

## **EEOC Guidance on Wellness Programs under GINA**

### **Background**

The Equal Employment Opportunity Commission (“EEOC”) has issued proposed rules regarding the extent to which employers may offer inducements for an employee’s spouse to provide information about current or past health status without violating the Genetic Information and Nondiscrimination Act (“GINA”).

The newly issued proposed rules (the “GINA Proposed Rules”) are similar to the requirements in the EEOC’s proposed rules issued earlier in 2015 (the “ADA Proposed Rules”) under the Americans with Disabilities Act (the “ADA”) and the rules previously issued under the nondiscrimination requirements of the Health Insurance Portability and Accountability Act of 1996 (the “HIPAA Wellness Rules”).

Title II of GINA prohibits the use of genetic information in employment, limits the disclosure of genetic information, and restricts employers and other covered entities from requesting, requiring or purchasing genetic information, unless one of six exceptions applies. Genetic information includes information about an individual’s genetic tests and the genetic tests of a family member; manifestation of a disease or disorder in family members of an individual (*i.e.*, family medical history); requests for the receipt of genetic services by an individual or family member; and genetic information about a fetus carried by an individual or family or of an embryo legally held by an individual or family member using assisted reproductive technology. The term “family member” is defined broadly and includes an employee’s spouse.

One exception in the current regulations is for employers that offer health or genetic services, including as part of a voluntary wellness program, as long as certain specific requirements are met. However, the current regulations do not address whether an incentive could be offered for medical information about a spouse, which falls within the definition of genetic information noted above. The GINA Proposed Rules revise the existing regulations to provide additional guidance on when an employer may provide an incentive for an employee’s spouse to provide information on his or her current or past health status.

## Overview of the GINA Proposed Rules

<b>GINA Proposed Rules for Requesting Genetic Information, Including Spouse Health Information, as Part of a Wellness Program</b>	
<b>1. Reasonably designed to promote health or prevent disease</b>	<p>A wellness program that requests, requires, or purchases genetic information must be reasonably designed to promote health or prevent disease, and:</p> <ul style="list-style-type: none"> <li>• must have a reasonable chance of improving the health of, or preventing disease in, participating individuals; and</li> <li>• must not be overly burdensome, a subterfuge for violating Title II of GINA, or highly suspect in the method chosen to promote health or prevent disease.</li> </ul> <p>This is similar to standards in the HIPAA Wellness Rules and ADA Proposed Rules.</p>
<b>2. Permitted inducements for health status information of spouse</b>	<p>Inducements (financial or non-financial) are allowed for providing current or past health status information of an employee’s spouse, but NOT for:</p> <ul style="list-style-type: none"> <li>• genetic information of the employee’s spouse, or</li> <li>• health status or genetic information of the employee’s children.</li> </ul> <p>The spouse must be covered under the employer’s health plan and receive health or genetic services offered by the employer (including as part of a wellness program).</p>
<b>3. Authorization requirement; same GINA rules apply to employee and spouse HRAs</b>	<p>A health risk assessment (“HRA”) completed by a spouse is subject to the existing GINA rules in the same manner as an employee HRA, including the requirement to provide prior knowing, voluntary, and written authorization, and the requirement that the authorization form describe the confidentiality protections and restrictions on the disclosure of genetic information.</p>
<b>4. Maximum inducement that may be offered</b>	<p>Total inducement must be no more than 30% of the cost of the coverage in which the employee and dependents are enrolled, as follows:</p> <ul style="list-style-type: none"> <li>• inducement for the employee to provide health information limited to 30% of the cost of self-only coverage; and</li> <li>• inducement for the spouse to provide health information limited to 30% of the difference between the cost of coverage in which the employee and dependents are enrolled, and the cost of self-only coverage.</li> </ul>
<b>5. No conditioning participation on the disclosure of genetic information</b>	<p>An employer may not condition participation in a wellness program, or any inducement, on the employee, spouse, or other dependent agreeing to a sale of genetic information (including information about the current health status of an employee’s family member) or otherwise waiving protections under the provisions of GINA that generally prohibit disclosure of genetic information.</p>

A. Reasonably Designed to Promote Health or Prevent Disease.

The GINA Proposed Rules provide that covered entities (in this context, an employer) may request, require, or purchase genetic information as part of health or genetic services (including any acquisition of genetic information that is part of those services) only when those services are “reasonably designed to promote health or prevent disease.” This is similar to the requirement under the ADA Proposed Rules, and means that the program must:

- have a reasonable chance of improving the health of, or preventing disease in, participating individuals;
- not be overly burdensome;
- not be a subterfuge for violating Title II of GINA or other laws prohibiting employment discrimination; and
- not be highly suspect in the method chosen to promote health or prevent disease.

