

EEOC Proposes Six Substantive Changes To Title II GINA Regulations

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The EEOC is seeking comments on proposed regulations that would allow employers that offer wellness programs as part of group health plans, to provide limited incentives or inducements in exchange for an employee's spouse providing certain information about his or her health status. Such incentives include, but are not limited to, both financial inducements and in-kind inducements such as paid time off. On Oct. 30, the EEOC issued a Notice of Proposed Rulemaking (NPRM) which would amend the regulations related to Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA). Generally speaking, Title II of GINA protects job applicants, current and former employees, labor union members and apprentices and trainees from employment discrimination based on their genetic information, which also includes the health status of individuals within their families. With the exception of six limited and narrow circumstances, GINA also restricts employers from requesting, requiring, or purchasing genetic information. The NPRM provides clarification on one of these six narrow exceptions as it relates to employers that offer wellness programs and the permitted inducements for participation in these programs. According to the Summary of the Proposed Regulation within the NPRM, the EEOC proposes the following six substantive amendments:

1. Employers are only permitted to request, require, or purchase genetic information as part of health or genetic services when those services are reasonably designed to promote health or prevent disease;
2. A covered entity may offer, as part of its health plan, an inducement to an employee whose spouse (a) is covered under the employee's health plan; (b) receives health or genetic services offered by the employer, including as part of a wellness program; and (c) provides information about his or her current or past health status as part of a health risk assessment;
3. The maximum share of the inducement attributable to the employee's participation in an employer wellness program must be equal to 30 percent of the cost of self-only coverage;
4. A covered entity is prohibited from conditioning participation in a wellness program or an inducement on an employee, or the employee's spouse or other covered dependent, in exchange for an agreement that permits the sale of genetic information or any other waiver of the protections provided by GINA;
5. The addition of another example to provide further clarification on the fact that an employer is permitted to seek information (by way of medical questionnaires, medical examinations, and/or both) about the current or past health status of an employee's spouse who is covered by the employer's group health plan and who is voluntarily completing a health risk assessment; and

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6. Clarification on the term “inducements” to now include both financial and in-kind inducements such as time-off awards, prizes, or other items of value, in the form of either rewards or penalties.

Notwithstanding the proposed amendments, it is important to note that the NPRM would not alter GINA's absolute and general prohibition against the use of genetic information in making employment decisions. Instead, the EEOC's goal is to encourage beneficial wellness programs and, by way of the NPRM, provide clarity on this narrow rule exception for the benefit of both the employer and the employee. The EEOC's official press release, as well as additional information regarding the period of public comment, which is until Dec. 29, 2015, can be found [here](#). The NPRM, as published by the EEOC in the *Federal Register*, can be found [here](#).