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BENEFIT NEWS BRIEFS

EEOC Publishes Final ADA and GINA Regulations Concerning Wellness Programs

Model Notice Released Also

The U.S. Equal Employment Opportunity Commission (EEOC) recently issued a final rule under the *Americans with Disabilities Act (ADA)* and a final rule under 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 although they will may affect the design requirements of multiemployer health plans, as explained below.

The final rules are applicable to *the first plan year on or after 2017*.

The new *GINA* regulations affect Title II[1] of *GINA* which applies to employers; whereas, Title I of *GINA* applies specifically to health plans, including multiemployer group health plans. The *ADA* regulations affect Title I of the *ADA* which is applicable to "employment."[2] The new regulations focus on "wellness programs".

However, in conversations with the EEOC staff listed in the *Preambles* to these new regulations the EEOC staff stated these regulations will impact multiemployer group health plans with wellness programs. Although the new regulations are aimed at employers, we were informed that multiemployer plans that have contributing employers with more than 15 employees are required 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 employer 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 apparently be required 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.

In addition to the final rules, the EEOC also released *ADA* and *GINA* Fact Sheets and *ADA* and *GINA* Questions and Answers.

Specially prepared copies of the Q&A documents with a table of contents are available by "clicking" on the links below:

- *ADA* Questions and Answers (23 Q&As)
- *GINA* Questions and Answers (22 Q&As)

Specially prepared copies of the Fact Sheets are available by "clicking" on the links below. The Fact Sheets are less detailed than the Q&As and aimed at employers with 15 or more employees, but are helpful in understanding the rules that must be reflected in the design of multiemployer health plans with wellness programs.

- *ADA* Fact Sheet
- *GINA* Fact Sheet

In addition, we have prepared redlines of the *GINA* regs and *ADA* regs:

- Redline *ADA* Regs
- Redline *GINA* Regs
- Comparison Chart *GINA* and *ADA* regs
- New *ADA* Interpretive Guidance

Background – Other Federal Laws Affecting Group Health Plans

While one generally thinks of *ERISA* as the law affecting employer-sponsored group health plans, including multiemployer group health plans, there are also several other federal laws governing wellness programs offered by employers. Wellness programs must comply with the *ADA*, *GINA* and other employment discrimination laws enforced by the EEOC. Under *ERISA*, wellness programs that are part of or provided by a group health plan must comply with the nondiscrimination provisions of the *Health Insurance Portability and Accountability Act of 1996 (HIPAA)*, as amended by the *Affordable Care Act (ACA).* The *ADA* and *GINA* apply to employers with 15 or more employees. Any references below to "group health plan" includes *multiemployer group health plans*.

While these final Title II *GINA* rules are aimed at "employers" and not "plans", they affect the design of multiemployer plans if the actions of the plan are attributed to

contributing employers. Plans may wish to consult with Fund Counsel for an opinion as to the application of these final Title II *GINA* regulations to their plan.

The final *ADA* regulations specifically apply to wellness plans offered in conjunction with group health plans. While the *ADA* regulations do contain specific rules aimed at individuals with disabilities, the *ADA* regulations also have general rules about disability-related inquiries and *medical examinations* which are part of *health risk assessments (HRAs).*

***ADA* Final Rule**

The *ADA* prohibits discrimination against individuals on the basis of disability in regard to employment, compensation and other terms, conditions, and privileges of employment, including ''*fringe benefits available by virtue of employment, whether or not administered by the covered entity*.'' The *ADA* also restricts the medical information employers may obtain from employees by generally prohibiting them from making disability-related inquiries or requiring medical examinations. The *statute, however, provides an exception to this rule for voluntary employee health programs, which include many workplace wellness programs.*

This final rule amends the regulations and interpretive guidance implementing Title I of the *ADA* to provide guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that ask them to respond to disability-related inquiries and/or undergo medical examinations. This rule **applies to all *wellness programs* that include** disability-related inquiries *and/or* **medical examinations,** including those that are part of an *HRA*.

