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WARNING TO EMPLOYERS: IF YOUR HEALTH RISK ASSESSMENT VIOLATES GINA, YOU MAY HAVE TO TELL THE IRS (AND PAY EXCISE TAXES)

GINA AND HEALTH RISK ASSESSMENTS

As reported in an earlier *Jones Day Commentary* entitled "Open Enrollment Alert—No Reward Goes Unpunished," the Departments of Treasury, Labor, and Health and Human Services jointly issued interim final rules to implement certain provisions of the Genetic Information Nondiscrimination Act ("GINA"), including the prohibition on the collection of genetic information by group health plans and group health insurance issuers. These rules, which apply to plan years beginning on or after December 7, 2009, have an immediate impact on the information that can be requested from individuals prior to or in connection with enrollment or for underwriting purposes, particularly the continued use of health risk assessments and wellness programs.

The GINA rules prohibit a group health plan or group health insurance issuer from collecting genetic information (family history information, among other things) as part of a wellness program or health risk assessment if the group health plan or group health insurance issuer provides certain rewards to the individual for providing the information, or if the information is collected prior to or as part of enrollment in the plan. Although it is not entirely clear what rewards are prohibited, it is clear that premium discounts, changes in deductibles, rebates, and other incentives provided under the health plan are not permitted for plan years beginning on or after December 7, 2009. Many group health plans and group health insurance issuers have already collected or are currently collecting such information in connection with enrollments for the upcoming 2010 plan year and also have promised prohibited rewards to the individuals who supplied the information. Those plans and issuers are now trying to determine how to proceed.

NEW REGULATIONS REQUIRE SELF-REPORTING OF FAILURE TO COMPLY WITH GROUP HEALTH PLAN MANDATES, INCLUDING GINA

As if determining how to proceed under the GINA regulations were not difficult enough, the Department of the Treasury issued final regulations on September 8, 2009, effective for plan years beginning on or after January 1, 2010, requiring employers who sponsor group health plans and certain other responsible persons to self-report and pay excise taxes when they fail to comply with various mandates, including GINA.

THE PROBLEM

The new self-reporting requirement is particularly problematic at this time with respect to the recently released guidance under GINA and adds another issue to the employer's list of questions about how to handle health risk assessments. Effective January 1, 2010, if a group health plan provides a prohibited reward in exchange for genetic information that is used for underwriting purposes or if a group health plan collects genetic information prior to or in connection with open enrollment, the employer will have to self-report the violation and pay an excise tax.

THE CODE SECTION 4980D EXCISE TAX

The new reporting obligation applies to violations of a variety of requirements for group health plans, including GINA. Prior to issuance of the new regulations, the taxes applied, but there was no obligation to self-report. Failure to self-report by the due date will result in the imposition of penalties and interest, unless the failure to timely report or pay is due to reasonable cause and not willful neglect. The failure to report and the failure to pay penalties can each be as much as 25 percent of the amount of the unpaid tax. Interest on underpayments of tax is at a variable rate set by the Internal Revenue Service.

Code Section 4980D imposes an excise tax if a group health plan fails to provide for various mandated health benefits required under the Internal Revenue Code (the "Code"), including:

- Portability through limitations on preexisting condition exclusions (Code Section 9801);
- Special enrollment rights (Code Section 9801);
- Prohibition on discrimination based on health status factors (Code Section 9802);
- Prohibition on discrimination based on genetic information (GINA/Code Section 9802);
- Guaranteed renewability of coverage for multiemployer plans and certain multiple employer welfare arrangements (Code Section 9803);
- Minimum hospital stays for mothers and newborns (Code Section 9811);
- Parity in benefits for mental health and substance abuse disorders (Code Section 9812); and
- Coverage of dependent students on medically necessary leaves of absence from school (Michelle's Law/Code Section 9813).

