



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

Office of  
Legal Counsel

**ADA & GINA: INCENTIVES FOR WORKPLACE WELLNESS PROGRAMS**

June 24, 2011

[ADDRESS]

Dear \_\_\_\_\_:

This is in response to your March 8, 2011, letter to Chair Jacqueline A. Berrien (which you also sent to the Departments of Labor, Treasury and Health and Human Services) asking for guidance on certain issues affecting workplace wellness programs. In particular, you seek further guidance on: the incentives that employers can offer employees to participate in wellness programs, rules explaining how the Americans with Disabilities Act (ADA) applies to workplace wellness programs, and clarification of what you believe may be conflicting regulations interpreting Title I and Title II of the Genetic Information Nondiscrimination Act (GINA) about the use of family medical history to identify employees who would benefit from wellness programs. You state that EEOC should make clear that: 1) offering incentives for participation in wellness programs does not violate the ADA or GINA; and 2) family medical history provided voluntarily may be used to guide employees into disease management programs.

ADA

Title I of the ADA allows employers to conduct voluntary medical examinations and activities, including obtaining information from voluntary medical histories, as part of an employee wellness program as long as any medical information acquired as part of the program is kept confidential and separate from personnel records. EEOC guidance states that a wellness program is "voluntary" as long as the employer neither requires participation nor penalizes employees who do not participate. *See* EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act (ADA) at Q&A 22 (July 27, 2000), <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

As you know, the Commission has not taken a position on whether, and to what extent, Title I of the ADA permits an employer to offer financial incentives for employees to participate in wellness programs that include disability-related inquiries (such as questions about current health status asked as part of a health risk assessment) or medical examinations (such as blood pressure and cholesterol screening to determine whether an employee has achieved certain health outcomes). However, we will carefully consider your comments and the comments of other stakeholders that we have received on this important issue.

GINA

Title II of GINA prohibits employers and other covered entities from requesting, requiring, or purchasing genetic information, subject to six limited exceptions. *See* 29 C.F.R. §1635.8. One

exception allows a covered entity to acquire genetic information about an employee or his or her family members when it offers health or genetic services, including wellness programs, on a voluntary basis. The individual receiving the services must give prior voluntary, knowing, and written authorization. While individualized genetic information may be provided to the individual receiving the services and to his or her health or genetic service providers, genetic information may only be provided to the employer or other covered entity in aggregate form. Id. at §1635.8(b)(2)(i)(D). Finally, as you noted, the final rule makes clear that covered entities may not offer financial inducements for individuals to provide genetic information as part of a wellness program. Id. at §1635.8(b)(2)(ii).

Covered entities may use the genetic information voluntarily provided by an individual to guide that individual into an appropriate disease management program. However, if that program offers financial incentives for participation and/or for achieving certain health outcomes, the program must also be open to employees with current health conditions and/or to individuals whose lifestyle choices put them at increased risk of developing a condition. Id. at §1635.8(b)(2)(iii). Our GINA regulations offer an example to illustrate this point that you believe is inconsistent with a similar example in the regulations of the Departments of Labor, Treasury, and Health and Human Services interpreting Title I of GINA. Id.<sup>1</sup>

We are not in a position to offer an interpretation of the example in the GINA Title I regulations, since EEOC does not have responsibility for enforcing Title I. However, our goal in formulating the position on wellness program incentives and the examples in our Title II regulations was to be consistent with the positions taken by the Title I agencies (with which we coordinated extensively while developing our final GINA regulations).

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<sup>1</sup> This provision of the EEOC regulation cites the following example: Employees who voluntarily disclose a family medical history of diabetes, heart disease, or high blood pressure on a health risk assessment that meets the requirements of (b)(2)(ii) of this section and employees who have a current diagnosis of one or more of these conditions are offered \$150 to participate in a wellness program designed to encourage weight loss and a healthy lifestyle. This does not violate Title II of GINA.

We hope this information is helpful. Please note, however, that it does not constitute an official opinion of the EEOC. If you have further questions, please contact me at 202.663.4609 or Assistant Legal Counsel Christopher Kuczynski at 202.663.4665.

Sincerely,

/s/  
Peggy R. Mastroianni  
Legal Counsel