EEOC guidance defines "medical examinations" as:

Q&A2: A "medical examination" is a **procedure or test that seeks information about an individual's physical or mental impairments or health**. **Medical examinations** include, but are not limited to, the following:

- vision tests conducted and analyzed by an ophthalmologist or optometrist;
- blood, urine and breath analyses to check for alcohol use;
- blood, urine, saliva and hair analyses to detect disease or genetic markers (e.g., for conditions such as sickle cell trait, breast cancer, Huntington's disease);
- blood pressure screening and cholesterol testing;
- nerve conduction tests (i.e., tests that screen for possible nerve damage and susceptibility to injury, such as carpal tunnel syndrome);
- range-of-motion tests that measure muscle strength and motor function;
- pulmonary function tests (i.e., tests that measure the capacity of the lungs to hold air and to move air in and out);
- psychological tests that are designed to identify a mental disorder or impairment; and,

- diagnostic procedures such as x-rays, computerized axial tomography (CAT) scans, and magnetic resonance imaging (MRI).

We will concentrate on two aspects of the final *ADA* rules: (1) the concept of a "wellness program" and (2) the "voluntariness" of the wellness program.

"Wellness Program"

In order for a "wellness program" to qualify as an "employee health program" under the *ADA*, any disability-related inquiries or medical examinations that are part of such program must be *reasonably designed* to *promote health or prevent disease*. A program satisfies this standard if it has a *reasonable chance* of improving the health of, or *preventing disease in*, participating employees.

A program consisting of a measurement, test, screening, or collection of health-related information without providing results, follow-up information, or advice designed to improve the health of participating employees is not reasonably designed to promote health or prevent disease, unless the collected information actually is used to design a program that addresses at least a subset of the conditions identified.

A program also is not *reasonably designed* if it exists mainly to shift costs from the covered entity to targeted employees based on their health or simply to give an employer information to estimate future health care costs. Whether an employee health program is reasonably designed to promote health or prevent disease is evaluated in light of all the relevant facts and circumstances.

Voluntary

A wellness program must be voluntary. A wellness program that includes disability-related inquiries or medical examinations (including those that are part of a health risk assessment) is voluntary as long as it:

- Does not require employees to participate;
- Does not deny coverage *under any of its group health plans or particular benefits packages* within a group health plan for non-participation, **or** limit the extent of benefits (except as otherwise may be allowed) *for employees who do not participate;*
- Does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees; and
- Provides employees with a notice that:
  - is written so that the employee from whom medical information is being obtained is reasonably likely to understand it;
  - describes the type of medical information that will be obtained and the specific purposes for which the medical information will be used; and
  - describes the restrictions on the disclosure of the employee's medical information, the employer representatives or other parties with whom the information will be shared, and the methods that the covered entity will use to ensure that medical information is not improperly disclosed (including whether it complies with the HIPAA Privacy and Security Rules).

The EEOC released a model notice at:
https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm.

And also released FAQs on the Notice requirement at:
https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-notice.cfm

The *Preamble* explained that prohibition against denying participation in a benefit option due to a failure to undergo a medical examination which is part of an HRA addresses a trend towards employers experimenting with tiered health plan benefit and cost sharing structures (sometimes called ''gateway plans'') that base eligibility for a particular health plan on completing an HRA or undergoing biometric screenings.

For example, one insurer commented that a current trend is to allow employees who participate in a wellness program to enroll in a comprehensive health plan, while offering non-participants a less comprehensive plan or one that requires higher premiums or cost sharing. However, when an employer denies access to a health plan because the employee does not answer disability-related inquiries or undergo *medical examinations*, it discriminates against the employee by requiring the employee to answer questions or undergo *medical examinations* that are not job related and consistent with business necessity and cannot be considered voluntary.

