EEOC's Final Rule on Employer Wellness Programs and Title I of the Americans with Disabilities Act

On May 17, 2016, the Equal Employment Opportunity Commission (EEOC or the Commission) issued a final rule to amend the Regulations and the accompanying Interpretive Guidance (also known as the Appendix) implementing Title I of the Americans with Disabilities Act (ADA) as they relate to employer wellness programs. A notice of proposed rulemaking was previously issued on April 20, 2015. The final rule says employers may provide limited financial and other incentives in exchange for an employee answering disability-related questions or taking medical examinations as part of a wellness program, whether or not the program is part of a health plan.

Background

1. What is a wellness program?

The term "wellness program" generally refers to health promotion and disease prevention programs and activities offered to employees as part of an employer-sponsored group health plan or separately as a benefit of employment. Many of these programs ask employees to answer questions on a health risk assessment (HRA) and/or undergo biometric screenings for risk factors (such as high blood pressure or cholesterol). Other wellness programs provide educational health-related information or programs that may include nutrition classes, weight loss and smoking cessation programs, onsite exercise facilities, and/or coaching to help employees meet health goals.

ADA Protections

2. What is the ADA and how does it apply to wellness programs?

Title I of the ADA is a federal civil rights law that prohibits employers from discriminating against individuals on the basis of disability. It also generally restricts employers from obtaining medical information from applicants and employees but allows them to make inquiries about employees' health or do medical examinations that are part of a voluntary employee health program. Employee health programs include many workplace wellness programs.

Additionally, Title I of the ADA requires employers to make all wellness programs, even those that do not obtain medical information, available to all employees, to provide reasonable accommodations (adjustments or modifications) to employees with disabilities, and to keep all medical information confidential.

Purpose of the Rule

3. Why did EEOC issue this final rule?

Before this final rule was issued, EEOC's ADA regulations stated that employers may make inquiries and conduct medical examinations that are part of a voluntary health program but did not define the term "voluntary" or explain what constitutes a "health program." The regulations also did not say whether the ADA allows employers to offer incentives to encourage employees to participate in such programs. EEOC issued this rule to provide guidance on the extent to which employers may offer incentives to employees to participate in wellness programs that ask them to answer disability-related questions or undergo medical examinations. The rule also explains the differences between the ADA's requirements for voluntary health programs and other federal laws, such as the Health Insurance Portability and Accountability Act (HIPAA), as amended by the Patient Protection and Affordable Care Act (Affordable Care Act), which governs wellness programs that are part of a group health plan.

4. How does this rule relate to the wellness program rules under HIPAA and the Affordable Care Act?

In issuing this final rule, EEOC sought to provide consistency with HIPAA and the Affordable Care Act rules on wellness program incentives, while also ensuring that incentives would not be so high as to become coercive and render participation in the program involuntary. The ADA also regulates certain aspects of wellness programs that HIPAA and the Affordable Care Act do not. Consequently, there are some differences between this rule and the wellness program rules under HIPAA and the Affordable Care Act.

HIPAA and the Affordable Care Act allow wellness programs that are part of an employer-sponsored group health plan to offer incentives for "health-contingent" wellness programs. These programs offer rewards to employees who perform activities (such as walk 10,000 steps a day) or achieve certain health outcomes (such as lowering their blood pressure), or impose penalties if they do not perform an activity or fail to achieve a particular outcome.

The regulations implementing HIPAA do not impose any incentive limits on "participatory" programs (such as programs that only ask employees to complete a HRA or attend a smoking cessation class). As long as these programs are available to all similarly-situated individuals, and incentives are made available regardless of a health factor (e.g., participating employees receive the same incentive regardless of the answers provided on a HRA about their health status, medical condition, medical history, or disability), participatory wellness programs do not violate HIPAA and the Affordable Care Act.

Unlike HIPAA and the Affordable Care Act, the ADA places limits on disability-related inquiries and medical examinations related to wellness programs, regardless of how the information obtained is ultimately used. Therefore, EEOC's final rule makes clear that the limit on incentives applies to any wellness program that requires employees to answer disability-related questions or undergo medical examinations (whether it is participatory or health contingent). Like HIPAA and the Affordable Care Act, this rule also makes clear that the term "incentives" includes both financial and in-kind incentives (such as reductions in insurance premiums, cash, time-off awards, prizes, and other items of value -- including "trinket" gifts).

