

## ERIC FocusOn Call

# EEOC's Proposed GINA Wellness Rule – What Employers Need to Know

Frank C. Morris, Jr.  
Epstein Becker Green  
(202) 861-1880; [fmorris@ebglaw.com](mailto:fmorris@ebglaw.com)

November 12, 2015

This presentation has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal, state, and/or local laws that may impose additional obligations on you and your company or organization.

# Presented by

---



**Frank C. Morris, Jr.**

Epstein Becker & Green, P.C.  
Member of the Firm

[fmorris@ebglaw.com](mailto:fmorris@ebglaw.com)

202-861-1880

# Agenda

---

## **1. Background**

- i. GINA & Wellness Programs
- ii. EEOC GINA Guidance and Litigation

## **2. Summary of GINA Proposed Rule**

- i. Incentives to Spouses Authorized
- ii. Non-spousal Dependent Incentives Barred
- iii. Designed to Promote Health
- iv. Limit on Incentives and Required Calculations
- v. Prohibited Employer Actions
- vi. Inconsistencies: ACA Guidance and Proposed ADA Rule

## **3. EEOC Requests for Comments**

## **4. Employer Concerns and Costs**

# The Background and Problem

---

- GINA - the Genetic Information Nondiscrimination Act of 2008 and its impact on health benefits and Wellness Programs (WPs)
- Title II – prohibits
  - Use of genetic information in employment decisions
  - Requesting, requiring or purchasing genetic information
    - Strictly limits disclosure
- GINA and EEOC’s final rule say “genetic information” includes among other things – family medical history including of spouses
  - Thus, EEOC says a problem arises if a WP would provide an incentive for a spouse to complete a Health Risk Assessment (HRA) and biometric screening

# The Pertinent GINA Exception

---

- GINA has 6 narrow exceptions
  - Only one pertinent to WPs
    - An employer may request genetic information as part of health or genetic services, including WPs on a voluntary basis
- As with EEOC's proposed ADA WP rule – voluntariness issue is hook for EEOC's regulatory activity

# Background

## EEOC Litigation

---

- The EEOC alleged an ACA compliant wellness program violated GINA by offering inducements to incentivize participation by an employee's spouse.
  - October 27, 2014: *EEOC v. Honeywell International, Inc.* (USDC D MN)  
(Motion for TRO Denied on November 3, 2014)
  
- *EEOC v. Honeywell International, Inc.*
  - \$500 surcharge paid incrementally per pay period
  - \$1,000 premium increase for each enrollee who is a tobacco user,
  - Withholding of an HSA contribution ranging from \$250 to \$1,500
  - HEAL Advisory: Mainstream Wellness Program Challenged in EEOC v. Honeywell  
(November 20, 2014) (<http://www.ebglaw.com/publications/mainstream-wellness-program-challenged-in-eeoc-v-honeywell>)

# EEOC Proposed Rule Focus

---

- What incentive may be offered for spousal disclosure of family medical history in responding to a WPs' HRA and/or biometric screening without violating GINA
- EEOC Proposed Rule addresses this issue and purports to harmonize with Triagency ACA WP regulations
  - Harmony is in the eye of the beholder and employers may not see exactly the same harmony as EEOC
- EEOC Proposal once again is more demanding and would limit WP benefits authorized by the Triagency ACA regs
  - Disparity creates a dilemma for employers



# Summary of EEOC's Proposed GINA Rule

---

- Proposal would amend 29 C.F.R. Part 1635 and is at <http://federalregister.gov/a/2015-27734>
- Employees' covered spouses may be offered a limited financial or in-kind incentive to complete an HRA or biometric tests or otherwise provide information on the spouse's current and past health status, if:
  - prior, knowing, voluntary and written authorization
  - Documentation of this authorization will be key
- The incentives can be rewards or penalties
- Proposal bars inducements in return for a spouse providing his or her own genetic information, including results of his or her genetic tests
- Proposal reinforces that genetic information cannot be used in connection with
  - Any employment decision or discrimination
  - As a condition for participation in an employer health benefits program

# Summary of EEOC's Proposed GINA Rule

## Key Omission

---

- Non-spousal dependents may not be incentivized to provide information as to their current or past health status
  - EEOC Q & A No. 7: EEOC argues that because of “the possibility that an employee may be discriminated against based on genetic information about the health status of the employee’s children” non spousal incentives are barred. (see [EEOC GINA Q&A](#))
  - EEOC claims higher risk of discovery of genetic information about the employee if they have genetic information about employee’s children
  - Fallacy is that the employer almost never gets the HRA or biometric screening information of anyone – it goes to the WP provider
  - In any event, GINA expressly bars any adverse action against the employee because of family genetic information which makes this limitation unnecessary and counter productive to ACA goals for WPs

# Summary of EEOC's Proposed GINA Rule

## Permissible Incentives

---

- Not the straight forward ACA authorized 30% incentive of total cost for dependent or tiered coverage
- EEOC proposed that incentives may be up to 30% of cost of coverage for an employee and spouse
  - but maximum share of inducement for employee participation is 30% of self-only coverage cost and
  - remainder of the inducement – equal to 30% of total cost of coverage for an employee and any enrolled dependents minus 30% of the total cost of self-only coverage – may be provided as spousal incentive
- Why should employers be barred from treating employees and spouses alike?

