

Management Alert

GINA Restricts Acquisition and Use of Genetic Information by Employers and Group Health Plans

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits discrimination on the basis of genetic information in health plans and employment. Both employers and group health plans should be aware of approaching deadlines.

For Employment Purposes

On November 21, 2009, employers must begin complying with Title II of GINA. GINA limits employer acquisition of genetic information, requires employers to treat genetic information as confidential, and prohibits employers from discriminating against applicants or employees on the basis of genetic information. "Genetic information" includes information about genetic testing of, as well as the manifestation of a disease or disorder in, both the individual and family members of the individual. Final regulations from the Equal Employment Opportunity Commission (EEOC) are expected to be issued by November 21, 2009.

Employers should prepare for compliance by conducting self-audits, adjusting their policies and practices, and training. Such measures should include: omitting genetic information from post-offer, pre-employment health history examinations and/or questionnaires; updating policies to prohibit discrimination based on genetic information; adding claims of "genetic discrimination" to waivers and releases where appropriate; and segregating lawfully-acquired genetic information from personnel files. Employers also must post information regarding GINA's protections, which is contained in EEOC's revised "Equal Employment Opportunity is the Law" poster, available at: http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf.

Among other things, the proposed regulations: (i) limit employer liability where genetic information is inadvertently acquired; (ii) permit employers to obtain genetic information through a voluntary wellness program if certain requirements are met (e.g., voluntary, written authorization and disclosure of genetic information to the employer only in aggregate terms); and (iii) underscore that GINA's protections differ from those under the Americans With Disabilities Act, as amended. The final regulations are expected largely to track the proposed regulations. Comments submitted by Seyfarth Shaw are available at: <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480970cf1>.

For Group Health Plan Purposes

Title I of GINA prohibits a group health plan from: (1) increasing premiums or contributions based on genetic information; (2) requesting or requiring that an individual or family member undergo a genetic test; and (3) collecting genetic information prior to or in connection with enrollment, or at any time for underwriting purposes.

Title I of GINA was effective for plan years beginning after May 21, 2009. The Secretaries of Labor, Treasury and Health and Human Services recently issued interim final regulations implementing the genetic nondiscrimination provisions of Title I, effective for plan years beginning on and after December 7, 2009. Therefore, calendar year plans must be in compliance by January 1, 2010. Many health risk assessments (HRAs) and disease management programs offered under employer group health plans are affected by these new regulations.

No Rewards or Penalties Under Wellness Program

In an effort to lower health care costs, many entities have recently rolled out wellness programs that reward health plan participants for completing a health risk assessment (HRA) (e.g., by providing lower premiums or lower deductibles). However, under the new regulations, a plan may not offer participants a different deductible, premium or contribution amount in return for completing a health risk assessment or participating in a wellness program that collects genetic information.

Notably, the examples in the regulations make it clear that a plan may offer a reward for completing an HRA (after and unrelated to enrollment) that does not ask about family medical history or genetic tests or services received by the individual or the individual's family. The health plan may also request that the individual complete an HRA that inquires about family medical history and/or individual genetic test results, provided that completion of the HRA is wholly voluntary and is not tied to any financial incentive or disincentive.

Disease Management Programs

A group health plan may not condition the availability of a disease management program or other benefits on an individual's answers to HRA questions about individual or family medical history. However, if an individual seeks an existing benefit under a group health plan, and the plan conditions the benefit on genetic information, the regulations permit the plan to request the minimum genetic information necessary to determine whether the benefit is medically appropriate. For example, although a plan may not condition eligibility for a diabetes management program on an individual's answers to questions about his medical history, a plan that offers such a program to all individuals for whom it is medically appropriate (based on whether the individual has or is at risk for diabetes) may require the individual to disclose genetic information so that the plan can determine whether the program is medically appropriate for the individual.

Group health plan sponsors should conduct a compliance review of their HRAs and wellness programs to ensure that their programs comply with GINA. Failure to do so would result in penalties under HIPAA.

If you would like assistance in connection with these matters, please contact the Seyfarth attorney with whom you work, or any Employee Benefits or Labor and Employment attorney on our Website: www.seyfarth.com.



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