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A Review Of The GINA Regulations Applicable To Group Health Plans

On May 17, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) issued a final rule under the *Americans with Disabilities Act (ADA)* and a final rule under Title II of the *Genetic Information Nondiscrimination Act (GINA)* as they relate to employer wellness programs. The regulations are specifically applicable to employers with more than 15 employees and are not aimed at group health plans.

As noted, the new *GINA* regulations affect only Title II[1] of *GINA* which applies to employers; whereas, Title I of *GINA* applies specifically to health plans, including multiemployer group health plans. As explained below, the Title II *GINA* regulations and the Title I *ADA* regulations will impact the design of multiemployer health plans. The Title II *GINA* regulations build on parts of the GINA Title I regulations; hence, this refresher. The *ADA* regulations affect Title I of the *ADA* which is applicable to "employment."[2] Both sets of new regulations focus on "wellness programs."

In conversations with the EEOC staff listed in the *Preambles* to these new regulations it appears that the regulations will impact the design multiemployer group health plans. Although the new regulations are aimed at "employers", we were informed that multiemployer plans that have contributing employers with more than 15 employees would have to comply with the regulations in order for the employer to be considered compliant.

This is similar to how multiemployer group health plans had to offer coverage that complied with the Employer Mandate regulations governing applicable large employers (ALEs)(≥ 50 full-time employees) under the *Affordable Care Act (ACA)* in order for contributing employers that were ALEs to be compliant with the *ACA*. For example, as a result of the ALE rules, multiemployer plans that previously did not offer coverage to dependents had to be amended to offer such coverage in order for the ALE to comply with the *ACA*.

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Thus, although the new regulations apply to employers with more than 15 employees, multiemployer health plans with at least one contributing employer with more than 15 employees will to comply with the new regulations in order for the employer to be compliant. Trustees of multiemployer plans should consult with Fund Counsel concerning the applicability of the new regulations to their plans.

Before discussing the new regulations in a forthcoming newsletter, we thought a refresher on the Title I regulation of *GINA* that does specifically apply to health plans would be helpful. In a forthcoming newsletter we will discuss the new *ADA* and *GINA* Title II regulations.[3]

A Refresher of Title I of GINA

Title I of *GINA* includes provisions that generally prohibit group health plans and health insurance issuers from discriminating based on "genetic information." We will focus on the application of *GINA* to group health plans (although the same rules generally apply to health insurance issuers). The following discussion is drawn largely from the Title I regulations of *GINA* and FAQs discussed in *Benefit News Briefs 2010-66*. When we refer to *GINA* herein, we are limiting the discussion to Title I of *GINA*.

General Prohibitions on the Use of Genetic Information

Under *GINA*, group health plans cannot base premiums for a plan on genetic information. *GINA* also generally prohibits plans from requesting or requiring an individual to undergo genetic tests, and prohibits a plan from collecting genetic information prior to or in connection with enrollment, or for "underwriting purposes."

What is Genetic Information?

"Genetic information" means information about an individual's genetic tests, the genetic tests of family members of the individual, the *manifestation of a disease or disorder in family members of the individual* (i.e. family medical history) or any request for or receipt of genetic services, or participation in clinical research that includes genetic services by the individual or a family member of the individual. Genetic information does not include information about the sex or age of any individual.

What Does the Term "Underwriting Purposes" Mean?

Under *GINA,* the definition of "underwriting purposes" is broader than the commonly held idea of activities relating to rating and pricing a group policy. Under *GINA,* "underwriting purposes" means, with respect to a group health plan:

- Rules for or determination of eligibility (including enrollment and continued eligibility) for benefits under the plan (including *changes in deductibles* or *other cost-sharing mechanisms* in return for activities such as *completing a health risk assessment (HRA)* or *participating in a wellness program*);

- Computation of contribution amounts under the plan (including discounts, rebates, payments in kind, or other premium differential mechanisms in return for activities such as completing an HRA or participating in a wellness program); and

- Other activities related to the creation, renewal, or replacement of a contract of health insurance or health benefits.