5. Does this rule apply to wellness programs that are not part of an employer's group health plan?

Yes. The ADA makes no distinction between wellness programs that are part of, or outside of, a group health plan but, rather, requires all wellness programs that obtain medical information from employees to be voluntary. The final rule, therefore, applies to *all* wellness programs that include disability-related inquiries and/or medical examinations, while the wellness program requirements in HIPAA, as amended by the Affordable Care Act, apply only to wellness programs that are part of a group health plan.

ADA "Safe Harbor" Applicable to Insurance

6. What is the ADA's "safe harbor" provision, and does it apply to wellness programs that include disability-related inquiries or medical examinations?

The ADA's safe harbor provision allows insurers and plan sponsors (including employers) to use information, including actuarial data, about risks posed by certain health conditions to make decisions about insurability and about the cost of insurance. Such practices have to be consistent with laws governing insurance and cannot be a subterfuge to evade compliance with the ADA. Without the safe harbor, these practices would violate the ADA by treating some individuals with disabilities less favorably than individuals without those disabilities. Many of the insurance practices the safe harbor permitted at the time of the enactment of the ADA, such as denying health coverage for individuals with pre-existing conditions or charging some individuals in group health plans more than others because of their health conditions, are now unlawful under the Affordable Care Act.

The safe harbor provision does not apply to employer wellness programs, since employers are not collecting or using information to determine whether employees with certain health conditions are insurable or to set insurance premiums. The final rule adds a new provision explicitly stating that the safe harbor provision does not apply to wellness programs even if they are part of an employer's health plan.

"Reasonably Designed" Employee Health Programs

7. What standards apply to wellness programs that ask employees to provide medical information?

As noted above, the ADA allows employers to make disability-related inquiries (for example, by asking employees to complete a HRA) and require medical examinations that are part of a voluntary employee health program. The final rule retains the requirement in the proposed rule that an employee health program -- including any disability-related inquiries or medical examinations that are part of such a program -- must be "reasonably designed to promote health or prevent disease." To meet this standard, a program cannot require an overly burdensome amount of time for participation, involve unreasonably intrusive procedures, be a subterfuge for violating the ADA or other laws prohibiting employment discrimination, or require employees to incur significant costs for medical examinations.

8. What are some examples of wellness programs that meet the "reasonably designed" standard?

A wellness program that asks employees to answer questions about their health conditions or have a biometric screening or other medical examination for the purpose of alerting them to health risks (such as having high cholesterol or elevated blood pressure) is reasonably designed to promote health or prevent disease. Collecting and using aggregate information from employee HRAs to design and offer programs aimed at specific conditions prevalent in the workplace (such as diabetes or hypertension) also would meet this standard.

However, asking employees to provide medical information on a HRA without providing any feedback about risk factors or without using aggregate information to design programs or treat any specific conditions would not be reasonably designed to promote health or prevent disease. A wellness program also is not reasonably designed to promote health or prevent disease if it exists merely to shift costs from the employer to employees based on their health or is used by the employer only to predict its future health costs.

9. When is an employee's participation in a wellness program considered "voluntary"?

Like the proposed rule, the final rule lists several requirements that must be met in order for an employee's participation in a wellness program that includes disability-related inquiries or medical examinations to be considered voluntary. Specifically, an employer:

- may not require any employee to participate;
- may not deny any employee who does not participate in a wellness program access to health coverage or prohibit any employee from choosing a particular plan; and
- may not take any other adverse action or retaliate against, interfere with, coerce, intimidate, or threaten any employee who chooses not to participate in a wellness program or fails to achieve certain health outcomes.

Additionally, in order to ensure that an employee's participation is voluntary, an employer must provide a notice that clearly explains what medical information will be obtained, how it will be used, who will receive it, and the restrictions on disclosure. Finally, an employer must comply with the incentive limits explained below. (See Qs & As 12 - 14, below.)

