

THE GENETIC INFORMATION NON-DISCRIMINATION ACT AND ITS IMPACT ON EMPLOYERS

Linn F. Freedman, Esq.

December 11, 2009

NIXON PEABODY_{LLP}
ATTORNEYS AT LAW

The Genetic Information Non-Discrimination Act (GINA)

- Enacted in 2008
 - GINA generally prohibits employers from discharging, refusing to hire or otherwise discriminating against employees based on genetic information
 - Amends ERISA to preclude discrimination on the basis of genetic information by group health plans and health insurers
 - Prohibits insurers from requiring insureds to undergo genetic testing

GINA cont.

- GINA imposes strict workplace confidentiality and non-disclosure rules on all genetic information
 - Prohibits employers from collecting genetic information through workplace genetic testing or other means with very narrow exceptions

New GINA Regulations

- Departments of Labor, Health and Human Services and Treasury jointly released interim final regulations under GINA on October 7, 2009 under Title I of GINA, applicable to health plans and insurers
- Become effective for plan years commencing on or after 12/7/09
- Genetic information is broadly defined to include family histories
- Virtually every health risk assessment includes family history
- The new Regs impose significant limitations on the use of HRAs

GINA Limitations to HRAs

- If an HRA includes questions about family history or solicits any other genetic information, the new Regs prohibit group health plans and insurers from
 - Soliciting participation in the HRA at the time of enrollment or at any other time before the employee is a covered member
 - Linking any incentives to the completion of the HRA
 - No rewards-including reducing premiums or deductibles, issuing rebates or making contributions to a health reimbursement arrangement or flexible spending account

GINA Limitations to HRAs

- No using the HRA as a screening tool for determining participation in disease management programs or receipt of other medical benefits
- No use of open-ended questions on HRAs, which may obtain genetic information
 - Have you had any laboratory tests in the past year?
 - Is there anything else you would like to discuss or let us know?
 - May elicit genetic information
 - Must include an instruction not to provide any genetic information

Examples

- Directly from Regulations
 - A group health plan provides a premium reduction to enrollees who complete an HRA. The HRA is requested to be completed after enrollment. 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. The HRA includes questions about the individual's family medical history
 - Does this fact scenario comply with the Regulations?

Examples

- Conclusion
 - The HRA includes a request for genetic information because it requests family medical history. Because completing the HRA results in a premium reduction, the request for genetic information is for underwriting purposes, so the request violates the prohibition on the collection of genetic information

Examples

- Same facts as before, except there is no premium reduction or any other reward for completing the HRA
- Conclusion
 - Since the request is not for underwriting purposes, nor is it prior to or in connection with enrollment, it does not violate the prohibition on collecting genetic information

TITLE II of GINA--Employers

- In March of 2009, the EEOC issued proposed regulations pursuant to Title II of GINA, which is applicable to employers
- Title II included an exception from GINA's prohibition on requesting genetic information if the request is made in connection with a voluntary wellness program
- Title I does not include the exception

TITLE II of GINA-Employers

- Since vast majority of wellness plans are usually tied to a health plan, it is unclear if any of the exception of Title II remains.