



SPECIAL Alert

In This Issue

In this eighth McGraw Wentworth Special Alert for 2009, we discuss the guidance recently issued that provides clarifications to the Genetic Information Non-Discrimination Act (GINA).

GINA has two sections. One addresses employment rules and the other discusses health plan rules. This new guidance clarifies how health plans can use genetic information, and perhaps more importantly, when health plans cannot use genetic information.

We welcome your comments and suggestions regarding this issue of our Special Alert. For more information on this article, please contact your Account Manager or visit the McGraw Wentworth web site at www.mcgrawwentworth.com.

“GINA and Wellness Plans”

On October 7, 2009, the *Federal Register* published interim final rules for the *Genetic Information Non-Discrimination Act (GINA)*. The new rules clarify how health plans can use genetic information. Unfortunately, the new rules may affect current wellness or disease management programs, depending on how they are structured.

This *Special Alert* discusses the recently published Department of Health and Human Services (DHHS) clarifications including:

- Historical Overview of GINA
- Key Aspects of GINA
- Effect on Health Risk Assessments
- Effect on Disease Management Programs



The government has asked employers for comments and feedback on these rules. Many will be upset because they will need to change their wellness and disease management programs to comply with the expanded definition of underwriting purposes.

These new regulations will be effective on the first day of the first plan year beginning on or after December

7, 2009. If final regulations are not issued by then, employers are expected to comply with the current guidance.

Historical Overview of GINA

President Bush signed the *Genetic Information Non-Discrimination Act (GINA)* into law on May 21, 2008. GINA protects job applicants, current and former employees, labor union members, and apprentices and trainees from discrimination based on their genetic information. For more information on GINA in general, please see our August 2008 *Benefit Advisor* at

http://mcgrawwentworth.com/Benefit_Advisor/2008/BA_Issue_8.pdf.

The GINA regulations have two major sections.

Title I:

This section applies to employer, union, and even government sponsored group health plans. It also directly affects health insurance issuers, including group and individual insurance carriers, and carriers issuing Medicare supplement policies.

These regulations concern employer and group health plan use of genetic information. The basics include:

- Insurance carriers and employers cannot increase group premiums because of genetic information.
- Insurance carriers and employers cannot use genetic information to determine eligibility or set premiums.
- Group health plans, individual insurance carriers and Medigap markets may use genetic data only under specific conditions.
- GINA amended the Health Insurance Portability and Accountability Act's Privacy Rules such that genetic information is considered "Protected Health Information" or PHI.

The most recent guidelines offer more detailed information to assist health plans in complying with GINA.

Title II:

This section applies to private employers, state and local governments, federal or civil service employers, and the executive branch of government. Also included are employment agencies, labor organizations, and joint labor-management training and apprenticeship programs. These regulations:

- Prohibit employers from using or deliberately acquiring genetic information as a condition of employment.
- Require employers to keep genetic information confidential and strictly limit certain entities from disclosing genetic information on

employees as well as applicants.

The DHHS released more details on GINA employment requirements early this year. For more information on these requirements, please read our July 2009 *Benefit Advisor* at http://mcgrawhewitt.com/Benefit_Advisor/2009/BA_Issue_7.pdf.

Key Aspects of GINA

GINA prohibits group health plans and insurers from discriminating based on genetic information. Specifically, a group health plan or a group health insurance issuer cannot use genetic information to justify raising premium or contribution amounts. GINA now affects many more wellness plans because the new regulations broadened the definition of underwriting activities. The next section discusses the implications of this requirement on wellness plans.

The GINA regulations also limit the ability of insurers and health plans to use genetic information, rather than actual claim information, to determine their rates. However, in some cases, claim information about a disease or disorder for one participant can include genetic information. For example, let's say a health plan has three high amount claimants and the health plan has genetic information on two of them showing they are genetically predisposed for developing additional serious health conditions that have not yet manifested. The health plan can use the actual claim experience to develop rates; it cannot use the genetic information to add a mar-

gin to the rates because the claimants may develop certain conditions.

GINA also forbids group health plans or health insurance carriers from requesting or requiring genetic tests. The new regulations spend a fair amount of time clarifying this requirement. For example, the rules do permit health care providers to ask their patients to have genetic tests even if the health care providers work for an HMO.

In general, health plans and health insurance issuers cannot request genetic information. They can receive genetic information incidentally and not violate rules, but they can formally request it only under specific circumstances. They can request it, for example, if they need the information to determine whether the claim for a genetic test is payable under the plan. In this case, they must request only the minimum amount of information necessary.



