



EEOC Releases Proposed Amendments to Regulations on Employer Wellness Programs

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On October 30, 2015, the Equal Employment Opportunity Commission (EEOC) issued proposed rules that would amend the final regulations, issued in 2010, governing employer wellness programs under Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA). Among other things, the proposed rules provide additional guidance on the collection of spousal health information and the maximum incentives that may be offered under an employer wellness plan that requires the provision of information about a spouse's current or past health status.

GINA prohibits employers from using genetic information in employment decisions, restricts employers from requesting, requiring, or purchasing genetic information (unless a narrow exception applies), and strictly limits the disclosure of any genetic information by employers.

The 2010 regulations did not address how GINA's restriction on an employer's acquisition of genetic information interacts with the practice of offering employees inducements when their spouses participate in employer-sponsored wellness programs. Accordingly, through these proposed rules, the EEOC seeks to clarify that GINA does not prohibit an employer from offering limited inducements for the provision by an employee's spouse (who is covered under the employer's group health plan) of certain medical history information as part of a health risk assessment so long as the provision of information is knowing, voluntary, and is authorized beforehand in writing.

In addition, the proposed rules contain specific apportionment rules with respect to the total incentive that may be offered under a wellness plan that requires the provision of genetic information. The proposed rules provide that the total incentive for both an employee and a spouse to participate in a wellness program may not exceed 30% of the total cost of the plan. However, the employee's incentive would be capped at 30% of the total cost of employee-only coverage. The remaining incentive could then be provided to the spouse. The proposed regulations provide the following illustrative example:

[I]f an employee is enrolled in a health plan that covers the employee and any class of dependents for which the total cost of coverage is \$14,000, the maximum inducement the employer can offer for the employee and the employee's spouse to provide information about their current or past health status is 30 percent of \$14,000, or \$4,200. If the employer's self-only coverage costs \$6,000, the maximum allowable incentive the employer may offer for the employee's participation is 30 percent of \$6,000, or \$1,800. The rest of the inducement, \$4,200 minus \$1,800, or \$2,400, may be offered for the spouse to provide current or past health

status information. However, an employer would be free to offer all or part of the \$2,400 inducement in other ways as well, such as for the employee, the spouse, and/or another of the employee's dependents to undertake activities that would qualify as participatory or health-contingent programs but do not include requests for genetic information, disability-related inquiries, or medical examinations.

While the additional guidance is useful, the EEOC approach is likely to require changes to existing wellness plans that typically apportion the amount of incentives equally among the employee and his or her spouse.

The EEOC is seeking comments on the proposed guidance through December 29, 2015.

If you would like additional information or have questions and/or comments regarding this Benefits Blast, please do not hesitate to contact me or another member of the Winston & Strawn team.

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