ACA, HIPAA AND FEDERAL HEALTH BENEFIT MANDATES:

Practical Q&A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, Carolyn Smith, and Dan Taylor provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte and Washington, D.C. law firm. Ashley Gillihan, Carolyn Smith and Dan Taylor are members of the Health Benefits Practice. Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

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Navigating the Winding Highway of Wellness Program Compliance

A GPS for the EEOC's Wellness Program Rules

The road to health plan compliance has never been straight and narrow, but it has become more winding over the years, due in large part to the Affordable Care Act (ACA). The road to compliance just became even more difficult with the issuance of two new final regulations by the Equal Employment Opportunity Commission (EEOC) that implement certain provisions of the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). The final ADA-related regulations ("Final ADA Regulations") and the final GINA-related regulations ("Final GINA Regulations") join the existing wellness regulations previously issued by the tri-agencies—Departments of Labor (DOL), Treasury and Health and Human Services (HHS)—that implement the bona fide wellness program rules of the Health Insurance Portability and Accountability Act (HIPAA), as amended by the ACA and Title I of GINA. This article will serve as a GPS for sponsors and administrators of wellness programs to help navigate the road to compliance with the ADA and GINA rules. This is Part One of Two. This part focuses on GINA. Part Two will cover ADA compliance issues, and will be in the December issue of The Self-Insurer.

Highlights of the Final GINA Regulations

Title II of GINA prohibits employers from requesting, requiring or purchasing the genetic information of an employee or a family member of the employee except in certain limited instances, such as when the employee provides prior, knowing, voluntary and written authorization. Genetic information includes not only an employee's genetic tests but also the medical history of an employee's family members. The EEOC issued regulations in 2010 that shed light on the application of Title II of GINA to wellness programs. Despite the 2010 GINA regulations, questions remained regarding the application of GINA's rules to wellness programs. In particular, the extent to which employers may request or acquire information regarding the medical history of an employee's spouse or child was unclear.

The Final GINA Regulations make the following clarifications about the medical history of an employee's family members:

- Employers may provide an inducement to the employee whose spouse provides his or her medical history as part of a health risk assessment. An employer may not, however, offer an inducement in exchange for the genetic information (beyond medical history) of a spouse (e.g., the spouse's genetic tests) or the genetic information and/or medical history of an employee's children, without regard to whether such children are adopted or natural, minors or adults.

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- Any inducement provided in connection with the spouse's medical history may not exceed 30% of the total cost of self-only coverage (30 Percent Limit) under the applicable group health plan (Benchmark Plan). Much like the Final ADA Regulations, the Final GINA Regulations provide specific rules for identifying the Benchmark Plan, which vary depending on whether the employer offers group health plan coverage and, if so, how many health plan options are offered.

- In accordance with the 2010 GINA regulations, the spouse must provide prior, written authorization. In addition, all information collected must be used solely for the purpose of the program, and no information collected may be disclosed to the employer except in aggregate, de-identifiable form.

The wellness program must be reasonably designed to promote health and prevent disease.

Employers are prohibited from denying access to health insurance if a spouse refuses to provide his or her medical history.

The provisions in the Final GINA Regulations related to inducements for a spouse's medical history are effective on the first day of plan years that begin on or after January 1, 2017.

The Road to Compliance—the Final GINA Regulations

Which wellness programs are subject to the Final GINA Regulations?

A wellness program is generally subject to the Final GINA Regulations if the wellness program is maintained by a private or state or local governmental employer with 15 or more employees for each working day in at least 20 calendar weeks in the current or preceding calendar year (similar to Title I of the ADA).

In what ways do the Final GINA Regulations regulate wellness programs?

The 2010 GINA regulations set the stage by indicating that employers who offer health or genetic services, including a wellness program, are not in violation of GINA if the employer obtains an individual's genetic information to the extent the following requirements are satisfied:

- The individual voluntarily provides the information. Information is not considered to be voluntarily provided if a penalty is imposed on individuals who choose not to provide such information.

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- The individual provides prior, written authorization.

- The individual's identifiable genetic information collected through the program is used solely for purposes of the program and none of the information collected is disclosed to the employer except in aggregate, de-identified form.

The Final GINA Regulations were primarily issued to address a discrete issue—the extent to which inducements can be offered in exchange for information regarding the manifestation of disease or disorder (i.e., current or past medical history) of an employee's family members. The Final GINA Regulations make the following clarifications:

- An inducement may be provided to the employee only in exchange for information regarding a spouse's manifestation of disease, and then only to the extent the spouse provides the authorization required by the 2010 GINA regulations. No inducement may be offered in exchange for a spouse's genetic information (other than medical history) or the genetic information and/or medical history of a child.

Practice Pointer: ***The regulations make no distinctions between adult or minor children and natural and adopted children. Moreover, the 2010 GINA regulations define "genetic information" to include the genetic information of a fetus carried by an employee or family member of an employee.***

The request for such information must be made as part of a health risk assessment. The Final GINA Regulations clarify that this may be through a questionnaire, medical exam or both.

- In accordance with the 2010 GINA regulations, the information collected may only be used for the program, and no information may be provided to the employer except in aggregate, de-identifiable form.

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Practice Pointer: *Unlike the Final ADA Regulations, the Final GINA Regulations, in conjunction with the 2010 GINA regulations, do not appear to allow disclosure of identifiable information to the employer to administer the health plan. It is unclear if this is an intentional limitation or an oversight. Such a limitation could have a significant impact on plans that use health risk assessments and screenings.*

The wellness program must be reasonably designed to promote health. This is essentially the same standard espoused by the EEOC in the Final ADA Regulations.

- The employer may not exclude a spouse from participating in a health plan, restrict access to health plan options or otherwise retaliate against the employee or the spouse who chooses not to participate from participation in or restrict access to health coverage.
- If the employee and spouse are offered the opportunity to participate in the program, the inducement to each may not exceed 30 percent of the total cost of self-only coverage (30 Percent Limit) under the applicable group health plan (Benchmark Plan). Much like the Final ADA Regulations, the Final GINA Regulations provide specific rules for identifying the Benchmark Plan, which vary depending on whether the employer offers group health plan coverage or not. These rules are identical to the rules prescribed in the Final ADA Regulations for identifying the applicable Benchmark Plan.

Practice Pointer: *If the total cost of employee-only coverage for the Benchmark Plan is $3,000, then the total inducement offered for information regarding the spouse's manifestation of disease would be $900.*

- The employer may not condition participation in the wellness program or provide any inducement to the employee or spouse in exchange for an agreement permitting the sale, exchange or disclosure of genetic information.

Practice Pointer: *The Final GINA Regulations clarify that tobacco usage is not considered "medical history" for purposes of GINA.*

Arriving at Your Destination

Charting a course for compliance with the Final ADA and GINA Regulations is no small challenge, especially when you consider that the tri-agencies also have issued wellness program rules under both HIPAA and Title I of GINA. Part II will explore those rules and how they coordinate with the EEOC's ADA and Title II GINA Rules. In the meantime, employers who sponsor wellness programs should input the following coordinates:

- Carefully review your wellness programs to determine whether it includes DRIs or MEs.
- Include an ADA-compliant notice in your wellness program materials and ensure that program participants receive that notice before they provide any information.
- If you offer inducements in connection with responses to DRIs or completion of MEs, ensure that all inducements related to DRIs and MEs (even if offered under different programs maintained by the same employer) do not exceed the 30 Percent Limit.
- If you provide inducements in exchange for information regarding a spouse's manifestation of disease or disorder, be sure that the spouse provides a prior, written authorization for such information and that the information is kept confidential in accordance with the Final GINA Regulations. ■