GINA, Underwriting and Health Risk Assessments

Title I of *GINA* prohibits a plan from collecting genetic information (including family medical history) *prior to or in connection with enrollment or at any time for underwriting purposes*. Thus, under *GINA*, plans must ensure that any HRA conducted prior to or in connection with enrollment does not collect genetic information, which includes *family medical history*, and that any genetic information is not used for underwriting purposes.

Therefore, a plan conducting an HRA prior to or in connection with enrollment, should ensure that the HRA explicitly states that genetic information should not be provided. A definition of "genetic information" should inform the user that "family medical history" is "genetic information."

Accordingly, a plan cannot require an individual to complete an HRA that requests family medical history in order to receive a wellness program reward, such as a financial incentive, in return for the completion of the HRA as that would be using genetic information for underwriting purposes, which is prohibited. This is the result even if rewards are not based on the outcome of the assessment.[4]

However, a plan may use an HRA that requests family medical history, *if* it is requested to be completed after and unrelated to enrollment and *if* there is no premium reduction or any other reward for completing the HRA.

A plan may offer a premium discount or other reward for completion of an HRA that does not request family medical history or other genetic information, such as information about any genetic tests the individual has undergone. The plan should ensure that the HRA explicitly states that genetic information should not be provided. The regulation has numerous examples, "*excerpted here*."

For example, plans may use two separate HRAs:

(1) one that collects genetic information, such as family medical history, which is conducted after and unrelated to enrollment and is not tied to a reward, and

(2) another HRA that does not request genetic information, which can be tied to a reward.

In conclusion, under Title I of *GINA*, a group health plan cannot condition access to a plan or benefit structure offering lower deductible or coinsurance amounts based upon a participant completing an HRA that collects genetic information, including family medical history.

A Look Ahead

With this brief refresher behind us, in an upcoming newsletter we will take a look at the new regulations under *GINA* Title II and the new revised *ADA* Title I regulations. The new *ADA* Title I and *GINA* Title II regulations build on these *GINA* Title I regulations and more specifically address the use of a physical exam or completion of an HRA as part of a "wellness program" to gain access to a "better" plan of benefits (lower premium, deductible or coinsurance rates). They also detail what incentives can be offered an employee for an employee's spouse for providing certain information to the Plan.

Given that these various regulations are not co-extensive, although they do overlap, group health plans that wish to use HRAs and/or provide wellness programs using HRAs or medical exams will need to carefully parse the regulations to assure compliance. In addition to the Title I and Title II of *GINA* and Title I of the *ADA* rules, there are also the *HIPAA* rules on wellness programs that need to be taken into account.

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For more on the *HIPAA* Wellness Program rules see:

Benefit News Briefs 2006-65 **-** Final HIPAA Nondiscrimination and Wellness Regulations

Research Memo 2007-18 **-** "Wellness Programs" Under HIPAA Regulations

Client Bulletin 2012-64 **-** Proposed Wellness Regulations Ups Rewards from 20% to 30%

Client Bulletin 2013-33 **-** Final Wellness Regulations - "Rewards" from 20% to 30% or More

HIPAA Wellness Rules at 29 CFR:
§2590.702 Prohibiting discrimination based on a health factor

§2590.702-1 Prohibiting discrimination based on genetic information

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[1] Title II of *GINA* is administered by the EEOC, as is Title I of the *ADA*. Title I of *GINA* is jointly administered by the IRS, DOL and HHS.

[2] The *ADA* is comprised of five Titles: *Title I: Employment, Title II: Public Services, Title III: Public Accommodations And Services Operated By Private Entities, Title IV: Telecommunications and Title V: Miscellaneous Provisions.*

[3] *GINA* is comprised of three Titles: *Title I: Genetic Nondiscrimination in Health Insurance, Title II: Prohibiting Employment Discrimination on the Basis of Genetic Information and Title III: Miscellaneous Provisions.*

[4] *Preamble*, Interim Final Title I *GINA* regulations at 74 FR 51668, 3rd col.