ERIC

The ERISA Industry Committee

February 17, 2012

Chai R. Feldblum, Commissioner
Victoria A. Lipnic, Commissioner
Equal Employment Opportunity Commission
131 M Street, N.E.
Washington, DC 20507

Re: Permitting Spousal Incentives in Workplace Wellness Programs

Dear Commissioners Feldblum and Lipnic:

We very much appreciate your meeting with members and representatives of The ERISA Industry Committee ("ERIC") on November 30, 2011 to discuss workplace wellness programs and the important role these programs play in improving the health of American workers and families.

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, and welfare benefit plans of America's largest employers. ERIC's members sponsor group health plans that provide comprehensive health benefits directly to some 25 million active and retired workers and their families. ERIC members have taken the lead in developing wellness programs that have significantly improved the health of their employees.

As we discussed during our meeting, many large employers extend workplace wellness programs to an employee's spouse. Although this is a positive development, ERIC's members have become concerned that recent action by the Equal Employment Opportunity Commission could jeopardize employers' efforts to promote the health of spouses in addition to that of the employees themselves.

Specifically, ERIC members have received reports that the Commission is taking enforcement action against employers that offer incentives to encourage spouses to complete health risk assessments, on the ground that the spousal incentives violate Title II of the Genetic Information Nondiscrimination Act ("GINA"). As you requested, we are writing to explain why we think spousal incentives are consistent with the purposes of the statute and are permissible under the Commission's regulation interpreting Title II of GINA.

The Importance of Incentives in Wellness Programs

Workplace wellness programs have a central role to play in the Administration's efforts to improve the health of American workers. Moreover, workplace wellness programs have proved effective in containing health costs, reducing disability claims, and improving workers' productivity.

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In addition to these measurable benefits, wellness programs improve the quality of life for American workers and their families by promoting healthy lifestyles. Employees value these programs, and they benefit from the programs' emphasis on promoting good health and addressing health problems before the problems become more serious and more costly to treat.

Many of the most effective wellness programs are tailored to address each participant's personal health needs. These programs begin by asking the individual to complete a "health risk assessment" that evaluates the individual's health status and identifies any conditions or lifestyle choices that merit further attention. A health risk assessment provides targeted individual health information that increases the participant's awareness of health risks. The wellness program then helps the participant find ways to manage or reduce his or her personal health risks.

Because the health risk assessment is a key part of a wellness program's success, many employers offer incentives to encourage their employees to complete the assessment. The incentives might include items such as a small cash bonus, a gift card, or a health club pass. Employers have found that employees are much more likely to complete a health risk assessment if they receive a modest incentive, and studies have confirmed this observation. For example, a 2011 survey showed that 28 percent of employees completed a health risk assessment if the employer offered no incentive, but participation increased to 48 percent when the employer offered an incentive.[1]

The use of incentives has been restricted by recent governmental regulations, however, and these restrictions have made it more difficult for employers to encourage participation in workplace wellness programs. As an example, the Commission's regulation interpreting Title II of GINA prohibits an employer from conditioning an incentive on the employee's agreement to provide family medical history.[2] In order to comply with this requirement, ERIC's members either have removed questions about family medical history from their health risk assessments or have made it clear that employees will receive incentives regardless of whether they answer these questions. As a result, employees are effectively discouraged from procuring and providing family medical history, information that often provides a very significant window into an individual's health risk factors, both present and future.

Large employers provide group health coverage not only to their employees, but also to the employees' family members. Employers wish to promote a healthy lifestyle and to address health risks for all of the individuals covered by the employer's health plan. In addition, individuals are more likely to make positive changes in their health and lifestyle if more than one family member is involved in the wellness program. As a result, it is increasingly common for employers to extend workplace wellness programs to employees' spouses and domestic partners.

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[1] *See* PricewaterhouseCoopers Health and Well-Being Touchstone Survey at 42-43 (May 2011), http://www.pwc.com/us/en/hr-management/publications/health-wellness-touchstone-survey.jhtml.

