New GINA Regulations from EEOC

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GINA REGULATIONS

As readers may recall, the Genetic Information Nondiscrimination Act of 2008 (GINA) was created to address perceived misuse of genetic information by employers and providers of health insurance. In 2009, the Internal Revenue Service published final regulations on GINA, which applied to insurers providing health insurance and self-insured group health plans. These IRS regulations were addressed in a previous column in the March/April 2010 issue of this journal. Now the Equal Employment Opportunity Commission (EEOC) has issued its final GINA regulations,[1] which are applicable to employers provided they have at least 15 employees. The EEOC regulations took effect on January 10, 2011.

"Genetic information" is defined as genetic tests and the manifestation of disease or disorder in family members (i.e., family medical history). A genetic test does not include an analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes (CPM); a medical examination that tests for the presence of a virus that is not composed of DNA, RNA, or CPM; a test for infectious and communicable diseases transmitted through food handling; blood counts; cholesterol tests; liver function tests; and tests for the presence of alcohol or illegal drugs (although a test for a genetic predisposition for alcoholism or drug use is a genetic test).

It is still permissible for an employer to require a pre-employment physical as long as such physical is restricted to determining whether the applicant can perform the job in question. Under these EEOC regulations, the physician performing the pre-employment examination cannot ask for family history or any other genetic information. To further compliance with this requirement, the EEOC has suggested model language that should be included with any request from an employer to a physician regarding a physical examination for employment purposes:

> *The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information,' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.*

On a similar note, when physicians are providing medical information to an employer in response to a request under the Family and Medical Leave Act or the Americans with Disability Act, they should not provide any genetic information about the individual (and the employer should state this fact in communications to the physician by using the model notice cited above).

Often employers seek to obtain genetic information in the form of family history under a wellness program in order to better target the medical problems found in the employee population. The EEOC, just like the IRS, states that while an employer can request family history information, the provision of such information must be totally voluntary on the part of the employee. An employer can still use financial inducement in order to encourage employees to complete a health risk assessment questionnaire but it must be made clear to the employee that the reward will be paid whether or not the employee provides genetic and family history information. Here are examples from the regulations:

> *(A) A covered entity offers $150 to employees who complete a health risk assessment with 100 questions,*

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the last 20 of them concerning family medical history and other genetic information. The instructions for completing the health risk assessment make clear that the inducement will be provided to all employees who respond to the first 80 questions, whether or not the remaining 20 questions concerning family medical history and other genetic information are answered. This health risk assessment does not violate Title II of GINA.

(B) Same facts as the previous example, except that the instructions do not indicate which questions request genetic information; nor does the assessment otherwise make clear which questions must be answered in order to obtain the inducement. This health risk assessment violates Title II of GINA.

Employers are permitted some flexibility in targeting particular at-risk individuals in the employee population by offering a financial inducement to address the identified problem, although the inducement must be offered to both employees who voluntarily disclose a family medical history and to employees who are already diagnosed with the medical condition in question, and as well as to employees whose lifestyle choices make the medical condition more likely.

A covered entity may offer financial inducements to encourage individuals who have voluntarily provided genetic information (e.g., family medical history) that indicates that they are at increased risk of acquiring a health condition in the future to participate in disease management programs or other programs that promote healthy lifestyles, and/or to meet particular health goals as part of a health or genetic service. However, to comply with Title II of GINA, these programs must also be offered to individuals with current health conditions and/or to individuals whose lifestyle choices put them at increased risk of developing a condition. For example:

(A) Employees who voluntarily disclose a family medical history of diabetes, heart disease, or high blood pressure on a health risk assessment that meets the requirements of (b)(2)(ii) of this section and employees who have a current diagnosis of one or more of these conditions are offered $150 to participate in a wellness program designed to encourage weight loss and a healthy lifestyle. This does not violate Title II of GINA.

(B) The program in the previous example offers an additional inducement to individuals who achieve certain health outcomes. Participants may earn points toward 'prizes' totaling $150 in a single year for lowering their blood pressure, glucose, and cholesterol levels, or for losing weight. This inducement would not violate Title II of GINA.

Just as is the case under HIPAA, for those employees who cannot qualify for the inducement due to a medical condition or because it is medically inadvisable, the employer must offer an alternative goal as a reasonable accommodation.

