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TO: Clients of Sitzmann Morris & Lavis Insurance Agency

RE: EEOC Issues Proposed Rule to Amend Title II of GINA

On October 30, 2015, the U.S. Equal Employment Opportunity Commission (EEOC) issued a [Notice of Proposed Rulemaking](#) to amend the federal regulations issued in November 2010 which implement Title II of the Genetic Information Nondiscrimination Act (GINA) as they relate to employer wellness programs that are part of group health plans. The ruling addresses how an employer may offer certain incentives, such as financial and other inducements, in exchange for an employee's covered spouse to provide information about current or past health status as part of a health risk assessment (HRA) associated with the employer's wellness program. They also provided [Q&A](#) and a [Fact Sheet](#).

Background: Under the Genetic Information Nondiscrimination Act of 2008 (GINA), which applies to all employers with 15 or more employees, there are only six distinct circumstances in which an employer can require, request or purchase genetic information about an employee. One of the six narrow exceptions permits employers that offer health or genetic services, including services offered as part of a voluntary wellness program, to request genetic information as part of these programs as long as specific requirements are met. GINA defines the term "genetic information" of an employee to broadly include information about a family member's (including a spouse's) current or past health status. In other words, genetic information includes family medical histories.

One of these requirements is that the wellness program cannot condition inducements or incentives to employees on the provision of genetic information. The current regulations failed to give guidance on how GINA's restriction on the acquisition of genetic information by an employer, relates to the practice of offering employees inducements where a spouse participates in a wellness program. This brought into question whether or not an employer violated GINA by offering an employee an inducement if the employee's spouse, who is also covered by the group health plan, completes a HRA that seeks the "medical history" of the spouse.

Key Points: The EEOC's current regulations state that a wellness program cannot require employees to provide their genetic information as a condition of receiving incentives. The proposed rule makes clear that an employer can offer, as part of its group health plan, limited incentives to employees whose spouses are covered under the employee's health plan in exchange for the employee's spouse providing information about his or her current or past health status.

The proposed rule would also add 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.



Also, the proposed rule would clarify 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 an 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 information, just as the employee must do. The authorization forms must describe the confidentiality protections and restriction on the disclosure of information.

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. For example, if the employee is enrolled in family level coverage, the maximum is 30% of the family premium. This amount has to be apportioned between the employee and spouse. The employee's incentive is capped at 30% of the employee only coverage cost, and the spouse can receive the excess, up to the 30% of family cost. If they are enrolled as employee + spouse, then the spouse can receive the amount above the employee only cost up to 30% of the employee + spouse cost. The incentive may be financial or in-kind (for example, time-off awards, prizes and other items of value).

This ruling does not have any impact to the limitations on providing medical information for an employee's child.

What's Next: The EEOC is accepting comments on the proposed rule until December 29, 2015. The EEOC will then review all comments submitted and make any necessary modifications. The commission will then vote on the final rule. The proposed rule will take effect after it is issued in final form.