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OAKLAND APPROVES MEASURE Z: HOTEL EMPLOYERS TO PROVIDE HEALTHCARE BENEFITS OR INCREASED PAY TO HOTEL WORKERS

In November of 2018, Oakland, California voters approved Measure Z, requiring hotel employers in Oakland to provide their hotel employees with either a minimum wage of $15 per work hour plus healthcare benefits, or an increased minimum wage of $20 per work hour without coverage for healthcare benefits. Measure Z became effective January 1, 2019. Measure Z also contains important safety protections for hotel workers (e.g., a "panic button" for hotel employees with emergencies, support to hotel employees who report violent or threatening behavior against them, workload restrictions), but the below analysis only focuses on the portion of Measure Z as it relates to healthcare benefits for hotel employees.

Covered Employers

Measure Z applies to all Oakland hotels (i.e., hotel employers) with 50 or more guest rooms or suites of rooms.

Covered Employees

A covered employee, or "hotel employee" is any individual who:

- is employed to provide services in an Oakland hotel with 50 or more guest rooms or suites of rooms, whether directly employed by the hotel, or by the hotel's contractor; and
- who is hired to or was previously hired to work an average of 5 hours per week for 4 weeks (or more).

Certain Collective Bargaining Agreement (CBA) employees may be exempt from Measure Z, contingent upon the waiver of such rights being explicitly set forth in the CBA in clear and unambiguous terms.

Healthcare Benefits and Hotel Employees

A hotel employer is required to either pay a hotel employee a minimum wage of (adjusted annually with inflation):

- at least twenty dollars ($20) per hour of work, without any contribution towards healthcare benefits (excludes gratuities, service charge distributions, or bonuses); or

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- at least fifteen dollars ($15) per hour of work (excludes gratuities, service charge distributions, or bonuses), and pay the difference between the non-healthcare benefit wage (at this time $20, which is described below) and the healthcare benefit wage (at this time, $15) towards the healthcare coverage of a hotel employee (Example: Employee works 30 hours a week, and therefore is entitled to $450 a week in wages ($15 X 30 hours = $450), and $150 a week in healthcare coverage contributions by an employer ($20 - $15 = $5; $5 X 30 hours = $150).

Notice, Hotel Employer Record Retention, and Penalties

Notice of the protections afforded to employees under Measure Z must be provided to hotel employees, and must be provided in each of the languages that are spoken by more than ten percent (10%) or ten (10) hotel employees at the hotel (whichever is less). Hotel employers are required to keep any records related to their compliance with the ordinance for up to three (3) years.

Hotel employers shall not discharge, reduce compensation of, or discriminate against any person who reports a violation of the Measure by their hotel employer to the city of Oakland. Also, employers may not discharge an employee within one-hundred twenty (120) days of reporting a violation to the city of Oakland, unless the hotel employer has clear and convincing evidence of just cause for such discharge.

Hotel employers may be fined an administrative penalty to be paid to each employee/person whose rights have been violated in the amount of $50 for each violation per day, and pay up to $50 for each day per employee to the city of Oakland, to compensate the city for enforcement of the Measure.

Action Required

Hotel employers in Oakland, California should review their wage and healthcare benefits policies with their legal counsel to ensure their policies are in compliance with Measure Z, or revise their policies as needed.

For the text of the Ordinance, see:

https://www.acvote.org/acvote-assets/02_election_information/PDFs/20181106/en/Measures/22%20-%20Measure%20Z%20-%20City%20of%20Oakland.pdf

COMPLIANCE REMINDER: ONLINE CMS DISCLOSURE FORM DUE BY MARCH 1, 2019

Health plan sponsors are required to complete an annual online disclosure form in relation to their prescription drug coverage with the Centers for Medicare and Medicaid Services (CMS). This form details whether prescription drug coverage under the sponsor's health plan is "creditable" (meaning that the plan's prescription coverage is comparable to, or better than, Medicare Part D's prescription drug benefit), or is "non-creditable" (does not reimburse prescription coverage at the same level as Medicare Part D's prescription drug benefit). Plan sponsors must complete the disclosure within 60 days of the start of the plan year if any plan participants are receiving Medicare Part D prescription drug benefits. Therefore, for calendar year health plans, this online disclosure form is due to CMS by March 1, 2019.

