



American Benefits Council

Benefits Briefing

EEOC Proposed Rules - GINA Title II and Application to Employer Wellness Programs

November 16, 2015

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Principal

Today's Discussion

- Begin with a brief overview of wellness program regulation to date, including history of EEOC activity
- Follow with brief refresher on EEOC's proposed ADA regulations regarding wellness programs generally
- Overview of EEOC's proposed GINA Title II regulation regarding spousal HRAs

Regulation of Wellness Programs

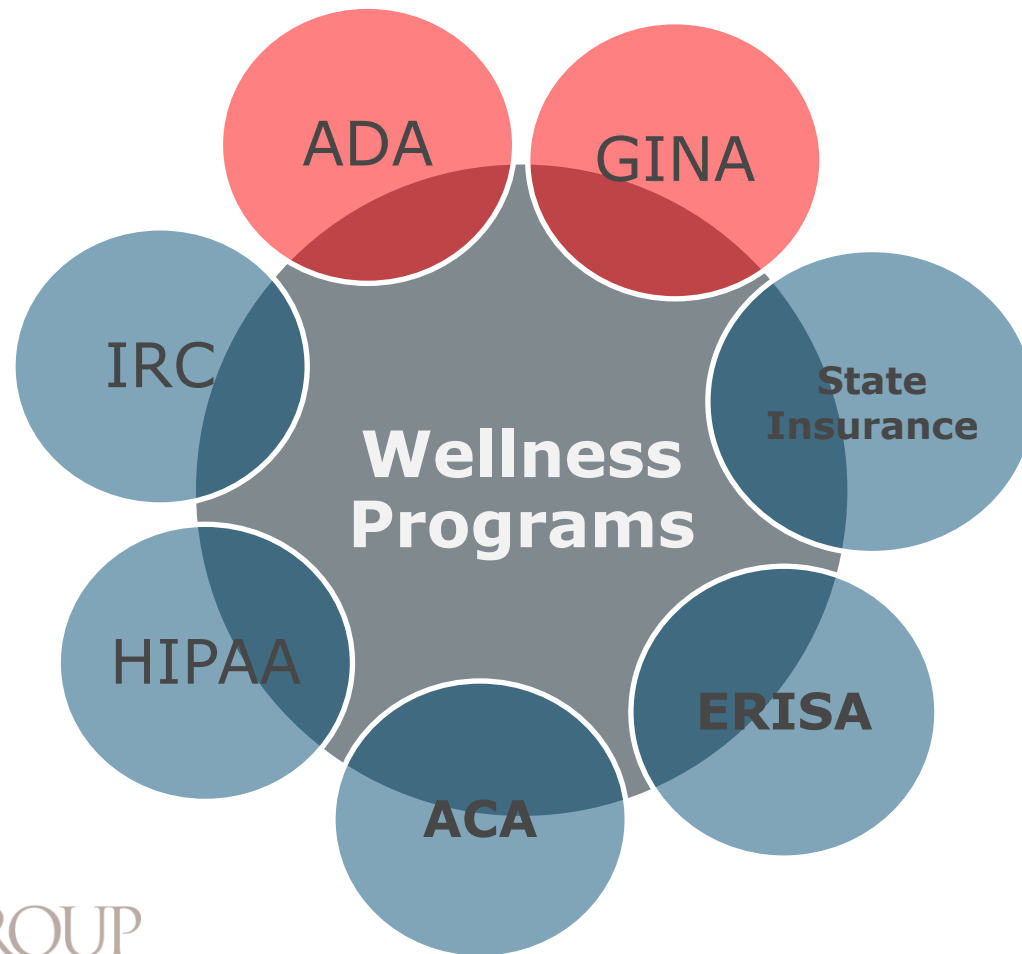


Regulation of Wellness Programs

- Traditionally permitted via HIPAA and implementing regulations
- Congress reiterated strong support by codifying HIPAA regulations in ACA
 - Including increasing permitted reward limit from 20% to 30% (up to 50% for smoking cessation)
- Continued uncertainty re: interplay between HIPAA and other laws, such as ADA and GINA