The regulations do recognize the reality that sometimes medical information is disclosed to an employer in a totally inadvertent manner. This is called the "water cooler exception." This concern is addressed in the preamble as follows:

Congress intended this exception to address what it called the water cooler problem in which an employer unwittingly receives otherwise prohibited genetic information in the form of family medical history through casual conversations with an employee or by overhearing conversations among co-workers. Congress did not want casual conversation among co-workers regarding health to trigger federal litigation whenever someone mentioned something that might constitute protected family medical history.

Although the genetic information may be obtained inadvertently, an employer still has to be careful not to turn this inadvertent disclosure into a prohibited act by asking follow-up questions seeking to disclose additional genetic information.

NEW STRICT NONDISCRIMINATION RULES FOR FULLY INSURED PLANS

Ever since 1978, self-insured group health plans have been subject to nondiscrimination requirements, which means eligibility for benefits, the duration of benefits, and the amount of benefits could not favor highly compensated employees. If discrimination was found, the highly compensated employee in question would have to pay taxes on all or a portion of the benefits provided. It should be noted that a "highly compensated employee" for this purpose is an employee in the top 25% of employees ranked by pay, not the "highly compensated employee" definition used for a 401(k) plan. The same requirement was not extended to fully insured group health plans since it was believed that underwriting would take care of any discrimination problems. What happened, however, was that some carriers developed insurance products that favored or only covered highly compensated employees. Employers also frequently paid all or a higher percentage of the premium for highly compensated employees and extended coverage and absorbed all or a substantial portion of the cost as part of a severance agreement for an executive.

Congress reacted to what it viewed as abuses by including in the Patient Protection and Affordable Care Act (PPACA) a requirement that fully insured plans be subject to the same type of nondiscrimination rules as previously

applied to self-insured group health plans. Effective for plan years beginning on or after September 23, 2010, fully insured plans will be subject to a nondiscrimination requirement. Grandfathered plans are exempt from these rules. The Internal Revenue Service in Notice 2011-1 delayed implementation of this requirement until guidance is published.

While, as noted above, the penalty for discrimination under a self-insured plan is tax to the highly compensated employee, under a fully insured plan the penalty *paid by the employer*, not the employee, is $100 a day for each person who suffered from the discrimination up to a maximum of $500,000 for the period of noncompliance.

No regulations have been issued under this new provision but it is widely believed by benefits practitioners that practices such as subsidizing on a tax-free basis premiums at a higher level for highly compensated employees, restricting coverage under an insured plan to such a group, and providing health coverage as part of a severance package that is more favorable than that offered to rank-and-file terminating employees will no longer be permitted. Further guidance hopefully will address these issues.

CAFETERIA PLAN CHANGES

Another provision of the PPACA states that starting January 1, 2011, over-the-counter medications cannot be reimbursed under a health flexible spending account, which is part of a Code Section 125 cafeteria plan. This effective date applies regardless of the plan year of the plan. Notice 2010-59 states reimbursement is permissible only if the medicine or drug: (1) requires a prescription; (2) is available without a prescription (an over-the-counter medicine or drug) and the individual obtains a prescription; or (3) is insulin. While it was hoped that perhaps merely a doctor's note would be sufficient for reimbursement, the IRS took a conservative position on what it means to secure a prescription:

> *A prescription means a written or electronic order for a medicine or drug that meets the legal requirements of a prescription in the state in which the medical expense is incurred and that is issued by an individual who is legally authorized to issue a prescription in that state.*

The IRS did grant a short grace period of until June 30, 2011, for cafeteria plans to be formally amended to reflect this new rule.

ONE-YEAR RELIEF GRANTED TO DEFINED BENEFIT PLANS

In Notice 2010-77, the IRS granted a one-year extension for defined benefit plans to be amended to comply with new funding rules and for cash balance pension plans to comply with new vesting rules. The new deadline is the last day of the plan year beginning on or after January 1, 2011. ■

The above discussion is intended to briefly summarize certain recent legal developments in employee benefits, but is not intended to be legal advice and must not be relied upon as such. All readers are urged to raise any concerns they may have based on matters discussed in this column with experienced benefits legal counsel.

REFERENCE

1. *Federal Register*. November 9, 2010;75(216):68911-68939.