10. Does an employer have to create a new notice to comply with this rule?

In some cases. To the extent that an employer already clearly provides the information required by this rule, such as in a brochure or email that describes the details of the wellness program, an employer does not have to create a new notice. However, where an employer does not provide employees with the detailed information about what medical information will be obtained, how it will be used, who will receive it, and the restrictions on disclosure, an employer must revise existing communications or create a new notice to comply with this rule. The EEOC will provide a sample notice on its website that satisfies the necessary requirements.

Incentives Permitted

11. Does this rule apply to all wellness programs that offer incentives based on participation or health outcomes?

No. This rule applies only to wellness programs that require employees to answer disability-related questions or to undergo medical examinations in order to earn a reward or avoid a penalty. It would not apply, for example, to a wellness program that simply requires employees to engage in a certain activity (such as attending a nutrition or weight loss class or to walk a certain amount every week) in order to earn an incentive.

However, the ADA requires employers to provide reasonable accommodations that allow employees with disabilities to participate in such programs. For example, an employer would have to provide a sign language interpreter for an employee who is deaf and wants to attend a smoking cessation class, materials in an accessible format (such as in Braille or large print) for an employee who is blind, or an alternative to a program that requires a certain amount of walking for an employee who uses a wheelchair.

12. How much of an incentive may an employer offer to encourage employees to participate in a wellness program or to achieve certain health outcomes when a wellness program is offered as part of a particular health plan?

If a wellness program is open only to employees enrolled in a particular plan, then the maximum allowable incentive an employer can offer is **30 percent of the total cost for self-only coverage** of the plan in which the employee is enrolled.

For example, if the total cost for self-only coverage for the plan in which the employee is enrolled is $6,000 annually, the employer can reward the employee up to $1,800 for participating in the wellness program and/or for achieving certain health outcomes (or penalize the employee up to the same amount for not participating and/or failing to meet health outcomes). The employer also could offer the same level of incentive if it offered only one group health plan but allowed any employee to participate in the wellness program regardless of whether he or she is enrolled in the health plan.

13. How does an employer calculate incentive limits when an employer has more than one group health plan but offers a wellness program that does not require employees to participate in a particular plan?

When an employer offers more than one group health plan but participation in a wellness program is open to all employees regardless of whether they are enrolled in a plan, the employer may offer a maximum incentive of **30 percent of the lowest cost major medical self-only** plan it offers.

For example, if an employer offers three different major medical group health plans ranging in cost for self-only coverage from $5,000 to $8,000 and wants to offer an incentive to employees for participating in a wellness program and completing a HRA, the employer could offer a maximum incentive of $1,500 (30 percent of its lowest cost plan).

14. May an employer offer an incentive to employees to participate in a wellness program if it does not offer health insurance?

Yes. If an employer does not offer health insurance but wants to offer an incentive for employees to complete a HRA or to have annual tests that check their glucose and cholesterol levels, the employer could offer an incentive up to **30 percent of the cost that a 40-year-old non-smoker would pay for self-only coverage under the second lowest cost Silver Plan** on the state or federal health care Exchange in the location that the employer identifies as its principal place of business. If such a plan would cost an employee $4,000, the employer could offer a maximum incentive of $1,200.

15. What is the second lowest cost Silver Plan, and why does the rule use this plan to calculate wellness program incentives where an employer does not offer health insurance?

The second lowest cost Silver Plan is used as a benchmark for determining an individual's entitlement to a premium tax credit for purchasing health insurance on the Exchanges. The rule uses this plan because it is the most popular plan on the Exchanges, and information about its costs is readily available. Additionally, using the cost of the Silver Plan for someone who is 40 years old and a non-smoker -- a plan that is neither the least nor the most expensive plan offered on the Exchanges -- reflects the Congressional goal in HIPAA, as amended by the Affordable Care Act, of allowing incentives that may encourage meaningful participation in wellness programs, while avoiding incentive limits that are so high as to be considered coercive.

16. Why does the rule set the incentive limit at 30 percent of the cost of self-only coverage?

This is the incentive limit under HIPAA regulations that applies to health-contingent wellness programs that require employees to perform an activity or achieve certain health outcomes. (See Q and A 4.)