Regulation of Wellness Programs



History of EEOC Activity

- **EEOC's historic position regarding wellness programs**
 - Famous Peggy Mastroianni letter from 2009
 - Certain OLC representatives suggested in public comments that financial incentives for spousal HRAs could violate GINA
 - Sporadic regional investigations; apparent reluctance to litigate directly
- **2013 hearing on wellness programs**
 - Statements made at the hearing suggested that Commissioners were sensitive to not having the ADA supplant HIPAA; rather, act as gap-filler
 - Continued concerns around privacy of health information
- **Announced rulemaking projects**
 - February 2015 according to semi-annual regulatory agenda
- **Fall Trilogy of cases**
 - *Orion, Flambeau and Honeywell*
- **Proposed Regulations Regarding the ADA on April 20, 2015**

History of EEOC Activity

- **On October 30th, EEOC published proposed regulations with respect Title II of GINA in the Federal Register**
 - Comments are due by December 29th
 - Semi-annual regulatory agenda indicates final ADA and GINA regulations are expected to be issued in Q1 of 2016

Proposed ADA Regulations

- Proposed rule amended the existing ADA regulations to provide guidance on wellness programs **that include disability-related inquiries and/or medical examinations ...** and a bit more too...

Proposed ADA Regulations

- **Maximum incentives:**
 - **HIPAA: 30% of the total cost of coverage in which the individual is enrolled** (except if only the employee is eligible to participate in the wellness program and he or she is enrolled in other than self-only coverage, the maximum incentive is 30% of the total cost of self-only coverage) (Note: special 50% rule for smoking cessation)
 - **Proposed EEOC Regs for the employee only: 30% of the total cost of self-only coverage** regardless of whether the employee is enrolled in a different coverage tier and/or whether the employee's spouse or dependents are eligible to participate in the wellness program

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Example: Employer offers medical coverage to its employees. Self-only coverage costs **\$7,000** per year and employee-plus-spouse coverage costs **\$14,000** per year. Employer also sponsors a wellness program. In accordance with HIPAA, Employer provides a premium incentive of 30% of the cost of coverage for employees and spouses who complete the wellness program -- part of which requires Sue and her husband to both complete a health risk assessment that asks for information about current medical conditions. Under this program, employee Sue and her husband, Bob, who are enrolled in employee-plus-one coverage are eligible for a wellness incentive of **\$4,200**, but only if they both complete the program.

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UNDER HIPAA: Complies because no more than 30% of the total cost of the coverage in which they are enrolled

UNDER the EEOC Regs: Appears at risk since the incentive that applies to Sue is \$4,200 in excess of \$2,100 (i.e., 30% of total cost of self-only coverage). But if unbundle, then works because Sue's incentive is equal to half of \$4,200 or \$2,100

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UNDER the EEOC Regs: Even if unbundle, Sue's incentive amount here (i.e., \$2,250) measured as a percentage of self-only coverage (\$7,000) exceeds the maximum 30% limit (i.e., \$2,100). Thus, Employer would need to reduce the extent of Sue's incentive. But what about Bob? Appears No

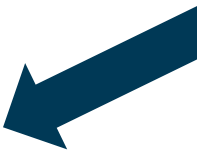
Proposed ADA Regulations

- Proposed ADA rules did **not** address how GINA may affect an employer's ability to condition incentives on family member's participation in a wellness program
- Specifically, there have been concerns that the use of even HIPAA-compliant incentives with spousal HRAs (whether through a questionnaire or biometric test) could result in a technical violation of GINA

GINA – Generally

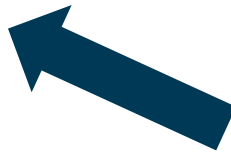
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- Both Titles include an exception for requesting information in connection with a voluntary wellness program
 - But Title II requires affirmative written consent

GINA – Firewall

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GINA – Spousal HRAs

- “Genetic Information” – Includes:
 - Information about an individual’s genetic tests
 - Information about the genetic tests of a “family member”
 - Information about the manifestation of a disease or disorder in a “family member”
 - Requests for and receipt of genetic services by an individual or a family member

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GINA – Spousal HRAs

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EEOC's GINA Title II NNPRM

- Clarifies that GINA does not prohibit the use of financial incentives with respect to spousal HRAs when offered in connection with a group health plan if:
 - 1. The spouse is enrolled in the group health plan**
 - 2. The program is “reasonably designed”**
 - 3. The incentives qualify as “limited inducements”**
 - 4. The spouse gives prior, knowing and voluntary written authorization**

