



Qs & As

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission’s Notice of Proposed Rulemaking on Title II of the Genetic Information Nondiscrimination Act and Incentives in Employer Wellness Programs for Employees’ Spouses to Provide Their Current or Past Health Status Information

On Friday, October 30, 2015, the U.S. Equal Employment Opportunity Commission (EEOC or the Commission) 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](#) says employers that offer wellness programs as part of group health plans may provide limited financial and other inducements (also called incentives) in exchange for an employee’s spouse providing information about his or her current or past health status.

The following questions and answers explain the proposed rule in detail and set forth the next steps in the process leading to a final regulation.

1. What are the basic protections provided by Title II of GINA?

Title II of 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. It prohibits employers covered by the law from using genetic information in making decisions about employment. It restricts employers and other entities covered by GINA¹ from requesting, requiring, or purchasing genetic information, unless one or more of six narrow exceptions applies. In addition, it strictly limits entities covered by GINA from disclosing genetic information.

One of the narrow exceptions to GINA’s prohibition on requesting, requiring, or purchasing genetic information applies when an employee voluntarily accepts health or genetic services offered by an employer, including such services offered as part of a wellness program.

The statute and EEOC’s GINA regulations say that “genetic information” includes, among other things, information about the “manifestation of a disease or disorder in family members of an individual.” The term “family members” includes spouses.

2. Why did EEOC issue this NPRM?

The proposed rule addresses the extent to which an employer may offer incentives for an employee’s spouse to provide information about his or her current or past health status as part of an employer-sponsored wellness program, when he or she participates in the employer’s health plan.

Some employers that offer wellness programs want to provide incentives to participate not only for employees, but also for others covered by their group health plans. GINA allows employers to request an employee’s genetic information, on a voluntary basis, for the purpose of providing health or genetic services, including wellness programs. However, EEOC’s current regulations say that a wellness program cannot require employees to provide their genetic information as a condition of receiving incentives. Because information about the current or past health status of a spouse or other family member is genetic information about an employee, EEOC’s current GINA regulations could be read as prohibiting employers from offering incentives in return for a spouse providing his or

¹ Unless otherwise noted, the term “GINA” refers to Title II of GINA.

her current or past health information. The proposed rule explains how employers may lawfully offer incentives for such information under GINA.

3. What does the proposed rule do?

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 as part of a wellness program; and (3) provides information about his or her current or past health status. Information about current or past health status usually is provided as part of a health risk assessment (HRA), which may include a questionnaire or medical examination, such as a blood pressure test or blood test to detect high cholesterol or high glucose levels.

Any health or genetic services an employer offers must be reasonably designed to promote health or prevent disease. This means that the service must have a reasonable chance of improving the health of, or preventing disease in, participating individuals. It also means that an employer-sponsored wellness program must not be overly burdensome to employees, 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.

4. How much of an incentive may an employer offer?

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 percent of the total cost of the plan in which the employee and any dependents are enrolled. The incentive may be financial or in-kind (e.g., time-off awards, prizes, and other items of value).

For example, if an employee and his or her spouse are enrolled in self and family coverage that costs \$14,000, the maximum incentive the employer may offer the employee and spouse to provide information on their current or past health status as part of a wellness program is \$4,200 (30 percent of \$14,000).

The proposed rule also says that 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. So, if the employer in the example above 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 percent of \$6,000). The rest of the incentive (\$2,400 in the example above) 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.

5. How do the incentive levels described above compare with permissible incentives for information on current and past health status under other laws, such as the Americans with Disabilities Act (ADA), the Health Insurance Portability and Accountability Act (HIPAA), the Affordable Care Act, and Title I of GINA?

On April 20, 2015, EEOC published an NPRM for public comment in the *Federal Register*, describing when a wellness program that seeks medical information from an employee is considered voluntary under the ADA. The proposed ADA rule set a limit on the level of incentives that may be offered in exchange for an employee's medical information. The incentive levels in this proposed GINA rule are consistent with those in the proposed ADA rule and with regulations under HIPAA, as amended by the Affordable Care Act, and the provisions of Title I of GINA governing health insurance.

Thirty percent 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 Affordable Care Act for wellness programs that require employees and their dependents to achieve certain health outcomes. The portion of this incentive that may be provided for the employee's participation alone—30 percent of the cost of self-only coverage—is the maximum allowable incentive EEOC has proposed that an employer may offer, consistent with ADA, for an employee to participate in a wellness

program that is part of a group health plan and includes disability-related inquiries and/or medical examinations. *See* 80 FR 21659, 21663 (April 20, 2015).

6. Why did the EEOC make this change to a straightforward rule that prohibited incentives in exchange for genetic information?

