Wellness Program Incentives: Planning for 2019

As employers plan their employee benefits and wellness programs for 2019, one thing is clear – the Equal Employment Opportunity Commission's (EEOC) wellness incentive regulations remain uncertain. EEOC regulations allowing a maximum wellness program penalty/incentive of 30% are vacated as of January 1, 2019, per the court's ruling in *AARP v. EEOC*.

Since the ruling, the EEOC provided a status update stating that the agency has no plans to issue new wellness regulations by a specified date as instructed by the court. With guidance unlikely in time for employers to plan their 2019 wellness strategies, employers are left unsure about the future of their wellness programs subject to the EEOC's regulations.

Planning for 2019

Employers who sponsor wellness program components that are subject to the EEOC's incentive limit rules (such as biometric screening, health risk assessment, or an annual physical that collects medical information) will need to consider the level of risk they are comfortable with, as it is not anticipated that there will be new guidance prior to January 1, 2019. What is known now is that the EEOC's stance related to wellness incentives is the 30% maximum. Unless new rules are issued, one could reason that the EEOC is unlikely to challenge an employer that voluntarily complies with the rescinded incentive limits. If the EEOC does not validate such level as voluntary, they will respond with a lesser percentage.

One of the more conservative approaches would be for an employer to remove any incentives from a wellness program that are tied to completing a health risk assessment or biometric testing (i.e. subject to EEOC regulations). In contrast, the most aggressive approach is to apply incentives over 30% to said wellness programs. Any amount of incentives in between poses some level of risk (the lower the percentage perhaps the lower the risk). For example, if an employer is already providing incentives at 30%, it may choose to maintain until guidance suggests otherwise. Alternatively, if an employer is not offering a health risk assessment or biometric testing component to their wellness program, it may want to wait and see what further guidance provides.

Important to note, the *AARP v. EEOC* ruling only impacts wellness programs subject to the EEOC's wellness regulations, as previously mentioned. For example, wellness programs that include a tobacco surcharge without testing for nicotine, or participatory programs (such as providing gym use or educational lunch-n-learns) are not subject to EEOC's wellness regulations but rather, subject to HIPAA and ACA regulations and not impacted by the court's decision.

With the above in mind, employers should discuss options with legal counsel when planning their wellness strategy for 2019. While employers are left without guidance, they should assess their current incentive amounts and the level of risk they wish to assume in the interim.

HORAN advocates for clients to maximize benefits, minimize costs and improve physical and financial wellness. They work to identify and understand clients' organizational challenges and then collaborate to put strategies in place that will achieve their desired outcome. To speak to a HORAN representative today, call Cheryl Mueller, President & Managing Principal, Columbus/Dayton Regions at 614.376.0901 or cherylm@horanassoc.com.