

Legislative Brief

GINA - EEOC Proposed Rule

November 2015

EEOC Proposed Rule Amends GINA Regarding Wellness Program Incentives

SUMMARY:

- The EEOC issued a proposed rule to amend GINA as it relates to employer wellness programs that are part of group health plans by clarifying that an employer may offer incentives through an employer-sponsored wellness program in exchange for an employee's spouse providing health information. GINA applies to private sector employers with 15 or more employees.
- For employers who offer a wellness incentive as part of their health plan, the proposed rule would allow the inclusion of an 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 as part of a wellness program; and (3) provides information about his or her current health status.
- The incentive (which may be financial or in-kind) may not exceed 30% of the total cost of the plan in which an employee and the employee's dependents are enrolled.
- The incentive cannot be offered to obtain genetic health information of an employee's child, only a spouse. Additionally, a spouse must provide prior, knowing, voluntary written authorization for an employer to collect such genetic information.
- Employers are not required to comply with the proposed rule immediately; it will take effect when it is issued in final form. However, employers may use this time during the interim to determine whether a change to their current wellness programs will be necessary.

On Oct. 30, 2015, the U.S. Equal Employment Opportunity Commission (EEOC) issued a [proposed rule](#) 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 would allow employers that offer wellness programs as part of group health plans to provide limited financial and other inducements ("incentives") in exchange for an employee's spouse providing information about his or her current or past health status.

In addition, to help employers understand the proposed requirements, the EEOC has provided a set of [questions and answers](#) about the proposed rule.

BACKGROUND

GINA is a federal law that protects job applicants, current and former employees, labor union members and apprentices, and trainees from employment discrimination based on their genetic information. **GINA applies to private sector employers that have 15 or more employees.** GINA prohibits covered employers from using genetic information in making decisions about employment. GINA also prohibits covered employers from disclosing genetic information and restricts employers from requesting, requiring, or purchasing genetic information, unless one of the narrow exceptions apply. "Genetic information" includes information about the "manifestation of a disease or disorder in family members of an individual." The term "family members" includes spouses.

One of the six narrow exceptions to GINA's general rule provided above permits employers that offer health or genetic services, including such services offered through a voluntary wellness program, to request genetic information as part of these programs, as long as certain specific requirements are met. For example, under current EEOC rules a wellness program **cannot require** employees to provide their genetic information as a condition of receiving incentives.

The proposed EEOC rule is being offered because information about the current or past health status of a spouse is determined to be genetic information about an employee, and existing GINA regulations could be read as prohibiting employers from offering incentives in return for such health information. The proposed rule explains how employers may offer incentives for a spouse's genetic information under GINA.

PROPOSED RULE

The proposed rule would allow an employer to offer limited incentives for an employee's spouse to provide current or past health status information as part of a wellness program, where the spouse participates in the employer's health plan. Under the proposed rule, 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:

- Is covered under the employee's health plan;
- Receives health or genetic services offered by the employer, including as part of a wellness program; and
- Provides information about his or her current or past health status.

Information about current or past health status is usually provided as part of a health risk assessment (HRA), which may include a questionnaire, medical examination or both. However, no incentives may be offered in return for a spouse providing his or her own genetic information (including the results of his or her genetic test).

In addition to the above general requirement, the following additional requirements will need to be met:

- **Incentive must be designed to promote health or prevent disease and not be overly burdensome.** Any health or genetic service an employer offers must be reasonably designed to promote health or prevent disease, and any wellness program must not be overly burdensome. The program must have a reasonable chance of improving the health of, or preventing disease in, participating individuals.
- **Prior voluntary written authorization must be obtained from the spouse.** An employer must obtain a spouse's prior knowing, voluntary and written authorization prior to the spouse providing his or her genetic information as part of a HRA or before the employer collects genetic information about a spouse's past and current health status. Any such authorization must describe the confidentiality protections and restrictions on the disclosure of genetic information. The authorization to acquire this information may be included on an existing employee authorization form (*i.e.*, it does not need to be a separate form).
- **Maximum permitted incentive cannot be exceeded.** The total incentive for an employee and spouse to participate in a wellness program that is part of a group health plan and that collects information about current or past health status of a spouse **may not exceed 30% of the total cost of the plan** in which the employee and any dependents are enrolled.

Example: If an employee and his spouse are enrolled in coverage that costs \$14,000 (combined employee and employer cost of coverage), the maximum incentive the employer may offer to the employee and spouse to provide information on the current or past health status of the spouse as part of a wellness program is \$4,200 (\$14,000 x 30%).