17. Are the incentive limits related to smoking cessation programs the same as for all other wellness programs?

Like the proposed rule, the final rule makes a distinction between smoking cessation programs that require employees to be tested for nicotine use and programs that merely ask employees if they smoke. A wellness program that merely asks employees whether or not they use tobacco (or whether they ceased using tobacco by the end of the program) is not a wellness program that asks disability-related questions. Therefore, the rule's 30 percent incentive limit does not apply and, an employer can offer an incentive up to 50 percent of the cost of self-only coverage, consistent with HIPAA, as amended by the Affordable Care Act. However, where an employer requires any biometric screening or other medical procedure that tests for the presence of nicotine or tobacco, the rule's 30 percent incentive limit applies.

Confidentiality

18. What confidentiality requirements apply to the medical information employees provide when they participate in wellness programs?

The final rule does not change language concerning confidentiality (including any exceptions to confidentiality) that was already part of EEOC's existing ADA regulations, but adds two new requirements. First, a covered entity only may receive information collected by a wellness program in aggregate form that does not disclose, and is not reasonably likely to disclose, the

identity of specific individuals except as is necessary to administer a health plan. Second, an employer may not require an employee to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information, or to waive confidentiality protections under the ADA as a condition for participating in a wellness program or receiving an incentive for participating, except to the extent permitted by the ADA to carry out specific activities related to the wellness program.

19. Are there any other federal laws that protect the confidentiality of medical information obtained through a wellness program?

Yes. For example, where a wellness program is part of a group health plan, HIPAA's privacy, security, and breach notification rules protect information collected from or created about participants that can be used to identify them (such as their address or birth date) and that relates to any past or present health condition and sets limits on the uses and disclosures that may be made of such information. An employer that sponsors a group health plan may receive this information but must certify to the plan that it will safeguard and not improperly use or share it. Generally, wellness programs can comply with EEOC's final rule by complying with their obligations under the HIPAA Privacy Rule, and employers can comply with their obligations by certifying that they will not use any personally identifiable information for employment purposes and abiding by that certification.

Coordination with Other Federal Agencies

20. Did the EEOC coordinate with the agencies that enforce the wellness program rules under HIPAA, as amended by the Affordable Care Act?

Yes. As with the proposed rule, EEOC coordinated extensively with the Department of Labor, the Department of Health and Human Services, and the Department of Treasury, Internal Revenue Service. EEOC sought to promote consistency, to the extent possible, with HIPAA, as amended by the Affordable Care Act, with respect to wellness program incentives, while also recognizing the protections against discrimination established by Title I of the ADA.

Applicability Date

21. When do employer wellness programs have to comply with this rule?

The new provisions of the final rule concerning the requirement to provide a notice that clearly explains to employees what medical information will be obtained and how it will be used (see Q & A 9) and the limits on incentives (see Qs & As 12 - 14) apply only prospectively to wellness programs as of the first day of the first plan year that begins on or after January 1, 2017, for the

health plan used to determine the level of incentives permitted under this rule. For example, if the health plan that is used to calculate the permissible incentive limit begins on January 1, 2017, that is the date on which the rules on incentives and the notice requirements apply to the wellness program. If the plan used to calculate the level of incentives begins on March 1, 2017, the provisions on incentives and notice requirements will apply to the wellness program as of that date. The rest of the provisions of the rule, which simply clarify existing obligations, apply both before and after publication of the final rule.

22. What is the difference between the rule's effective date and its applicability date?

The effective date is the date on which the rule will be in the Code of Federal Regulations, the official publication for federal regulations. The applicability date is the date on which employers have to comply with the requirement to provide a notice and the provisions limiting incentives.

Other EEOC Guidance on Wellness Programs

23. Has the EEOC provided any other guidance to employers about wellness programs and whether incentives can be offered as part of such programs?

Yes. On May 17, 2016, the same day that the ADA file rule was published, the EEOC issued a final rule amending the regulations implementing Title II of the Genetic Information Nondiscrimination Act (GINA). This rule says that employers may offer limited inducements (incentives) for an employee's spouse to participate in a wellness program. (See Questions and Answers about EEOC's Final Rule on Employer Wellness Programs and Title II of GINA.)