[2] C.F.R. §1635.8(b)(2)(ii). The regulations interpreting Title I of GINA include similar restrictions. *See* Treas. Reg. § 54.9802-3T(d)(1)(ii); 29 C.F.R. § 2590.702-1(d)(1)(ii); 45 C.F.R. § 146.122(d)(1)(ii).

A spouse who participates in a workplace wellness program often receives an incentive to complete a health risk assessment. The health risk assessment asks questions about the spouse's health conditions and lifestyle. The wellness program treats the spouse in the same way that it treats the employee: the program does not offer an incentive for the spouse to provide the spouse's family medical history or other genetic information about the spouse, although the program might invite the spouse to provide this information voluntarily without receiving an incentive.

Some wellness programs offer the incentive separately to the employee and to the spouse, so that each could receive an incentive if he or she completes the health risk assessment. Other programs provide an incentive only if both the employee and the spouse complete a health risk assessment. In either case, if the spousal incentive is provided in the form of a cash bonus or other taxable benefit, federal tax rules treat the incentive as compensation to the employee, and the employer reports the incentive on the employee's Form W-2.[3]

Employers Need Guidance Concerning Spousal Incentives

Last fall, a leading provider of health management and wellness services issued a memorandum alerting its clients that the Commission had initiated enforcement action against "a number of employers providing incentives to employees for spouse participation in a health assessment." The provider explained that the spouse's personal medical history was family medical history with respect to the employee, so that the spouse's personal medical history fell under the broad definition of "genetic information" in Title II of GINA.[4] The provider cautioned, "We have been advised that the Commission deems the use of incentives to induce spouses to complete [a health assessment] to be a violation of GINA."

ERIC has not been able to determine how many employers were affected by these enforcement actions, which local office of the Commission was involved, or how the enforcement actions were resolved. Because the provider's memorandum reached a number of large employers, however, the issue has created significant confusion and uncertainty. Employers are concerned that they will violate GINA by offering incentives for spouses to complete health risk assessments, and they are uncertain how to structure spousal participation in their wellness programs without violating GINA.

We urge the Commission to provide national guidance on this issue, so that the rules will be clear and evenly enforced. Employers devote substantial time and resources to developing effective workplace wellness programs, training internal staff and outside vendors to administer

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[3] *See* Internal Revenue Code § 83 (when an employer transfers property to any third person in connection with an employee's services, the value of the property is included in the employee's gross income); Treas. Reg. § 1.61-21(a)(3) (a "fringe benefit provided in connection with the performance of services [is] considered to have been provided as compensation for such services"); Treas. Reg. § 1.61-21(a)(4) (a taxable fringe benefit is included in the income of the person performing the services, even if that person did not actually receive the fringe benefit).

[4] *See* 29 C.F.R. § 1635.3(c)(1)(iii) (defining "genetic information" to include information about "[t]he manifestation of disease or disorder in family members of the individual (family medical history)").

the programs properly, and communicating the programs to their employees. In the aggregate, the wellness programs sponsored by ERIC's members cover hundreds of thousands of employees and their family members. If employers are forced to remove spousal incentives from their workplace wellness programs in order to avoid the risk of enforcement action, the effectiveness of the programs will be diminished.

As we explain below, the reported enforcement actions appear to be contrary to the Commission's regulation interpreting Title II of GINA. Regardless of how the Commission resolves the substantive issue, however, any interpretation of GINA that significantly affects workplace wellness programs should be provided in the form of published guidance and should reflect the considered position of the Commission rather than the enforcement initiative of a local office. Any guidance restricting or prohibiting spousal incentives should be effective only prospectively, with ample time for implementation, so that employers will not be penalized for failing to comply with a restriction they could not have foreseen.

Title II of GINA Permits Spousal Incentives

For the reasons we explain below, we think that Title II of GINA allows employers to offer incentives that encourage spouses to provide their own health information, as long as the employer protects the information from disclosure and uses the information only in a manner that is permissible under GINA. Three provisions in the Commission's regulation interpreting Title II of GINA support this view: the rule that allows an employer to acquire information about manifested health conditions, the exception for voluntary wellness programs, and the rule that permits an employer to acquire information about family members who receive health services from the employer. We discuss each provision below.

