Insight

IN-DEPTH DISCUSSION

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The EEOC Issues Proposed Rule on GINA and Wellness Programs

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On October 30, 2015, the Equal Employment Opportunity Commission (EEOC) issued a Notice of Proposed Rulemaking (NPRM) to amend the regulations implementing Title II of the Genetic Information Nondiscrimination Act (GINA) as they relate to employer wellness programs that are part of group health plans. The proposed rule clarifies that an employer may offer, as part of its health plan, a limited incentive (in the form of a reward or penalty) to an employee whose spouse (1) is covered under the employee's health plan; (2) receives health or genetic services offered by the employer, including such services as part of a wellness program; and (3) provides information about his or her current or past health status. The proposal carves a narrow exception to the general prohibition on providing incentives in exchange for an employee's genetic information. The long-awaited rule comes after the EEOC issued a proposed rule on the treatment of wellness programs under the Americans with Disabilities Act (ADA) in April 2015.[1]

GINA prohibits employers from acquiring an employee's genetic information, except in limited circumstances. One of the exceptions permits employers offering health or genetic services, including those offered as part of voluntary wellness programs, to request genetic information as part of these programs, as long as certain requirements are satisfied. The EEOC's final rule on Title II of GINA explained that an employer could not offer a financial inducement for providing genetic information as part of a wellness program.[2] However, the final rule did not expressly address the issue of spousal incentives. Employers were therefore left without clear direction about whether a financial inducement for the spouse to provide health status information in connection with a wellness program was permissible.

In the proposed rule, the EEOC explains that, read one way, such an inducement could be seen to violate the prohibition on providing financial inducements in return for an employee's protected genetic information. When an employer seeks information from a spouse (who is a "family member" under GINA) about his or her current or past health status, the employer is also treated under GINA as requesting genetic information about the employee. This is because GINA defines

1 For a discussion of the EEOC's proposed regulations on wellness programs under the ADA, see Ilyse Schuman, Russell Chapman and Michelle Thomas, *EEOC Issues Long-Awaited Proposed Rule on Employer Wellness Programs*, Littler Insight (May 14, 2015).

2 For a discussion of the impact of the GINA final regulations on HRAs and wellness programs, see Ilyse Schuman, *EBSA Clarifies GINA Provisions for Insurance Providers and Group Health Plans*, Littler ASAP (Oct. 18, 2010).

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the term "genetic information" of an employee broadly to include information about a family member's (including a spouse's) current or past health status. However, the EEOC's final GINA rule specifically permits employers to seek such information from a family member who is receiving health or genetic services from the employer, including such services offered as part of a voluntary wellness program, as long as each of the requirements concerning health or genetic services provided on a voluntary basis is met.

The proposed rule seeks to resolve this apparent conflict. Specifically, the proposed regulations would clarify that GINA does not prohibit employers from offering limited inducements—in the form of rewards or penalties avoided—if spouses covered under the health plan provide information about their current or past health status as part of a health risk assessment (HRA), as long as certain requirements are satisfied. An HRA may include a questionnaire or medical examination, such as a blood pressure test or blood test to detect high cholesterol or high glucose levels. The provision of genetic information must be voluntary and the individual from whom the genetic information is being obtained must provide prior, knowing, voluntary and written authorization, which may include authorization in electronic format. The employer must also obtain authorization from the spouse when collecting information about the spouse's past or current health status, although a separate authorization for the acquisition of this information from the employee is not necessary.

The proposed rule also caps the total incentive amount. The total incentive for an employee and spouse to participate in a wellness program that is part of a group health plan and collects information about current or past health status may not exceed 30% of the total annual cost of the plan in which the employee and any dependents are enrolled.[3] In addition, the maximum portion of an incentive that may be offered to an employee alone may not exceed 30% of the total cost of <u>self-only</u> coverage, which is the maximum amount the EEOC has proposed may be offered under the ADA for an employee who answers disability-related inquiries or takes medical examinations in connection with a wellness program that is part of a group health plan. In this regard, both the proposed ADA and the GINA wellness rules diverge from the Affordable Care Act (ACA) and Health Insurance Portability and Accountability Act (HIPAA) regulations on wellness programs.[4]

