Checking In On GINA: Revisiting the EEOC's Rules on the Genetic Information Nondiscrimination Act

Insights
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On May 16, 2016, the Equal Employment Opportunity Commission ("EEOC") issued regulations governing the treatment of wellness programs under the Genetic Information Nondiscrimination Act ("GINA"), as well as under the Americans with Disabilities Act ("ADA"). The rules regarding financial inducements began applying to employer-sponsored wellness programs as of the first day of the first plan year that began on or after January 1, 2017. This move led to a legal challenge by the AARP regarding whether the financial incentives provided for in both laws was consistent with the notion of voluntary participation. The United States District Court for the District of Columbia agreed with the AARP, and on August 22, 2017, just a little over a year after the regulations went into place, the court held in *AARP v. United States Equal Employment Opportunity Commission* that incentives and penalties up to 30% of employee health care costs are inconsistent with the "voluntary participation" requirement under both the ADA and GINA.

While most employers are very familiar with the ins and outs of the ADA, few fully understand GINA, which is a relatively new federal law enacted in 2008 which prohibits employers from requesting "genetic information" from their employees. Specifically, it prohibits employers with 15 or more employees from discriminating against an employee on the basis of the employee's genetic information. "Genetic information" includes information from genetic tests, the genetic tests of the employee's family members, and family medical history. GINA also prohibits employers from retaliating against an employee who has opposed a practice made unlawful by GINA. Finally, GINA prohibits employers from requesting an employee's genetic information, subject to six exceptions.

The first jury verdict based upon a GINA violation came in 2015 when a jury awarded two employees $2.2 million dollars after their employer forced them to take DNA swab tests to determine whether either of them was defecating on company property. Interestingly enough in that case, neither of the two workers tested ended up being the "devious defecator" at issue.

GINA's enactment complicated matters for employers interested in offering "wellness programs" to their employees. Wellness programs include things such as health risk assessments, health screenings, flu shots, health fairs and workshops, exercise groups, fitness classes, smoking cessation classes, and/or participation incentives. Wellness programs have obvious benefits to both employers and employees, but they also frequently involve gathering medical (including genetic) information. However, GINA provides an exception for wellness programs if the employee provides prior, knowing, voluntary and written authorization; there is no penalty for not participating in the prior, knowing, voluntary and written authorization; there is no penalty for not participating in the part of the program seeking genetic information; only the employee and licensed health care professional or counselor receive individually identifiable information concerning the results of such services; and genetic information cannot be disclosed to the employer except in aggregate terms. The issue of when a wellness program is truly “voluntary” and when financial inducements may be offered for participation, has been up for debate ever since.

The May 2016 rule by the EEOC specified, amongst other things, that no more than 30% of the cost of *self-only* coverage may be given as an inducement for the employee’s participation in an employersponsored wellness program. Likewise, the maximum total inducement for a spouse to provide information about his or her manifestation of disease or disorder will also be 30% of the total cost of (employee) *self-only* coverage, so that the combined total inducement will be no more than twice the cost of 30% of self-only coverage.

The AARP challenged this rule in October 2016, alleging that the 30% incentives permitted by the rule are not consistent with the “voluntary” requirement of the laws. In other words, employees who cannot afford to pay a 30% increase to their premiums will be required to disclose protected information in order to get the incentive, when they otherwise would have kept this information confidential.

The court granted the AARP’s motion for summary judgment on August 22, 2017. Specifically, the court noted that it could find “nothing in the administrative record that explains the agency’s conclusion that the 30% incentive level is the appropriate measure for voluntariness.” Accordingly the court did not award deference to the EEOC on this issue, and instead reasoned that the 30% incentive amount was “arbitrary.” The court then remanded the rules to the EEOC for further consideration.

This is hardly the last we will hear on this issue. The EEOC may choose to revise the allowable incentives and then see if the revised amounts pass the legal muster. Alternatively, the EEOC may continue to maintain that 30% is an appropriate amount, but provide a firm legal basis for this rational that would not be considered arbitrary and capricious. For now, employers should continue to monitor developments on this issue.

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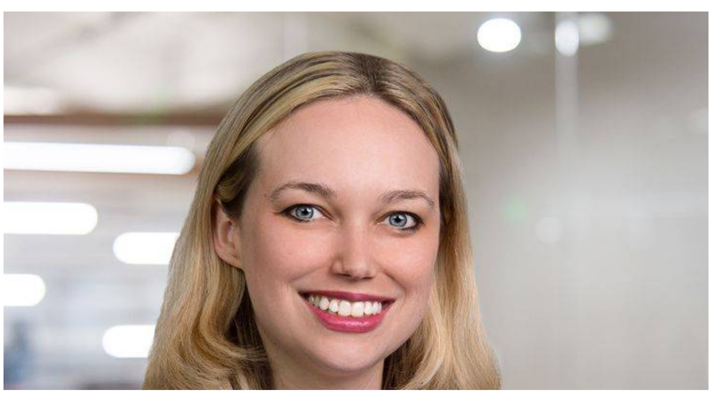

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