U.S. Equal Employment Opportunity Commission

EEOC's Final Rule on Employer Wellness Programs and the Genetic Information Nondiscrimination Act

On May 17, 2016, the U.S. Equal Employment Opportunity Commission (EEOC or the Commission) issued a final rule to amend the regulations implementing Title II of the Genetic Information Nondiscrimination Act (GINA) as they relate to employer wellness programs. A notice of proposed rulemaking (NPRM) was previously issued on October 30, 2015. The final rule says employers 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 as part of a wellness program, whether or not the program is part of a group health plan.

Background

1. What is a wellness program?

The term "wellness program" generally refers to health promotion and disease prevention programs and activities offered to employees. Some wellness programs are part of an employer-sponsored group health plan, and other wellness programs are not tied to group health plans. Many of these programs ask employees to answer questions on a health risk assessment (HRA) and/or undergo biometric screenings for risk factors (such as high blood pressure or cholesterol). Other wellness programs provide educational health-related information or programs that may include nutrition classes, weight loss and smoking cessation programs, onsite exercise facilities, and/or coaching to help employees meet health goals. Some employers now extend wellness programs to employees' family members, particularly those who are enrolled in employer group health plans.

2. What is GINA?

GINA is a federal law that prohibits discrimination in insurance and employment on the basis of genetic information. The EEOC enforces Title II of GINA, which applies to employment. Other federal agencies, including the Department of Labor (DOL), the Department of Health and Human Services (HHS), and the Department of the Treasury, Internal Revenue Service (IRS) enforce Title I, which applies to insurance.

3. What basic protections does Title II of GINA provide?

Title II of GINA protects job applicants, current and former employees, labor union members and apprentices, and trainees. It prohibits employers and other covered entities from using genetic information in making decisions about employment. It restricts employers 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[1] from disclosing genetic information.

4. What is genetic information?

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 "past or current health status" is used in these questions and answers, rather than the term "manifestation of disease or disorder.") Family members include certain blood relatives, like parents, grandparents, and children, but also include spouses and adopted children.

5. Why is a spouse's or an adopted child's current or past health status treated as the employee's genetic information?

When it defined family members, Congress included two very specific provisions - one that covers blood relatives and a second that refers to "dependents" within the meaning of a specific section of the Employee Retirement Income Security Act (ERISA). The section of ERISA referenced in GINA defines dependents to include spouses and adopted children.

6. Why did EEOC issue this final rule?

There is an exception to GINA's general prohibition against acquiring genetic information of applicants or

employees where employers offer voluntary health or genetic services to employees or their family members. Some employers want to offer inducements for employees and their family members to answer questions about their health or to take medical examinations as part of a wellness program. This rule clarifies that an employer may offer a limited incentive for an employee's spouse to provide information about the spouse's current or past health status as part of a voluntary wellness program.

Purpose of the Rule

7. What does the final rule do?

Like the proposed rule, the final rule clarifies that an employer may offer a limited incentive (in the form of a reward or penalty) to an employee whose spouse receives health or genetic services offered by the employee -- including as part of a wellness program -- and provides information about his or her current or past health status. This kind of information usually is provided as part of a 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.

"Reasonably Designed" Program

8. What standards apply to wellness programs that ask for genetic information?

Just as EEOC said in the proposed rule, a wellness program, like any health or genetic service an employer offers that collects genetic information, 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.

A wellness program is not reasonably designed to promote health or prevent disease if it exists merely to shift costs from an employer to employees based on their health; is used by the employer only to predict its future health costs; or imposes unreasonably intrusive procedures, an overly burdensome amount of time for participation, or significant costs related to medical exams on employees. A wellness program will also not be considered reasonably designed to promote health or prevent disease if it consists of a measurement, test, screening, or collection of health-related information and that information is not used either to provide results, follow-up information, or advice to individual participants or to design a program that addresses at least some conditions identified (e.g., a program to help employees manage their diabetes if aggregate information from HRAs shows that a significant number of employees in an employer's workforce have diabetes).