A. Employers May Acquire Information About Manifested Conditions

Section 202(b) of GINA prohibits an employer from acquiring genetic information "with respect to an employee or a family member of the employee" unless an exception applies. The regulation interpreting Title II of GINA defines "family member" to include an individual's spouse, as well as the individual's natural and adopted children and relatives to the fourth degree.[5] "Genetic information" includes, with respect to *any* individual, information about "[t]he manifestation of disease or disorder in family members of the individual (family medical history)."[6] Accordingly, the regulation treats as "genetic information" not only the family medical history of the employee, but also the family medical history of any family member of the employee.

If one construes these provisions broadly, they create a paradox. Information about an employee's own manifested health conditions is family medical history—and thus is "genetic information" —with respect to any family member of the employee. Since an employer is prohibited from acquiring genetic information about a family member of an employee, a broad

[5] 29 C.F.R. § 1635.3(a); *see also* GINA § 201(3).

[6] 29 C.F.R. § 1635.3(c)(1)(iii); *see also* GINA § 201(4)(A)(iii).

interpretation of this restriction would prohibit the employer from acquiring information about any manifested health condition of the employee unless the employee had no living relative who qualified as a "family member."[7] This interpretation cannot be correct: it would place an unworkable constraint on an employer's ability to request information about an employee's own manifested health conditions.

The Commission's regulation interpreting Title II of GINA recognizes this problem and provides a solution, although in a narrower context. One comment on the proposed regulation raised a concern that an employer would violate GINA if the employer obtained information about a manifested disease or disorder of an employee whose family member worked for the same employer, since the personal medical history of the first employee would constitute family medical history with respect to the second employee.[8] In response, the final regulation confirms that an employer does not violate GINA solely because the employer "requests, requires, or purchases information about a manifested disease, disorder, or pathological condition of an employee . . . whose family member is an employee for the same employer."[9]

The final regulation presents the co-employee provision not as an exception to the restriction on acquiring genetic information,[10] but as a general principle of interpretation. Although the regulation addresses a situation in which both members of the family work for the same employer, the rationale for the rule is not limited to this situation. As we have explained, information about an employee's manifested health conditions is "genetic information" with respect to *any* family member of the employee, whether or not the family member works for the same employer. Accordingly, the rule will be workable only if it is construed as an illustration of a broader principle: the principle that GINA does not prohibit an employer from requesting information about an individual's own manifested health conditions, even though that information constitutes family medical history with respect to the family members of the individual who provides the information.

The preamble to the final regulation describes this provision in broad terms as a rule that permits an employer to acquire information about an employee's manifested conditions in all circumstances, whether or not the employee's family members work for the employer. In the preamble, the Commission explained:

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[7] Section 210 of GINA permits an employer to acquire "information *that is not genetic information* about a manifested disease, disorder, or pathological condition of an employee . . . " (emphasis added). This exception suffers from the same internal contradiction, however, since information about an employee's manifested health condition *is* genetic information if the employee has any living family member.

[8] 75 Fed. Reg. 68,912, 68,915 (Nov. 9, 2010).

[9] 29 C.F.R. § 1635.8(c)(1).

[10] All of the exceptions to the rule prohibiting an employer from acquiring genetic information appear in subsection 8, paragraph (b) of the regulation. *See* 29 C.F.R. § 1635.8(a) (an employer may not acquire genetic information "except as specifically provided in paragraph (b) of this section"). In contrast, the provisions concerning co-employees, and a similar provision (discussed below) concerning health services provided to family members, appear in paragraph (c) of the regulation.