THE NEW REPORTING REQUIREMENT

Employers and other persons who are liable for the Code Section 4980D excise tax are required to file Form 8928, "Return of Certain Excise Taxes Under Chapter 43 of the Internal Revenue Code," and thereby self-report the violation and pay the excise tax. The taxes also apply to multiemployer plans and multiple employer welfare arrangements. The Form has not been issued yet, but a draft version of the Form may be found at: http://www.irs.gov/pub/irs-dft/f8928--dft.pdf.

For noncompliance under Code Section 4980D during a taxable year, the employer or other person liable for payment of the tax must file the return by the deadline for filing the person's federal income tax return for such taxable year, with no extensions. An extension to file the person's tax return does not extend the date for filing Form 8928. For multiemployer and multiple employer plans, the return is due on or before the last day of the seventh month after the end of the plan's plan year.

EXCISE TAX AMOUNT

Amount of Tax. $100 per day for each day in the "Noncompliance Period" for each affected individual.

Noncompliance Period. The Noncompliance Period begins on the day the failure first occurred and ends on the day the failure is corrected.

If Discovered During Audit. The tax may not be less than the lesser of $2,500 or the regular tax amount determined above if the failure is discovered after the employer has received a Notice of Examination from the IRS. If the failure is more than de minimis, $15,000 is substituted for $2,500.

Maximum Tax for Unintentional Failures. If the failure is due to reasonable cause and not willful neglect, the maximum tax is the lesser of $500,000 or 10 percent of the aggregate amount paid or incurred by the employer during the preceding taxable year for group health plans. If the failure is intentional, however, there is no cap on the amount of tax that is imposed.

Waiver of Tax. The excise tax does not apply during any period for which it is established to the satisfaction of the Secretary of the Treasury that the person otherwise liable for the tax did not know, and exercising reasonable diligence would not have known, that the failure existed.

In addition, the excise tax does not apply if a failure is due to reasonable cause and not willful neglect, and the failure is corrected within the 30-day period beginning on the first date that the person otherwise liable for the tax knew, or exercising reasonable diligence would have known, that the failure existed. Correction requires retroactively undoing the failure to the extent possible, and placing the individual to whom the failure relates in a financial position that is as good as such individual would have been in had the failure not occurred.

If the failure is due to reasonable cause and not willful neglect, the Secretary of the Treasury can waive all or part of the tax to the extent payment of the tax would be excessive relative to the failure involved. If the failure is intentional, however, the Secretary of the Treasury would not have the authority to waive the tax.

WHAT TO DO NOW?

As stated above, the new self-reporting requirement is particularly problematic at this time with respect to the recently issued guidance under GINA because a failure to comply with the new GINA regulations will cause the employer to have to self-report the violation and pay the excise tax.

There is already an open question of whether a group health plan that collected genetic information (*e.g.,* family histories) in a health risk assessment prior to the GINA rules becoming effective is violating GINA by providing a reward in 2010. The conservative answer is that providing a reward is a violation, although we are hopeful for transition guidance that says otherwise. Now, however, the transition issue is made more difficult by the self-reporting requirement. If providing a reward in 2010 is a violation of GINA, and if a group health plan provides the reward, the employer will have to self-report the violation and pay the excise tax. In addition, if it is determined that the employer knew of the new regulations and intentionally violated the regulations by providing a reward, the amount of the tax could be unlimited.

If providing a reward in 2010 is a violation, and the employer avoids the violation by not providing the reward, will the employer have sufficiently corrected to avoid the tax reporting and payment requirements? Or will the employer have to take other corrective action to put the employees in a financial position that is as good as the financial position the employees would have been in had the reward not been promised?

There are few good options for group health plans that have already collected genetic information and offered a prohibited reward. On one hand, they can pay the reward and struggle with the issues of whether they violated GINA and, thus, have to self-report and pay the tax. On the other hand, they can break their promises to employees by not providing the reward and then struggle with how to apply the correction methodology.

Jones Day lawyers are prepared to help employers ascertain if their group health plans are affected by the new regulations and to counsel employers on a strategy for how to comply with the new rules.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

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