

Blog Post

Employee Wellness Developments: Keeping Your Finger on the Pulse

October 4, 2017

As we alluded in our “[Preparing for the Unknown: Open Enrollment 2018](#)” blog post, employers that are finalizing their employee benefit plan designs in advance of the 2018 plan year would be well-advised to monitor the developments concerning the future of health care reform, the employee wellness program regulations, and mental health benefit enforcement activity.

Over the past several weeks, there have been notable updates regarding employee wellness program regulations and mental health benefit enforcement activity that employers should be aware of and monitoring. These updates are summarized below.

EEOC Required to Justify Wellness Program Regulations

Employers that have spent the last several years navigating complex, and at times contradictory, wellness program regulations, will be interested to learn of a federal court ruling in August that the Equal Employment Opportunity Commission (EEOC) must justify, or change, its controversial wellness program regulations.

The case, brought by the AARP, claims that its members will suffer irreparable harm as a result of the premium increases that were deemed permissible in the wellness program regulations

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issued by the EEOC under the Americans with Disabilities Act (ADA), and the Genetic Information Nondiscrimination Act (GINA). The regulations are discussed in greater detail [here](#).

Although the federal court declined the AARP's request earlier this year to enjoin the enactment of the ADA and GINA wellness program regulations, with its most recent decision, the court has signaled its agreement with the AARP that the EEOC did not sufficiently justify how the financial incentives permitted under the ADA and GINA regulations can still result in wellness programs being considered "voluntary" for those who cannot, or choose not to, complete them.

In its August ruling, the court directed the EEOC to provide additional justification regarding how wellness programs imposing a financial incentive may still be considered voluntary under the ADA and GINA regulations, or rewrite such regulations.

The EEOC recently indicated that it will address the court's concerns with proposed rules by August of 2018, and that it intends to issue final rules by October 2019. However, the EEOC clarified that to the extent the new rules require substantial amendments to wellness programs by employers, such rules will not likely be applicable until 2021.

In the meantime, the court ordered that the current ADA and GINA wellness program regulations will remain in effect while the EEOC considers how to proceed. Therefore, employers should continue to draft their wellness programs in compliance with the ADA and GINA regulations, but should follow this lawsuit, as well as other ongoing challenges to the wellness program regulations closely.

Increased Enforcement Regarding Mental Health/Substance Use Disorder Benefits

In addition to the recent passing of the Cures Act, which clarified that eating disorders are mental

health conditions subject to the Mental Health Parity and Addiction Equity Act (MHPAEA), and the dramatic increase in enforcement actions and investigations to improve compliance with the MHPAEA, the Department Of Labor (DOL) has recently released a tool empowering group health plan participants to ensure that their group health plans comply with the MHPAEA.

The **draft model form** released by the DOL is intended to be presented by group health plan participants to their employer-sponsored group health plan or insurance, and requests detailed information regarding plan limitations on mental health and substance abuse benefits. The draft model form also advises participants of their rights to request certain plan documents that substantiate the group health plan's treatment limitations, and provides DOL contact numbers for participant questions or concerns.

Employers should familiarize themselves with the current draft of the DOL's model form so that they are prepared to respond to forms presented by employees, and should confirm that any plan limitations regarding mental health and substance abuse benefits comply with the MHPAEA.

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