Inducements Permitted

9. Does this rule apply to all wellness programs that offer inducements based on participation or health outcomes?

No. This rule applies only where a portion of the inducement offered within a wellness program is for an employee's spouse to answer questions about his or her current or past health status or to take a medical examination. GINA does not apply to inducements made available in exchange for an employee's spouse engaging in certain activities that do not require obtaining information about current or past health status, such as attending a weight loss or nutrition program or exercising a certain amount each week. However, inducement limits and a requirement to provide a reasonable alternative standard may apply to some of these programs under HIPAA, as amended by the Affordable Care Act.

10. How much of an inducement may an employer offer to an employee's spouse for providing information about his or her own current or past health status when a wellness program is offered as part of a particular health plan?

If a wellness program is open only to employees and family members in a particular group health plan, then the maximum inducement for the employee's spouse to provide information about current or past health status is **30 percent of the total cost of self-only coverage** under the group health plan in which the employee and family members are enrolled. For example, if an employee is enrolled in a self and family plan at a total cost (considering both the employee's and employer's contributions to the premium) of $14,000 and that plan has a self-only option for a total cost of $6,000, the maximum inducement for the employee's spouse to provide health information is $1,800.

11. Does the wellness program have to be part of a group health plan in order for an employer to offer inducements?

No. Unlike the proposed rule, which applied only to wellness programs that were part of group health plans, the final rule applies to all wellness programs, regardless of whether the wellness program is offered through a group

health plan. Even if an employer offers no group health plan at all, it may still offer limited inducements for an employee's spouse to participate in wellness programs that ask for current or past health information.

12. How does an employer calculate inducement limits when an employer has more than one group health plan but offers a wellness program that does not require employees or their families to enroll in a particular group health plan?

If an employer provides more than one group health plan and enrollment in a particular plan is not required to participate in the wellness program, the maximum inducement is **30 percent of the lowest cost major medical self-only plan** the employer offers. So, if an employer has three self-only major medical plans that range in total cost from $5,000 to $8,000, the maximum inducement that can be provided for the employee's spouse to provide health information is $1,500 (30 percent of its lowest cost plan).

13. May an employer offer an inducement to the spouse for information about his or her current or past health status if it does not offer group health insurance?

Yes. If the employer does not offer a group health plan, then the maximum inducement for the spouse to provide health information is **30 percent of the total cost to a 40-year-old non-smoker purchasing coverage under the second lowest cost Silver Plan** available through the state or federal Exchange in the location that the employer has identified as its principal place of business. For example, if a 40-year-old non-smoker could purchase the second lowest cost Silver Plan for $4,000, the maximum inducement the employer could offer for the employee's spouse to provide health information as part of a wellness program is $1,200.

Note that all of the inducement limits are exactly the same as the limits on incentives available to employees under the Americans with Disabilities Act (ADA), as described in the final rule on the ADA and Wellness Programs published at the same time as the GINA final rule.

14. What is the "second lowest cost Silver Plan" and why is it used to calculate wellness program incentives where an employer does not offer health insurance?

The second lowest cost Silver Plan is used as a benchmark for determining the amount of an eligible individual's premium tax credit for purchasing health insurance on the Exchange. The Silver Plan is the most frequently purchased plan on the Exchanges, and information about it should be readily available to employers. Additionally, using the cost of the Silver Plan for someone who is 40 years old and a non-smoker -- a plan that is neither the least nor the most expensive plan offered on the Exchanges -- reflects the Congressional goal in HIPAA, as amended by the Affordable Care Act, of allowing incentives that may encourage meaningful participation in wellness programs, while avoiding incentive limits that are so high as to be considered coercive.

15. Why doesn't the final rule allow employers to offer inducements for the current or past health status of employees' children who participate in wellness programs?

As explained in the preamble to the NPRM and the final rule, 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 health information 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 health information about the employee's spouse. By contrast, there is a significantly higher likelihood of discoveringinformation about an employee's genetic make-up or predisposition todisease from health information about the employee's children.

