*GINA and Wellness Programs: What Every Company Needs to Know*

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Between provisions of the *Patient Protection and Affordable Care Act* (PPACA)slated for continued implementation over the next few years and programs such as the 2012 *National Healthy Worksite Program* from the Centers for Disease Control and Prevention, workplace wellness programs are receiving renewed support from the federal government.

But before your company runs out to sign up for a corporate wellness program, there are several things you need to know first. In the first of our three part series, we will examine various areas to consider before implementing a company wellness program. With advice from skilled individuals in the healthcare arena such as a healthcare attorney or consultant, many of these issues can be dealt with in a way such that you can ensure your employees implement lifestyle changes and habits for a healthier 2012.

This article will focus on wellness programs, the *Genetic Information Non-discrimination Act* (GINA) and their intersection. Future articles will focus on HIPAA and the Americans with Disabilities Act.

GINA was signed into law on May 21, 2008 and includes two titles. We will focus on Title II which deals with GINA in the private employer arena. Title II regulates employers, employment agencies, labor organization practices and training programs and how they utilize genetic information. GINA states that “[a]covered entity may not request, require, or purchase genetic information of an individual or family member of the individual, except as specifically provided in paragraph (b) of this section.”[[1]](#endnote-1) There is an exception for wellness programs which allows for certain genetic information to be gathered and utilized by employers as part of a voluntary wellness program.

The exception has certain caveats. The exception only applies where the individual voluntarily provides genetic information to the entity and where an employee is not penalized when they fail to provide such information. Additionally, the individual/employee must provide written authorization that is knowing and voluntary, and the individual must understand the type of genetic information that will be obtained and any restrictions on how the information can be used.[[2]](#endnote-2) Genetic information must be provided in the aggregate to entities; individuals cannot be identifiable from such information. Finally, and probably most difficult for entities, there cannot be a financial incentive offered to provide genetic information, but there can be a financial incentive for individuals to complete a health risk assessment that includes questions regarding genetic information as long as it is clear that the individual will receive that financial incentive regardless of whether they answer the genetic information questions. The regulation helpfully gives an example:

 A covered entity offers $150 to employees who complete a health risk assessment with 100 questions, 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.

 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.[[3]](#endnote-3)

An entity may also offer financial incentives where an individual provides genetic information as described above and their answers indicate that they are at increased risk for developing certain conditions. These individuals can be offered information regarding disease management and programs to lead a healthy lifestyle based on such genetic information. Such programs need to be offered to individuals equally. An example given by the regulation is where an employee discloses a family history of diabetes, heart disease or high blood pressure on a health risk assessment. If employees who currently have such conditions are also offered disease management assistance, this is in line with the regulation. Employers are even able to offer additional incentives for lowering blood pressure or glucose levels which would be in line with the regulation. It is only where employees are not given equal access to such disease management programs that employers begin to run afoul of the law.

In response to questions that arose based on the regulations, the *Equal Employment Opportunity Commission* (EEOC) released an information discussion letter on June 24, 2011[[4]](#endnote-4) which clarified the above issues, and specifically the incentive issue. According to the EEOC, entities are indeed able to use incentives to guide voluntarily obtained genetic information disease management for employees. However, such disease management programs must be offered equally to individuals who already have health conditions or engages in other lifestyle choices that put them at risk for certain diseases. So if, for example, an employee answers questions on a health risk assessment that suggest an increased risk for developing diabetes, an employer can offer incentives for that employee to participate in diabetes prevention health programs but they must also offer programming to individuals who already have diabetes, and individuals engaging in unhealthy lifestyle choices that put them at risk for diabetes.

So where does this leave employers? The best advice for employers is to consult with a health/wellness attorney regarding whether your current program and the incentives offered are in line with GINA. If an employer does not currently have a program, it is important to ensure that the program they wish to implement meets the requirements described above. Given the emphasis on wellness programs especially within the PPACA, such programming will become increasingly important for small and large companies alike to ensure the health of all employees.

1. <http://tinyurl.com/76qref5>. “Request” includes conducting an Internet search on an individual in a way that is likely to result in a covered entity obtaining genetic information; actively listening to third-party conversations or searching an individual's personal effects for the purpose of obtaining genetic information; and making requests for information about an individual's current health status in a way that is likely to result in a covered entity obtaining genetic information [↑](#endnote-ref-1)
2. <http://tinyurl.com/76qref5>. [↑](#endnote-ref-2)
3. <http://tinyurl.com/76qref5>. [↑](#endnote-ref-3)
4. <http://www.eeoc.gov/eeoc/foia/letters/2011/ada_gina_incentives.html>. [↑](#endnote-ref-4)