> Although the acquisition of information about manifested conditions is limited under other laws such as the ADA, it is permissible under GINA, *even where* an employee's family member works for the same employer.[11]

Accordingly, the co-employee provision stands for the proposition that GINA does not prohibit an employer from acquiring information about an individual's manifested health conditions, since that information is not "genetic information" with respect to the individual who provides it.[12] If GINA does not prohibit an employer from acquiring information from an employee about the employee's manifested health conditions, there is even less reason to think that GINA prohibits an employer from acquiring information from an employee's spouse about the spouse's manifested health conditions.[13]

Because information about an individual's manifested health conditions is family medical history with respect to the individual's family members, the employer must treat the information as "genetic information" once the employer acquires it. The employer may not use the information to discriminate against an employee and may not disclose the information except as permitted by the regulation.[14] These restrictions apply to information acquired from an employee's spouse in a health risk assessment. Accordingly, although Title II of GINA does not prohibit an employer from requesting information from a spouse about the spouse's own health conditions, Title II of GINA fully protects the employee from any misuse of this information.

B. The Exception for Voluntary Wellness Programs Applies to Spouses

Although Title II of GINA generally prohibits an employer from acquiring genetic information with respect to an employee or the employee's family member, the statute creates several exceptions to this restriction. One exception applies in a case where "health or genetic services are offered by the employer, including such services offered as part of a wellness program."[15] The regulation interpreting Title II of GINA incorporates this exception. Unlike the statute, however, the regulation requires that the wellness program be a "voluntary" wellness

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[11] 75 Fed. Reg. at 68,916 (emphasis added); *see also* Preamble, 75 Fed. Reg. at 68,926 ("[A] request for information about whether an individual has a manifested disease, disorder, or pathological condition does not violate GINA simply because a family member of the individual to whom the request was made works for the same employer . . .").

[12] Although we have not discussed Title I of GINA in this letter, we believe that the same concept is implicit in the interpretation of Title I by Departments of Treasury, Labor, and Health and Human Services. For example, the interim final regulation interpreting Title I includes an example in which an employer is permitted to provide a financial incentive when an individual completes a health risk assessment that "instructs the individual to answer only for the individual and not for the individual's family." Treas. Reg. § 54.9802-3T(d)(3) *Example 5*; 29 C.F.R. § 2590.702-1(d)(3) *Example 5*; 45 C.F.R. § 146.122(d)(3) *Example 5*. Accordingly, we believe that an incentive to a spouse to provide information about the spouse's own manifested health conditions is permissible under Title I of GINA as well as under Title II.

[13] As we explain below, the regulation at 29 C.F.R. § 1635.8(c)(2) confirms this interpretation.

[14] *See* Preamble, 75 Fed. Reg. at 68,915-16 & 68,926.

[15] GINA § 202(b)(2).

program. The regulation explains that the program is voluntary only if it "neither requires the individual to provide genetic information nor penalizes those who choose not to provide it."[16]

The regulation explains that a wellness program will not fail to be "voluntary" solely because the employer offers a financial inducement for participants to complete a health risk assessment. If the health risk assessment requests family medical history or other genetic information, however, the employer must make clear that the participants will receive the financial inducement whether or not they answer the questions about genetic information. As we explained in the preceding section, "genetic information" means, in this context, information that is genetic information with respect to the individual who completes the health risk assessment, such as the individual's family medical history. The term does not include information about the individual's own manifested health conditions, even though that information is "genetic information" with respect to the individual's family members. Any other interpretation would make the exception meaningless, since the purpose of a health risk assessment is to collect and evaluate information about the health conditions of the person who completes the assessment.

Neither the statute nor the regulation limits the exception for voluntary wellness programs to employees. To the contrary, both the statute and the regulation acknowledge that a family member might receive services under the wellness program.[17] Because GINA prohibits an employer from acquiring genetic information about family members as well as about employees, it is logical that the exception also would apply to family members. The regulation adopts this interpretation: it extends the exception to any "individual," a term that is broad enough to include an employee's family member as well as an employee or member of a labor organization. Accordingly, if an employee's spouse receives a financial inducement to provide information about the spouse's own manifested health conditions in response to a health risk assessment, the employer does not violate the restriction on acquiring genetic information, even though the information about the spouse's manifested health conditions is genetic information with respect to the spouse's family members (including the employee).

