



HEALTH PLAN OPEN ENROLLMENT ALERT—NO REWARD GOES UNPUNISHED

The Genetic Information Nondiscrimination Act of 2008 (referred to in this *Commentary* as “GINA”) became law on May 21, 2008. GINA was designed, among other things, to prohibit a group health plan or group health insurance issuer from collecting genetic information from or about an individual or family member prior to or in connection with enrollment, or at any time for underwriting purposes. These provisions of GINA are effective for plan years beginning after May 21, 2009 (January 1, 2010, for calendar year group health plans).

On October 1, 2009, the Department of Labor and the Centers for Medicare & Medicaid released interim final rules and the Internal Revenue Service (“IRS”) issued temporary and final rules to implement certain provisions of GINA, including the prohibition on the collection of genetic information by group health plans and group health insurance issuers. These rules, which will become effective on December 7, 2009, will have an immediate impact on the information that can be requested, required, or purchased from individuals in connection with enrollment or for

underwriting purposes, particularly the continued use of health risk assessments (referred to in this *Commentary* as “HRAs”) and wellness programs. Because many employers are in the process of soliciting information from employees and their dependents in connection with annual open enrollment, immediate action may be required to comply with the new rules. Monetary penalties may apply in the case of violations that are not corrected promptly.

WHAT CONSTITUTES THE COLLECTION OF GENETIC INFORMATION?

GINA prohibits a group health plan or a group health insurance issuer from collecting genetic information from an individual or a family member for the purposes of restricting enrollment in a group health plan or for purposes of determining the amounts to be charged to either the individual or the group for coverage or benefits. The word “collect” was not defined in GINA. The regulations broadly define “collect”

to mean, with respect to genetic information, to request, require, or purchase such information. Genetic information includes information about an individual's genetic tests (such as DNA, RNA, chromosome, protein, or metabolites tests, if the tests detect genotypes, mutations, or chromosomal changes), genetic services (for example, counseling, education, and the interpretation of genetic information), and manifestation of a disease or disorder by a family member (for example, genetic information that might be learned from family medical history). Genetic information does not include blood tests that are not designed to obtain information relating to genotypes, mutations, or chromosomal changes; cholesterol tests; or information about the age or sex of an individual or family member.

WHO ARE FAMILY MEMBERS UNDER GINA?

Family members of an individual include:

- Any dependents;
- Any first-degree relatives (parents, spouses, siblings, and children);
- Any second-degree relatives (grandparents, grandchildren, aunts, uncles, nephews, and nieces);
- Any third-degree relatives (great-grandparents, great-grandchildren, great aunts, great uncles, and first cousins); and
- Any fourth-degree relatives (great-great grandparents, great-great grandchildren, and children of first cousins).

Relatives by affinity (*i.e.*, by marriage or adoption) are treated the same as are relatives who share a common biological ancestor, and relatives who share only one common ancestor (such as half-siblings) are treated the same as are relatives who share full-blood relation (such as siblings who share both parents).

WHEN IS GENETIC INFORMATION USED FOR PURPOSES OF ENROLLMENT OR UNDERWRITING?

One of the more controversial aspects of the regulations relates to the use of genetic information for purposes of enrollment or underwriting. Under the regulations, "enrollment" means initial enrollment or continued enrollment in a group health plan (for example, at the plan's annual open

enrollment). As one might expect, "underwriting" includes activities relating to the rating and pricing of a group policy (such as computation of premium or contribution amounts and application of preexisting condition exclusions). The regulations go further, however, and include in the definition of underwriting such things as changing deductibles or other cost-sharing mechanisms, and providing discounts, rebates, payments in kind, or other premium incentives in return for activities such as completing an HRA or participating in a wellness program. The incidental collection of genetic information in connection with collection of other information does not violate GINA, unless the plan or issuer can reasonably anticipate that genetic information would be collected. In that case, the collection of genetic information will be "incidental" if the individual is explicitly told that he or she should not provide genetic information.

EXAMPLES

The following examples from the regulations apply the new rules to some of the more typical situations in which HRAs and rewards are utilized by group health plans today.

Example 1. *A group health plan provides a premium reduction to individuals who complete an HRA. The plan requests completion of the HRA after enrollment. Neither the completion of the HRA nor the responses given on the HRA have any effect on an individual's enrollment status or on the enrollment status of the individual's family members. The HRA includes questions about the individual's family medical history.*

The regulations conclude that this example illustrates a violation of the prohibition on the collection of genetic information for underwriting purposes because the HRA includes a request for genetic information (that is, the individual's family medical history) and because the individual receives a premium reduction for completing the HRA.

Example 2. *The facts are the same as in Example 1, except that there is no premium reduction or other reward for completing the HRA.*

In this case, the plan does not violate the prohibition on the collection of genetic information under GINA because the

information is not requested for underwriting purposes (i.e., there is no premium reduction) nor is it requested prior to, or in connection with, enrollment.

Example 3. *The facts are the same as in Example 2, except that certain people completing the health risk assessment may become eligible for additional benefits under the plan by being enrolled in a disease management program based on their answers to questions about family medical history (for example, early detection and management of diabetes).*

Because the request for information about the individual's family medical history could result in the individual's becoming eligible for benefits for which the individual would not otherwise be eligible, the questions about family medical history on the HRA are a request for genetic information for underwriting purposes, which is prohibited under GINA.

Example 4. *A group health plan waives its annual deductible for enrollees who complete an HRA. The HRA is to be completed after enrollment and has no effect on the enrollment status of the individual or any family member. The HRA does not include any direct questions about the individual's genetic information, including family medical history. However, the last question reads, "Is there anything else relevant to your health that you would like us to know or discuss with you?"*

Under the regulations, the HRA violates GINA because it does not explicitly state that individuals should not provide genetic information when responding to the final question. Plans and issuers can avoid this result by including the following statement on the HRA: "In answering this question, you should not include any genetic information related to genetic testing, genetic services, genetic counseling, or genetic diseases for which you believe you may be at risk." Even if the statement is included, neither the plan nor the issuer may use any genetic information that individuals voluntarily provide on the HRA for underwriting purposes.

CONCLUSION

Many employers are using HRAs together with rewards or other incentives in connection with annual open enrollment periods that are currently underway or that will begin shortly.

If the plan or health insurance issuer could obtain genetic information in connection with an HRA, and if rewards or incentives will be paid or the information obtained will be used to provide benefits to individuals or family members, the arrangement may run afoul of the newly issued regulations. At a minimum, the new regulations will cause employers and health insurance issuers to rethink or redesign their HRAs and wellness programs, as well as the incentives that are provided in connection with completion of HRAs or participation in wellness programs. Because open enrollment season is occurring now, immediate coordination among employers and group health insurance issuers may be needed in order for the plan or issuer to obtain important information designed to improve the health and wellness of employees and, at the same time, ensure compliance with the new rules.

Jones Day is available to assist employers with the new requirements applicable to the collection and use of genetic information and the design of HRAs and wellness programs. As always, Jones Day continues to monitor and analyze the ever-changing landscape of employee benefits.

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