For example, a program is not reasonably designed to promote health or prevent disease if the program collects information on a health questionnaire without providing follow up information, or if as a condition of obtaining a reward, it imposes an overly burdensome amount of time for participation, requires intrusive procedures, or requires employees to pay significant costs of medical examinations. In addition, a program is not reasonably designed if it exists merely to shift costs from the covered entity to targeted employees based on their health.

B. Restrictions Regarding Inducements for Health Risk Assessments Completed By Spouses

Under the GINA Proposed Rules, a covered entity may offer, as part of its health plan, an inducement to an employee whose spouse:

- is covered under the employer’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 as part of an HRA, which can include a medical questionnaire, medical exam, or both.

The regulations define “inducement” broadly to include both inducements that are financial and in-kind, such as time-off awards, prizes, or other items of value, and to include either rewards or penalties.

*Spousal HRA Subject to Same Authorization Requirements as Employee HRA.* The HRA completed by an employee's spouse is required to comply with the existing GINA rules in the same manner as an HRA that is completed by the employee, including the requirement that the spouse provide prior knowing, voluntary, and written authorization, and the requirement that the authorization form describe the confidentiality protections and restrictions on the disclosure of genetic information. The HRA must also be administered in connection with the spouse's receipt of health or genetic services offered by the employer, which can include such services offered as part of a wellness program.

*No Inducement for Genetic Information of a Spouse or Information Regarding Children.* The GINA Proposed Rules prohibit employers from offering an inducement in return for a spouse providing his or her own genetic information, including the results of the spouse's genetic tests, and also prohibit inducements for providing information about the current or past health status, or genetic information, of an employee's child, whether biological or non-biological.

In the preamble to the GINA Proposed Rules, the EEOC described its concern that there is a higher likelihood of obtaining information about an employee's genetic make-up or predisposition for disease from information about his or her children than the current or past health status of the employee's spouse. However, 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 a part of providing such services.

### C. Quantitative Limitation on Inducements

*Inducement No More than 30% of Actual Coverage Cost.* The total inducement for the HRAs completed by both the employee and spouse may not exceed 30% of the total annual cost of coverage in the plan which the employee and any dependents are enrolled, when combined with any other inducements permitted under the ADA Proposed Rules for the employee's participation in a wellness program that asks disability-related questions or includes medical examinations.

This limitation also generally parallels the HIPAA Wellness Rules, which generally limit rewards for participation in a health-contingent wellness program to 30% of the total cost of coverage in which the employee and dependents are enrolled (50% for smoking cessation programs).

*Allocation of Inducement Between Employee and Spouse.* The GINA Proposed Rules further specify how the inducements may be allocated between the employee and spouse. The maximum share of the inducement that can be attributable to the employee's participation in the wellness program is 30% of the cost of self-only coverage. The remainder of the inducement – the difference between 30% of the coverage for the plan in which the employee and any dependents are enrolled, and 30%

of the cost of self-only coverage – can be offered for the spouse participating in the program.

For example, if an employee and the employee's dependents, including the employee's spouse, are enrolled in a plan for which the total cost of coverage is \$14,000, and the cost of self-only coverage is \$6,000, the maximum inducement that can be offered to the employee and the employee's spouse for providing information about their current or past health status is \$4,200 (30% of \$14,000). The incentives are further limited as follows:

- The maximum inducement that can be offered for the employee to provide current or past health information is \$1,800 (30% of \$6,000)
- The maximum inducement that can be offered for the spouse to provide current or past health information is \$2,400 (\$4,200 minus \$1,800).

In the preamble to the GINA Proposed Rules, the EEOC noted that employers may offer all or part of the inducement in other ways (for example offering an inducement to participate in a health-contingent wellness program) that do not include requests for genetic information, disability-related inquiries, or medical examinations. In addition, a wellness program may offer inducements in accordance with HIPAA and the Affordable Care Act without needing to comply with the limits in the GINA Proposed Rules if neither the employee nor the spouse are required to provide current or past health status information, so long as the wellness program otherwise complies with the requirements of the ADA and GINA.

#### D. Prohibition on Conditioning Participation on Disclosure of Genetic Information

The GINA Proposed Rules also prohibit an employer or other covered entity from conditioning participation in a wellness program, or any inducement, on the employee, spouse, or other dependent agreeing to a sale of genetic information, including information about the current health status of an employee's family member, or otherwise waiving protections under the provisions of GINA that generally prohibit disclosure of genetic information.

### **Effectiveness**

The EEOC requested comments on several issues raised in the GINA Proposed Rules, which were required to be submitted by December 29, 2015. While compliance with the GINA Proposed Rules is not required until the rules become final, the EEOC noted in Q&As accompanying the GINA Proposed Rules that employers may voluntarily comply, and clients may want to review their wellness programs to determine if any changes will be necessary in order to comply once the final rules become effective.