GINA clearly prohibits wellness programs from requiring employees to provide their genetic information as a condition for receiving incentives. However, the statute does not clearly extend this prohibition to incentives offered in exchange for an employee's spouse providing information on his or her current or past health status. In fact, Title I of GINA explicitly allows group health plans to offer such incentives for plan participants, who may include employees' spouses, to provide information on their current and past health status in connection with wellness programs.

EEOC believes that the approach adopted in this rule aligns the two titles of GINA, which both regulate employer wellness programs that are part of group health plans, as a coherent whole. At the same time, EEOC is mindful that this change creates an exception to the general rule that no incentives may be provided for an employee's genetic information. Therefore, we have interpreted the exception as narrowly as possible. For example, the exception applies to information on the current and past health status of spouses, but not of children.

7. Why doesn't the NPRM allow employers to offer incentives for information about the current or past health status of employees' children who participate in wellness programs that are part of a group health plan?

Although information about the current or past health status of both a spouse and children is considered genetic information about an employee, the possibility that an employee may be discriminated against based on genetic information is greater when an employer has access to information about the health status of the employee's children. There is minimal, if any, chance of determining information about an employee's genetic make-up or predisposition to disease from information about current or past health status of the employee's spouse. By contrast, there is a significantly higher likelihood of discovering information about an employee's genetic make-up or predisposition to disease from information about the current or past health status of the employee's children.

8. Does the proposed rule change any confidentiality requirements that apply to the genetic information employees provide when they participate in wellness programs?

The proposed rule adds a new provision stating that employers may not require employees (or employees' spouses or dependents covered by the employee's health plan) 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.

9. Does the NPRM make any other revisions to the GINA regulations?

Yes. The proposed rule makes clear that an employer is permitted to request information about the current or past health status of an employee's spouse who is covered by the employer's group health plan and is completing a HRA on a voluntary basis, as long as the employer follows GINA rules about requesting genetic information when offering health or genetic services. These rules include requirements that the spouse provide prior, knowing, written, and voluntary authorization for the employer to collect genetic information, just as the employee must do.

The proposed rule also makes several technical changes, including re-numbering paragraphs as the result of addition of new material, correcting an erroneous cross-reference in the original regulations, eliminating the word "financial" to describe incentives to account for in-kind incentives, and adding references, where needed, to HIPAA and the Affordable Care Act.

10. What are the next steps in the regulatory process?

The NPRM is a notice alerting the public that EEOC plans to change the GINA regulations related to employer wellness programs and seeks comments about the proposed revisions. Anyone who wishes to comment has 60 days to do so. EEOC will accept comments through Tuesday, December 29, 2015. EEOC then will evaluate all of the comments it receives and make revisions to the proposed rule, as necessary, in response to them.

The Commission then will vote on a final rule. The Commission will send the approved final rule to the Office of Management and Budget (OMB), pursuant to Executive Order 12866. OMB will coordinate the final rule with other federal agencies. Upon clearance from OMB, the EEOC will submit the final rule to the *Federal Register* to be published.

11. What should employers do to make sure they comply with GINA before the final rule is published in the *Federal Register*?

While employers do not have to comply with the proposed rule before it formally takes effect, they certainly may do so. EEOC encourages employers that offer employer-sponsored wellness programs as part of a group health plan to use this time to determine whether the proposed rule would require changes to their current wellness program.

12. Did the EEOC coordinate with DOL, HHS, and IRS—the agencies that issued the regulations on wellness program incentives under HIPAA, as amended by the Affordable Care Act—when developing this proposed GINA rule?

Yes. EEOC coordinated extensively with these agencies at two stages in developing the proposed rule—informally as the agency prepared the proposed rule and formally through the coordination process required under Executive Order 12866, while the NPRM was under review at OMB. EEOC also will coordinate with these agencies, as well as others, on the final rule.

13. Has EEOC provided any other guidance to employers about wellness programs and whether incentives can be offered as part of such programs?

Yes. As noted above, on April 20, 2015, EEOC [issued an NPRM](#) to amend the ADA regulations, at 29 C.F.R. Section 1630.14(d), “Other Acceptable Examinations and Inquiries,” and the Interpretive Guidance (also known as the Appendix) related to employer wellness programs. *See* 80 FR 21659. The proposed ADA rule provides guidance on the extent to which the ADA permits employers to offer incentives to promote participation in wellness programs that require employees to respond to disability-related inquiries or undergo medical examinations. The comment period for the ADA proposed rule ended on June 19, 2015. EEOC is evaluating the comments and making revisions to the rule, as necessary, in response. EEOC will coordinate both final rules to ensure that there is no conflict between the two.