

## Genetic Information Nondiscrimination Act Regulations Expected: Are Your Wellness Programs Ready?

Employers who sponsor workplace wellness programs should be on alert for new regulations that may change their programs extensively. The employment provisions (“Title II”) of the Genetic Information Nondiscrimination Act (“GINA”), which prohibit employers from discharging, refusing to hire or otherwise discriminating on the basis of genetic information, become effective on November 21, 2009. Although final GINA regulations were expected months ago, the Equal Employment Opportunity Commission has now approved a proposed final rule to implement Title II. The proposed regulations are being reviewed by the White House Office of Management and Budget and will be released by the EEOC only weeks before the law’s November 21st effective date.

### **GINA’s Impact on Wellness Programs**

Title II prohibits employers from discharging, refusing to hire, or otherwise discriminating on the basis of genetic information, and from intentionally acquiring genetic information about applicants and employees. The law imposes strict confidentiality requirements regarding genetic information.

“Genetic information” is defined broadly to include, among other things, information about “the manifestation of a disease or disorder in family members of such individual.” As an exception, GINA permits employers to acquire genetic information when it is requested as part of an employer’s **“health or genetic services, including such services offered as part of a voluntary wellness program.”** We expect the EEOC will clarify the nature and scope of this exception in the final regulations.

The EEOC’s proposed regulations, issued in March 2009, define “manifestation of a disease or disorder” to mean “that an individual has been or could reasonably be diagnosed with the disease, disorder or pathological condition by a health care professional with appropriate training and expertise in the field of medicine involved . . . . [A] disease, disorder or pathological condition is not manifested if the diagnosis is based principally on genetic information or on the

results of one or more genetic tests.” A “family member” under GINA includes a dependant and extends to the fourth degree of consanguinity (e.g., great-great grandparents and first cousins once removed).

In requesting comments on its proposed regulations, EEOC acknowledged that under the Americans with Disabilities Act, the Commission has said only that a wellness program is voluntary if it neither requires employees to participate nor penalizes employees for non-participation.

The EEOC received approximately 40 comments, approximately 16 of which addressed the issue of whether and when a wellness program should be considered “voluntary” under GINA. Of these 16 comments, 4 requested that the EEOC’s final regulations clarify that a wellness program **would not be “voluntary”** if the program provided individuals **any financial inducement** to provide “genetic information.” Approximately 9 comments requested the EEOC issue a final rule clarifying that a wellness program would be “voluntary” if the inducement provided to individuals fell within the HIPAA 20% cap governing financial rewards for participating in wellness programs covered by HIPAA.

As many employers inquire about family medical history in the course of administering wellness programs, usually through “health risk appraisals” aimed at identifying health risks, and many wellness programs also are made available to family members who participate in group health programs, the final GINA regulations will affect significantly the design and implementation of wellness programs.

### **ADA Rules May Also be Affected**

As the EEOC also enforces the ADA, many expect the position the EEOC adopts in the GINA final regulations will become its enforcement position concerning wellness programs under the ADA.

In furtherance of its mission to end disability discrimination, the ADA severely limits an employer’s ability to ask employees about their medical conditions. The ADA’s “medical inquiries and examinations” provisions apply to both disabled and non-disabled individuals. While the ADA normally requires that employee medical inquiries and examinations be “job-

related and consistent with business necessity,” it permits employers to conduct “voluntary” medical examinations, including “voluntary” medical histories, which are part of an employee health program. As with GINA, the unanswered question is whether a program remains “voluntary” under the ADA if it provides a financial incentive to answer medical inquiries or participate in medical examinations.

The EEOC has been grappling with this issue for years. In 1998, it responded unofficially to an inquiry on whether a wellness program with a monetary incentive component that elicits information about an individual’s potential disabilities is “voluntary.” In its response, the agency noted:

[I]t could be argued that providing a monetary incentive to successfully fulfill the requirements of a wellness program renders the program involuntary....The size of the financial benefit is significant.... Also, where an employer decreases its share of the premium and increases the employee’s share, resulting in a significantly higher health insurance premium for employees who do not participate or are unable to meet the criteria of the wellness program, the program may arguably not be voluntary.

In its 2000 *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees*, the EEOC offered additional insight into the meaning of “voluntary”: “A wellness program is *voluntary* as long as an employer neither requires participation nor penalizes employees who do not participate.”

Further, the EEOC stated in a March 2009 informal opinion letter that requiring a *health risk assessment* as a prerequisite for obtaining health insurance coverage would violate the ADA: “[E]ven if the health risk assessment could be considered part of a wellness program, the program would not be voluntary, because individuals who do not participate in the assessment are denied a benefit (i.e., penalized for non-participation) as compared to employees who participate in the assessment.”

EEOC representatives reiterated this position on May 6, 2009, during an informal question and answer session with American Bar Association’s Joint Committee of Employee Benefits (see <http://www.abanet.org/jceb/2009/EEOC2009.pdf>). EEOC representatives confirmed informally

that GINA would “curtail the collection of much of [the family history information collected when a participant completes a health risk assessment].”

### **Wellness Programs at a Crossroads?**

Recognizing that a healthier workforce may lower health care expenditures and increase productivity, employers across the country are embracing the “prevention model” by implementing corporate wellness programs. Many of these use market-based financial incentives, such as premium rewards and penalties, to encourage healthy behavior.

According to the human resources consulting firm Hewitt Associates, “just under two-thirds (63 percent) of companies provide or plan to provide employees with financial incentives [for participating in programs that encourage healthy behaviors].... On the opposite end, almost 17 percent of companies in 2008 charged or planned to charge higher contributions for employees engaging in certain health behaviors, such as smoking.”

Employer-sponsored wellness programs — particularly those that offer financial incentives to drive participation in health screenings and programs designed to encourage healthier behaviors — also have their critics, including disability rights advocates. Some argue that these programs will result in discrimination against individuals with health problems, such as diabetes or obesity, and will harm, rather than help, workers who cannot control unhealthy habits, such as smoking. Some worry that raising premiums for workers who refuse to participate will actually increase the number of uninsured Americans. Finally, some say that employers have no business regulating how employees lead their lives and jeopardize employees’ privacy.

Employers should watch closely for the final GINA regulations. They will need to evaluate whether and how their existing or planned wellness programs will be affected. Given the nature of these programs, GINA does not embrace all possible legal challenges wellness programs face. Employers should consider other federal and state laws and regulations, such as HIPAA and the ADA, that affect the design and implementation of workplace wellness programs.

In addition, the ongoing national debate on health care reform may have sharpened employees’ focus on their current health plan offerings. Communication of a program’s benefits and features is critical and should be designed to drive participation and the success of the program.

