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Employee Benefits & Executive Compensation ADVISORY ■

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Navigating the Winding Highway of Wellness Program Compliance

Part I: 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.

NOTE: Part II of this article will discuss the manner in which the EEOC's ADA and GINA, Rules coordinate with the HIPAA/ACA and GINA, Title I wellness rules jointly administered by the Departments of Labor, Treasury and Health and Human Services.

Highlights of the ADA Final Regulations

The ADA prohibits employers from making disability-related inquiries or requiring medical exams that are not job related unless they are part of a voluntary employee health program. A dearth of guidance in this area from the EEOC has led to much uncertainty around the application of the ADA to employer-sponsored wellness programs, especially around the term "voluntary." The Final ADA Regulations provide a much clearer roadmap of the EEOC's view of compliance.

In general, the Final ADA Regulations provide the following coordinates for compliance with the ADA:

- An employee health program that includes a disability related inquiry (DRI) and/or requires a medical exam (ME) will not be considered voluntary for purposes of the ADA unless special notice is furnished to participants that describes, among other things, the information that will be collected and the manner in

which the information will be used. The Final ADA Regulations identify the contents of the notice, and the EEOC has furnished a model notice for employers to use as a guide for their own notice.

- An employee health program that includes DRIs or MEs is also not considered voluntary if the employer excludes employees who choose not to participate in the wellness program from participating in the employer's health plan or in one or more of the health plan options.
- An employee health program that includes DRIs or MEs will not be considered voluntary if any inducements offered in connection with the DRIs or MEs exceed 30 percent of the total cost of self-only coverage (30 Percent Limit) under the applicable group health plan coverage (Benchmark Plan). The Final ADA Regulations include specific rules for identifying the Benchmark Plan. These rules vary depending on whether the employer offers group health coverage and, if so, how many health plan options the employer offers.
- Mere inquiries about tobacco usage do not qualify as DRIs; however, screening for tobacco usage likely qualifies as an ME.
- Employee health programs that include DRIs and MEs must be reasonably designed to promote health and prevent disease.
- Employee health programs must also satisfy the ADA's confidentiality provisions.

The requirements of the Final ADA Regulations regarding the definition of "voluntary" are effective on the first day of plan years beginning on or after January 1, 2017; however, the other requirements prescribed by the Final ADA Regulations (e.g., programs must be reasonably designed to promote health and confidentiality) are effective immediately because they are reiterations of existing requirements of the ADA.

Practice Pointer: Do the new requirements apply to inducements provided after the first day of the plan year that begins in 2017 if the inducements are conditioned on requirements satisfied in 2016? This is unclear. Arguably, the inducement offered in 2017 must satisfy the new requirements since it is offered after the effective date; however, the inducement is conditioned on satisfaction of requirements that apply before the effective date of the rules. Additional guidance from the EEOC on this issue would be welcomed.

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.
- 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 ADA Rules

Which employee health programs are subject to the Final ADA Regulations?

As a threshold matter, the Final ADA Regulations apply only to employee health programs maintained by employers subject to Title I of the ADA. Title I of the ADA generally applies to all private and state and local governmental employers with 15 or more employees for each working day in at least 20 calendar weeks in the current or preceding calendar year.

What is an employee health program?

Neither the ADA nor the Final ADA Regulations provide a specific definition of "employee health program." The lack of a specific definition leads to a very broad application of the rules. Consequently, most employer-sponsored wellness programs would qualify as employee health programs for purposes of the ADA, including:

- Programs designed to increase physical activity
- Smoking/tobacco cessation classes
- Weight reduction classes
- Health risk assessments

- Screenings (including biometric screenings)
- Disease management programs
- Well-woman programs
- Prenatal programs

Practice Pointer: The Final ADA Regulations apply to employee health programs without regard to whether they are offered in connection with participation in an employer's group health plan.

In what ways do the Final ADA Regulations regulate employee health programs?

The Final ADA Regulations ensure that employee health programs that include DRIs and MEs are voluntary. In addition, the Final ADA Regulations ensure that employee health programs, including the DRIs and MEs that are part of such programs, are reasonably designed to promote health and that all information obtained as part of the program is kept confidential in accordance with the ADA. Last, it ensures that disabled individuals are provided a reasonable accommodation if they are unable to satisfy the requirements of the employee health program.

What is a DRI?

