Reinhart

GINA: Final ECOA Regulations for Title II

On November 9, 2010, the Equal Employment Opportunity Commission (EEOC) published final regulations under Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA). Title II of GINA applies to employers and prohibits the use of genetic information in employment, restricts employers from requesting, requiring, or purchasing genetic information, and strictly limits the disclosure of genetic information. The final regulations are effective January 10, 2011, and generally follow the proposed regulations issued in March 2009. Previously, on October 7, 2009, the Departments of Labor, Treasury, and Health and Human Services issued final interim regulations under Title I of GINA, which applies to group health plans and health insurers. The 2009 Title I regulations impose significant restrictions on wellness programs which must be reconciled with the new Title II regulations.

POSTED:

Dec 21, 2010

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General Rule and Exceptions

Title II generally prohibits an employer from requesting, requiring, or purchasing genetic information of an employee or an employee's family member. The final rule clarifies that specific intent to acquire genetic information is not required to violate GINA. The regulations include an exception for inadvertent acquisition of genetic information and provide a safe harbor for employers requesting medical information from a third party. Under the safe harbor, if the employer includes a statement that genetic information should not be provided and the third party provides the information, the employer will not be in violation of GINA for acquiring this information. Other exceptions include requests in the context of voluntary wellness programs as further described below, requests for family medical history in the context of the Family and Medical Leave Act (FMLA) or state or local leave laws, and acquisition of genetic information when it is readily available through public sources such as newspapers or the internet.

Wellness Programs Exception

Employers can request genetic information under a wellness program without violating GINA if the following requirements are met:

- The program is voluntary. This means that the employer neither requires the disclosure of the information nor penalizes those who choose not to provide it.
- The individual must provide a knowing, voluntary, and written authorization.

- The individually identifiable genetic information acquired by the wellness program is used only as authorized by the employee within the wellness program, and is disclosed only to the employee (or family members receiving services), the licensed health care professional, and/or genetic counselor. No individually identifiable genetic information can be made available to the employer, including managers, supervisors, or others who make employment decisions.

Reinhart Comment: In March 2009, the EEOC published an opinion letter indicating that a wellness program requiring an employee to complete a health risk assessment to be eligible for group health benefits was not "voluntary" as contemplated by the Americans with Disabilities Act (ADA), which uses the same standards as GINA for this purpose. Since then, the question is whether or at what level the offering of a financial inducement for participation in a wellness program renders the program "involuntary." The Title II regulation confirms that an employer can offer a financial inducement to individuals to provide genetic information through a health risk assessment as long as it is clear that the inducement will be made available whether the individual answers the genetic questions or not. The regulations do not, however, specifically answer at what point a financial inducement might be so large as to render the program involuntary.

Title I Reconciliation Issues

Plan sponsors should keep in mind that Title I further requires that a request for genetic information cannot be made prior to or in connection with enrollment. In addition, the preamble to the Title I regulations contains the following observation, "Wellness programs that provide rewards for completing HRAs that request genetic information, including family medical history, violate the prohibition against requesting genetic information for underwriting purposes." Therefore, if an employer connects the financial inducement to participate in a health risk assessment that collects genetic information to a reward under the group health plan, it may not violate the new Title II regulations, but it will likely violate the Title I regulations.

The Title I regulations do not contain a prohibition on making individually identifiable genetic information collected through a wellness program available to the employer. HIPAA privacy rules also allow disclosure of such information to an employer/plan sponsor in its role as plan administrator of a group health plan, if the employer/plan sponsor has properly complied with the requirements of the

HIPAA privacy rule for receipt of such information. However, it appears that an employer who receives such information may now be in violation of the new Title II regulations.

Firewall Provisions

The final rule includes firewall provisions to separate Title I and Title II of GINA to avoid double liability for a group health plan or health insurer. Under these provisions, health plan or insurer actions are addressed and remedied exclusively through Title I and employer actions are addressed and remedied exclusively through Title II. This does not mean that the employer need not comply with both titles; it simply means that the employer will not be penalized under both titles for the same act or omission.