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EEOC Proposed GINA Regulations Permit Limited Wellness Plan Incentives In Exchange For Spousal Health Data

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The Equal Employment Opportunity Commission (EEOC) issued a Notice of Proposed Rulemaking (NPRM) on October 30, 2015 to amend the federal regulations implementing Title II of the Genetic Information Nondiscrimination Act (GINA) as they relate to wellness programs. Most notably under the proposal, employers who offer wellness programs as part of a group health plan may provide certain incentives, such as financial and other inducements, in exchange for an employee's spouse providing information about his or her current and past health.

In general terms, Title II of GINA prohibits discrimination against employees based on their genetic information. The statute also strictly limits the disclosure of employees' genetic information. And unless one of six narrow exceptions applies, GINA prohibits covered employers from acquiring employees' genetic information. "Genetic information", under the statute, is defined to include family medical history, or the manifestation of a disease or disorder in family members of the individual. An employee's spouse's medical history is considered the employee's family medical history.

Under the current GINA regulations, implemented on November 9, 2010, an employer does not violate the prohibition on acquiring genetic information if an employee voluntarily accepts health services offered by an employer as part of a wellness program, provided certain requirements are met. One of those requirements is that the wellness program cannot condition inducements to employees on the provision of genetic information. Left unanswered by the current regulations, however, is how GINA's restriction on an employer's acquiring of genetic information interacts with the practice of offering employees inducements where a spouse participates in a wellness program. As a result, employers have been left wondering whether they will violate GINA by offering an employee an inducement if the employee's spouse, who is also covered by the group health plan, completes a health risk assessment (HRA) that seeks the "medical history" of the spouse – i.e., the employee's genetic information.

The proposed regulations attempt to clarify that GINA does not prohibit employers from offering limited inducements for a spouse's provision of information about his or her current or past health status as part of an HRA. No inducement may be offered, however, in return for the spouse providing his or her own genetic information, including the results of a genetic test. According to the EEOC, the inducements or incentives "may take the form of a reward or penalty and may be financial or in-kind (e.g., time-off awards, prizes, or other items of value)." The key, however, is that inducements cannot be so rich that an employee's or spouse's participation in the wellness program, including the provision of the spouse's current and past health status, can no longer be considered "voluntary."

To that end, the proposed regulations provide that the total inducement to the employee and spouse may not exceed 30% of the total annual cost of coverage for the plan in which they are enrolled. For example, if an employer offers a health plan at a total cost of $14,000 (including both employer and employee contributions), the inducement to participate in a wellness program that elicits the spouse's current and past health status may not exceed $4,200. This, according to the EEOC, "generally parallels the limitations set forth in section 1201 of the Affordable Care Act…and promotes GINA's interest in limiting access to genetic information and ensuring that inducements are not so high as to be coercive, and thus prohibited." The 30% threshold, the EEOC explains, "is consistent with those in the proposed [Americans Disabilities Act] rule" that the EEOC proposed in April 2015.

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In its press release, the EEOC has also announced that it intends to interpret the new rule, whatever it looks like in its final version, "as narrowly as possible." Consequently, this proposed rule, according to the EEOC, applies to information on the current and past health status of spouses, but not of children. The EEOC's NPRM also reminds employers that, before participating in a wellness program that elicits a spouse's current and past health status, the employer also must obtain authorization from the spouse, "though a separate authorization for the acquisition of this information from the employee is not necessary."

The EEOC will accept comments on the proposal through Tuesday, December 29, 2015. If you have questions about the proposed rule, or if you would like help submitting a comment to the EEOC, please contact Scott R. Eldridge or any one of Miller Canfield's other attorneys in its Employment and Labor group.

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