

EEOC Amends Title II of Genetic Information Nondiscrimination Act

Article By:

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The US ***Equal Employment Opportunity Commission (EEOC)*** [recently published a proposed rule](#) to amend ***Title II*** of the ***Genetic Information Nondiscrimination Act (GINA)*** as it relates to employer wellness programs that are part of group health plans. Title II of GINA restricts how employers may collect and disclose genetic information and prohibits employers from using genetic information in employment decisions. EEOC's prior GINA regulations prohibit employers from offering incentives in return for "genetic information," which includes information about the "manifestation of a disease or disorder in family members of an individual."

The proposed rule is consistent with the EEOC proposed regulations published on April 20, 2015 regarding the application of the ***Americans with Disabilities Act (ADA)*** to employer wellness programs.

The proposed rule provides clarification on the following points:

- An employer may offer, as part of its health plan, a limited incentive—in the form of a reward or penalty (financial or in-kind)—to an employee whose spouse (i) is covered under the employee's health plan; (ii) receives health or genetic services offered by the employer, including as part of a wellness program; and (iii) voluntarily provides information about his or her current or past health status as part of a health risk assessment, which may include a medical questionnaire, medical examination (e.g., blood pressure or blood test to detect high cholesterol or high glucose levels).
- The total incentive allowed for an employee and spouse to participate in a wellness program that is part of a group health plan is 30% of the total cost of employee plus family coverage, and if offered to the employee alone, the maximum incentive is 30% of the total cost of self-only coverage. Note that these proposed regulations do not adopt the same 50% incentive allowance for enrollment in tobacco cessation programs as allowed under the existing wellness program regulations issued by the Department of Labor, Internal Revenue Service, and Department of Health and Human Services (Tri-Agencies) under the Health Insurance Portability and Accountability Act (HIPAA) and the Affordable Care Act (ACA).
- 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.

- Any health or genetic services an employer offers must be reasonably designed to promote health or prevent disease. That means that the service must have a reasonable chance of improving the health of, or preventing disease in, participating individuals. An employer-sponsored wellness program cannot be overly burdensome to employees, a subterfuge for violating GINA or other employment discrimination laws, or highly suspect in the method chosen to promote health or prevent disease.
- Inducements in exchange for current or past health status information about an employee's children (biological or not) are not permitted, although an employer may offer health or genetic services (including participation in a wellness program) to an employee's children on a voluntary basis and may ask questions about a child's current or past health status as part of providing such services.

The EEOC will accept comments on the proposed GINA regulations through December 29, 2015, and will likely finalize regulations based on those comments at some point in 2016. We expect that the final regulations will prohibit using a wellness program for "genetic tests," the meaning of which is still unclear. A possible prohibition would apply, for example, to a breast cancer BRCA test.

The breadth of this prohibition is anticipated to be the subject of many comments.

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