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COMPLIANCE ALERT 2015-7



## EEOC Issues Proposed Rule Relating to Genetic Information and Wellness Programs

On October 30, 2015, the 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 to offer financial incentives and inducements to spouses who offer information about current or past health status as part of a wellness program.

GINA protects job applicants, current and former employees, and others (such as labor union members) from employment discrimination based on genetic information. Genetic information includes information regarding the "manifestation of a disease or disorder in family members of an individual," which includes spouses. One narrow exception to GINA applies when an employee voluntarily accepts health or genetic services offered by an employer, such as through a wellness program.

Current wellness program rules provided by other federal agencies allow employers to extend the financial incentives of a wellness program to spouses and children of an employee, so long as the spouse and children are permitted to participate in the wellness program. When the EEOC issued its Proposed rule in April 2015 to integrate wellness program rules with Title I of the Americans with Disabilities Act (ADA), it expressly provided that financial incentives for wellness programs would be limited to employees only. This is because current regulations state that a wellness program cannot require employees to provide genetic information as a condition of receiving incentives, and this includes current or past health status of spouses and family members. This has led to interpretation that GINA prohibits employers from offering wellness program incentives to spouses who are asked to provide their current or past health information. The October Proposed rule intends to provide the parameters for an employer to lawfully offer wellness incentives to spouses.

The Proposed rule has six main components.

First, the EEOC proposed to add a subsection to regulations that would explain that employers may request, require, or purchase genetic information as part of health or genetic services only when those services are reasonably designed to promote health or prevent disease. The program must have a reasonable chance of improving health or preventing disease in participants, and may not be overly burdensome or be a subterfuge for violating GINA or other discrimination laws. Collecting information without follow up or advice would not be reasonably designed.

Second, the Proposed rule provides that a covered entity may offer, as part of the health plan, an inducement to an employee whose spouse is (1) covered by 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 as part of a health risk assessment. Inducements are not permissible in return for a spouse providing his or her own genetic information, including the results of genetic tests.

The Proposed rule would also limit inducements to an employee or spouse to 30 percent of the total annual cost of coverage for the plan in which the employee and any dependents are enrolled. In its third prong, the Proposed rule would provide a process to apportion the inducements between the employee and the spouse. The maximum share of the inducement attributable to the employee's participation would be 30 percent of the cost of self-only coverage. The remainder -- equal to 30 percent of the total cost of coverage for the plan the employee plus any dependents are enrolled in, minus 30 percent of the total cost of self only coverage -- may be provided in exchange for the spouse providing information to a wellness program.

Fourth, the Proposed rule would prohibit an entity from conditioning participation in a wellness program, or an inducement to an employee or the employee's spouse, on agreeing to the sale of genetic information or the waiver of protections provided by federal law.

Fifth, the Proposed rule would clarify that an employer may seek information through medical questionnaires or exams (for example, to detect high cholesterol) on the current or past health status of a spouse who is covered by the employer's group health plan and is completing a health risk assessment on a voluntary basis.

Sixth, and finally, the Proposed rule would remove the term "financial" as a modifier for inducements to be clear that inducements can be both financial and in-kind, such as time-off awards, prizes, or other items of value in the form of both rewards and penalties.

The EEOC is also seeking comments from the public on the Proposed rule in general as well as specific issues, including:

1. 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.
2. Should the proposed authorization requirement 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 health risk assessment? If so, how should the Commission define "*de minimis*?"

For more information, see:

[EEOC FAQ](#) on the Proposed Rule

EEOC Small Business [Fact Sheet](#)

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