and attained or maintained the specified number health outcomes.

- **Acosta v. Macy's** (pending motion to dismiss). DOL alleges, among other things, that Macy's wellness program failed to provide a reasonable alternative standard to stop paying a tobacco surcharge because tobacco users who completed a smoking cessation program were still paying the surcharge unless they certified non-tobacco user status for 6 months.

- **Acosta v. Dorel** (filed September 2018). DOL alleges, among other things, that the wellness program failed to provide a reasonable alternative standard to stop paying a tobacco surcharge because tobacco users who completed a smoking cessation program were still paying the surcharge unless they certified non-tobacco user status.

In each case, the documentation describing the program did not reflect a reasonable alternative standard for removing the surcharge was available.

These enforcement efforts highlight the importance of wellness program compliance, in particular around incentives and proper documentation and allowing employees who do not meet the standard to qualify for the reward another, reasonable way.

Employer Action

Employers with incentive-based wellness programs should:

- Review existing programs to determine whether they are subject to the ADA and/or GINA (require employees (and/or their spouses) to complete a medical exam, biometrics or a health risk assessment).

- If subject to the ADA and/or GINA, determine a strategy around incentives during an uncertain period while the EEOC works to reissue guidance. Any strategy will be based on the employer's risk tolerance and advice of counsel is recommended.

- HIPAA/ACA wellness rules remain in effect and are actively being looked at by the DOL. If an employer offers activity or outcome-based programs, they should ensure there are (among other things) reasonable alternative mechanisms to achieve the reward and appropriate notice is provided.