# Summary of EEOC's Proposed GINA Rule

## Permissible Incentives

---

- Unlike the ACA Triagency regs, EEOC would apply the 30% limit not just to Health Contingent WPs, but also to Participatory WPs
  - Difficult to see justification for EEOC's departure from ACA regs
  - EEOC's GINA proposed rule unfortunately tracks its proposed ADA rule on this limitation

# Summary of EEOC's Proposed GINA Rule

## Incentive Calculation and Necessary Apportioning

---

- Example: Employee and dependent total coverage cost - \$14,000

Maximum inducement to employee and spouse is 30% of \$14,000 or \$4,200.

If employee's self-only coverage cost would be \$6,000, the maximum incentive for the employee's participation is 30% of \$6,000 or \$1,800.

The remainder of the inducement \$4,200 - \$1,800 or \$2,400 may be offered for the spouse to provide current or past health status information.

- Employer could offer all or part of \$2,400 inducement in other ways, e.g.
  - An inducement for employee or dependents to undertake activities qualifying as participatory or health contingent wellness programs which do not include requests for genetic information, disability related inquiries or medical exams.

# Summary of EEOC's Proposed GINA Rule

## Prohibited Employer Actions

---

- Employer may not condition participation in WP or receipt of an inducement on employee or a dependent agreeing to sale of or general disclosure of genetic information
- Genetic information of an employee or a spouse (or dependent) may not be used in making any employment decisions
- Inducements in return for information about current or past health of an employee's children, or in exchange for inquiries directed to an employee about the employee's family medical history or other genetic information are still prohibited.
- Employer may not condition participation in its health benefits plan on participation in a WP and disclosure of genetic information or family medical history

# Potential Problem Areas

## Key Inconsistencies With the ACA Rules

---

- GINA proposed rule makes no mention of 50% incentive for tobacco cessation programs
  - Unfortunately, may mean this will not change in EEOC's final ADA rule
  - Given the health consequences of tobacco usage why shouldn't employers and employees be able to use full ACA authorized incentives to attack this problem?

# Potential Problem Areas

## Inconsistencies With the ACA Rules

---

- Like the ADA proposed rule, the GINA proposed rule requires that WPs, including any inquiries and testing, must be “reasonably designed to promote health or prevent disease”
  - EEOC says “not reasonably designed” if WP requires:
    - Too much time
    - Requires overly intrusive procedures or
    - Requires costly medical exams at employee’s or dependent’s expense.
  - EEOC does not say this list is exclusive list of what would be an “unreasonably” designed WP
- For items beyond those specified, does EEOC have expertise to determine if a plan is reasonably designed to promote health or prevent disease?
  - With the Triagencies and especially HHS enforcing the ACA, why should EEOC be in this space?



# Potential Additional Problem Areas

## EEOC Requests for Comments

---

- EEOC framed 7 Requests for Comments
- Several of EEOC's Requests for comments raise concerns as to what may be added to final rule
- Whether employers offering inducements for spousal WP participation must also offer inducements to those with a medical professional's certification that the spouse is under medical care and any identified medical risks are "under active treatment"?
  - EEOC posed this same question as to its proposed ADA rule
  - This would appear to equate alleged and unknown benefits from being "under active treatment" with the health improvements that might come from entirely different programs and strategies provided under a WP

# Potential Additional Problem Areas

## EEOC Requests for Comments

---

- Which best practices or procedural safeguards ensure WPs are designed to promote health or prevent disease and don't shift costs to employees with spouses who "have health impairments or stigmatized conditions"?
  - EEOC posed similar question in its proposed ADA rule
  - Why aren't the considerable safeguards in the Triagency ACA WP regs enough?
- In light of electronic storage of personnel information and recent data breaches, should EEOC's GINA rule provide more specific electronic record keeping guidance and what procedures are necessary to ensure compliance with 29 C.F.R. 1635.9(a)?
  - Interesting question in light of the federal government's record in securing electronically stored information

# Employer Comments – Take the Opportunity

---

- Comment Period is open for 60 days until Dec. 29, 2015
- Employers should consider submitting comments
  - The advocacy groups who dislike WPs will do so

# Costs of the Proposed GINA Rule

## Interesting Factoids

---

- EEOC opines that it estimates “that the typical human resources professional will need to dedicate, at most, 60 minutes to gain a satisfactory understanding of the revised regulations” (emphasis added) at a median cost of \$49.41
- EEOC also estimates the costs of training small entities’ HR professionals/managers on the GINA rule at a “cost per entity of providing appropriate training . . . [of] between approximately \$49.41 and \$247.05”

# Questions?

---



Frank C. Morris, Jr.  
Epstein Becker & Green, P.C.  
Member of the Firm

[fmorris@ebglaw.com](mailto:fmorris@ebglaw.com)

(202) 861-1880

EPSTEIN  
BECKER  
GREEN

Thank You.