GROOM LAW GROUP CHARTERED

BENEFITS BRIEF

November 19, 2015 www.groom.com

Authors: Kathryn Bjornstad Amin, Tamara Killion, Seth Perretta, Vivian Hunter Turner, Allison Ullman

If you have questions, please contact your regular Groom attorney or one of the attorneys listed below:

Kathryn Bjornstad Amin
kamin@groom.com
(202) 861-2604

Jon W. Breyfogle
jbreyfogle@groom.com
(202) 861-6641

Lisa M. Campbell
lcampbell@groom.com
(202) 861-6612

Thomas F. Fitzgerald
tfitzgerald@groom.com
(202) 861-6617

Christine L. Keller
ckeller@groom.com
(202) 861-9371

Tamara S. Killion
tkillion@groom.com
(202) 861-6328

Rachel Leiser Levy
rlevy@groom.com
(202) 861-6613

Mark C. Nielsen
mnielsen@groom.com
(202) 861-5429

Seth T. Perretta
sperretta@groom.com
(202) 861- 6335

Christy A. Tinnes
ctinnes@groom.com
(202) 861-6603

Vivian Hunter Turner
vturner@groom.com
(202) 861-6324

Allison Ullman
aullman@groom.com
(202) 861-6336

Brigen L. Winters
bwinters@groom.com
(202) 861-6618

EEOC Releases Proposed GINA Rule on Wellness Programs

On October 30, 2015, the Equal Employment Opportunity Commission ("EEOC") published a proposed rule ("Proposed Rule") in the *Federal Register* that would amend the regulations implementing Title II of the Genetic Information Nondiscrimination Act of 2008 ("GINA") as they relate to employee wellness programs.[1] The Proposed Rule provides guidance regarding the extent to which employers may offer employees inducements where the employee's spouse completes a health risk assessment and/or takes a biometric screening (together, an "HRA") and clarifies that Title II of GINA does not prohibit employers from offering limited inducements for current or past health information from spouses as part of a voluntary wellness program, provided certain criteria are met. Comments on the proposed rule are due December 29, 2015.

The Proposed Rule expands on the existing criteria for such "voluntary wellness programs," and adds six new requirements, including a new requirement that the program be reasonably designed to promote health and prevent disease and a clear prohibition on providing an inducement for health information or genetic information of children. Notably, the Proposed Rule generally extends the 30 percent limit under the HIPAA wellness rules to spousal HRAs that are offered as part of an employer-sponsored group health plan, with certain key distinctions, discussed in more detail below.

The Proposed Rule is the latest in a series of actions by the EEOC with respect to wellness programs, including the issuance in April 2015 of a proposed rule addressing the extent to which inducements may be provided with respect to wellness programs under the Americans with Disabilities Act ("ADA"). Please see our prior Benefits Briefs for background on these actions.[2]

Of note, the Proposed Rule only provides guidance under Title II of GINA, which relates to employers. The Proposed Rule does not provide guidance under Title I of GINA, which relates to group health plans and is under the jurisdiction of the Departments of the Treasury, Labor, and Health and Human Services. There continues to be uncertainty regarding the level of inducements, if any, that may be provided with respect to spousal HRAs under Title I of GINA.

Background Regarding Title II of GINA

Among other things, Title II of GINA restricts employers from requesting, requiring, or purchasing genetic information, with certain limited exceptions. For this purpose, "genetic information" includes (1)

[1] The EEOC also issued a press release, a small business fact sheet, and Q&As regarding the Proposed Rule.
[2] *See* Groom Benefits Brief, EEOC Releases Proposed Rule on Wellness Programs (Apr. 27, 2015), available at http://www.groom.com/resources-965.html; Groom Benefits Brief, Senate and House Leaders Introduce Bill Supporting Employee Wellness Programs (Mar. 9, 2015), available at http://www.groom.com/resources-953.html.

information about an individual's genetic tests, (2) information about the genetic tests of a family member, (3) information about the manifestation of a disease or disorder in family members of an individual (i.e., family medical history), (4) requests for and receipt of genetic services by an individual or a family member, and (5) genetic information about a fetus carried by an individual or family member or of an embryo legally held by the individual or family member using assisted reproductive technology. For this purpose, "family member" includes a spouse.

An exception to the general prohibition on employers requesting, requiring, or purchasing genetic information is available to employers that offer health or genetic services, including those offered as part of voluntary wellness programs. They may request genetic information as part of these programs, so long as certain requirements are satisfied. Under the current GINA Title II regulations, the wellness program cannot condition inducements to employees on the provision of genetic information (based on the Title I prohibition against adjusting premium or contribution amounts based on genetic information).

The current Title II regulations have raised significant questions as to whether incentives may be offered to spouses for completing HRAs that request health information. This is because, when an employer seeks information from an employee's spouse about the spouse's current or past health status, it may be considered a request for the employee's genetic information (i.e., an inquiry regarding the manifestation of a disease or disorder in a family member).