The exception for voluntary wellness programs applies not only when the employee and spouse receive separate incentives for completing health risk assessments, but also when both members of the couple must complete health risk assessments in order to receive an incentive. In either case, the incentive will be available if the participants provide information concerning their own health conditions and lifestyle choices, which is not genetic information with respect to the individual completing the assessment. The incentive will be available whether or not the participants answer questions about their family medical history or provide other genetic information. The information that each participant provides will be protected from disclosure or improper use. Whether the incentive is provided separately or jointly, the federal tax rules will treat both the employee's and the spouse's incentive as compensation to the employee.[18]

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[16] 29 C.F.R. § 1635.8(b)(2)(i)(A).

[17] GINA § 202(b)(2)(c); 29 C.F.R. § 1635.8(b)(2)(i)(C).

[18] See footnote 3, above.

If the employer offers a joint incentive, each member of the couple will receive the incentive only if the other member of the couple chooses to complete the health risk assessment. Although this incentive structure might increase the likelihood that both members of the couple will participate in the health risk assessment, it does so by providing an additional incentive for each member to provide information about his or her own manifested health conditions. The regulation interpreting Title II of GINA expressly allows an employer to offer a financial inducement to encourage an individual to provide information about the individual's own manifested health conditions. Accordingly, the regulation does not prohibit an employer from offering a joint incentive for an employee and spouse to complete health risk assessments.

C. An Employer May Obtain Information From Family Members Who Receive Health Services

The Commission's final regulation confirms that an employer does not violate Title II of GINA when the employer acquires "genetic information or information about the manifestation of a disease, disorder, or pathological condition" from an employee's family member who "is receiving health or genetic services on a voluntary basis."[19] The preamble of the final regulation explains, "The collection of information about the manifested disease or disorder of a family member in the course of providing health or genetic services to the family member is not an unlawful acquisition of genetic information about the [employee]."[20] Like the provision applicable to co-employees, this provision describes a general principle of interpretation rather than a specific exception under Title II of GINA.[21]

The provision concerning health services provided to family members is consistent with the exception for voluntary wellness programs. The health services provision confirms that an employer does not violate Title II of GINA when it acquires information about a spouse's own manifested health conditions, even though this information constitutes genetic information with respect to the members of the spouse's family, including the employee.

The regulation does not explain what it means for a family member to receive health services "on a voluntary basis." The exception for voluntary wellness programs makes it clear, however, that an employer may offer an employee's spouse a financial inducement to complete a health risk assessment that requests information about the spouse's own manifested health conditions, as long as the spouse is not required to provide the spouse's family medical history or other genetic information in order to receive the incentive.[22] Accordingly, a spouse who receives a financial inducement to complete a health risk assessment that requests information about the spouse's own manifested health conditions is receiving health services "on a voluntary basis."

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[19] 29 C.F.R. § 1635.8(c)(2).

[20] 75 Fed. Reg. at 68,926.

[21] See footnote 10, above, and accompanying text.

[22] 29 C.F.R. § 1635.8(b)(2)(ii); see also the discussion of this point in the preceding section of this letter.

Conclusion

The Commission's regulation interpreting Title II of GINA permits an employer to offer a financial inducement to an employee's spouse to complete a health risk assessment. The regulation makes clear that the employer may condition the incentive on the spouse's willingness to provide information about the spouse's own manifested health conditions, even though this information constitutes genetic information with respect to the employee and other members of the spouse's family.

ERIC members strongly support GINA's goal of preventing discrimination in employment based on genetic information. The Commission's regulation prohibits an employer from disclosing or making improper use of genetic information obtained by any means, including information obtained from a spouse's health risk assessment. The exception for voluntary wellness programs states that this information may not be made available to the employer in a manner that identifies it with a specific employee or spouse. These safeguards ensure that genetic information gathered through workplace wellness programs will be used only for its intended purpose: to prevent disease and improve the health of workers and their families.

We appreciate your willingness to meet with us and to consider these comments on spousal incentives. If additional information would be helpful to you, please let us know. We hope the Commission will issue guidance making clear to its enforcement staff and to employers that spousal incentives offered through a workplace wellness program do not violate Title II of GINA and are consistent with the purposes of the statute.

Sincerely,

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