EEOC's Final Rule on Employer Wellness Programs and the Genetic Information Nondiscrimination Act

On May 17, 2016, the U.S. Equal Employment Opportunity Commission (EEOC or the Commission) issued a final rule to amend the regulations implementing Title II of the Genetic Information Nondiscrimination Act (GINA) as they relate to employer wellness programs. A notice of proposed rulemaking (NPRM) was previously issued on October 30, 2015. The final rule says employers 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 as part of a wellness program, whether or not the program is part of a group health plan.

Background

1. What is a wellness program?

The term "wellness program" generally refers to health promotion and disease prevention programs and activities offered to employees. Some wellness programs are part of an employer-sponsored group health plan, and other wellness programs are not tied to group health plans. Many of these programs ask employees to answer questions on a health risk assessment (HRA) and/or undergo biometric screenings for risk factors (such as high blood pressure or cholesterol). Other wellness programs provide educational health-related information or programs that may include nutrition classes, weight loss and smoking cessation programs, onsite exercise facilities, and/or coaching to help employees meet health goals. Some employers now extend wellness programs to employees' family members, particularly those who are enrolled in employer group health plans.

2. What is GINA?

GINA is a federal law that prohibits discrimination in insurance and employment on the basis of genetic information. The EEOC enforces Title II of GINA, which applies to employment. Other federal agencies, including the Department of Labor (DOL), the Department of Health and Human Services (HHS), and the Department of the Treasury, Internal Revenue Service (IRS) enforce Title I, which applies to insurance.

3. What basic protections does Title II of GINA provide?

Title II of GINA protects job applicants, current and former employees, labor union members and apprentices, and trainees. It prohibits employers and other covered entities from using genetic information in making decisions about employment. It restricts employers 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[1] from disclosing genetic information.

4. What is genetic information?

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 "past or current health status" is used in these questions and answers, rather than the term "manifestation of disease or disorder.") Family members include certain blood relatives, like parents, grandparents, and children, but also include spouses and adopted children.

5. Why is a spouse's or an adopted child's current or past health status treated as the employee's genetic information?

When it defined family members, Congress included two very specific provisions - one that covers blood relatives and a second that refers to "dependents" within the meaning of a specific section of the Employee Retirement Income Security Act (ERISA). The section of ERISA referenced in GINA defines dependents to include spouses and adopted children.

6. Why did EEOC issue this final rule?

There is an exception to GINA's general prohibition against acquiring genetic information of applicants or employees where employers offer voluntary health or genetic services to employees or their family members. Some employers want to offer inducements for employees and their family members to answer questions about their health or to take medical examinations as part of a wellness program. This rule clarifies that an employer may offer a limited incentive for an employee's spouse to provide information about the spouse's current or past health status as part of a voluntary wellness program.

Purpose of the Rule

7. What does the final rule do?

Like the proposed rule, the final rule clarifies that an employer may offer a limited incentive (in the form of a reward or penalty) to an employee whose spouse receives health or genetic services offered by the employee -- including as part of a wellness program -- and provides information about his or her current or past health status. This kind of information usually is provided as part of a 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.

"Reasonably Designed" Program

8. What standards apply to wellness programs that ask for genetic information?

Just as EEOC said in the proposed rule, a wellness program, like any health or genetic service an employer offers that collects genetic information, 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 to employees, 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.

A wellness program is not reasonably designed to promote health or prevent disease if it exists merely to shift costs from an employer to employees based on their health; is used by the employer only to predict its future health costs; or imposes unreasonably intrusive procedures, an overly burdensome amount of time for participation, or significant costs related to medical exams on employees. A wellness program will also not be considered reasonably designed to promote health or prevent disease if it consists of a measurement, test, screening, or collection of health-related information and that information is not used either to provide results, follow-up information, or advice to individual participants or to design a program that addresses at least some conditions identified (e.g., a program to help employees manage their diabetes if aggregate information from HRAs shows that a significant number of employees in an employer's workforce have diabetes).

Inducements Permitted

9. Does this rule apply to all wellness programs that offer inducements based on participation or health outcomes?

No. This rule applies only where a portion of the inducement offered within a wellness program is for an employee's spouse to answer questions about his or her current or past health status or to take a medical examination. GINA does not apply to inducements made available in exchange for an employee's spouse engaging in certain activities that do not require obtaining information about current or past health status, such as attending a weight loss or nutrition program or exercising a certain amount each week. However, inducement limits and a requirement to provide a reasonable alternative standard may apply to some of these programs under HIPAA, as amended by the Affordable Care Act.

