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Employee Benefits & Executive Compensation ADVISORY ■

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EEOC's Proposed Rules for Wellness Programs Under the Genetic Information Nondiscrimination Act (GINA)

On October 30, 2015, the Equal Employment Opportunity Commission (EEOC) published Proposed Rules on the Genetic Information Nondiscrimination Act of 2008 (GINA). The Proposed Rules provide clarification about what incentives may be offered for spousal participation under employer-sponsored wellness programs without violating GINA. The Proposed Rules follow 2013's HIPAA wellness rules (see our advisory here) and the EEOC's proposed wellness rules under the Americans with Disabilities Act (ADA) from April 2015 (see our advisory here) and add yet another layer of complexity for employer-sponsored wellness programs.

The proposed ADA wellness regulations left some question about the permissibility of offering incentives for spousal participation in a wellness program. These Proposed Rules clarify that GINA does not prohibit employers from offering limited inducements (either rewards or penalties) if covered spouses provide information about their current or past health status, as long as certain requirements are met. Among other things, the Proposed Rules require that the provision of information must be voluntary and that the individual provide prior, knowing, voluntary and written (including electronic) authorization.

Background: What Is GINA?

Title II of GINA, which is the focus of these Proposed Rules, is designed to protect employees from discrimination based on their genetic information.[1] GINA generally prohibits the use of genetic information in employment; restricts employers from requesting, requiring or purchasing genetic information, except in very limited circumstances; and places strict limits on disclosure of genetic information. "Genetic information" is broadly defined under GINA and includes, for example, information about the genetic tests of an individual or a family member (including blood relatives and spouses) and family medical history, including the manifestation of disease—i.e., health status. One of the limited exceptions in which employers can acquire genetic information is as part of voluntary wellness programs, as long as certain requirements are met. The Proposed Rules provide much-needed guidance about the scope of this exception.

[1] Title I, which is not at issue here, addresses nondiscrimination in health insurance (including group health plans and insurers).

Overview of the Proposed Rules

Under the Proposed Rules, employers may offer inducements to enrolled spouses to provide their medical history through a medical inquiry or exam, as long as certain requirements are met. While some of these requirements, if finalized, may prove burdensome, the rules are not as stringent as they could have been. For instance, employers can use 30 percent of the family rate of coverage (under certain circumstances), which was not clear from the EEOC's proposed ADA regulations. (See our prior advisories for a discussion of the 30 percent limit, as interpreted under HIPAA and the ADA). Employers also now have guidance regarding when spouses may participate in wellness programs that collect information about current or past health status and clear guidance that inducements cannot be made for a child's medical information.

The new requirements that employers must address before offering an incentive for spousal participation include:[2]

Employers may acquire genetic information as part of a wellness program only when the program is reasonably designed to promote health or prevent disease.

The program must have a reasonable chance of improving the health of, or preventing disease in, participating individuals, and must not be burdensome, a subterfuge for violating the law or highly suspect in the method chosen to improve health or prevent disease. This language should be familiar to employers, as there is similar language in the HIPAA wellness regulations and proposed ADA wellness regulations. While the Proposed Rules provide some examples, whether a wellness program meets this threshold will ultimately be a fact-specific inquiry.

Employers cannot condition participation in a wellness program or the receipt of a reward on an employee, spouse or dependent agreeing to the sale of genetic information or waiving GINA's protections.

In other words, employers cannot avoid the application of GINA's rules by requiring individuals to waive their protection under the statute.

The spouse must be covered by the health plan, and there cannot be any inducement for the spouse's genetic information.

As part of a health plan, an employer may offer an inducement to an employee whose spouse is covered under the employer's health plan, receives health or genetic services offered by the employer and provides information about current or past health status, as long as an inducement is not offered in return for the spouse providing his or her own genetic information, including the results of genetic tests.

According to the EEOC, the health risk assessment (HRA) can include a medical questionnaire, a medical examination or both. In order for this to be permissible, employers must abide by the same rules that apply to employees under GINA; for example, the spouse must provide prior knowing, voluntary and written authorization, and the employer must describe the confidentiality protections and restrictions on the disclosure of genetic information. The good news here for employers is that the regulations do not seem to require that employers provide an inducement directly to spouses, which may have prevented the common practice of reducing the employee's contribution for health coverage. However, note that employers will need to have some contact with spouses, because the spouse must affirmatively consent to participate.

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[2] While the Proposed Rules are not limited to wellness programs, this advisory focuses on their application to employer-sponsored wellness programs.

Practice Pointer: Employers may need to incorporate new steps to meet these requirements (e.g., a spouse may have to log on and verify receipt of the various notices and authorization to proceed before providing any health information during an HRA).

In addition, under these rules, a wellness program would have to be designed to include questions about health status, not genetic information.

Practice Pointer: Under the Proposed Rules, it does not matter whether this request is benign. For example, an HRA could not include an inducement for questions about genetic markers for BRCA, even if the employer was merely intending to offer a fuller picture of the individual's health and risk of future illness.

The Proposed Rules also make clear that the spouse must be enrolled in the employer's group health plan in order to trigger an incentive. One implication of this is that employees who cover their children but not a spouse would automatically be limited to 30 percent of the cost of individual coverage (because no incentive can be offered for a child's participation).

Finally, it is important to keep in mind that these rules apply to wellness programs that are part of group health plans. The EEOC has requested comments on whether wellness programs outside of group health plan arrangements may use inducements for spousal participation, and whether the final rules should allow inducements in such situations. Any employers utilizing such arrangements should consider submitting comments on this issue.

If a spouse participates in a wellness program, the limit for the incentive is 30 percent of the total cost of the plan in which the employee and any dependents are enrolled (i.e., family, not just individual, coverage).

This is welcome news for employers that want to provide a reward based on 30 percent of the cost of family coverage (which is likely to be much more persuasive to an employee than a reward based on 30 percent of individual coverage alone), and helps to clear up what appeared to be a discrepancy between the HIPAA wellness rules and the proposed ADA wellness program rules. Under the Proposed Rules, the limit of 30 percent of family coverage, as set forth in the HIPAA rules, is available, but requires participation by the spouse.

The Proposed Rules also describe how to calculate the reward when either the employee or the spouse does not participate in the wellness program. The maximum portion of an incentive that may be offered to an employee alone may not exceed 30 percent of the total cost of self-only coverage (which is consistent with the EEOC's proposed rules under the ADA). Likewise, the maximum inducement for a spouse would be 30 percent of the cost of family coverage minus 30 percent of the cost of self-only coverage. The Proposed Rules also point out that the 30 percent cap does not apply if there is no information about health status provided.

Notably, the Proposed Rules state that an "inducement" includes financial and in-kind rewards, including time-off awards, prizes and other items of value (either rewards or penalties), all of which would count toward the 30 percent cap.

Open Questions

One point on which many plan sponsors would have liked clarity is GINA's application to a spouse's use of tobacco products. Under the proposed ADA regulations, the EEOC stated that it would not treat a request regarding an employee's tobacco use to be a disability-related inquiry for purposes of the ADA, but any medical test or examination would be considered such an inquiry. Here, it is not clear whether a request for a spouse's tobacco use status would be treated similarly for purposes of GINA, or would be subject to the 30 percent limit.

In addition, the EEOC did not discuss how limits are calculated if the wellness program is not part of a group health plan. Clarity on these points in the final regulations would be welcome.

Opportunity to Submit Comments

Comments to these Proposed Rules were originally required by December 29, 2015; however, on December 4, the EEOC extended the comment period to January 28, 2016.

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