

SESSION  
CASES

legislativeUPDATE

November 15, 2011

## **GINA Concerns for Employers Providing Spouse Incentives to Complete Health Assessments**

Recently, at least one regional office of the Equal Employment Opportunity Commission (EEOC), has raised the concern that offering financial incentives for spouses to complete Health Assessments (HAs) may be a violation of the Genetic Information Nondiscrimination Act of 2008 (GINA). Employers offering wellness programs that offer a cash incentive (such as premium contribution reductions) if both an employee and spouse take a health risk questionnaire should be aware that this design may raise questions under GINA.

### **Background**

GINA prohibits employers, health plans, and insurers from discriminating against individuals on the basis of genetic information, which is defined to include family medical history. In general, family medical history includes information about a manifested disease or disorder of an individual's family members, including a spouse. Title I of GINA prohibits health plans and insurers from adjusting premium or contribution amounts on the basis of genetic information or requesting, requiring, or purchasing genetic information for most purposes. See Department of Labor (DOL) final regulations implementing Title I. Title II of GINA prohibits employment discrimination on the basis of genetic information. See EEOC final regulations implementing Title II.

### **Wellness Program Design in Question**

Wellness programs that collect or use genetic information must comply with restrictions under GINA. Under the DOL regulations, group health plans can offer incentives for completing HAs, provided the HAs do not include any requests for family medical history or other genetic information. Under the EEOC regulations, voluntary wellness programs can be designed to offer incentives to complete HAs that include questions about family medical history or other genetic information, provided the employers make clear that the incentives will be available whether or not the employees answer the questions regarding family medical history or other genetic information. Based on these regulations, some plan sponsors providing HA incentives have removed family medical history questions from HAs or separated questions about family medical history into separate HAs that do not involve incentives.

Recently, an EEOC office interpreted GINA Title II as prohibiting an employer from providing an incentive for a spouse to complete an HA—even if the HA does not request any family medical history or other genetic information. Under this design, the reward was paid only if both the employee and spouse completed the HA. Apparently the EEOC office interpreted the HA incentive

as a request for “family medical history” (thus, “genetic information”) with respect to the employee.

No formal written guidance exists to support the EEOC position, but employers should nonetheless be aware of this EEOC enforcement activity. Employers should note that in the absence of formal written guidance on this issue, the regulations allow employers and plans to provide incentives for completing HAs, provided answering any questions about family medical history or other genetic information is voluntary and is not associated with any incentive or penalty. In addition, EEOC regulations specifically state that a covered entity does not violate GINA when it requests, requires, or purchases genetic information about the manifestation of a disease, disorder, or pathological condition of an individual's family member who is receiving health or genetic services on a voluntary basis. For example, an employer does not unlawfully acquire genetic information about an employee when it asks the employee's family member who is receiving health services from the employer if her diabetes is under control. The example in the regulations appears to indicate that the EEOC did not intend for a GINA violation to occur when an employer requests health information from an employee's family member, including a spouse, in the context of providing health services. Thus, until further official guidance is released, it appears permissible under GINA for an employer to provide incentives for participants and their spouses to complete HAs.

### Considerations

The EEOC has issued no guidance for employers on this type of wellness incentive design under Title II of GINA and has taken no official or informal position on the design's compliance with GINA Title II regulations. Also, this design has not raised issues for group health plans under GINA Title I. Employers should, however, be aware of the potential for increased EEOC enforcement activities, and even where no action is taken by the EEOC, employees may bring private lawsuits complaining of employers' wellness programs. This recent action is a reminder for employers to review their wellness programs for compliance with relevant laws. Concerns around potential risks and penalties should be addressed with legal counsel.

Should you have any questions regarding this topic or need assistance with wellness programs and design, please contact your Conner Strong & Buckelew account representative toll-free at 1-877-861-3220.



[connerstrong.com](http://connerstrong.com)



877-861-3220



[news@connerstrong.com](mailto:news@connerstrong.com)



[Change My Preferences](#)



INSURANCE | RISK MANAGEMENT | EMPLOYEE BENEFITS



[Click here to change your email preferences or unsubscribe from all communication.](#)