Employment Law Update: Spring Has Sprung Proposed Overtime Rule and Confusion Over Wellness Incentives

Department of Labor's Proposed Overtime Rule

By: Vernon McFarland and Sam Kapoor

The U.S. Department of Labor (DOL) recently unveiled a proposed rule raising the annual minimum salary requirement for the "white collar" overtime exemption. Its proposal increases the minimum salary from $23,660 to $35,308 for employees to be considered "white collar" under the overtime requirements of the Fair Labor Standards Act (FLSA). In addition, the threshold for "highly-compensated" employees will increase from $100,000 to $147,414.

Under the FLSA, employers must pay non-exempt employees at least the minimum wage and overtime for over 40 hours of work. While most employees are classified as non-exempt, an exemption applies to "white collar" and "highly-compensated" workers: certain professional, administrative, and executive employees. To qualify for the exemption, employees must have a minimum fixed salary and primary job duties that involve specific office and non-manual work. If an employee is not paid the minimum required salary, then they are considered eligible for overtime payments for all hours worked in excess of 40 hours per workweek. The proposed rule allows employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the minimum salary level.

The DOL anticipates that the earliest possible date this proposed rule might take effect would be January 2020. Meanwhile, the DOL is accepting public comments on the proposed rule. In preparation for the rule's implementation, employers should begin identifying the employees who will be impacted once the proposed rule is finalized. Additionally, employers should figure the new calculations for overtime compensation to determine the overall impact of the rule and to make any necessary adjustments in anticipation of the rule becoming final. In addition, if finalized, employers must keep in mind that although this is a federal rule, they must also comply with their individual state overtime rules that may be more stringent.

Spring has Sprung, Season of Confusion Over Wellness Incentives Sticks Around

By: Taylor H. White and Malissa Wilson

The seasons have changed from Winter to Spring, but the EEOC's position regarding wellness incentives remains the same. This year's stalemate over employee wellness programs has increasingly caused employers to ask: have wellness incentives become more trouble than they are worth? In a dramatic shift from its former endorsement of wellness incentives, the Equal Opportunity Employment Commission (EEOC) has invalidated the incentive provisions of its wellness program regulations. The result: since January 1, 2019, when the EEOC regulations became ineffective, employers have been in limbo when it comes to implementing their employee wellness programs, with no guidance from the EEOC to speak of.

For years, many employers have sponsored wellness programs designed to reward workers for *voluntarily* keeping themselves healthy. Motivated by the passage of the Affordable Care Act, these incentives have allowed workers to receive copayment waivers or premium holidays in exchange for enrolling in programs like tobacco cessation and biometric screening. But these employer-sponsored wellness programs are subject to one key limitation: enrollment must be voluntary.

Under the Americans with Disabilities Act (ADA) and the Genetic Information Non-Discrimination Act (GINA), employers cannot *force* workers to submit to medical exams, disability-related inquiries, or questions about their genetic history. After years of uncertainty over how attractive a wellness incentive may be without crossing the "involuntary" line, the EEOC finally provided guidance in May 2016. The EEOC's 2016 rules allowed employers to provide an incentive of up to 30% of the cost of employee-only coverage, without rendering participation involuntary. But it wasn't long before the EEOC's 30% rule faced challenges – in December 2017, a Washington D.C. District Court promised to vacate the regulation, favoring employees' "civil right to keep private health-related information private." The rule became invalid on January 1, 2019, despite the fact that the EEOC has yet to set forth an amended regulation to guide employers on how much (if any) financial incentive would be permissible.

If you are an employer considering whether to sponsor a wellness program in 2019, the EEOC's recent balk affects you. As we await the EEOC's new rules regarding creation and enforcement of wellness programs, there are three basic approaches employers should take, depending on your individual degree of risk tolerance.

- High Risk, High Reward: In the absence of any EEOC guidance as to the upper limit of financial incentives, an employer could choose to keep a 30% cost incentive program in place. Under this "do-nothing" option, an employer would bide time until the EEOC releases its new wellness incentive rules, holding out hope that the EEOC won't challenge an employer who simply complied with its own incentive limits (even if they're rescinded). However, maintaining the status quo with regard to wellness incentives could come at the price of violating the ADA and GINA.
- Moderate Risk, Middle Ground: A safer option is to drastically reduce the financial incentive for opting in to the wellness program, thereby increasing the probability that a worker's participation would be considered voluntary. This "moderate risk" option may be most attractive for some employers, especially considering the majority of wellness programs in place as of 2018 provided small incentives, far short of the now-invalidated 30% of employee-only cost ceiling. There is the low-likelihood of an EEOC challenge, but employers still run the risk of defending challenges by individual employees or organizations arguing that their incentives remain too aggressive.
- Low Risk, Wait-and-See: To ensure compliance, the most conservative response to the EEOC's change is to remove any wellness program incentive whatsoever and await Agency guidance when it promulgates a revised

set of rules by 2021. Under the lowest-risk option, employers would be free to maintain incentives for other programs that promote healthy habits, such as gym memberships or lifestyle “lunch-and-learns.” But as for wellness program incentives that are subject to the ADA and GINA, such as health condition assessments or biometric screenings, the safest approach is to eliminate incentives and wait for further instruction.

In sum, by rescinding its 30% incentive rule, the EEOC has left employers in the same quandary they were in pre-2016. The regulations that remain neither prohibit nor expressly permit wellness plan incentives. Only time will tell whether offering some incentive, even a significantly decreased incentive, violates these rules. Meanwhile, there’s no better time than the start of Spring for employers to review their wellness programs.