Thus, these final *ADA* rules will not allow plans to condition participation in particular coverages or benefit packages on completion of a *medical examination, including those that are part of an HRA.*

Other aspects of the final rule address the percentage limits on incentives to participate in the wellness program. Generally the maximum incentive is 30% of the premium (up to 50% for tobacco-related incentives)

GINA

These new *GINA* regulations affect only Title II of *GINA* and apply to employer-sponsored wellness programs, in particular inducements for the providing spousal information. As noted earlier, Title I of *GINA* addresses the wellness plan rules applicable to group health plans. See *Benefit News Briefs 2016-32.*

Congress enacted Title II of *GINA* to protect job applicants, current and former employees, labor union members, and apprentices and trainees from employment discrimination based on their genetic information. *GINA* generally restricts the acquisition and disclosure of genetic information and prohibits the use of genetic information in making employment decisions.

There are only six limited exceptions to this rule on obtaining genetic information. One exception permits employers that offer health or genetic services, including such services offered as part of voluntary wellness programs, to request genetic information as part of these programs, as long as certain *specific* requirements are met.

This final rule amends the regulations relating to the exception for obtaining genetic information under employer-sponsored wellness programs and addresses the extent to which an employer may offer an incentive to an employee for the employee's spouse to provide information about the spouse's *manifestation of disease or disorder* as part of an HRA administered in connection with an employer-sponsored wellness program. The final rule reiterates that employers may offer children the *opportunity to participate* in wellness programs, as long as they are not offered inducements in exchange for information about their current health status or about their genetic information.

Thus, employers may not generally offer an incentive (financial or in-kind), whether in the form of a reward or penalty, for individuals to provide genetic information, but they may offer incentives for completion of HRAs that include questions about family medical history or other genetic information, provided the employer makes clear, in language reasonably likely to be understood by those completing the HRA, that the incentive will be made available whether or not the participant answers questions regarding genetic information.

The HRA, which may include a medical questionnaire, a medical examination (*e.g.,* to detect high blood pressure or high cholesterol), or both, must otherwise comply with the rules and in the same manner as if completed by the employee, including the requirement that the *spouse provide prior, knowing, voluntary and written authorization*.

The authorization form must describe the confidentiality protections and restrictions on the disclosure of genetic information. The HRA must also be administered in connection with the spouse's receipt of health or genetic services offered by the employer, including such services offered as part of an employer sponsored wellness program.

GINA also has reasonable design requirements on the type of program that is used to obtain such health information similar to the definition of "employee health program" under the *ADA*.

Under Title II of *GINA*, an employer may not deny access to health insurance or any package of health insurance benefits to an employee, or the spouse or other covered dependent of the employee due to a spouse's refusal to provide information about his or her manifestation of disease or disorder to an employer-sponsored wellness program.

Other aspects of the final rule address limits on incentives to participate in the wellness program. Generally the maximum incentive is 30% of the premium (up to 50% for tobacco-related incentives)

For a review of the *HIPAA* wellness regulations, see *Research Memo 2007-18*.

Conclusion

At first thought, offering a wellness program seems like a simple proposition; however, because various federal laws affect such programs, it is more involved

than one might imagine. A helpful study on wellness programs is available at: *https://www.dol.gov/ebsa/pdf/WellnessStudyFinal.pdf*.

Plans with wellness programs should review their programs and use of rewards, incentives and penalties in light of the final *ADA* and *GINA* regulations. A brief list of practice pointers is available by "*clicking here*."

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IRS Internal Guidance on Taxability of Wellness Program Cash Rewards

An IRS Office of Chief Counsel Memorandum concluding the cash awards given to participants in employer-sponsored wellness programs are taxable income to the recipient. Since this internal guidance and not IRS guidance to the public, there is no "effective date" but presumably the memo represents the IRS view of the law now. It would be helpful if the IRS would release some official guidance and address any possible retroactive effect of this memorandum's conclusions. The document is available by "*clicking here*."

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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.*