The Final ADA Regulations do not define "disability related inquiry." The EEOC enforcement manual defines a DRI as a question (or series of questions) that is likely to elicit information *about a disability*, as defined by the ADA. The enforcement manual is clear that not all questions about a person's health or impairments will qualify as a DRI—only those questions that are likely to elicit information about an impairment that qualifies as a disability are DRIs.

So what conditions or impairments constitute a disability under the ADA? Before the Americans with Disabilities Act Amendments Act (ADAAA), the scope of conditions and impairments that qualified as disabilities was relatively narrow. The ADAAA, which was signed into law in 2008, and the final ADAAA regulations issued by the EEOC in 2011, significantly expanded the definition of disability such that many common conditions or illnesses not previously considered a disability would now be considered as such. For example, the ADAAA rules define a physical or mental impairment as *any* physiological, mental or psychological disorder that "substantially limits" one or major life activities. Major life activities include:

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing

- Sitting
- Reaching
- Lifting
- Bending
- Speaking
- Concentrating
- The operation of major bodily functions

The EEOC further notes in the final ADAAA regulations that the term "substantially limits" is to be construed broadly and is not meant to be a demanding standard. In fact, the EEOC notes that "an impairment need not prevent, or significantly or severely restrict the individual from performing a major life activity in order to be considered substantially limiting." Given the significant breadth of the ADA's definition of disability after the ADAAA, most questions in an employee health program that are specifically designed to determine if an employee has any condition or impairments or not, or that are designed to determine the severity of a particular condition, will likely constitute a DRI.

Practice Pointer: The Final ADA Regulations clarify that inquiries regarding the employee's tobacco usage are *not* considered DRIs.

What is a "medical examination"?

Neither the ADA nor the Final ADA Regulations define "medical examination." According to the EEOC enforcement manual, a medical examination is a procedure or test that seeks information about an individual's physical or mental impairments or health. The EEOC enforcement manual indicates that the following factors should be considered to determine whether a test (or procedure) is an ME under the ADA rules:

- Whether the test is administered by a health care professional.
- Whether the test is interpreted by a health care professional.
- Whether the test is designed to reveal an impairment or physical or mental health.
- Whether the test is invasive.
- Whether the test measures an employee's performance of a task or whether it measures physiological responses to performing the task.
- Whether the test normally is given in a medical setting.
- Whether medical equipment is used.

The EEOC enforcement manual indicates medical exams for purposes of the ADA rules include:

- Vision test analyzed by an ophthalmologist
- Blood, urine, saliva and hair analysis to detect disease
- Blood pressure screening
- Cholesterol screening
- Nerve conduction tests
- Pulmonary function tests
- Psychological tests designed to identify a mental disorder
- Diagnostic procedures such as x-rays, CAT scans and MRIs

Practice Pointer: Although mere inquiries regarding tobacco use are not considered DRIs, screenings or exams that test for tobacco use may qualify as MEs.

Is the employee health program voluntary?

If an employee health program includes DRIs and/or requires an ME, then the program must be voluntary as defined by the Final ADA Regulations. Such a program is considered voluntary only if the program satisfies each of the following requirements:

- Employees are not required to participate. For example, an employee's refusal to participate does not result in his or her termination of employment.
- Employees who choose not to participate are not denied eligibility in any group health plan or group health plan option offered by the employer.
- The employer takes no adverse employment action or does not retaliate against those who choose not to participate.
- The employee receives a notice that contains certain required information.
- Any inducements provided in connection with the program are limited in accordance with the Final ADA Regulations.

Practice Pointer: It is and has been common for employers to condition eligibility in a health plan or the health plan's options to those who complete a health risk assessment and/or screening. Such common practices will *not* be considered voluntary under the Final ADA Regulations.

What are the applicable notice requirements?

If an employee health program includes DRIs and/or requires MEs, the employer must provide notice to the employees that satisfies the following requirements:

- The notice is written so that the employee from whom medical information is being obtained is reasonably likely to understand it.
- The notice describes the medical information that is obtained by the program and the specific purposes for which the information is obtained.
- The notice describes the restrictions on the disclosure of the employee's medical information and the identity of any employer representatives or third parties with whom the information will be shared.
- The methods the employer will use to protect the confidentiality of such information (including whether it complies with HIPAA's privacy and security rules, if applicable).