Notably, 30% of the cost of the plan in which an employee and his or her dependents *are enrolled* is the maximum incentive allowed under HIPAA and the ACA for wellness programs that require employees and their dependents to achieve certain health outcomes. Under the EEOC's proposal, if a wellness program that is part of a group health plan requires an employee to respond to disability-related inquiries or undergo a medical examination, the portion of the incentive that may be provided to the employee separately will be limited to 30% of the total cost of self-only coverage. In contrast to the ACA regulations, the EEOC would limit the incentive to the employee to 30% of the cost of self-only coverage, even if the employee was enrolled in family coverage.[5] Thus, for example, if an employee is enrolled in a health plan that covers the employee and any class of dependents for which the total cost of coverage is $14,000, the maximum inducement the employer can offer for the employee and the employee's spouse to provide information about their current or past health status is 30% of $14,000, or $4,200. If the employer's self-only coverage costs $6,000, the maximum allowable incentive the employer may offer for the employee's participation is 30% of $6,000, or $1,800. The rest of the inducement, $4,200 minus $1,800, or $2,400, may be offered for the spouse to provide current or past health status information.

The proposed rule adds a new requirement to align the GINA regulations with the ADA proposed regulations as they relate to wellness programs. Any health or genetic services in connection with which an employer requests genetic information must be "reasonably designed to promote health or prevent disease." In order to meet this standard, the program must have a reasonable chance of improving the health of, or preventing disease in, participating individuals, and must not be overly burdensome, a subterfuge for violating Title II of GINA or other laws prohibiting employment discrimination, or highly suspect in the method chosen to promote health or prevent disease. The proposed rule adds another new provision to the GINA regulations prohibiting employers from requiring employees (or employees' spouses or dependents covered by the employee's health plan) to waive the confidentiality of their genetic information as a condition for receiving an incentive for

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3 Note that this formulation appears to depart from that set out in the ADA proposed regulations on wellness programs, which limits rewards to 30% of single employee-only coverage.

4 For a discussion of the ACA's final wellness regulations, see Russell Chapman, *Double Whammy, Part II: EEOC Stance and ACA Final Regulations Impose New Burdens on Wellness Programs*, Littler Insight (Aug. 8, 2013).

5 In the EEOC's ADA proposed wellness regulations, where a wellness program that is part of a group health plan offers an employee an incentive for participating in an HRA that includes disability-related inquiries or medical examinations, the maximum allowable incentive is 30% of the total cost of employee-only coverage (or up to 50% in the case of a tobacco cessation program that does not determine compliance with a non-tobacco use standard through a test or measurement). The EEOC's NPRM under the ADA for wellness programs came under severe criticism for not conforming to the ACA wellness regulations that would make the reward applicable to the total cost of coverage for the "applicable coverage tier" in which the participant was enrolled. It can be hoped that the GINA NPRM signals a shift back toward the ACA's formulation of the available wellness reward for the ADA regulations when they are finalized.

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participating in a wellness program. The revisions to the GINA regulations would remove the term "financial" as a modifier of the type of inducements discussed in the regulation and make clear that the term "inducements" includes both financial and in-kind inducements—such as time-off awards, prizes, or other items of value—in the form of either rewards or penalties.

The EEOC explains that the exception to the general prohibition on offering an incentive in exchange for genetic information is a narrow one. While inducements in exchange for information about a spouse's health status are permitted, the proposed rule does not permit inducements in exchange for current or past health status information about an employee's children, either biological or adopted. According to the EEOC, the possibility that an employee may be discriminated against based on genetic information is greater when the employer has access to information about the health status of the employee's children versus the employee's spouse. However, employers may offer health or genetic services, including participation in a wellness program, to an employee's children on a voluntary basis and may ask questions about a child's current or past health status as part of providing such services.

