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Health Policy in Transit

A Purchaser Viewpoint

National Alliance of Healthcare Purchaser Coalitions
Driving Innovation, Health and Value

Working to Make Wellness Voluntary
Moving Forward in the Absence of New Guidance

In December of 2017, a federal court held in AARP v. EEOC that a regulation issued by the Equal Employment Opportunity Commission (EEOC) related to employee wellness programs was arbitrary, and ordered the EEOC to re-issue new rulemaking. The rule would have allowed employers to give employees discounts on premiums of up to 30% if they participated in wellness programs. At issue is whether participation is truly voluntary, as required by the Americans with Disabilities Act if the differential is as high as 30%. The ADA states that employees can't be forced or coerced into providing personal health information to their employers, which potentially happens in many employee wellness programs through employee participation in a health risk assessment and/or biometric screening. The court's ruling indicated that 30% was too arbitrarily high and could be interpreted as coercive, but declined to indicate what an acceptable, non-coercive percentage would be.

As reported, the main types of employer wellness program features impacted by the court's ruling are:

- Biometric screenings (and any other medical examinations) for employees and spouses;
- Disability-related inquiries directed at employees (which might include some questions on an HRA, depending on how questions are worded);
- Family medical history questions (HRA questions that ask about the manifestation of disease or disorder in an employee's family member and/or HRA questions that ask an employee's spouse about his or her own manifestations of disease or disorder); and
- Any other features that involve genetic information (e.g. an employee's genetic tests, the genetic tests of the employee's family members, biometric screening results of the employee's spouse).

Instead of vacating the rule immediately, the court allowed the original rule to stand while the EEOC works on issuing a new one. However, if the EEOC does not issue a new rule, the existing rule is automatically vacated on January 1, 2019. At the end of March, the EEOC issued a very brief statement indicating that they do not anticipate issuing a revised rule in response to the court's direction.

> *"We do not currently have plans to issue a notice of proposed rulemaking addressing incentives for participation in employee wellness programs by a particular date certain, but we also have not ruled out the possibility that we may issue such a notice in the future." - EEOC statement March, 2018*

Employer Implications

This leaves employers and wellness vendors in a tough spot. If a relatively large incentive, such as 30% of premiums, is not permissible, what else can employers do to encourage participation? Unless and until the EEOC issues clear rules, employers and vendors are left to try to balance the risks and rewards individually, which is not an ideal place to be. Some actions that employers can take now while we await further rulemaking:

- Assess the risk of whether your program includes clinical features that could be deemed "involuntary" based on the court's ruling
- Consider programs that have no or more limited incentives
- Consider eliminating clinical features that were targeted by the ruling
- Consider offering a non-clinical option as an alternative for employees to earn similar incentives
- Continue to keep an eye out for further regulatory guidance that might be issued by the EEOC

National Alliance of Healthcare Purchaser Coalitions is a national, non-profit, membership association of employer led coalitions across the country collectively serving 12,000 purchasers and 41 million Americans.