The EEOC has issued a model notice that employers may use in lieu of their own notice or that employers may use to help draft their own notice. The EEOC has also issued FAQs in connection with the model notice. The FAQs provide the following directions:

- The employer may engage a third-party vendor to provide the notice, but the employer remains liable for the third-party's failure to send.

Practice Pointer: Employers and third-party wellness vendors should memorialize their agreements in writing so that the notice requirement obligations of each party are clear.

- The EEOC does not prescribe a specific time frame for providing the notice so long as the notice is provided before the employee provides any health information in connection with the wellness program.

Practice Pointer: Should employers include the notice in any materials describing the wellness program that were furnished to employees in 2016 for the 2017 plan year? We believe the conservative approach is to include materials related to the wellness program that were furnished in 2016 but relate to the 2017 plan year even though the notice requirements do not technically apply until the first plan year beginning on or after January 1, 2017.

- The notice may be given in any format that is "effective in reaching employees" before being offered an opportunity to participate in the wellness program. For example, it can be sent in hard copy form or in an email with a subject line that identifies the significance of the information in the email.
- The notice should *not* be provided to the employee along with substantial other information unrelated to the wellness program since it may cause confusion or cause employees to ignore the information.

Practice Pointer: Should employers include the wellness program information in the enrollment materials and/or the health plan's summary plan description? While we believe that it is prudent to include the notice in the enrollment materials and/or the summary plan description to the extent such documents reference the wellness program, employers should be cautious about including the notice only in those documents since such documents are typically not limited to the wellness program.

- Employers should make accommodations for employees with disabilities. For example, employers may need to print hard copy notices in large print for employees with vision impairments. Electronic notices should be formatted so that employees who use screen-reading programs can read them.

Practice Pointer: Are employers permitted to use their existing wellness program materials? Yes, employers are not required to use the model notice; however, existing materials should be revised to the extent that the existing materials do not contain the elements required by the Final ADA regulations, as reflected in the EEOC's model notice.

How does the notice requirement in the Final ADA Regulations align with HIPAA's privacy rules?

Many wellness programs that are group health plans or that are offered in connection with group health plans are also subject to HIPAA's privacy rules, which require health plans to furnish a notice to covered individuals that contains information similar to the information required in the ADA notice. Will the HIPAA privacy notice operate to satisfy the notice requirement of Final ADA Regulations? Perhaps, but we recommend employers consider the following before relying on the HIPAA privacy notice to satisfy the ADA notice requirements:

- If the wellness program is made available to all employees without regard to whether the employee participates in the employer's group health plan, then furnishing the group health plan's privacy notice to employees who participate in the wellness program but not the group health plan may cause confusion or cause the employee to ignore the information. The EEOC recommends against sending the ADA notice with a lot of information unrelated to the wellness program.
- HIPAA's privacy rules only require plans to provide the notice after an individual becomes covered and only after there is a change in the notice. Otherwise, plans are merely furnishing covered individuals with reminders every three years of its existence and where to locate it. If the wellness program is made available every year, we recommend that employers provide the ADA notice every year. This may not coincide with the frequency with which the HIPAA notice is furnished.

What are the applicable limitations on inducements?

A wellness program that includes DRIs or requires an ME must be voluntary. While some would argue that a financial inducement does not make a program involuntary,[1] the EEOC does not necessarily see it that way. According to the EEOC, if a wellness program that includes DRIs or requires an ME offers inducements (reward or penalty) to participate, the inducement cannot exceed the 30 Percent Limit (i.e., 30 percent of the total cost of self-only coverage for the Benchmark Plan). Any inducement that exceeds the 30 Percent Limit is, according to the EEOC, coercion. The Final ADA Regulations provide rules for calculating the 30 Percent Limit in each of these instances. The chart below summarizes these rules for various common situations.

NOTE: In light of guidance issued by EEOC in an information letter addressed to Ashley Gillihan of Alston & Bird LLP dated August 21, 2016, it is clear that the EEOC interprets the reference to "plan" in the rules to mean health plan option.

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1 *EEOC v. Orion Energy Sys. Inc.*, 2016 WL 5107019 (E.D. Wis. 2016) (court held that a program shifting the entire cost of coverage to an employee was voluntary because "even a strong incentive is still no more than an incentive; it is not compulsion.")