10. How much of an inducement may an employer offer to an employee's spouse for providing information about his or her own current or past health status when a wellness program is offered as part of a particular health plan?

If a wellness program is open only to employees and family members in a particular group health plan, then the maximum inducement for the employee's spouse to provide information about current or past health status is **30 percent of the total cost of self-only coverage** under the group health plan in which the employee and family members are enrolled. For example, if an employee is enrolled in a self and family plan at a total cost (considering both the employee's and employer's contributions to the premium) of $14,000 and that plan has a self-only option for a total cost of $6,000, the maximum inducement for the employee's spouse to provide health information is $1,800.

11. Does the wellness program have to be part of a group health plan in order for an employer to offer inducements?

No. Unlike the proposed rule, which applied only to wellness programs that were part of group health plans, the final rule applies to all wellness programs, regardless of whether the wellness program is offered through a group health plan. Even if an employer offers no group health plan at all, it may still offer limited inducements for an employee's spouse to participate in wellness programs that ask for current or past health information.

12. How does an employer calculate inducement limits when an employer has more than one group health plan but offers a wellness program that does not require employees or their families to enroll in a particular group health plan?

If an employer provides more than one group health plan and enrollment in a particular plan is not required to participate in the wellness program, the maximum inducement is **30 percent of the lowest cost major medical self-only plan** the employer offers. So, if an employer has three self-only major medical plans that range in total cost from $5,000 to $8,000, the maximum inducement that can be provided for the employee's spouse to provide health information is $1,500 (30 percent of its lowest cost plan).

13. May an employer offer an inducement to the spouse for information about his or her current or past health status if it does not offer group health insurance?

Yes. If the employer does not offer a group health plan, then the maximum inducement for the spouse to provide health information is **30 percent of the total cost to a 40-year-old non-smoker purchasing coverage under the second lowest cost Silver Plan** available through the state or federal Exchange in the location that the employer has identified as its principal place of business. For example, if a 40-year-old non-smoker could purchase the second lowest cost Silver Plan for $4,000, the maximum inducement the employer could offer for the employee's spouse to provide health information as part of a wellness program is $1,200.

Note that all of the inducement limits are exactly the same as the limits on incentives available to employees under the Americans with Disabilities Act (ADA), as described in the final rule on the ADA and Wellness Programs published at the same time as the GINA final rule.

14. What is the "second lowest cost Silver Plan" and why is it used to calculate wellness program incentives where an employer does not offer health insurance?

The second lowest cost Silver Plan is used as a benchmark for determining the amount of an eligible individual's premium tax credit for purchasing health insurance on the Exchange. The

Silver Plan is the most frequently purchased plan on the Exchanges, and information about it should be readily available to employers. Additionally, using the cost of the Silver Plan for someone who is 40 years old and a non-smoker -- a plan that is neither the least nor the most expensive plan offered on the Exchanges -- reflects the Congressional goal in HIPAA, as amended by the Affordable Care Act, of allowing incentives that may encourage meaningful participation in wellness programs, while avoiding incentive limits that are so high as to be considered coercive.

15. Why doesn't the final rule allow employers to offer inducements for the current or past health status of employees' children who participate in wellness programs?

As explained in the preamble to the NPRM and the final rule, although information about the current or past health status of both a spouse and children is considered genetic information about an employee, the possibility that an employee may be discriminated against based on genetic information is greater when an employer has access to health information of the employee's children. There is minimal, if any, chance of determining information about an employee's genetic make-up or predisposition to disease from health information about the employee's spouse. By contrast, there is a significantly higher likelihood of discovering information about an employee's genetic make-up or predisposition to disease from health information about the employee's children.

The final rule reiterates that employers may offer children the opportunity to participate in wellness programs, as long as they are not offered inducements in exchange for information about their current health status or about their genetic information. It also clarifies that the prohibition on offering inducements in exchange for information about the current or past health status of children applies to adult and minor children.

Confidentiality

16. Does the final rule change any confidentiality requirements that apply to the genetic information that employees or their family members provide when they participate in wellness programs?