A health plan is also required to report to CMS within 30 days if a prescription drug plan is terminated, or if there are any other changes in a plan's creditable coverage status.

Plans Exempt from the Filing Process

Employer health plans that do not offer prescription drug coverage to any Medicare-enrolled employees, employees' spouses, employees' dependents, or retirees at the start of the plan year are exempt from filing with CMS. In addition, employers who qualify for the Medicare Part D retiree drug subsidy are exempt from filing, but only in regard to those individuals for which they claimed the plan subsidy.

Annual Part D Notice

As a reminder, plan sponsors must annually issue a notice to their Medicare-enrolled employees, dependents, and retirees informing them whether the drug coverage under the sponsor's plan is "creditable" or "non-creditable". Notices must be provided:

- Prior to enrollment in the employer's plan
- Prior to annual Part D enrollment window (opens October 15th)
- Prior to an individual's initial enrollment period for Part D
- When a plan ceases prescription drug coverage, or drug coverage status changes (i.e., creditable to non-creditable)
- Upon Request

Action Required

Plan sponsors with calendar year health plans must complete the disclosure to CMS by March 1, 2019. Plan sponsors must go online to complete this filing before the due date. Plan sponsors should print a copy of the confirmation page for their records.

For instructions on how to file, see:

https://www.cms.gov/Medicare/Prescription-Drug-Coverage/CreditableCoverage/CCDisclosure.html

To complete the online disclosure to CMS form, see:

https://www.cms.gov/Medicare/Prescription-Drug-Coverage/CreditableCoverage/CCDisclosureForm.html

EEOC REMOVES INCENTIVE LIMITS FROM ADA AND GINA FINAL WELLNESS PLAN RULES

On December 20, 2018, the Equal Employment Opportunity Commission (EEOC) removed the bright-line incentive limits from its Americans with Disabilities Act (ADA) Final Rule and the Genetic Information Nondiscrimination Act (GINA) Final Rule (collectively Final Rules).

Previously, the Final Rules allowed employers to offer wellness incentives of up to thirty-percent (30%) of the cost of employee-only coverage for a wellness program to be considered compliant and voluntary to participants under the ADA and GINA. The previous incentive limits in the Final Rules applied to any employer sponsored wellness program that requested disability related information, genetic information (i.e. health risk assessments), and to any wellness program that required a medical examination (i.e. biometric screenings).

Background

On May 17, 2017, the EEOC released the Final Rules which described the parameters by which a wellness program could offer incentives and still be considered voluntary under both the ADA and GINA.

Generally, the ADA prohibits employers from discriminating against an employee based upon his/her disability. Pursuant to the Final Rules drafted by the EEOC, a wellness incentive offered to an employee for answering questions related to his/her disability or being subject to a medical examination based upon his/her disability would not be considered discriminatory so long as these questions or examinations were a part of a voluntary wellness program.

In addition, GINA restricts employers from acquiring and disclosing the genetic information of its employees, and prohibits employers from the use of genetic information in making employment decisions. Genetic information includes genetic information about the employee and employee's family members' past or current health status. An employer, under the Final Rules drafted by the EEOC, is allowed to offer an incentive to an employee who provides his/her genetic information to an employer, so long as it is a part of a voluntary wellness program.

Due to the term "voluntary" being somewhat ambiguous as it relates to wellness programs, the EEOC sought to provide a bright-line rule as to how much of an incentive an employer could offer for a wellness program to still be considered voluntary. The EEOC, under its Final Rules, provided a bright-line rule to employers that were interested in offering incentives to employees who disclosed their disability related information and/or genetic information. The EEOC stated that an employer could offer rewards and/or penalties of up to thirty-percent (30%) of the cost of self-only coverage for a wellness program incentive to still be considered voluntary.

The Final Rules clarified that a wellness program would be considered voluntary so long as an employer did not offer a wellness incentive of greater than thirty-percent (30%) of the total cost of self-only coverage to employees for disclosing medical information as it relates to their disability, for participating in a medical examination, or for providing the genetic information of an employee (or spouse) to the employer.

Court Rulings

After the EEOC released the Final Rules, in AARP v. EEOC, the AARP brought a lawsuit challenging the EEOC's thirty-percent (30%) incentive limit in the Final Rules and argued it rendered an employee's disclosure of ADA and GINA protected information involuntary.