Situation	Benchmark Plan
Employer maintains only one group health plan option. *This situation is a combination of the categories described in 1630.14(d)(2)(i) and (ii)* This situation includes programs that are limited to employees who enroll in the group health plan or that are made available to employees without regard to whether they enroll in the health plan.	30% of the total cost of self-only coverage under the one health plan option offered to employees.
The employer maintains multiple group health plan options and limits the inducement to those employees who enroll in a specific health plan option. For example, the employer offers a PPO and HDHP but limits the inducement to those who enroll in the HDHP. *Although this situation is not clearly described in one of the categories in 1630.14(d)(2), a close examination of the rules and the manner in which EEOC interprets the term "plan" indicates this situation falls within the category described in 1630.14(d)(2)(i)* This situation includes programs that are made available to all employees without regard to whether they enroll in the health plan but that limit the inducements to employees who enroll in a specific health plan option.	30% of the total cost of self-only coverage for the specified option in which the employees must enroll to receive the inducement.

Employer maintains multiple group health plan options but does not limit the inducement to those who enroll in a specific health plan option. This situation includes a program that is made available to all employees but limits the inducement to those who enroll in any of the health plan options. It also includes a program that is limited to those who enroll in any of the health plan options and provides the inducement to any such employee.	30% of the total cost of self-only coverage for the lowest-cost group health plan option maintained by the employer *without regard to the option in which the employee actually enrolls*
Employer maintains multiple group health plan options but offers a different wellness program with each option and limits the inducement for each program to those who enroll in the plan. For example, the employer maintains a PPO and HDHP. Those that enroll in the PPO are eligible for a premium reduction if they complete a health risk assessment. Employees who enroll in the HDHP are eligible for a premium reduction if they complete a biometric screening. The program is not available to employees who do not participate in the program.	Although not specifically addressed in the Final ADA Regulations, we believe it is a reasonable interpretation of the Final ADA Regulations to conclude that the Benchmark Plan in this situation is the plan in which the employee is enrolled since the wellness program is different for each health plan option
Employer does not offer any group health plan options.	30% of the total cost of self-only coverage for the second-lowest-cost silver plan for a 40-year-old nonsmoker in the state or federal health care exchange in the state of the employer's principal place of business

The Final ADA Regulations do *not* prescribe a method for calculating the "total cost" of self-only coverage. Presumably, employers may follow the rules for calculating the applicable premium under COBRA; however, the regulations do not foreclose the use of alternative methods.[2]

The Final ADA Regulations also clarify that the 30 Percent Limit applies to any financial or in-kind incentives, such as DRI or MEs. Thus, the 30 Percent Limit might apply to an inducement in the form of a gift card or other non-cash item, such as an iPad or gym membership.

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[2] For example, the proposed regulations issued by the IRS on the "Cadillac tax" under Code Section 4980I have identified possible alternative methods for calculating the total cost of health coverage for purposes of the Cadillac tax, and those methods, once finalized, might be a sufficient basis for calculating the total cost under these rules.

Practice Pointer: If an employer offers a minimum essential coverage (MEC) only plan that provides only ACA mandated preventive care (a so-called "skinny plan") as one of its options, the total cost of the self-only coverage for the MEC will be the Benchmark Plan in most cases. This may have an adverse impact on the wellness program due to the relatively low cost of an MEC plan.

What if the participant can obtain the full inducement without the DRIs or MEs?

How do the inducement rules apply when the employee health program includes DRIs or MEs but participants can obtain the full inducement offered without responding to the DRIs or completing the MEs? Consider the following illustration:

> ABC Company provides employees with a $300 per month premium reduction if they complete any two of the following five action items:
>
> - They record their physical activity during the week
> - They record the food that they have eaten during the week
> - They take a stress relief class
> - They take a class on healthy eating
> - They complete a health risk assessment
>
> In the above list, only the health risk assessment is a DRI. Moreover, the $300 per month premium reduction exceeds the 30 Percent Limit.

In the above example, the wellness program includes a DRI—the health risk assessment—but the participants in the program can obtain the full inducement—the $300 per month premium reduction—without completing the health risk assessment. Does this program violate the Final ADA Regulations merely because the program includes a DRI, even though the participants can obtain the inducement without completing the health risk assessment? EEOC officials indicate that the inducement offered by the wellness program would not be subject to the 30 Percent Limit (or the notice requirement) to the extent that the inducement was available to participants without regard to the DRI or ME. Thus, even though a program might include DRIs and/or MEs, the 30 Percent Limit will not apply if the employees or participants do not have to respond to the DRIs or take the MEs to obtain the full inducement.

