

Does Your Company's Wellness Program Violate GINA?

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The Genetic Information Non-Discrimination Act (GINA) expressly prohibits covered employers and health plan sponsors from asking an employee to provide genetic information in exchange for an incentive.

The EEOC has recently targeted employers that provide incentive-driven wellness programs for their employees in which an employer or health plan asks employees and their family members to complete a health risk assessment (HRA) in exchange for a discount on premiums or some other incentive.

Hidden problems often arise for employers and plan sponsors under GINA when they use the same HRAs to elicit the employee's genetic information indirectly through the employee's spouse or family member.

GINA defines "genetic information," in part, to include an individual's "family medical history" – i.e., the manifestation of disease or disorder in an individual's family members. "Family members" include up to fourth-degree genetic relatives and spouses, even though spouses generally do not share genes. Many wellness programs provide incentives to employees for completing HRAs and additional incentives when their dependent family members also complete HRAs. In these situations, employers and plan-sponsors may be unknowingly eliciting genetic information of employees when asking their family members to complete HRAs. That is, an HRA may ask a question that does not directly elicit genetic information of the employee, but, when posed to the employee's family member, may violate GINA because it is eliciting information about the "manifestation of disease or disorder" of the employee's family member.

For example, a typical HRA question may ask an employee whether she "has ever been diagnosed with congestive heart disease?" Although an employee's answer to that question will not necessarily reveal her genetic information, as defined by GINA, the employee's spouse's answer to that question will reveal the employee's genetic information because the question calls for information about the manifestation of a disease or condition of the employee's "family member." That the question is posed to the employee's spouse instead of asking the employee directly to reveal family medical history is immaterial.

Although GINA prohibits the use of incentives to acquire genetic information in this manner, it does not altogether prohibit an employer or plan-sponsor from acquiring genetic information or from providing incentives for employees and their family members completing HRAs. In fact, the GINA regulations offer guidance on how to administer wellness programs that provide incentives to employees for completing HRAs without violating the statute. But even if you believe that your company is following that regulatory guidance, you should double check to ensure that the HRAs you are using for family members are not inadvertently eliciting an employee's genetic information.

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