The final rule reiterates that employers may offer children the opportunity to participate in wellness programs, as long as they are not offered inducements in exchange for information about their current health status or about their genetic information. It also clarifies that the prohibition on offering inducements in exchange for information about the current or past health status of children applies to adult and minor children.

Confidentiality

16. Does the final rule change any confidentiality requirements that apply to the genetic information that employees or their family members provide when they participate in wellness programs?

The proposed rule prohibited an employer from requiring an employee or spouse to agree to the sale of health information in exchange for an inducement or as a condition for participating in a wellness program. The final rule has been expanded to include -- in addition to sale -- exchange, transfer, or other distribution. Some public comments indicated that genetic information may be transferred from one entity to another by means other than a sale.

The final preamble also references some best practices for ensuring confidentiality including establishing clear policies, training staff who handle confidential information, encryption of information stored electronically, and

prompt reporting of data breaches. The same kinds of best practices are referenced in the Appendix (Interpretive Guidance) to the ADA final rule.

The requirement that genetic information gathered as part of a wellness program be disclosed to employers only in aggregate terms has not been changed by the final rule, and that limitation on disclosure continues to apply.

17. Are there any other federal laws that protect the confidentiality of medical information obtained through a wellness program?

Yes. For example, where a wellness program is part of a group health plan, HIPAA's privacy, security, and breach notification rules protect information collected from or created about participants that can be used to identify them (such as their address or birth date) and that relates to any past or present health condition and sets limits on the uses and disclosures that may be made of such information. An employer that sponsors a group health plan may receive this information but must certify to the plan that it will safeguard and not improperly use or share it.

Other Revisions to the GINA Regulations

18. Does the final rule make any other revisions to the GINA regulations?

Yes. The final rule includes a new paragraph that prohibits employers from denying access to health insurance or any package of benefits to, or retaliating against, any employee whose spouse refuses to provide information about his or her current or past health status to an employer wellness program.

As with the proposed rule, the final rule also makes clear that an employer is permitted to request information about the current or past health status of an employee's spouse who 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, and that inducements in exchange for this information are limited.

The final rule also makes several technical changes proposed in the NPRM, including re-numbering paragraphs due to the 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.

Coordination with Other Federal Agencies

19. 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 final GINA rule?

Yes. As with the proposed rule, EEOC coordinated extensively with these agencies in developing the final rule. EEOC sought to promote consistency, to the extent possible, between this rule, HIPAA, as amended by the Affordable Care Act, and Title I of GINA with respect to wellness program incentives, while also ensuring the greatest protection possible for employees under title II of GINA.

Applicability Date

20. When will employer wellness programs have to comply with the final rule?

The provisions of the final rule related to wellness program inducements will apply only prospectively to employer-sponsored wellness programs as of the first day of the first plan year that begins on or after January 1, 2017, for the health plan used to determine the level of inducement permitted under this rule. For example, if the health plan that is used to calculate the permissible inducement limit begins on January 1, 2017, that is the date on which the rules governing inducements apply to the employer-sponsored wellness program. If the plan used to calculate the level of inducements begins on March 1, 2017, then March 1, 2017 is the date on which the wellness program begins.

21. What is the difference between the rule's effective date and its applicability date?

The effective date is the date on which the rule will be in the Code of Federal Regulations, the official publication for federal regulations. The applicability date is the date on which employers have to comply with the provisions limiting inducements.

Other EEOC Guidance on Wellness Programs

22. 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 May 17, 2016, the same day the final GINA rule was issued, EEOC issued the final rule to amend the ADA regulations, at 29 C.F.R. Section 1630.14(d), "Other Acceptable Examinations and Inquiries," and the Interpretive Guidance (related to employer wellness programs). The final ADA rule provides guidance on the extent to which the ADA permits employers to offer incentives to employees who respond to disability-related inquiries or undergo medical examinations as part of wellness programs.

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[1] Unless otherwise noted, the term "GINA" refers to Title II of GINA.