EEOC Removes Incentive Limits From ADA And GINA Final Wellness Plan Rules
(CONTINUED)

On August 22, 2017, a federal trial court agreed with the AARP and determined that the EEOC had failed to justify its conclusions in the Final Rules that a thirty-percent (30%) incentive was a reasonable interpretation of the term "voluntary" under the ADA and GINA. The court sent the Final Rules back to the EEOC for reconsideration, asking the agency to timely issue new rules addressing the court's concerns.

On December 20, 2017, the court issued an Order vacating the portions of the EEOC's Final Rules relating to the bright-line thirty-percent (30%) incentive limit that may be offered as part of an employer-sponsored wellness program, because the court was unwilling to allow the EEOC to issue new Final Rules in October 2019 that would be applicable, at the earliest, in 2021.

In response to the court's Order, on December 20, 2018, the EEOC removed the incentive limits from the Final Rules under the ADA and GINA.

Conclusion

Beginning January 1, 2019, the Final Rules' guidance on permissible incentive limits for voluntary wellness programs no longer applies as it relates to an employee's disability or an employee's genetic information under the ADA or GINA. Unfortunately, until the EEOC releases new regulations on wellness program incentives, there is uncertainty regarding when a financial incentive under the ADA and GINA would be considered voluntary.

The court Order and the EEOC's actions only invalidate the thirty-percent (30%) bright-line incentive limits of the ADA and GINA Final Rules. All other aspects of the Final Rules remain in effect, including the notice and consent provisions applicable to health risk assessments.

In addition, other regulations (HIPAA) affecting wellness programs remain in effect. Thus, while waiting for further guidance from the EEOC, employers are still free to provide incentives for other programs for promoting healthier habits and awareness that are not subject to the ADA or GINA, such as reimbursement for gym memberships or lunch and learn programs. These, of course, would be subject to the HIPAA nondiscrimination rules.

Action Required

Due to the uncertainty regarding the incentive limits that would render a wellness program involuntary, employers should carefully consider the level of incentives they use with their wellness programs that are subject to the ADA or GINA (e.g. biometric screenings and health risk assessments). Employers should continue to monitor this issue, so they can ensure their future wellness plans comply with federal law.

For the vacated GINA Final Rule, see:

https://www.federalregister.gov/documents/2018/12/20/2018-27538/removal-of-final-gina-wellness-rule-vacated-by-court

For the vacated ADA Final Rule, see:

https://www.federalregister.gov/documents/2018/12/20/2018-27539/removal-of-final-ada-wellness-rule-vacated-by-court

QUESTION OF THE MONTH

Is Health Club Membership an ERISA Benefit?

QUESTION: Our Company contributes toward the cost of health club memberships for employees. Does that make the program subject to ERISA? Would it make a difference if we offered an on-site health club or fitness center?

ANSWER: In general, neither paying for employees' health club memberships nor providing an on-site fitness center for employees will constitute an ERISA plan. For an employer-provided benefit program to qualify as an ERISA plan, it must (among other things) provide one or more of the benefits listed in the ERISA definition, such as medical, sickness, or disability benefits. While health and fitness clubs and on-site fitness centers promote general good health, they normally are made available without regard to sickness or disability and do not diagnose or treat specific medical conditions, so they typically do not provide medical care, benefits in the event of sickness, or any other ERISA benefit. Absent an ERISA benefit, a policy or program of paying for health club memberships or providing an on-site fitness center would not establish an ERISA plan.

In relatively rare situations, membership in a health club or access to an on-site fitness center may be offered to employees as part of an arrangement, such as a disease-management program, that includes diagnostic, therapeutic, or preventive care or "coaching" for specific health conditions or risks. This type of health club arrangement may be considered to provide a medical benefit, potentially making it subject to ERISA and applicable group health plan rules either on its own or as an element of a larger plan, depending on how the arrangement is structured. Determining how ERISA applies to this type of program is complex and fact-specific, and should be undertaken with the assistance of legal counsel.

Note that an employer's payment or reimbursement of health club dues—or provision of an onsite fitness center—will raise tax issues, which should also be reviewed with legal counsel.

Source: *EBIA*

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