Likewise, if a program includes various components with different inducements that can be satisfied separately, only the inducements related to DRIs or require MEs must comply with the 30 Percent Limit. Consider the following illustration:

> ABC Company maintains a wellness program that has three components, each of which has a corresponding inducement:
>
> - Complete a health risk assessment in exchange for a $100 premium reduction
> - Complete a biometric screening in exchange for a $50 premium reduction
> - Participate in an educational session on nutrition in exchange for a $50 premium reduction

In this situation, the 30 Percent Limit applies to the combined inducements for the health risk assessment and the biometric screening, but not to the inducement for the educational session because it does not contain any DRIs or MEs.

Practice Pointer: Is it permissible to offer the wellness program to all employees but limit the inducement to those who enroll in the employer's health plan? According to informal conversations with EEOC officials, it is permissible; however, the employer must follow the rules described above to determine the 30 Percent Limit.

When is a program reasonably designed to promote health and prevent disease?

An employee health program, including DRIs and MEs offered as part of the employee health program, must be reasonably designed to promote health and prevent disease, even those that do not include disability-related inquiries or medical exams. According to the Final ADA Regulations, the program must have a reasonable chance of improving health or preventing disease, must not be overly burdensome or time consuming, and must not be a subterfuge for violating the ADA or any other federal law.

Examples of programs that do not satisfy this standard include:

- A program that requires a significant amount of time to obtain a reward.
- A program that imposes unreasonably intrusive procedures.
- A program that imposes significant costs related to medical examinations.
- A program that exists mainly to shift costs to targeted employees.
- A program that exists simply to collect information for the employer to estimate future health care costs.

In addition, wellness programs that collect medical information through a measurement, screening or test without follow-up information or advice designed to improve health would not be reasonably designed to promote health or prevent disease *unless* the collected information is actually used to design a wellness program that addresses at least a subset of the conditions identified through the program.

What are the applicable confidentiality requirements?

Under the ADA's confidentiality provisions, employer-sponsored wellness programs may not:

- Disclose identifiable medical information to the employer except as necessary for the employer to administer the health plan.
- Require employees to waive confidentiality protections or agree to the sale or exchange of medical information as a condition of participating in the program.

Read literally, employers who sponsor wellness programs that are not limited to health plan participants arguably will not be able to obtain any identifiable medical information obtained through the wellness program. Such employers will be limited to information regarding participation (did the employee participate or not). Likewise, employers who sponsor wellness programs that are limited to health plan participants will not be able to receive any identifiable medical information obtained through the wellness program unless the information is necessary to administer the health plan.

The ADA's confidentiality requirements are similar to HIPAA's privacy requirements; however, there is a key difference between the two. HIPAA's rules only apply to health plans, while wellness programs subject to the ADA might not qualify as a health plan subject to HIPAA. For example, if a wellness program provides an inducement to employees who log physical activity each week, the wellness program is likely not a health plan subject to HIPAA but it would be a wellness program subject to the ADA's confidentiality requirements.

Under what circumstances would an employer be required to make a reasonable accommodation for a wellness program?

If an employee is unable to participate in the wellness program due to a disability, the employer must provide an alternative in accordance with the ADA's rules. For example, if the employer provides a reward for employees who walk or exercise a specified amount of time each week, the employer would be obligated to provide a reasonable alternative to an employee who is unable to satisfy the requirements due to a disability.

Does the ADA's bona fide employee benefit plan exception apply?

Despite two recent court decisions indicating that it does, the EEOC does not agree.[3] The Final ADA Regulations make clear, in no uncertain terms, that the EEOC does not believe that the bona fide employee benefit plan exception to the ADA's requirements applies in the context of employee health programs. A recent court decision seems to support this position.[4]

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.
- 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.

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3 *Seff v. Broward County*, 691 F. 3d 1221 (11th 2012); *EEOC v. Flambeau*, 2015 U.S. Dist. LEXIS 173482 (W.D. Wis. Dec. 30, 2015).

4 *EEOC v. Orion Energy Sys., Inc.*, 2016 WL 5107019 (E.D. Wis. 2016). However, as noted above, the court disagreed with the EEOC's determination of what is voluntary.

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.

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.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

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