



Issue Date: November 2015

EEOC Issued GINA Wellness Rules

On Friday, October 30, the Equal Employment Opportunity Commission (EEOC) issued proposed rules that would amend the regulations implementing Title II of the Genetic Information Nondiscrimination Act (GINA). These rules relate to incentives offered in exchange for health information about an employee’s spouse as part of an employer-sponsored wellness program. The proposed rules provide a narrow exception to the prohibition on incentives that are contingent on the provision of genetic information. Specifically, they allow employers to provide incentives to spouses who participate in the group health plan that are contingent upon completion of a health risk assessment (HRA).

Background

Title II of GINA prohibits employers from conditioning eligibility or financial inducements on the provision of an employee’s genetic information. “Genetic information” is broadly defined, and includes the current or past health information of a spouse. Therefore, employers offering an incentive in conjunction with a wellness program that is contingent upon the completion of an HRA, may have risked violating GINA since the health information provided by the spouse would, by definition, constitute genetic information.

Analysis

DISTRIBUTION OF INCENTIVES OR INDUCEMENTS

The proposed rule mirrors the proposed EEOC regulations relating to the Americans with Disabilities Act, limiting the total inducement related to health status information to 30% of the total cost of the plan in which the employee and any dependents are enrolled. In addition to this limitation, any

inducement specific to the employee could not exceed 30% of the cost of self-only coverage. For example, if the total cost of single coverage is \$6,000 and the family coverage is \$14,000, then inducement could not be more than \$4,200 for the family as a whole (30% of \$14,000), and not more than \$1,800 (30% of \$6,000) for the employee.

After application of the employee limit, any remaining inducement could be applied to the rest of the family, including to the employee for other wellness related activities (other than providing health information). In addition, employers could apply inducements not related to health status information without regard to apportionment requirements.

REQUIREMENTS FOR INDUCEMENTS

The proposed regulations clarify that GINA does not prohibit an employer from offering incentives for information by a spouse as part of an HRA, as long as the following requirements are satisfied:

1. The supplying of genetic information is voluntary and the individual (employee or spouse) provides written authorization
2. The request for information clearly describes both the types of information being requested and the applicable restrictions on the employer’s use of such information; and
3. The request for genetic information must be in connection with a program reasonably designed to promote health or prevent disease (e.g., a wellness program).

The proposed rule maintains the existing prohibition on use of genetic information for employment based decisions (e.g., using health information provided by a spouse to make an employment decision related to the employee). Moreover,



EEOC Issued GINA Wellness Rules *(continued)*

incentives cannot be tied to a spouse' genetic information, other than current or past health status of a spouse as part of an HRA and who is enrolled in the group health plan. Finally, no information – health status or genetic – could be requested of the employee's children, as the EEOC is concerned that this would create greater opportunity for discrimination against the employee.

Other conditions require that genetic information only be requested as part of a program designed to have a reasonable chance of improving the health of, or preventing disease in, participating individuals. This would mean it could not be overly burdensome (i.e., a subterfuge for violating Title II of GINA or other laws prohibiting employment discrimination), intrusive or costly and could not shift costs to targeted employees based on their health or condition the incentive on a waiver of GINA's protections.

Conclusion

The proposed regulations seek to strike a balance between the strict definition of "genetic information" under GINA (and its associated protections) and the recognition that spouses should be permitted, like employees, to voluntarily provide their own health status information in exchange for an inducement as part of an employer-sponsored wellness program.

As always, should you have any questions, please contact your [Parker, Smith & Feek Benefits Team](#).

While every effort has been taken in compiling this information to ensure that its contents are totally accurate, neither the publisher nor the author can accept liability for any inaccuracies or changed circumstances of any information herein or for the consequences of any reliance placed upon it. This publication is distributed on the understanding that the publisher is not engaged in rendering legal, accounting or other professional advice or services. Readers should always seek professional advice before entering into any commitments.