

## EEOC's Proposed Rule on GINA and Wellness Programs: Approving Spousal HRA Incentives and Clarifying Other Matters

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On October 30, 2015, the U.S. Equal Employment Opportunity Commission (EEOC) released [proposed regulations](#) on Title II of the Genetic Information Nondiscrimination Act (GINA) that reverse a prior position prohibiting wellness programs from requiring an employee to provide his genetic information (which includes information about a spouse or other family members) as a condition of receiving incentives. The proposed regulations would allow a wellness program to offer incentives for an employee's spouse to provide information about his or her current or past health status (*i.e.*, health status information) as part of a health risk assessment (HRA). The proposed regulations add much needed clarity for employers seeking to promote health and prevent disease through wellness programs.

### Background

GINA protects individuals from employment discrimination based on their genetic information. GINA also has strong confidentiality requirements which strictly limit entities covered by GINA from disclosing genetic information.

Under the law, *genetic information* includes the following:

1. Information about an individual's genetic tests;
2. Information about the genetic tests of an individual's family member; and
3. Information about the manifestation of a disease or disorder in an individual's family member (*i.e.*, family medical history or family health status information)

The term "*family member*" includes, but is not limited to, an individual's spouse, children, parents and siblings. While health status information of a family member is considered genetic information, health status information of an employee is not considered genetic information.

GINA prohibits covered employers from requesting, requiring or purchasing genetic information unless a specified exception applies. One such exception applies when an employee or dependent voluntarily accepts health or genetic services offered by an employer, including such services offered as part of a wellness program. However, the [EEOC's current regulations](#) (issued in

2010) bar employers from requiring employees to provide genetic information as a condition of receiving an incentive.

While many employers have eagerly embraced offering incentives to employees in exchange for employees' health status information, wellness programs have generally been designed to exclude spouses from participation because the 2010 EEOC regulations consider "spousal information" to be "genetic information" about the employee. Thus, the current regulations could be read as prohibiting employers from offering incentives to both employees and spouses if an incentive is conditioned on the spouse providing his or her health status information.

Indeed, in a 2014 lawsuit, the EEOC took the position that an employer violated GINA by requiring an employee's covered spouse to provide health status information for the employee to avoid a surcharge with respect to the employer-sponsored group health plan. (See *EEOC vs. Honeywell International, Inc.*) The proposed regulations reverse this prior EEOC position and provide guidance going forward.

### How to Offer Incentives for Spousal Health Status Information

The proposed regulations allow an employer to offer limited incentives to an employee when the spouse provides health status information if all of the following requirements are satisfied:

1. **Covered as a Dependent:** The spouse is covered under the employer-sponsored group health plan as the employee's dependent; and
2. **Receives Genetic or Health Services:** The spouse receives health or genetic services offered by the employer, including as part of a wellness program; and
3. **Provides Information via HRA:** The spouse provides information on his or her own current or past health status as part of an HRA, which may include a medical questionnaire, a medical examination (e.g., to detect high blood pressure or high cholesterol), or both; and
4. **No Spousal Personal Genetic Information:** The spouse does not provide his or her own genetic information, including results of his or her genetic tests. In other words, the spouse only provides information on his or her own current or past health status (*i.e.*, the spouse cannot be required to provide information about other family members such as children); and
5. **Authorization:** The spouse provides prior, knowing, voluntary and written authorization (which may be in electronic format) regarding the release of health status information. The authorization form must describe GINA's confidentiality protections and restrictions on the disclosure of genetic information. Separate authorization from the employee is not necessary for the spouse to provide health status information.

### Incentives: Limits and Types

Under the proposed regulations, the total incentive for an employee and spouse to participate in a wellness program that is part of a group health plan and collects health status information may

not exceed **30%** of the total cost of the plan in which the employee and any dependents are enrolled. For example, if an employee and his or her spouse are enrolled in self and family coverage that costs \$14,000 per year, the maximum annual incentive that the employer may offer for providing health status information as part of a wellness program is \$4,200 (or 30% of \$14,000).

