

## GINA Undercuts the Utility of Health Risk Assessments

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Wellness initiatives that include health risk assessments (HRAs) will be significantly impacted by the Genetic Information Nondiscrimination Act of 2008 (GINA). Under GINA, family medical history is genetic information. Since the passage of GINA on May 21, 2008, a number of groups have asked the Internal Revenue Service (IRS) and Department of Labor (DOL) to interpret GINA in a way that would permit the continued inclusion of family medical history in HRAs regardless of whether individuals receive financial incentives for completion of the HRAs. The hope for such an interpretation ended when the IRS and DOL recently released an advance copy of interim final GINA regulations that are scheduled to be published on October 7, 2009.

### GINA includes two prohibitions relevant to HRAs:

1. A group health plan cannot ask any questions about the individual's family medical history prior to or in connection with an individual's enrollment in the plan. An individual is enrolled in a group health plan on the date that the individual's coverage becomes effective.
2. Even after enrollment, a group health plan cannot ask any questions about the individual's family medical history if the information will be used for "underwriting." "Underwriting" is broadly defined to include "changing deductibles or other cost-sharing mechanisms, or providing 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." Preamble to Interim Final Regulations, page 19.

The application of the second prohibition is illustrated by two examples in the regulations:

#### *Example 1.*

*Facts.* A group health plan provides a premium reduction to enrollees who complete an HRA. The HRA is requested to be completed after enrollment and includes questions about the individual's family medical history. Whether or not it is completed or what responses are given on it has no effect on an individual's enrollment status, or on the enrollment status of members of the individual's family.

*Conclusion.* In this Example 1, the HRA includes a request for genetic information (that is, the individual's family medical history). Because completing the HRA results in a premium reduction, the request for genetic information is for underwriting purposes. Consequently, the request violates the prohibition on the collection of genetic information.

#### *Example 2.*

*Facts.* The same facts as Example 1, except there is no premium reduction or any other reward for completing the HRA.

*Conclusion.* In this Example 2, the request is not for underwriting purposes, nor is it prior to or in connection with enrollment. Therefore, it does not violate the prohibition on the collection of genetic information.

29 CFR §2590.702-1(d).

Along with the publication of the IRS and DOL final interim regulations under GINA, the Department of Health and Human Services (HHS) will issue proposed regulations amending the HIPAA privacy rules for GINA. Under the HHS proposed

regulations, any use of family medical history for underwriting purposes would be a violation of the HIPAA privacy rules. If finalized as proposed, the HHS proposed regulations may also require the revision of a health plan's notice of privacy practices to state that the plan is not permitted to use genetic information for underwriting purposes.

In addition to the problems under GINA, the application of the Americans with Disabilities Act (ADA) to HRAs is still an open issue. The ADA generally prohibits making inquiries into employees' disabilities and requiring medical examinations unless such inquiries and examinations are voluntary. Earlier this

year, a letter from the Equal Employment Opportunity Commission (EEOC) expressed the opinion that an HRA is not voluntary if an employee must complete the HRA in order to be eligible for group health coverage. The letter is not formal guidance but is an indication of the EEOC's current thinking on the issue.

GINA applies to plan years starting after May 21, 2009 (January 1, 2010 for calendar year plans). If your company asks employees to complete an HRA, you provide any sort of financial reward for the completion of the HRA and the HRA includes questions about individuals' family medical history, you will want to revisit the arrangement in the near future.

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