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EEOC Addresses Spousal Participation in Wellness Programs

Today the EEOC issued proposed guidance under GINA addressing financial incentives provided to employees for a spouse's participation in a group health plan's wellness program. The regulations apply to spouses covered under the employer's group health plan and permit limited inducements for spousal participation in a wellness program. Having been in limbo without definitive guidance for years, these proposed regulations provide much needed guidance to employers and the wellness program community.

Background

The Genetic Information Nondiscrimination Act (GINA) prohibits discrimination on the basis of an individual's "genetic information" by group health plans, insurers and employers. GINA consists of two parts:

- Title I (enforced by the DOL, IRS and HHS) restricts the collection and use of genetic information by group health plans and insurers.
- Title II (enforced by the EEOC) generally prohibits employers from discriminating against employees with respect to the compensation, terms, conditions, or privileges of employment based on genetic information. Health benefits fall within this definition.

Employers are prohibited from requesting, requiring or purchasing an employee or family member's genetic information except in certain limited cases. (See our March 17, 2009 and February 1, 2011 *For Your Information* publications.)

One exception to Title II's prohibition on acquiring genetic information is where the employer offers health or genetic services, including services offered as part of a voluntary wellness program. To meet the requirements of this exception, the wellness program must be

Genetic Information

Genetic information is defined broadly to include information about an individual's genetic tests, the genetic tests of an individual's family members, or the manifestation of a disease or disorder in an individual's family member (i.e., family medical history). "Family member" includes relatives by marriage. Thus, information about the medical conditions of an employee's spouse is considered genetic information of the employee (even though the employee and spouse do not share genetic material). See our *For Your Information* from **March 8, 2013**.

- **Voluntary**. Employees must not be required to provide, nor penalized for withholding, such information. While employers may offer financial incentives to encourage participation in wellness programs, they may not offer incentives, no matter the size, specifically for providing genetic information. An employer may offer incentives to encourage employees to complete a health risk assessment (HRA) that includes questions about genetic information (e.g., family medical history) as long as the HRA identifies those questions and clearly states that the incentive is available regardless of whether the individual answers those questions.
- **Authorized**. The individual must give voluntary, knowing and written authorization before providing genetic information. The notice must describe the genetic information that will be obtained, the general purposes for which it will be used, and the restrictions that apply to the disclosure.
- **Confidential**. Individually identifiable information may be provided only to the individual (or family member) receiving the genetic services and the licensed health care professionals or board-certified genetic counselors providing them. Also, such information can be available only for purposes of the services and may not be disclosed to the employer, except in aggregate terms that do not disclose the identity of the specific individuals.

Many employers and group health plans have responded to the regulatory requirements by omitting questions on family medical history from HRAs. Over the past several years, a more troubling question is whether a spouse's completion of an HRA about his or her own medical conditions would be considered genetic information of the employee. (See our November 4, 2014 *FYI Alert.*) The EEOC addresses that question in proposed regulations published today.

Wellness Program Exception

The EEOC released proposed regulations, Q&As and a related news release that address wellness programs provided to employees and spouses through an employer's group health plan. They would permit limited inducements (incentives, rewards, penalties) for spouses covered by the employer's group health plan for completing an HRA and/or having a biometric screening that would elicit information about the spouse's current and past health status (but not about the spouse's family medical history or genetic information).

> **Comment.** Under the proposed regulations, inducements in exchange for current or past health status information about an employee's children are not permitted. Employers extending wellness program rewards for participation of an employee's child should be careful that incentives are not attached to an HRA, biometric screening or other programs that could elicit genetic information.

What Is A Reward or Inducement?

Similar to HIPAA and the ADA, a reward includes a discount or premium or contribution rebate, a waiver of all or part of a cost-sharing mechanism, an additional benefit, or any financial or other incentive, including time-off awards or prizes. Avoiding a penalty, such as the absence of a premium surcharge or other financial or nonfinancial disincentive, is also considered a reward.

The proposed rules include the following requirements:

- **Reasonable.** Adopting the same standard outlined in the HIPAA nondiscrimination provisions, as well as the ADA proposed regulations (See our April 17, 2015 *FYI Alert.)*, such programs must be reasonably designed to promote health or prevent disease.

Example. The preamble states that a program is not reasonably designed "if it exists merely to shift costs from the covered entity to targeted employees based on their health."

- **Authorized**. Similar to the requirement for employees, a spouse must provide prior, knowing, voluntary and written authorization. The authorization form must explain the confidentiality protections and the restrictions on disclosure of genetic information. Authorization may be provided by the employee and spouse on the same form (i.e., a separate authorization for the spouse is not needed).
- **Limited Inducement**. Similar to the HIPAA wellness rules, the total inducement to the employee and spouse for their participation in the wellness program may not exceed 30% of the total cost of coverage for the plan in which the employee and any dependents are enrolled. In contrast to the HIPAA wellness rules, however, the proposed rules require the employer to allocate the 30% incentive between the employee and spouse. Any inducement for the employee's participation must be no more than 30% of the cost of self-only coverage under the plan; the remainder (i.e., 30% of the total cost of coverage less 30% of the cost of self-only coverage) may be offered in exchange for the spouse's participation.

  Example. The total cost of coverage for the plan an employee and his spouse are enrolled in is $14,000. The cost of self-only coverage is $6,000. The maximum inducement an employer can offer to the employee and spouse for participation is $4,200 (30% of $14,000). Of that $4,200, the employer can offer up to $1,800 (30% of $6,000) for the employee's participation and $2,400 ($4,200 minus $1,800) for the spouse's participation.

The 30% limit includes any inducement offered to an employee and/or spouse for providing past or current health status information and any other inducements offered to an employee for the employee's participation in a wellness program that includes a medical examination or asks disability-related questions. This is the total inducement; the 30% limitation does not apply separately to program offerings.

Comment. This rule appears to be a hybrid of the incentive limitation provided in the HIPAA wellness rules and the EEOC ADA proposed rules for wellness programs involving medical exams and disability-related inquiries. While attempting to be consistent with HIPAA and faithful to the ADA proposed rules, the EEOC crafts a rule that adds a level of complexity, requiring employers to compute the proper employee/spouse allocation and ensure that the total incentive (offered for both completion of an HRA and for a wellness program that involves medical exams and/or disability-related inquiries) does not exceed the 30%. That said, this could be the EEOC's response to the lack of guidance on coverage of family members in the proposed ADA regulations and provides some assurances for employers.

Comments

The EEOC requests comments on the proposed regulations generally and on a number of specific issues, including:

- Best practices or procedural safeguards to ensure programs are designed to promote health or prevent disease
- Physician certification rather than completion of an HRA
- Privacy considerations to protect genetic information collected
- Application of the proposed rules to wellness programs offered outside of a health plan

Comments are due by the end of December. The Q&As indicate that while employers are not required to comply with the proposed rule, those that do may rely on them. The EEOC encourages employers that offer employer-sponsored wellness programs as part of a group health plan to use this time (before the rules are finalized) to determine whether the proposed rule would require changes to their current wellness programs.

In Closing

These regulations are welcome news for employers that offer (or are contemplating) incentives for spousal health assessments and biometric screenings and is another step toward creating a more consistent legal framework for employer wellness programs. Employers should seek counsel with their trusted advisors to determine what, if any, changes need to be made to their wellness programs in light of the proposed rules.

Look for an upcoming *FYI In-Depth* covering wellness program compliance concerns and more on these most recent GINA changes.

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