New Federal Regulations May Change Your Wellness Program

What you can ask and what you can't

a special brief from

HOPE HEALTH

Health promotion practitioners are puzzling over new regulations that may change the types of questions and information gathered on health risk assessments. Just when you thought you had the right formula for success in boosting participation with incentives, the feds may now tie your hands.

If you work with a third-party disease management company and conduct a health risk assessment, you may already be making modifications to stay within the GINA regulations.

Simply put, GINA prohibits group health plans and insurers from collecting genetic information (in other words, asking questions about family medical history) for underwriting purposes or prior to or in connection with enrollment. And if you currently give rewards for employees who complete an HRA or participate in a wellness program, you could be in violation unless you make some changes. Options are available.

> “GINA is shorthand for the Genetic Information Nondiscrimination Act of 2008 – federal regulations given final approval by the Internal Revenue Service, Department of Labor, and the Department of Health and Human Services. Along with HIPAA and ADA, now add another alphabet-soup acronym of GINA to your “watch list” because your wellness program will have to comply.”

Ask the experts

Stephanie Smithey and Tim Stanton, employment law experts at the national law firm of Ogletree Deakins, answer the questions you might be asking.

Q: How does GINA affect my company’s wellness program?

A: If your company’s wellness program collects any genetic information—such as family medical history—GINA may require you to rethink the design of your program. Often a wellness program that is part of a group health plan will include a health risk assessment (HRA) that asks for family medical history. Under Title I of GINA you cannot collect that information prior to or in connection with enrollment in the health plan or for underwriting purposes. “Underwriting” includes any premium discount or rebate, among other things. If you offered a 10% premium discount [to employees] for completing that

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health risk assessment, your program would be in violation of Title I of GINA. You would want to redesign the program to eliminate either the reward or the questions about family medical history. Another option would be to create a two-step HRA process in which the reward is tied only to the completion of an initial health risk assessment after enrollment that does not seek family medical history, followed by a second voluntary health risk assessment that offers no reward and does not in any way impact the reward already earned.

Q. What would be an example of a forbidden family history question about genetics?

A. In the health plan context, remember you can always ask the question, so long as you are not collecting the information prior to or in connection with enrollment or for underwriting. If you are conducting the health risk assessment before enrollment, or if you have tied any kind of a reward such as a premium discount to completing the health risk assessment, then you need to avoid asking any questions about genetics or family medical history.

Here's a simple example:

> *Has a close blood relative (grandparent, parent, brother, sister) had any of the following health conditions (check all that apply)? ❑ heart disease ❑ diabetes ❑ skin cancer ❑ breast cancer ❑ colon cancer*

By contrast, it is okay to ask the employee if they themselves have had any of these conditions.

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Q. How will GINA affect my company's relationship with a third-party disease management company?

A. The new regulations include an example of a disease management program that would violate GINA. A health plan might use a health risk assessment (that includes family medical history) to identify certain participants who would be eligible for a disease management program. According to the GINA regulations, the request for family medical history is a request for genetic information for underwriting purposes because it could result in eligibility for benefits that would not otherwise be available. This is one example of how GINA might impact a disease management program.

Employers should consider GINA's potential impact on any disease management program that collects genetic information, requests or requires genetic testing, or adjusts premiums based on genetic information.

Q. By giving a disclaimer about not revealing family health history/genetic information or using the two types of HRAS, do you really think companies will do this?

A. Yes, we have worked with several clients and their wellness program vendors to redesign their wellness program so that they are consistent with the new rules. Many clients are choosing to implement a two-step health risk assessment process in which both HRAs occur after enrollment and the only "underwriting" is a premium discount linked to the first HRA, which does not ask any questions about family medical history or other genetic information. Some other clients have just deleted family medical history questions.

Q. Smart companies use HRA information to drive wellness programming, to assess needs of employees coupled with claims data (not available for small companies, however), and to then use that aggregate information to set programming priorities for wellness programs the rest of the year. Can they still get aggregate data from HRAs?

A. In designing their wellness programs, companies need to consider what their goals are and what information they legitimately need to implement a program that meets their goals. Remember that GINA does not preclude employers from collecting medical information about their employees for purposes of running a wellness program. If in fact the genetic or family medical history information is crucial to the program, the employer may continue to collect it—so long as the collection isn't prior to or in connection with enrollment or for underwriting purposes.

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So, in other words, if having the information is crucial to the program, collect it after enrollment in the health plan and do not offer any premium discount or other incentive that would be considered underwriting.

Also, remember that other laws will impact the wellness program, including HIPAA nondiscrimination, HIPAA privacy, the ADA, and Title II of GINA if the wellness program is an employment practice that is not a group health

plan. Each of those laws should be consulted when deciding what is a permissible program and what is a permissible use of the data generated by the program.

Next steps:

- **Review your current program practices** with an attorney who understands the GINA regulations.
- **Work with your plan administrators** and insurers to make sure you are in compliance.
- **Revise your HRA to comply.**
- **Read more from attorneys Smithey and Stanton** in their article entitled "Do Your Health and Wellness Plans Violate GINA?" at **www.ogletreedeakins.com/publications/index.cfm?Fuseaction=PubDetail&PublicationID=946.**

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