



## EEOC Proposes Rule on GINA's Impact on Wellness Programs

Provided by JRG Advisors, LLC

### Quick Facts

- The proposed rule clarifies that employer-sponsored wellness programs may provide incentives in exchange for an employee's spouse providing health information.
- The proposed rule will take effect after it is issued in final form.
- The EEOC encourages employers to use this time to determine whether the proposed rule would require changes to their current wellness programs.

The proposed rule would allow an employer to offer limited incentives for an employee's spouse to provide current or past health status information as part of a wellness program.

On Oct. 30, 2015, the U.S. Equal Employment Opportunity Commission (EEOC) issued a [proposed rule](#) 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 would allow employers that offer wellness programs as part of group health plans to 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 EEOC will accept comments on the proposed rule through Dec. 29, 2015. The EEOC will evaluate the comments it receives and possibly make revisions to the proposed rule before it is finalized. According to the EEOC, while employers do not have to comply with the proposed rule before it formally takes effect, they certainly may do so. The EEOC encourages employers that offer wellness programs as part of group health plans to use this time to determine whether the proposed

rule would require changes to their current wellness programs.

In addition, to help employers understand the proposed requirements, the EEOC has provided a set of [questions and answers](#) about the proposed rule.

### GINA's Prohibitions

Title II of GINA protects job applicants, current and former employees, labor union members and apprentices, and trainees from employment discrimination based on their **genetic information**.

GINA applies to private sector employers that have **15 or more employees**. It prohibits covered employers from using genetic information when making decisions about employment, and it restricts covered employers from disclosing genetic information. It also restricts employers from requesting, requiring or purchasing genetic information, unless one or more of six narrow exceptions applies.

One of those narrow exceptions applies when an employee voluntarily accepts health or genetic services offered by an employer, including such services offered as part of a **wellness program**.

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, the 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, the EEOC's current GINA regulations could be read as prohibiting employers from offering incentives in return for a spouse providing his or her current or past health information. The proposed rule explains how employers may lawfully offer incentives for this information under GINA.

#### **Proposed Rule – General Requirements**

The proposed rule would allow an employer to offer limited incentives for an employee's spouse to provide current or past health status information as part of a wellness program, where the spouse participates in the employer's health plan. Under the proposed rule, 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:

- Is covered under the employee's health plan;
- Receives health or genetic services offered by the employer, including as part of a wellness program; and
- Provides information about his or her current or past health status.

Information about current or past health status is usually 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. No inducement may be offered, however, in return for the spouse providing his or her own genetic information, including results of his or her genetic tests.

The proposed exception applies to information on the current and past health status of spouses, **but not of children**. According to the EEOC, the possibility that an employee may be discriminated against based on genetic information is greater when the employer has access to information about the health status of the employee's children versus the employee's spouse.

In addition, the proposed rule says that 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, 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.

The proposed rule would also add 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.

Also, the proposed rule would clarify that an employer may 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 an HRA on a voluntary basis, as long as the employer follows GINA's 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.

#### **Proposed Rule – Permitted Incentives**

The total incentive for an employee and spouse to participate in a wellness program that is part of a group health plan and that 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 (for example, time-off awards, prizes and other items of value).

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

The maximum portion of an incentive that may be offered to an employee alone may not exceed 30 percent of the total cost of the employer's self-only coverage. Thus, 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 inducement, \$4,200 minus \$1,800, or \$2,400, may be offered for the spouse to provide current or past health status information. However, an employer would be free to offer all or part of the \$2,400 inducement in other ways as well, such as for the employee, the spouse and/or another of the employee's dependents to undertake activities that would qualify as participatory or health-contingent programs but do not include requests for genetic information, disability-related inquiries or medical examinations.

Thus, in the example above, an employer could do the following:

- Offer \$1,800 for the employee to answer disability-related questions and/or to take medical examinations as part of a health risk assessment;
- Offer the same amount for the employee's spouse to answer the same questions and to take the same medical examinations; and
- Offer the remaining \$600 for the employee, the spouse or both to undertake an activity-based program, such as a program that requires participants to walk a certain amount each week

#### **Permissible Incentives under ADA and HIPAA/ACA**

Other laws, such as the Americans with Disabilities Act (ADA) and HIPAA and the Affordable Care Act (ACA), also impact the design of employer-sponsored wellness programs. Wellness program incentives need to be carefully structured to comply with all applicable laws. On April 20, 2015, the EEOC published a [proposed rule](#) that addresses 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. According to the EEOC, the incentive levels in this proposed GINA rule are consistent with those in the proposed ADA rule.

However, there are some differences between this proposed rule and the [final wellness program regulations](#) under HIPAA and the ACA. For instance, under the HIPAA/ACA final regulations, an incentive limit does not apply to "participatory wellness programs," which include HRAs that all participants may answer regardless of their health status. Also, the incentive limit on health-contingent wellness programs does not contain specific rules for apportioning the incentive between the spouse and the employee.

*Source: U.S. Equal Employment Opportunity Commission (EEOC)*

