SIDLEY AUSTIN LLP

SIDLEY

MAY 13, 2013

EMPLOYMENT AND LABOR, EMPLOYEE BENEFITS AND HEALTHCARE UPDATE

EEOC Hears Call for Guidance on Employer Wellness Programs During Public Meeting

As employers implement more aggressive and creative measures to lower health costs through wellness programs, there has been increased scrutiny as to whether such programs run afoul of federal anti-discrimination laws. During a public meeting on May 8, 2013, the U.S. Equal Employment Opportunity Commission (EEOC) heard testimony from a panel of witnesses representing business and employee advocates and providers regarding the importance of developing guidance under such laws as the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). The panel also discussed the interplay between employer wellness programs and healthcare laws, such as the Health Insurance and Portability and Accountability Act (HIPAA) and the Affordable Care Act (ACA). The EEOC meeting was just the beginning of its analysis of employer wellness programs and formal guidance from the EEOC is not expected for some time. Employers nevertheless must now navigate the area carefully as there are increasing challenges in the courts concerning the interplay between wellness programs and these statutes.

Guidance Needed Regarding Employer Obligations under ADA, GINA and Other EEO Laws

Panelists testified that the EEOC must provide clarity on a number of key issues, including the nature of employers' incentives for employees to participate in wellness programs and subjecting employees to disability-related questions or medical examinations in connection with these programs. Counsel for the EEOC stated that while the ADA permits employers to request medical information with respect to voluntary wellness programs, further clarification is needed on the definition of the term "voluntary" in the context of these programs. Among the questions for the EEOC to consider in implementing guidance are whether offering financial incentives for employees to participate in wellness programs, and for achieving certain health outcomes are consistent with the ADA, and what limitations should be placed on such incentives.

Employee advocates identified as key issues for consideration accommodating workers with disabilities and the potential disparate impact of wellness programs on employees in protected classes in violation of Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act (ADEA). Advocates testified that higher health insurance premiums and other penalties that employees may face by not participating in a wellness program or meeting the program's goals may have a disproportionate effect on individuals with disabilities, women and racial minorities. They also called for the need for guidance for employers to afford employees with reasonable accommodations to meet the standards for health-contingent wellness programs if employees otherwise would not meet such standards as a result of a disability.

Other panelists discussed the importance of issuing guidance regarding the interplay between employer wellness programs and GINA, which restricts employers from inquiring about employees' family medical history or other genetic information. EEOC counsel testified that the EEOC's regulations under GINA provide that wellness programs may not condition receipt of an incentive on an employee providing genetic information. Industry advocates, meanwhile, urged the EEOC to provide guidance clarifying whether employers may request employees' spouses to provide family medical history in connection with incentives to participate in wellness programs. Employers are concerned that offering incentives for spouses to complete health risk assessments would violate GINA and that the removal of such incentives would weaken these programs.

EEOC Must Consider Requirements under HIPAA and ACA When Developing Guidance

In addition to discussing the intersection between employer wellness programs and certain federal laws, the panel stressed that the guidance issued by the EEOC must not conflict with provisions under HIPAA and the ACA that relate to these programs. For example, HIPAA's non-discrimination rules, which were amended in 2006, provide that wellness programs that condition a reward based on an individual's ability to achieve a health-related-status factor would not be discriminatory if they satisfied certain standards such as being reasonably designed, and limiting the reward offered. A notice of proposed rulemaking published in November 2012 included potential amendments to the 2006 regulations consistent with the ACA changes, including requiring employers to provide reasonable alternatives to individuals who were unable to satisfy the initial standards of the wellness program so they may still be able to qualify for rewards.

The ACA codified the standards from HIPAA's 2006 non-discrimination rules to permit wellness programs that establish incentives or rewards based on health-related-status factors if the programs meet five standards, including the reasonably designed standard. However, the ACA further incentized the creation of wellness programs by increasing the amount of the maximum reward an employer may offer from 20 to 30 percent of the group healthcare plan cost. The ACA provided that future increases may be as high as 50 percent of the cost.

The panelists emphasized the need for consistency between the requirements under HIPAA and the ACA and future guidance with respect to the EEO laws so that employers may comply with the obligations imposed by all of these laws.

Implications for Employers

The EEOC made clear during the meeting that it has just begun its analysis of the interplay between employer wellness programs and federal EEO laws and that guidance will not be issued anytime soon. Meanwhile, a number of challenges to these programs have been initiated in the courts addressing these issues. The Eleventh Circuit in *Seff v. Broward County* (http://www.ca11.uscourts.gov/opinions/ops/201112217.pdf) upheld a district court's ruling that a governmental employer's wellness program, which included a penalty for failure to participate in the program, did not violate the ADA because it was a term of the group health insurance plan and fell under the ADA's safe harbor provision. This decision, however, did not address the separate issue of whether employers must show that their programs are "voluntary" under the ADA and other Circuits have yet to rule on to what extent such penalties are permissible under the ADA. Employers will need to keep a watchful eye on how the law is developing in this area so that they may understand how to design, implement or modify their wellness programs.

* * *

The EEOC is holding the record for the May 8 meeting open for 15 days and has invited members of the public to submit written comments on any issues or matters discussed during the meeting. For more information regarding the

meeting and written testimony prepared for the meeting, please visit the EEOC's website at http://www.eeoc.gov/eeoc/meetings/5-8-13/index.cfm.

Please contact a member of Sidley's Labor and Employment, Employee Benefits or Healthcare teams if you have any questions regarding these matters.

The Employment and Labor Practice of Sidley Austin LLP

Our Employment and Labor Practice has decades of experience in litigating virtually all types of employment and traditional labor claims before federal and state courts and agencies, ranging from single-plaintiff cases to complex class actions. We also provide comprehensive counseling to our clients on a wide variety of employment and labor issues.

The Employee Benefits Practice of Sidley Austin LLP

Our Employee Benefits group is one of the largest practices of its kind in the United States. Since its establishment in the 1920s, our lawyers have handled virtually every type of issue involving employee benefits.

Healthcare Practice

Our Healthcare Practice represents participants in all facets of the healthcare industry, including pharmaceutical, biotech and device companies, DME suppliers, hospitals, skilled nursing facilities, physician-owned companies, professional associations and research institutions. Our lawyers combine a strong background in the complexities of healthcare financing and delivery, including coding, reimbursement, and coverage issues, privacy and security, trade regulation, and competition. We have extensive experience representing clients on enforcement and regulatory matters before federal and state enforcement agencies.