

**Questions for the EEOC Staff for the
2012 Joint Committee of Employee Benefits Technical Session
May 10, 2012**

Question 1: Wellness Plans and Financial Incentives

Starting in 2014, PHS Act 2705(j) [42 USC 300gg-4(j)] will permit an employer to offer a financial incentive of 30% of the cost of employee-only coverage for an employee's participation in a standards-based wellness program. Does the ADA prohibit the standards-based wellness programs contemplated by PHS Act 2705(j)? If not, are there policies or practices that the Staff would recommend an employer adopt as part of its wellness program to avoid potential violations of the ADA when the employer offers a financial incentive of this magnitude?

***EEOC Answer:** The EEOC staff noted that the question was similar to questions asked in the past and that the answer was essentially the same. Programs that include disability-related inquiries and/or require medical examinations will violate the ADA if they are involuntary. They noted that while a program cannot require participation or penalize individuals who do not participate, the EEOC has taken no position as to whether a financial incentive provided as part of a wellness program that makes disability-related inquiries and/or requires medical examinations (such as examinations for the purpose of determining whether an employee has met certain health standards) would render the program involuntary.*

Question 2: Wellness Plans and Dependent Incentives

Question: PHS Act 2705(j)(3)(A) provides "The reward for the wellness program, together with the reward for other wellness programs with respect to the plan that requires satisfaction of a standard related to a health status factor, shall not exceed 30 percent of the cost of employee-only coverage under the plan. If, in addition to employees or individuals, any class of dependents (*such as spouses or spouses and dependent children*) may participate fully in the wellness program, such reward shall not exceed 30 percent of the cost of the coverage in which an employee or individual and any dependents are enrolled." [italics added] Is the reference to financial incentives for dependents' participation in standards-based wellness programs evidence that Congress did not think financial incentives for dependents' participation in standards-based wellness programs is prohibited by GINA?

***EEOC Answer:** The EEOC staff noted that since there is nothing in the statute that indicates whether or how Congress intended to harmonize PHS Act 2705 with the ADA or GINA, they decline to speculate on how Congress anticipated the statutes would interact.*

Question 3: ADAAA Definition of Major Life Activity

The ADAAA definition of “major life activity” not only includes previous activities formerly included, but also “interacting with others.” Can you include some specific activities that are included in this expansion of the definition? How can employers expected to challenge claims from problematic employees that conduct caused by mental disabilities is protected?

EEOC Answer: The EEOC staff noted that the Commission had recognized “interacting with others” as a major life activity prior to enactment of the ADAAA, and has provided guidance on interacting with others as a major life activity and how it relates to an employer’s ability to maintain and enforce conduct rules. They noted that employers are permitted to have and enforce job standards that are job-related and consistent with business necessity but that employers should communicate the standards, apply them uniformly to individuals with and without disabilities, and document misconduct carefully. They also noted that for discipline that is less than termination, the employer may have a duty to make a reasonable accommodation that would enable the employee to comply with the conduct standard going forward as part of the interactive reasonable accommodation process.

Question 4: ADAAA and Pregnancy

Pregnancy-related disabilities are not covered by the exceptions of the ADAAA expanded protections under major life activities. Please provide some examples of pregnancy-related disabilities that are covered by ADAAA. How is an employer expected to determine the extent of the disability, and the coverage under ADAAA, without asking specific questions that may fall into the category of discrimination under GINA. For example, would fertility treatments that causes significant personality disorder and absence from work be considered a disability under the determination that it rises to the level of an impairment substantially limiting a major life activity.

EEOC Answer: Public Commission meetings have included discussions of how the Pregnancy Discrimination Act (“PDA”) and the ADA intersect and when reasonable accommodations might be necessary. Whether a particular pregnancy-related impairment would constitute a disability must be determined on a case-by-case basis. Examples of pregnancy-related impairments that may qualify are gestational diabetes or preeclampsia. A pregnant employee may also be regarded as having a disability if an employer takes a prohibited action against her based on a real or perceived impairment that is not transitory (lasting or expected to last for six months or less) and minor. For example, an individual who is placed on leave or light duty because an employer believes she has a back impairment that makes her unable to do any lifting would be regarded as having a disability. An individual who is covered only under the “regarded as” prong of the definition of “disability” would not, however, be entitled to a reasonable accommodation. Inquiring into the nature of a pregnancy-related impairment to determine whether it is a disability for which a reasonable accommodation may have to be provided would not appear to raise GINA concerns beyond those that could arise in any request for documentation to support an accommodation request, such as the possibility that the request will likely result in the acquisition of genetic information (e.g., family medical history).

