WELLNESS PROGRAM ALERT

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If one of your clients offers or is in the process of considering a wellness program, hold the phone!

There is pending litigation involving AARP and the EEOC that could profoundly alter the regulatory and compliance requirements associated with certain wellness programs. Generally speaking, the rules and regulations affecting wellness programs apply to those defined as "health-contingent" and "outcome-based."

At present, there are myriad rules, agencies and regulations that regulate certain wellness programs including:

- HIPAA prohibits discrimination in premiums or plan eligibility based on health-related factors but offers exceptions to certain wellness programs.
- ACA expanded HIPAA exceptions to allow for up to a 30% incentive/penalty for wellness program participation and 50% for tobacco use.
- ADA generally does not allow discrimination within a wellness program based on disability.*
- GINA generally does not allow wellness programs to use genetic information to discriminate participants.*

THERE ARE MYRIAD RULES, AGENCIES AND REGULATIONS THAT REGULATE CERTAIN WELLNESS PROGRAMS.

At the heart of the disagreement between AARP and the EEOC is whether a wellness program can be construed as voluntary. Despite the EEOC's efforts to clarify the impact of the ADA's and GINA's impact on wellness programs through issued regulations, AARP contended that "the EEOC failed to adequately establish that a 30% incentive does not render a wellness program involuntary."

The Washington, DC-based District Court agreed with AARP and granted a judgment ordering the EEOC to vacate its regulations and submit a notice of proposed rule making (by 8/31/2018) and file a status report by 3/30/18. On March 30, the EEOC reported it had yet to promulgate new regulations, blaming a delay in Senate confirmation of its new chair and commissioner.

As of the writing of this article, the court order for the EEOC to vacate its wellness program-related regulations, effective 1/1/2019, remains intact. All of this leaves employers offering or considering offering health-contingent/outcome-based wellness programs with five options:

1. If your wellness program involves answering health-related questions (e.g., a health risk assessment) or medical testing (e.g., venipuncture/biometric screening), discontinue these practices.
2. Continue following the EEOC regulations (affecting incentive limits, providing separate wellness program notices, etc.), knowing these regulations have been ordered to be vacated effective 1/1/19.
3. Disregard the EEOC regulations and instead defer to the less restrictive HIPAA regulations and ACA amendments that followed.
4. If not currently offering a wellness program, postpone until the 2020 plan year (although there are no assurances this matter will be resolved by then).
5. Establish a totally voluntary, non-outcome-based wellness program that is not subject to the aforementioned regulations.

* In July of 2016, the EEOC released regulations allowing for the use of both ADA and GINA protected information by wellness programs. The regulations, which took effect 1/1/2017, established that employers could request otherwise ADA/GINA protected data provided there was no more than a 30% incentive/penalty and the related disclosures by program participants was not involuntarily provided.

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LESSONS LEARNED FROM 2017 ACA REPORTING

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many ALEs still questioned what actually qualified as an affordable plan. We found this issue with a lot of ALEs that had part-time employees and weren't aware of how to provide an affordable plan to employees of that status.

The other two common issues were specifically with the IRS. The first was error reporting. Every year the IRS modifies the way it reports back an error to ALEs or distinctly changes the wording of the error. Once again, it was a matter of waiting for the error response from the IRS, then deciphering what exactly that error meant.

The second was that multiple parts of filing forms were no longer valid for 2017. It was usually because a specific transition relief or safe harbor no longer existed, but it was still included on the form. For example, on the 1094-C form, line 22, A, B and C only apply to the 2015 and 2016 filing years. ALEs scrambled to figure out what needed to be filled out… and the answer ended up being nothing. Hopefully, sections of the form will be replaced and removed to avoid this issue next year.

Even with all the commonality among ALEs' issues this filing season, there are always unexpected revelations that we can learn from for the future.

FILING SURPRISES

It would probably be surprising for most people to learn that many ALEs filed for multiple years. The reasons behind this varied from blatant "I didn't want to do this and I'd thought it'd go away" to more HR and payroll complications.

Many ALEs were shocked to find out that their payroll companies were only gathering minor tracking data and weren't doing the filing for them. Or a company was acquired and wasn't aware that this caused its ACA employer status to change.

It also never ceases to amaze that so many ALEs wait until the very last minute to file. This happens every year, and only reminds us that preparedness and proactive planning is of ever-growing importance to filing correctly.

There was, however, a positive surprise: More ALEs were ready to e-file immediately and were fully confident in their information. Any errors in their filing were minor, like missing Social Security Numbers. The most important parts were largely spot on. Employers that leverage intelligent solutions saw fewer errors and more accurate filing data from the start, especially if they had been monitoring their employees and status throughout the year.

MOVING FORWARD

The most important piece of advice for ALEs is this: Understand how your hiring decisions and employer status affect your filing. Mistakenly marking a part-time or seasonal employee as full-time upon hiring will flag that employee as requiring a 1095-C form. We've seen situations where an ALE receives 6,000 forms but, due to marking incorrect employee status, actually only needs 800.

Ultimately, knowing their employer status and staying on top of employee tracking throughout the year will set them up for filing success.

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