The proposed rule prohibited an employer from requiring an employee or spouse to agree to the sale of health information in exchange for an inducement or as a condition for participating in a wellness program. The final rule has been expanded to include -- in addition to sale -- exchange, transfer, or other distribution. Some public comments indicated that genetic information may be transferred from one entity to another by means other than a sale.

The final preamble also references some best practices for ensuring confidentiality including establishing clear policies, training staff who handle confidential information, encryption of information stored electronically, and prompt reporting of data breaches. The same kinds of best practices are referenced in the Appendix (Interpretive Guidance) to the ADA final rule.

The requirement that genetic information gathered as part of a wellness program be disclosed to employers only in aggregate terms has not been changed by the final rule, and that limitation on disclosure continues to apply.

17. Are there any other federal laws that protect the confidentiality of medical information obtained through a wellness program?

Yes. For example, where a wellness program is part of a group health plan, HIPAA's privacy, security, and breach notification rules protect information collected from or created about participants that can be used to identify them (such as their address or birth date) and that relates to any past or present health condition and sets limits on the uses and disclosures that may be made of such information. An employer that sponsors a group health plan may receive this information but must certify to the plan that it will safeguard and not improperly use or share it.

Other Revisions to the GINA Regulations

18. Does the final rule make any other revisions to the GINA regulations?

Yes. The final rule includes a new paragraph that prohibits employers from denying access to health insurance or any package of benefits to, or retaliating against, any employee whose spouse refuses to provide information about his or her current or past health status to an employer wellness program.

As with the proposed rule, the final rule also makes clear that an employer is permitted to request information about the current or past health status of an employee's spouse who is completing a HRA on a voluntary basis, as long as the employer follows GINA 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, and that inducements in exchange for this information are limited.

The final rule also makes several technical changes proposed in the NPRM, including re-numbering paragraphs due to the addition of new material, correcting an erroneous cross-reference in the original regulations, eliminating the word "financial" to describe incentives to

account for in-kind incentives, and adding references, where needed, to HIPAA and the Affordable Care Act.

Coordination with Other Federal Agencies

19. Did the EEOC coordinate with DOL, HHS, and IRS-the agencies that issued the regulations on wellness program incentives under HIPAA, as amended by the Affordable Care Act-when developing this final GINA rule?

Yes. As with the proposed rule, EEOC coordinated extensively with these agencies in developing the final rule. EEOC sought to promote consistency, to the extent possible, between this rule, HIPAA, as amended by the Affordable Care Act, and Title I of GINA with respect to wellness program incentives, while also ensuring the greatest protection possible for employees under title II of GINA.

Applicability Date

20. When will employer wellness programs have to comply with the final rule?

The provisions of the final rule related to wellness program inducements will apply only prospectively to employer-sponsored wellness programs as of the first day of the first plan year that begins on or after January 1, 2017, for the health plan used to determine the level of inducement permitted under this rule. For example, if the health plan that is used to calculate the permissible inducement limit begins on January 1, 2017, that is the date on which the rules governing inducements apply to the employer-sponsored wellness program. If the plan used to calculate the level of inducements begins on March 1, 2017, then March 1, 2017 is the date on which the wellness program begins.

21. What is the difference between the rule's effective date and its applicability date?

The effective date is the date on which the rule will be in the Code of Federal Regulations, the official publication for federal regulations. The applicability date is the date on which employers have to comply with the provisions limiting inducements.

Other EEOC Guidance on Wellness Programs

22. Has EEOC provided any other guidance to employers about wellness programs and whether incentives can be offered as part of such programs?

Yes. As noted above, on May 17, 2016, the same day the final GINA rule was issued, EEOC issued the final rule to amend the ADA regulations, at 29 C.F.R. Section 1630.14(d), "Other Acceptable Examinations and Inquiries," and the Interpretive Guidance (related to employer wellness programs). The final ADA rule provides guidance on the extent to which the ADA permits employers to offer incentives to employees who respond to disability-related inquiries or undergo medical examinations as part of wellness programs.

Above material was retrieved from the U.S. EEOC website on May 17, 2016.

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[1] Unless otherwise noted, the term "GINA" refers to Title II of GINA.