- ***The incentive for employees and spouses must be apportioned***

The maximum portion of an incentive that may be offered to an employee alone **may not exceed 30 percent of the total cost for self-only coverage**. Using the above example, if the employer offers self-only coverage at a total cost of \$6,000, the maximum portion of the \$4,200 incentive that may be offered for the employee's participation is \$1,800 (30% of \$6,000). The rest of the incentive, \$2,400, may be received for the spouse's participation or for the employee, spouse, and/or employee's other dependents who are covered by the health plan participating in activities designed to promote health or prevent disease.

- ***An incentive for current or past health status information of an employee's child is impermissible***

Incentives in exchange for the current or past health status information about an employee's child are not permitted, because there is a greater likelihood of obtaining information about an employee's own genetic make-up from information about the current or past health status of the employee's child versus the employee's spouse.

- **Consent to sale or waiver of confidentiality of genetic information is prohibited.** An employer may not require an employee to agree to the sale, or waive the confidentiality, of their genetic information as a condition for receiving an incentive or participating in a wellness program.
- **Incentive may be financial or in-kind.** The limited incentive offered by an employer may be financial or in-kind (e.g., incentives attributable to time-off awards, prizes, and other items of value).

GINA INCENTIVES IN COMPARISON TO PERMISSIBLE INCENTIVES UNDER THE ADA AND HIPAA/ACA

Other laws, such as the Americans with Disabilities Act (ADA), the Health Insurance Portability and Accountability Act (HIPAA) and the Affordable Care Act (ACA), also impact the design of employer-sponsored wellness programs. **Wellness program incentives need to be carefully structured to comply with all applicable laws.**

The GINA incentive is generally consistent with the [final wellness program regulations](#) under HIPAA (as amended by ACA) for wellness programs that require employees and their dependents to achieve certain health outcomes. However, there are some noted differences:

- Under the final regulations, an incentive limit does not apply to “participatory wellness programs,” which include HRAs that all participants may answer regardless of their health status;
- The incentive limit on health-contingent wellness programs does not contain specific rules for apportioning the incentive between the spouse and the employee; and
- The final regulations permit an incentive limit regarding tobacco use of up to 50%.

On April 20, 2015, the EEOC published a [proposed rule](#) describing when a wellness program that seeks medical information from an employee would be considered voluntary under the ADA. The proposed EEOC rule under ADA, would set a limit on the level of incentives that may be offered in exchange for an employee's medical information that includes disability-related inquiries or medical examinations. The incentive levels proposed in this rule are consistent with those proposed in the ADA rule, except that the EEOC proposed rule under ADA would limit the maximum allowable incentive for a participatory program (that asks disability-related questions or conducts medical exams) or a health contingent program that requires participants to satisfy a standard related to a health factor to not exceed 30% of the total cost of **employee-only** coverage.

PENALTIES FOR FAILURE TO COMPLY WITH EEOC PROPOSED RULE REGARDING GINA

As previously mentioned, the EEOC proposed regulations regarding GINA are not final. Covered employers are not required to comply with these regulations until they are finalized and effective. While these proposed regulations will not be enforced until finalized, the EEOC does encourage employers that offer wellness programs to use this time to determine whether the proposed rule would require changes to their current wellness program.

The same remedies available under Title VII of the Civil Rights Act of 1964 (Title VII) are available under Title II of GINA. An aggrieved individual may seek injunctive relief, monetary damages (including compensatory and punitive damages) and attorneys' fees and costs. Title VII's cap on combined compensatory and punitive damages also applies to actions under Title II of GINA. The cap on combined compensatory and punitive damages (excluding past monetary losses) ranges from \$50,000 for employers with 15-100 employees to \$300,000 for employers with more than 500 employees.

For more information regarding the EEOC proposed rule under GINA relating to wellness program incentives, please contact your Client Executive.

GINA has many complex requirements for employers and health plans. Please contact Kapnick Insurance Group with any questions about how you can prepare for any of GINA's requirements. This Kapnick Insurance Group Update is not intended to be exhaustive nor should any discussion or opinions be construed as legal or tax advice. The information contained in this communication is intended to provide general information regarding GINA and related topics, and is based on general information available at the time it was prepared. Readers should contact their tax and/or legal counsel for advice that is appropriate to their specific circumstances.

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