

update

Compliance News for Plan Sponsors

November 12, 2015

Equal Employment Opportunity Commission Proposes Standards for Spousal Health Risk Assessments

The Equal Employment Opportunity Commission (EEOC) has published a proposed rule governing when an employer may ask an employee's spouse¹ about health information as part of a wellness program under the Genetic Information Nondiscrimination Act of 2008 (GINA).² Comments on the proposed rule must be submitted on or before December 29, 2015.

Background on GINA

GINA prohibits discrimination on the basis of genetic information. There are two parts in GINA:

- Title I applies to group health plans and insurers, and is enforced by the Departments of Labor, Treasury and Health and Human Services.
- Title II applies to employers and is enforced by the EEOC. The proposed rule was issued by the EEOC to implement GINA's restriction against employers requesting, requiring or purchasing genetic information.

GINA generally prohibits employers from requesting, requiring or purchasing genetic information. One narrow exception to the general rule is that employers may acquire genetic information in connection with wellness programs that meet specific criteria. These criteria require that the program be voluntary, and that the individual from whom the genetic information is being obtained provides prior, knowing, voluntary and written authorization. Additionally, a wellness program cannot provide a financial or other incentive to an employee to complete a health risk assessment questionnaire that asks questions about the medical history of the employee's family members. For example, a question asking about the medical history of the employee's parents would not be permissible if it is linked to a financial or other incentive. Consequently, employers that want to provide an incentive to an employee who completes a health questionnaire need to have either (1) eliminated all family medical history questions from these questionnaires or (2) adopted two-part questionnaires that made it clear that the employee did not have to answer the family medical history questions and could earn the entire incentive without doing so.



Health Compliance News Highlights:

- GINA prohibits employers from offering incentives for providing genetic information.
- Genetic information includes medical information about an employee's family (*i.e.*, family medical history).
- The proposed rule would permit employees to earn limited incentives when their enrolled spouses complete health questionnaires and undergo biometric screenings.

NEW! In the [December 7, 2015 Federal Register](#), the EEOC extended the comment period for this proposed rule. The new deadline is January 28, 2016.

¹ The proposed rule would also apply to retirees and their spouses.

² The proposed rule was published in the [October 30, 2015 Federal Register](#). The [FAQs](#) are available on the EEOC website.

The EEOC stated in its proposed rule that although the guidelines about seeking genetic information from an employee are well-known, it had become unclear whether an employer could offer incentives for an employee's spouse to complete a questionnaire that requested information about the spouse's own current or past medical history.

Overview of the EEOC's Proposed Rule

Under the proposed rule, employers would be permitted to offer a limited incentive for the employee's spouse to provide past or current health status information as part of a wellness program. The wellness program could include a questionnaire, a medical examination (e.g., to detect high blood pressure or high cholesterol) or both. Various conditions would apply, including the following:

- The spouse must be enrolled in the group health plan and be participating in the wellness program;
- The total incentive for an employee and spouse to provide information about their own past or current health status could not exceed 30 percent of the total cost of the plan in which the employee and any dependents are enrolled.³ In addition, costs must be apportioned between the employee and the spouse. The portion of the incentive that could be offered for the employee's participation could not exceed 30 percent of the cost of self-only coverage. For example, if the total cost of self-only coverage is \$6,000 (per year) and the total cost of the coverage in which the employee and spouse are enrolled is \$14,000 (per year), the portion of the incentive for the employee's participation could not exceed \$1,800, and the portion attributable to the spouse's participation could not exceed \$2,400;
- The wellness program must be reasonably designed to promote health or prevent disease;⁴
- The spouse cannot be asked to provide his or her own genetic information (such as the results of his or her genetic tests); and
- The spouse must provide prior, knowing, voluntary and written authorization on an authorization form that meets certain requirements.

The EEOC would prohibit any incentives in exchange for health information about an employee's children, both biological and non-biological.

Implications for Employers

This proposed rule would make it easier for employers to include spouses in wellness programs for which participation incentives may be offered. It would permit employers to use the same questionnaire and the same biometric testing program for employees and their spouses. Each person would be asked to provide information only about his or her own past or current health status. GINA's general prohibition against offering incentives to provide one's own genetic information is not affected.

³ If there are multiple components to the program and multiple incentives, the 30 percent limit applies to the combination of incentives that may be earned for participation in any program that asks disability-related questions or requires medical examinations.

⁴ Under the proposed rule, collecting information on a health questionnaire without providing follow-up information or advice would not be reasonably designed to promote health or prevent disease.

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