



FACT SHEET

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SMALL BUSINESS FACT SHEET

The Equal Employment Opportunity Commission’s Notice of Proposed Rulemaking on Title II of the Genetic Information Nondiscrimination Act and Incentives in Employer Wellness Programs for Employees’ Spouses to Provide Their Current or Past Health Status Information

On Friday, October 30, 2015, the Equal Employment Opportunity Commission (EEOC or the Commission) issued a Notice of Proposed Rulemaking (NPRM) to amend the regulations implementing Title II of the Genetic Information Nondiscrimination Act (GINA) as they relate to employer wellness programs that are part of group health plans. The proposed rule says employers that offer wellness programs as part of group health plans may provide limited financial and other inducements (also called incentives) in exchange for an employee’s spouse providing information about his or her current or past health status information.

Interested members of the public have **60 days from the date of publication of the proposed rule to provide comments** or until Tuesday, December 29, 2015. The proposed rule is available at <https://federalregister.gov/a/2015-27734>. This fact sheet explains the proposed rule in detail and highlights areas of particular interest to small businesses.

Title II of GINA prohibits employers covered by the law from using genetic information in making decisions about employment. It restricts employers and other entities covered by GINA¹ from requesting, requiring, or purchasing genetic information, unless one or more of six narrow exceptions applies. In addition, it strictly limits entities covered by GINA from disclosing genetic information. **EEOC’s current regulations implementing GINA prohibit employers from offering incentives in return for genetic information.**

- One of the narrow exceptions to GINA’s prohibition on requesting, requiring, or purchasing genetic information applies when an employee voluntarily accepts health or genetic services offered by an employer, including such services offered as part of a wellness program.
- The statute and EEOC’s GINA regulations say that “genetic information” includes, among other things, information about the “manifestation of a disease or disorder in family members of an individual.” The term “family members” includes spouses.
- Because information about the current or past health status of spouses and other family members is genetic information about an employee, EEOC’s current GINA regulations could be read as prohibiting employers from offering incentives in return for a spouse providing his or her current or past health information. The proposed rule explains how employers may lawfully offer incentives for such information under GINA.

¹ Unless otherwise noted, the term “GINA” refers to Title II of GINA.

The proposed rule would permit employers to offer limited incentives for the employee's spouse to provide current or past health status information as part of a wellness program, where the spouse participates in the employer's health plan.

- An employer may offer, as part of its health plan, a limited incentive (in the form of a reward or penalty) to an employee whose spouse (1) is covered under the employee's health plan; (2) receives health or genetic services offered by the employer, including as part of a wellness program; and (3) provides information about his or her current or past health status. Information about current or past health status usually is provided as part of a health risk assessment (HRA), which may include a questionnaire or medical examination, such as a blood pressure test or blood test to detect high cholesterol or high glucose levels.
- The total incentive for an employee and spouse to participate in a wellness program that is part of a group health plan and that collects information about current or past health status may not exceed **30 percent of the total cost of the plan** in which the employee and any dependents are enrolled. The incentive may be financial or in-kind (e.g., time-off awards, prizes, and other items of value).
 - For example, if an employee and his or her spouse are enrolled in self and family coverage that costs \$14,000, the maximum incentive the employer may offer the employee and spouse to provide information on current or past health status as part of a wellness program is \$4,200 (30 percent of \$14,000).
 - The maximum portion of an incentive that may be offered to an *employee* alone may not exceed 30 percent of the total cost of self only coverage. So, if the employer in the example above offers self-only coverage at a total cost of \$6,000, the maximum portion of the \$4,200 incentive that may be offered for the employee's participation is \$1,800 (30 percent of \$6,000). The rest of the incentive (\$2,400 in the example above) may be offered for the spouse's participation or for the employee, spouse, and/or employee's other dependents who are covered by the health plan participating in activities designed to promote health or prevent disease. These could include programs that reward participants for walking a certain amount each week or for attending nutrition or weight loss classes.

The proposed rule says that **any health or genetic services an employer offers must be reasonably designed to promote health or prevent disease**. This means that the service must have a reasonable chance of improving the health of, or preventing disease in, participating individuals. It also means that an employer-sponsored wellness program must not be overly burdensome, a subterfuge for violating Title II of GINA or other laws prohibiting employment discrimination, or highly suspect in the method chosen to promote health or prevent disease.

The proposed rule adds a new provision stating that **employers may not require employees (or employees' spouses or dependents covered by the employee's health plan) to agree to the sale, or waive the confidentiality, of their genetic information as a condition for receiving an incentive or participating in a wellness program**.

The proposed rule makes clear that **an employer may request information about the current or past health status of an employee's spouse** who is covered by the employer's group health plan and is completing a HRA on a voluntary basis, as long as the employer follows GINA's rules about requesting genetic information when offering health or genetic services. These rules include requirements that the spouse provide prior, knowing, written, and voluntary authorization for the employer to collect genetic information, just as the employee must do.