



EEOC Issue GINA Wellness Rules

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Introduction

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) as they 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 would provide a narrow exception to the prohibition on incentives that are contingent on the provision of genetic information. Specifically, they would allow employers offering an employer-sponsored wellness program 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 wishing to offer an incentive in conjunction with a wellness program contingent upon the completion of an HRA may have risked violating GINA since the health information provided by the spouse as part of this process would, by definition, constitute genetic information.

Analysis

Requirements for Inducements

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

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

The proposed rule would maintain 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, it would not permit inducements conditioned upon provision of an employee's or spouse's genetic information (other than current or past health status of a spouse enrolled in the group health plan as part of an HRA). 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 would 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 participation on a waiver of GINA's protections.

Apportionment of Inducements

The proposed rule would mirror the proposed EEOC regulations relating to the Americans with Disabilities Act in 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.

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.

Please be aware that this does not represent legal or tax advice and is only Frenkel's interpretation of the laws, regulations and statutes. It is highly recommended that you seek the advice of your legal and tax professional as to the applicability of this information to your particular situation.