In the preamble to the proposed rule, the EEOC states that the narrow exception "strikes the appropriate balance between GINA's goal of providing strong protections against employment discrimination based on the possibility that an employee may develop a disease or disorder in the future or may face discrimination because a family member is expected to become ill in the future, and the goal of the wellness program provisions of [HIPAA], as amended by the Affordable Care Act, of promoting participation in employer-sponsored wellness programs." According to EEOC's press release, the Commission believes that "the approach adopted in this rule harmonizes the two titles of GINA, which both regulate employer wellness programs that are part of group health plans, as a coherent whole."

Prior to these proposed regulations, the EEOC's apparent enforcement position was that giving incentives to covered employees in exchange for health information obtained through an HRA provided by the employee's covered spouse was not permitted under GINA. In comparison to this past enforcement practice, the proposed regulations may be seen as a positive step. Yet, employers still face inconsistency in the approach to wellness programs adopted by the EEOC and that of that of both the ACA and ADA.

For employers who have increasingly turned to wellness programs to reduce health care costs and improve the health and productivity of the workforce, the inconsistent guidelines, while partially reconciled, still present challenges. The new NPRM includes, almost as an aside, a seeming expansion of the scope of the ADA as it applies to group health plans. In noting that the GINA proposed regulations do not limit the application of any other federal law such as the ADA, the NPRM reminds the reader that the ADA may require reasonable accommodation to a qualified individual with a disability under the ADA in order to permit the individual to "enjoy equal benefits and privileges of employment" on the same basis as individuals who are not disabled. As an example, the GINA proposal states that where an employer offers an inducement to an employee to participate in a disease-management or wellness program, the program must offer a disabled participant reasonable accommodation unless it is subject to the "undue hardship" exception.

As an example of where the EEOC might require reasonable accommodation as part of a disease-management program, a January 2013 EEOC ruling addressed a group health plan that waived its deductible for participation in a disease-management program or adherence to doctor-prescribed exercise and medication program, and included a requirement that the participants undergo blood tests to determine that they were taking their prescribed medications. The EEOC ruled that the disease-management program constituted a wellness program, and, among other things, the program would be required to provide reasonable accommodation to any participant who could not comply with the requirements due to a disability. Since the applying the ADA's "reasonable accommodation interactive process" to day-to-day group health plan administration would be highly disruptive to the operation of such plans, employers should consider submitting comments on the EEOC's position on this point.

The EEOC has requested comments on possible additional changes to the GINA regulations that, if adopted, may further complicate the promotion of wellness programs. For example, the Commission asks whether employers that offer inducements to encourage the spouses of employees to disclose information about current or past health must also offer similar inducements to persons who choose not to disclose such information, but who instead provide certification from a medical professional stating that the spouse is under the care of a physician, and that any issues raised in the HRA are being addressed. Another question posed is whether the proposed authorization requirement applies only to wellness programs that offer more than de minimis rewards or penalties to employees whose spouses provide information about current or past health status as part of an HRA. If so, how should the Commission define "de minimis"? Given concerns about the privacy of genetic information, the EEOC asks what procedures are needed to achieve GINA's goal of ensuring the confidentiality of genetic information

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with respect to electronic records stored by employers. Additionally, should the regulation restrict the collection of any genetic information by a workplace wellness program to only the minimum necessary to directly support the specific wellness activities, interventions, and advice provided through the program? Inasmuch as the proposed rule covers only inducements in connection with wellness programs that are part of group health plans, the EEOC also seeks input on the extent to which inducements should be offered with respect to wellness programs that are outside of group health plans.

The EEOC's decision to follow the rulemaking process for its proposed rules on wellness programs is contrary to the agency's standard practice of merely issuing "guidance" such as the recently issued pregnancy discrimination guidance and the agency's 2012 criminal history guidance. Establishing its position through formal rulemaking will likely strengthen the EEOC's argument that courts should defer to the agency's position on this issue.

Next Steps for Employers

What should employers be doing now to ensure their wellness programs are in compliance with all the applicable rules? Even though the EEOC's proposed changes to the GINA regulations are not final, we recommend that employers review their current wellness programs and identify where changes may need to be made to ensure compliance.

It is important that the employer community and those seeking to promote the use of wellness programs as envisioned by the ACA provide their input to the EEOC to try to ensure the final regulations offer the support for such programs that employers need. The EEOC will accept comments through December 29, 2015.

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