



NEW GENETIC INFORMATION NONDISCRIMINATION ACT (GINA) GUIDANCE: HEALTH RISK ASSESSMENT

URGENT ACTION ADVISED

On Oct. 1, three federal agencies issued a lengthy package of regulations under the Genetic Information Nondiscrimination Act of 2008 (GINA). Though it will take some time to digest this entire package, one point is abundantly clear: Health plan sponsors and their insurers should think twice - if not three or four times - before including questions concerning an individual's family medical history in any health risk assessment (HRA).

Among other things, GINA bars a group health plan or insurer from discriminating on the basis of genetic information. This prohibition extends to *collecting* genetic information if that information will be used for underwriting purposes. GINA's statutory language made clear that family medical history falls within the definition of genetic information. Accordingly, GINA makes it impermissible to ask for family medical history before enrolling an individual in a health plan.

What many found surprising in the recent regulations, however, is a flat-out prohibition on asking for family medical history in even *post*-enrollment HRAs if employees will be *rewarded* for completing the assessment (or penalized for not doing so). Here is the rationale put forth by the government agencies for adopting this more stringent approach:

Under GINA, the definition of underwriting is broader than merely activities relating to rating and pricing a group policy. These interim final regulations clarify that underwriting purposes includes 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. (Emphasis added)

So what does this all mean? At a minimum, it means that HRAs may not ask for family medical history in either of the following two circumstances:

1. Before an individual is enrolled in a plan (or even before *reenrollment*, if the information may *affect* that reenrollment), or
2. At *any time*, if a reward will be given for providing this information (including a penalty for *not* doing so).

These prohibitions apply to plan years beginning after Dec. 7, 2009 - or as of Jan. 1, 2010, for calendar-year plans.

Now that many employers are beginning their annual enrollment season, employers, insurers and wellness vendors may need to respond immediately in order to delete from their HRAs any questions concerning family medical history. It may also be necessary to *add* language to open-ended questions stating that, in answering those questions, individuals should not provide any genetic information (including family medical history). The regulations impose this requirement in order to take advantage of an "incidental collection exception."

Fortunately, the regulations contain a number of examples that help to illustrate what may or may not be done in this regard. Those examples make clear that the following practices *will* pass muster under GINA (though they may still run afoul of other laws - including more stringent state laws):

1. Offering a financial incentive to complete an HRA, but excluding from that HRA any questions concerning family medical history.
2. Including questions concerning family medical history, but offering no financial incentive to complete the HRA (and deferring the HRA until after enrollment).
3. Offering a financial incentive to complete an HRA that requests no family medical history, and then including an addendum that requests such history - clearly stating that employees who leave the addendum blank will still receive the financial incentive for completing the rest of the HRA.

Keep in mind, though, that to effectively omit questions concerning family medical history, an HRA must plainly state that such history should not be provided in response to open-ended questions.

Kenneth A. Mason, Partner
Spencer Fane Britt & Browne LLP