

BENEFITS ALERT

Rose & Kiernan, Inc.

October, 2009



Health Risk Assessments and Incentives New rules from GINA

This alert addresses new interim rules that will prohibit providing incentives for employees to participate in certain HRAs, as outlined below. At the end of this document you will also find instructions for submitting comments about these regulations electronically at the Federal rulemaking portal www.regulations.gov.

The **Genetic Information Nondiscrimination Act (GINA)**, was originally passed in 2008 as an amendment to ERISA and the Public Health Service Act (PHSA). GINA is intended to prohibit discrimination in health coverage based on genetic information and builds on the safeguards enacted by HIPAA that prohibit imposing a pre-existing condition exclusion based solely on genetic information. HIPAA also prohibits discrimination in eligibility, benefits or premiums based on genetic information. GINA expands on HIPAA and defines genetic information to include family medical history as well as individuals' genetic tests or those of a family member. GINA limits not only the use but the collection of genetic information and prohibits the use of or collection of genetic information for underwriting purposes. Underwriting purposes has been given a broad definition and is the reason for this Alert.



Most of GINA is intended to prevent health plans from taking any action whatsoever based on genetic information. Insurers or plans are prohibited from adjusting premiums or contribution amounts based on genetic information.

Collection of genetic information has now been defined to include requesting family medical history and also includes asking an enrollee questions about a condition that has not yet manifested itself in a disease, disorder or pathological condition. A Health Risk Assessment (HRA) that includes questions about family history is considered a request for genetic information.

Underwriting purposes has been defined to now include changing deductibles or other cost sharing mechanisms, or providing discounts, rebates, payments in kind, or other premium differential mechanisms in return for activities such as completing a health risk assessment (HRA) or participating in a wellness program. A health plan or carrier is also prohibited from making enrollment in the health plan contingent on completing an HRA that includes questions on family medical history. The wellness programs in this case are mostly the disease management programs. Many disease management programs are offered to enrollees who respond to a questionnaire requesting information about a family history of a disease or condition, such as hypertension or cardiac disease. This is considered requesting genetic information and is a violation of GINA. There are limited exceptions to this.

In short, neither you nor your health insurance carrier can provide incentives for employees to participate in an HRA which asks questions about family medical history or reveals any information that has not manifested itself in some kind of disease, disorder or pathological condition. HRA's will need to remove these types of questions (mainly those involving family medical history) if incentives are to be offered.

GINA also prohibits the requirement that an HRA be completed prior to enrollment regardless of whether the information obtained is used in any way to effect enrollment.

An HRA with questions on family history can be made available if there is no incentive to participate.

You can incent employees to complete an HRA if there are no questions on family medical history.

In addition, no plan can solicit information from a plan participant regarding family medical history in order to place them in a disease management program, such as a diabetes or asthma disease management program.

Any activities which violate these interim rules which occurred prior to this date are not in question. However, if an HRA was incentivized prior to the effective date of these interim rules, any genetic information collected cannot be used after the effective date in violation of these regulations.

These rules are effective for the first plan renewal after December 7, 2009.

From now until January 5, 2010, the Department of Labor, Dept of HHS and the Internal Revenue Service are accepting comments. You may submit comments on these interim regulations electronically at the Federal rulemaking portal <http://www.regulations.gov>. Once you are on the site scroll down to the list of rules until you find the one on Genetic Information Nondiscrimination Act. Then follow the instructions on the site.

Here are a couple examples from the regulations

Example #1

Facts: A group health plan provides a premium reduction to enrollees who complete a health risk assessment. The health risk assessment is requested to be completed after enrollment. Whether or not it is completed or what responses are given on it has no effect on an individual's enrollment status or on the enrollment status of members of the individual's family. The health risk assessment includes questions about the individuals' family medical history.

Conclusion: The health risk assessment includes a request for genetic information (that is, the individual's family medical history). Because completing the health risk assessment results in a premium reduction, the request for genetic information is for underwriting purposes; consequently, the request violates the prohibition on the collection of genetic information.

Example #2

Facts: The same facts as Example #1 except there is no premium reduction or any other reward for completing the health risk assessment.

Conclusion: In this Example 2, the request is not for underwriting purposes, nor is it prior to or in connection with enrollment. Therefore, it does not violate the prohibition on the collection of genetic information.

This Summary is provided to you for general informational purposes only and does not include references to other legal resources (e.g., supporting regulations, or formal or informal opinions) unless specifically noted. Please seek qualified and appropriate counsel for further information and/or advice regarding the application of the topics discussed herein to your employee benefits plans.

Updated October 20, 2009