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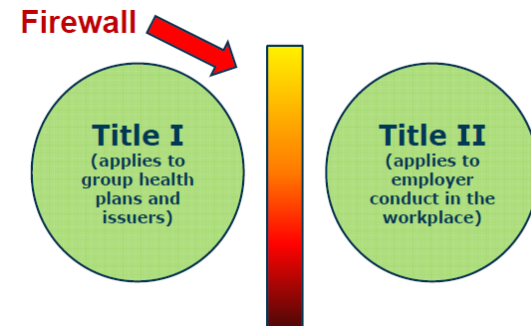
Note: For purposes of the NPRM, an HRA encompasses both questionnaires and biometric tests

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GINA – “Reasonably Designed”

- Must have a reasonable chance of improving the health of, or prevent disease in, participating individuals
- Must not be overly burdensome, including regarding:
 - Amount of time
 - Unreasonably intrusive procedures
 - Placing significant costs of medical exams on employees
- Must not be subterfuge for violating Title II of GINA or other laws prohibiting employment discrimination
- Must not be highly suspect in the method chosen to promote health or prevent disease
- Cannot exist merely to shift costs to targeted employees based on their health

GINA – “Voluntary”

- The total inducement to the employee and spouse may not exceed 30% of the total annual cost of the coverage for which the employee and spouse are enrolled
 - Language of GINA NPRM tracks ADA NPRM in that it indicates the total inducement for the employee with respect to wellness program participation cannot exceed 30% of self-only coverage (if HRA or includes disability related inquiry or exam)
 - How does this relate to a qualified tobacco cessation program that asks about current tobacco use (which would seem to be eligible for the 50% maximum per HIPAA, as modified by the ADA NPRM)?
 - No incentives may be offered to a spouse for her OWN genetic information. But how does this relate to the employee HRA?

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GINA – Required Authorization

- Must be provided in advance of completing the spousal HRA
- Must be a knowing and voluntary authorization
- Must be in writing (including electronic format)
- The spouse must also be noticed of GINA's (i) confidentiality provisions, and (ii) disclosure restrictions

GINA – Additional Rules

- Cannot request spouse's OWN genetic information
 - But how does this relate to use of employee HRA?
- Cannot use inducements with respect to child HRAs
- Does not alter absolute prohibition against use of genetic information in making employment decisions
- Cannot condition participation in wellness program on waiving GINA's confidentiality provisions

GINA – Additional Rules

- Reasonable accommodations must be made to the extent required by the ADA

“The employer must make ‘modifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities’ unless ‘such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.’”

GINA NPRM – Comments Requested

- The EEOC is requesting comments on several issues, including:
 - Whether employers that offer inducements to encourage the spouses of employees to disclose information about current or past health must also offer similar inducements to persons who choose not to disclose such information, but who instead provide certification from a medical professional stating that the spouse is under the care of a physician and that any medical risks identified by that physician are under active treatment.

GINA NPRM – Comments Requested

- The EEOC is requesting comments on several issues, including:
 - Whether the proposed authorization requirement should apply only to wellness programs that offer more than de minimis rewards or penalties to employees whose spouses provide information about current or past health status as part of a HRA?
 - If so, how should the Commission define “de minimis”?

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- The EEOC is requesting comments on several issues, including:
 - Which best practices or procedural safeguards ensure that employer-sponsored wellness programs are designed to promote health or prevent disease and do not operate to shift costs to employees with spouses who have health impairments or stigmatized conditions?

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- The EEOC is requesting comments on several issues, including:
 - In contrast to the status quo when the ADA was enacted, most employers today store personnel information electronically. In light of increasingly frequent breaches to electronically stored employment records, should the rule include more specific guidance to employers regarding how to implement the requirements for electronically stored records?
 - If so, what procedures are needed to achieve GINA's goal of ensuring the confidentiality of genetic information with respect to electronic records stored by employers?

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- The EEOC is requesting comments on several issues, including:
 - Given concerns about privacy of genetic information, should the regulation restrict the collection of any genetic information by a workplace wellness program to only the minimum necessary to directly support the specific wellness activities, interventions, and advice provided through the program—namely information collected through the program’s HRA and biometric screening?
 - Should programs be prohibited from accessing genetic information from other sources, such as patient claims data and medical records data?

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- The EEOC is requesting comments on several issues, including:
 - Whether employers offer (or are likely to offer in the future) wellness programs outside of a group health plan or group health insurance coverage that use inducements to encourage employees' spouses to provide information about current or past health status as part of a HRA, and the extent to which the GINA regulations should allow inducements provided as part of such programs

Questions?

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