The Proposed Rule

1. **Inducements for Spousal Information**

Under the Proposed Rule, an employer may offer, as part of its health plan, an inducement for an employee's spouse's "health information," when the spouse (i) is covered under the employer's health plan, (ii) receives health or genetic services offered by the employer, including as part of a wellness program, and (iii) provides information about his or her current or past health status as part of an HRA. However, no inducement may be offered in return for the spouse providing his or her own genetic information, including the results of his or her genetic tests.

Form of HRA and Authorization. The spousal HRA may take the form of a medical questionnaire, a medical examination (e.g., blood pressure or glucose testing), or both, and it must otherwise satisfy the requirements applicable to employee HRAs under existing Title II rules, including that the spouse provide prior, knowing, voluntary, and written authorization and that the authorization form describe the confidentiality prohibitions and restrictions on the disclosure of genetic information. It also has to be administered as part of the spouse's receipt of genetic services offered by the employer (e.g., participation in a wellness program).

Type and Amount of Inducement. The Proposed Rule outlines the maximum inducement that may be offered for spousal health information, based on the cost of coverage in which the employee is enrolled. However, the Proposed Rule **does not** separately address the amount of inducement, if any, that may be offered for spousal health information for a wellness program that is not tied to a health plan. The Proposed Rule clarifies that the reward may be financial or in-kind (e.g., time-off awards, prizes, and other items of value) and may take the form of a reward or a penalty. The total inducement, together with any inducements permitted under the ADA proposed rule for an employee's participation in a wellness program that asks disability-related questions or requires medical examinations, may not exceed 30% of the total cost of the coverage under the plan in which an employee and the spouse are enrolled; however, the Proposed Rule prescribes how the award must be apportioned between the employee and the spouse:

- Employee: The maximum amount of the inducement that may be attributable to an employee's actions in a wellness program described above cannot exceed 30% of self-only coverage (i.e., the limit imposed on employee incentives under the ADA proposed rule).
- Spouse: The maximum amount of the inducement that may be attributable to the employee's spouse completing an HRA may not exceed 30% of the total cost of coverage for the plan in which the employee and spouse are enrolled **less** 30% of the total cost of self-only coverage.

Although not entirely clear, it appears that the potentially more generous limits under the Health Insurance Portability and Accountability Act ("HIPAA") (i.e., different apportionment of rewards, no reward limit for participatory wellness programs, and a higher reward limit for tobacco cessation programs) may still be available in the event that the wellness program at issue contains other components in addition to spousal HRAs covered by the Proposed Rule and disability-related inquiries or medical examinations covered by the ADA proposed rule. For example, a tobacco cessation program that merely asks the spouse and employee whether he and/or she use tobacco may still be eligible for the higher HIPAA limit and may not be subject to the reward limits outlined in the Proposed Rule and the ADA proposed rule.

2. Treatment of Genetic Information of Children

The preamble to the Proposed Rule makes very clear that no inducements may be offered for the provision of an employee's child's genetic information or health information (whether or not the child is biological), although an employer may offer health or genetic services (including participation in a wellness program) to an employee's children on a voluntary basis and may ask questions about a child's current or past health status as part of providing such services. The preamble cites a concern that a child's genetic information is more likely than a spouse's genetic information to give rise to information about an employee's genetic make-up.

3. Reasonably Designed to Promote Health and Prevent Disease

Any health or genetic services in connection with which an employer requests the employee's genetic information (including the spouse's health information) must be reasonably designed to promote health or prevent disease. This is similar to the reasonable design requirement already in effect with respect to wellness programs under HIPAA and included in the ADA proposed rule. The preamble specifies that collecting information on a health questionnaire without providing follow-up information or advice would not be reasonably designed to promote health or prevent disease and that a program is not "reasonably designed" if it imposes, as a condition of obtaining a reward, an overly burdensome amount of time for participation, requires unreasonably intrusive procedures or places significant costs related to medical examinations on employees.

4. Other Provisions of the Proposed Rule

In addition to the provisions described above, the Proposed Rule addresses the following:

- An employer may not condition participation in a wellness program or provide any inducement to an employee, or the spouse or other covered dependent of the employee, in exchange for an agreement permitting the sale of genetic information, including information about the current health status of an employee's family member, or otherwise waiving the existing confidentiality provisions relating to genetic information under Title II of GINA.

- The Proposed Rule makes clear that it does not limit the rights or protections of an individual under the ADA, other civil rights laws, or HIPAA. Therefore, employers must be careful to comply with other applicable laws.

Next Steps

Comments with respect to the Proposed Rule must be submitted by December 29, 2015. Following the close of the comment period, the EEOC will evaluate comments received and revise the Proposed Rule as necessary. The EEOC will then vote on the final rule. The Q&As issued by the EEOC provide that the EEOC will coordinate final rulemakings under both the ADA and Title II of GINA.

The Q&As also state that while employers do not have to comply with the Proposed Rule before it formally takes effect, they may do so. To this end, employers should start considering what changes, if any, should be made to their wellness programs once the final rule goes into effect.