EEOC Releases Final Rule Revising the Genetic Information Nondiscrimination Act

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In a much anticipated move, on May 16, 2016, the Equal Employment Opportunity Commission issued final regulations governing the treatment of wellness programs under the Genetic Information Nondiscrimination Act ("GINA"), as well as under the Americans with Disabilities Act ("ADA"). The new rules regarding financial inducements will apply to employer sponsored wellness programs as of the first day of the first plan year that begins on or after January 1, 2017.

GINA is a relatively new federal law enacted in 2008 which prohibits employers from requesting "genetic information" from their employees. Specifically, it prohibits employers with 15 or more employees from discriminating against an employee on the basis of the employee's genetic information. "Genetic information" includes information from genetic tests, the genetic tests of the employee's family members, and family medical history. GINA also prohibits employers from retaliating against an employee who has opposed a practice made unlawful by GINA. Finally, GINA prohibits employers from requesting an employee's genetic information, subject to six exceptions.

While GINA's enactment was considered a positive response to employers seeking to rely on genetic information to screen out potentially unhealthy employees and lower healthcare costs, it complicated matters for employers interested in offering "wellness programs" to their employees. Wellness programs include things such as health risk assessments, health screenings, flu shots, health fairs and workshops, exercise groups, fitness classes, smoking cessation classes, and/or participation incentives. Wellness programs have obvious benefits to both employers and employees, but they also frequently involve gathering medical (including genetic) information. However, GINA provides an exception for wellness programs if the employee provides prior, knowing, voluntary and written authorization; there is no penalty for not participating in the part of the program seeking genetic information; only the employee and licensed health care professional or counselor receive individually identifiable information concerning the results of such services; and genetic information cannot be disclosed to the employer except in aggregate terms. The issue of when a wellness program is truly "voluntary" and when financial inducements may be offered for participation, had previously been up to debate.

The EEOC issued a Notice of Proposed Rulemaking on October 30, 2015 to address how GINA applies to wellness programs offered as part of group health plans. After receiving over 3,000 comments on the proposed rules from advocacy groups, people with disabilities, employer

associations, members of Congress, and others, the EEOC issued its final regulations approximately six and a half months later.

The final rule clarifies that an employer may offer an incentive to an employee whose spouse receives health or genetic services from the employer, such as part of a wellness program, and who provides information about his or her manifestation of disease or disorder. This kind of information is most often provided in a health risk assessment, such as a questionnaire or medical examination. However, no inducement may be offered in exchange for a spouse revealing his or her own genetic information. At the same time the final rule was announced, the EEOC also released a final rule to amend the ADA regulations regarding when employers may use incentives to encourage employers to participate in wellness programs which request information regarding disabilities or require medical examinations.

The final rule specifies no more than 30% of the cost of *self-only* coverage may be given as an inducement for the employee's participation in an employer sponsored wellness program. Likewise, the maximum total inducement for a spouse to provide information about his or her manifestation of disease or disorder will also be 30% of the total cost of (employee) *self-only* coverage, so that the combined total inducement will be no more than twice the cost of 30% of self-only coverage.

For example, if an employee is enrolled in health insurance through the employer at a total cost of $14,000 for family coverage, with a self-only option for $6,000, and the employer provides participating employees and spouses with the option of participating in a wellness program, they employer may offer no more than $1,000 to the employer and $1,8000 to the spouse as an incentive.

If an employer provides more than one group health plan and enrollment in a particular plan is not required to participate in the wellness program, the maximum inducement is 30% of the lowest cost major medical *self-only* plan offered. Additionally, if the employer does not offer a group health plan, then the maximum inducement is 30% of the total cost to a 40-year-old non-smoker purchasing coverage under the second lowest cost Silver Plan available through the state or federal Exchange in the location that the employer has identified as its principal place of business.

The final rule prohibits inducements for information about children of employees. Employers may still allow children of employees to participate it wellness programs, but may not offer an inducement to do so.

GINA is certainly still a developing law, and employers should stay on top of changes and monitor their own compliance.

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