Effect on Health Risk Assessments

The new GINA regulations may affect the employer's ability to motivate employees to complete a health risk assessment. The law states a health plan or health insurance issuer cannot collect genetic information as part of the underwriting process. The new regulations broaden the definition of underwriting process significantly. Under the broader definition of the underwriting process, your organiza-

tion **cannot use genetic information** for any of these underwriting activities:

- Creating eligibility rules (enrollment and continued eligibility) for plan benefits that include potential changes in deductibles, or other cost-sharing mechanisms in return for certain activities such as completing a wellness program or completing an HRA.
- Calculating premium or contribution amounts, including rebates, discounts, or other premium incentives in return for activities such as completing an HRA or participating in a wellness program.
- Applying any pre-existing condition limit.
- Creating, renewing or replacing a contract for health insurance or health benefits.



Genetic information is defined as “information about an individual’s genetic tests, the genetic tests of family members and the manifestation of a disease or disorder in a family member of the individual.” Genetic information does not include an individual’s age or gender.

The effect on health risk assessments depends on how you use them:

- GINA does not affect strictly voluntary HRAs with no incentives to participate.
- If your organization offers a premium discount for health plan coverage if an individual

completes an HRA, this could be an issue. If your health risk assessment asks any questions relating to genetic information, this would be viewed as collecting genetic information to determine employee contributions. Typically with HRAs, genetic information most likely will be questions relating to family health history. If your HRA asks questions about family health history, you cannot allow the completion of those questions to influence your contribution strategy, as in offering a premium discount for completing the HRA. For most employers, the best approach to comply with GINA and still have an effective incentive for HRA completion will be to remove family health history questions from the HRA. This will remove any reference to genetic information when setting contributions for health plan.

- Other organizations structure their health plan to offer enhanced benefits to participants that complete HRAs and either achieve specific health targets or commit to improving health. These plans are particularly popular in Michigan as many of the predominant insurance carriers offer these plan options. In order to continue these types of plans, the carrier must examine the HRA assessment and any biometric screening tools to determine if they collect genetic information. Again, it is likely that the genetic information collected

will be family health history questions in the HRA. For this arrangement to be compliant with GINA, all questions relating to family health history will need to be removed from the HRA.

Most wellness vendors are analyzing their HRAs. They will likely delete questions requiring genetic information so that employers can continue to offer incentives to participate in the wellness program.

Effect on Disease Management Programs

The new GINA regulations may also affect your disease management program. More aggressive disease management programs will use HRA data to determine whether the employee is eligible. The new regulations include two examples:

- GINA does not allow disease management programs to use genetic information questions (primarily family history questions) to determine eligibility for a disease management program. Under the law, health plans cannot use genetic information to determine whether an employee is eligible for additional disease management program benefits.
- GINA does allow disease management programs to use genetic information in order to determine whether a program is medically appropriate.

Although these situations seem similar, they do differ. In the first example, the plan is using the employee's genetic information to determine eligibility which is considered an underwriting purpose. In the second example, the employee decides whether the disease management program makes sense and can volunteer to participate. While employers cannot use genetic information to determine whether an employee is eligible, they can use it to determine whether the disease management program is "medically appropriate." The employee can then decide whether or not to participate.

Many employers do not have a clear understanding of how disease management programs identify potential participants. If your plan collects genetic information in that process, it is violating GINA rules. Your organization should check with your disease management vendor to determine whether your current arrangement may have potential discrimination issues.



Concluding Thoughts

GINA may affect your current wellness and disease management programs. Your organization needs to review both programs to determine whether any changes are necessary:

- Your plan cannot offer employees a premium incentive or benefit differential for completing an HRA that asks questions about family health history. You can either remove your incentives (thus driving down

participation) or you can delete family health history questions.

- Your disease management firm cannot use HRA questions regarding family health history to determine eligibility for a disease management program. The easiest way to comply with this rule is to delete the family health history questions.

The good news for employers during this busy time is that most wellness vendors and disease management firms are taking the lead in helping employers comply. Some wellness vendors have determined their HRAs do not ask any family health history questions and therefore will not be an issue. Other wellness and disease management vendors have identified the problematic questions in the HRA and are working toward removing them.

In many cases, a simple call to your vendors should be all that is necessary to be sure you are complying with the new GINA wellness and disease management program requirements.

If you need immediate assistance, please contact your McGraw Wentworth Account Manager. **MW**

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