The maximum amount of the incentive for only the spouse to provide health status information may not exceed 30% of the total cost of coverage in which the employee is enrolled **less** 30% of the cost of self-only coverage. For example, if the employer offers health coverage at a total cost of \$14,000 for employees and their dependents and \$6,000 for self-only coverage, then the maximum incentive that could be offered for the employee's spouse to provide health status information is \$2,400, which is \$4,200 (30% of \$14,000) minus \$1,800 (30% of \$6,000). The maximum portion of an incentive that may be offered for only the employee to provide health status information may not exceed 30% of the total cost of self-only coverage (or in the above example, \$1,800).

The proposed regulations also clarify that incentives may be both financial and in-kind inducements, such as time-off awards, prizes, or other items of value, in the form of either rewards or penalties. This is a change from the current regulations which only address financial inducements.

## Other Clarifications

The proposed regulations also provide further clarity regarding the following matters.

### ***No Incentives for Providing Children's Health Status Information***

Offering incentives for the current or past health status information of an employee's child or children is strictly prohibited. In the preamble to the regulations, the EEOC explains that there is a minimal, if any, chance of eliciting information about an employee's own genetic make-up or predisposition for disease from spousal health status information. On the other hand, there is a significantly greater likelihood of eliciting information about an employee's own genetic make-up from the health status information of an employee's child or children.

Nonetheless, an employer may offer health or genetic services (e.g., via a wellness program or onsite clinic) to an employee's child or children on a voluntary basis and may ask questions about a child's current or past health status as part of providing the services. However, no incentive may be offered in exchange for the child's or children's health status information.

### ***Services Must be Reasonably Designed to Promote Health or Prevent Disease***

The proposed regulations also explain that employers may request, require, or purchase genetic information as part of offering health or genetic services only if the services are reasonably designed to promote health or prevent disease. A program satisfies this standard if:

- (i) it has a reasonable chance of improving the health of, or preventing disease in, participating individuals, and
- (ii) it is not overly burdensome, and
- (iii) it is not a subterfuge for violating GINA or other laws prohibiting employment discrimination, and

(iv) it is not highly suspect in the method chosen to promote health or prevent disease.

The preamble to the proposed regulations gives the following examples of programs which do not satisfy the standard: (1) collecting information on an HRA without providing any follow-up information or advice (*i.e.*, would not be reasonably designed to promote health or prevent disease); and (2), a program that exists merely to shift costs from the employer to targeted employees based on their health.

### ***No Exchange Involving Sale of Genetic Information or Waiver of Confidentiality***

Lastly, the proposed regulations bar employers from conditioning participation in a wellness program or the receipt of any incentive in exchange for an agreement permitting the sale of genetic information or waiver of GINA's confidentiality provisions.

### **Next Steps**

Employers should review their wellness programs to determine whether they comply with these proposed regulations. The EEOC plans to finalize the regulations after evaluating comments on the proposed regulations and other issues, including the following:

1. Must employers that offer incentives to encourage employees' spouses to disclose health status information also offer similar incentives to persons who choose not to disclose such information, but who instead provide certification from a medical professional stating that the spouse is under a physician's care and that any medical risks identified by that physician are under active treatment?
2. Which best practices or procedural safeguards ensure that employer-sponsored wellness programs are designed to promote health or prevent disease and do not operate to shift costs to employees with spouses who have health impairments or stigmatized conditions?
3. Given that most employers today store personnel information electronically, and in light of increasingly frequent breaches to electronically stored information, should the regulations include more specific guidance regarding how to implement GINA's confidentiality requirements in the context of electronically stored records?

Until the regulations are finalized, employers may elect to comply with the proposed regulations. Employers may also want to take the time to ensure that their wellness programs comply with other applicable laws, such as Title I of GINA, the Americans with Disabilities Act, the Health Insurance Portability and Accountability Act, the Affordable Care Act and the regulations issued thereunder (please see our [July, 2013 newsletter article](#) for an overview of these regulations). For an overview of the EEOC proposed regs under ADA, see [our webinar slides](#) from May 7, 2015.

If you have questions regarding these proposed regulations, please contact the author of this article or the Trucker ♦ Huss attorney with whom you normally work.

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