Question 5: Additional ADA/AA Guidance

Will the EEOC consider future changes to the ADA/AA regulations and guidance to include concepts of “condition, manner or duration” as conditional elements for analyzing substantial limitation?

***EEOC Answer:** The EEOC’s regulations interpreting the ADA/AA already allow “condition, manner, or duration” to be considered in determining whether an impairment substantially limits a major life activity. Specifically, the EEOC staff pointed to Section 1630.2(l)(4) of the Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act as Amended. (76 FR 16978 (2011-3-25) or go to: <http://www.gpo.gov/fdsys/pkg/FR-2011-03-25/pdf/2011-6056.pdf>).*

Question 6: GINA Enforcement

There has been recent speculation in the group health plan industry regarding whether the EEOC may be bringing enforcement actions against employers under GINA related to financial inducements offered for spouses to complete an HRA. When an employee provides his own medical history, that employee is not providing any *family medical history* (defined as “genetic information” in 42 USC § 2000ff(4)(A)) relating to a *family member* (42 USC § 2000ff(3)) – the employee is merely providing his own personal medical information. However, under GINA it appears that a spouse is considered a *family member* (29 USC § 1181(f)(2)(iii); 29 CFR 2590.701-2).

***EEOC Answer:** Although EEOC staff are aware of speculation that the EEOC may bring an enforcement action against an employer who offers financial incentives for spouses or other family members to complete an HRA, noting that this speculation has “gone viral,” they are not aware of any enforcement actions on this topic; nor have any of the groups who have asked us about this possibility been able to identify a pending enforcement action. The statute makes clear that a spouse is a family member and information about a spouse’s health status is considered the family medical history of the employee because Congress defined family member in GINA with reference to the ERISA definition of a dependent.*

As noted in the preamble to the EEOC’s final rule concerning Title II of GINA, an individual’s dependents are determined pursuant to 29 USC § 1181(f)(2), which governs the definition of dependent for purposes of HIPAA special enrollment rights. This provision states that “a person becomes such a dependent of the individual through marriage, birth, or adoption or placement for adoption.” The applicable regulations provide that the term “dependent” for purposes of this statute includes “any individual who is or may become eligible for coverage under the terms of a group health plan because of a relationship to a participant.” (29 CFR 2590.701-2.) Also see the answer to Question 7 below.

Question 7: Dependent Providing HRA Data

When the employee’s spouse provides her personal medical history to the health plan of the employee’s employer by completing an HRA, does the EEOC take the position that the spouse is providing *family medical history* on behalf of the employee? In other words, would the

employee receive an impermissible financial inducement to provide genetic information information under GINA (29 CFR § 1635.8(b)(2)(ii)) if the employee or spouse receives a reward for the spouse providing her personal medical history in an HRA?

EEOC Answer: As noted in response to question 6, the EEOC staff are not aware of any enforcement activity on this issue. The statute does not address whether providing financial incentives to family members who provide medical information on health risk assessments (HRAs) violates Title II of GINA. Moreover, because the EEOC did not receive any comments raising this question during the notice and comment period, the issue is not specifically addressed in EEOC's GINA regulations. Although there is no established policy position, the EEOC staff believes the more general rules under Title II of GINA are instructive.

The statutory language of Title II of GINA makes clear that the medical history of an employee's spouse is genetic information about the employee. Furthermore, although the regulations do not address the question of inducements for family member participation in health services, 29 C.F.R. 1635.8(c)(2), can be read to allow for the acquisition of family medical history in the form of information about a family member's current health status through HRAs voluntarily completed by family members in conjunction with participation in voluntary health or genetic services. Thus, there is generally not an issue with respect to an employee's spouse participating in a HRA provided that the spouse's response is voluntary, and there is no incentive tied to the collection of health status information about an employee's spouse.

A potential problem arises where the employer wants to deny or reduce the level of incentive provided to an employee if the spouse (or other family member) refuses to provide medical information in a HRA. Title II of GINA unconditionally prohibits employers from using genetic information to make employment decisions, including decisions about terms, conditions, or privileges of employment. When employers offer a financial incentive in return for a spouse's medical information, or deny or reduce the incentive if the spouse does not provide the information, this may lead to the use of genetic information in making an employment decision. For example, if an employee receives \$100 if both the employee and spouse complete an HRA that collects medical information, but \$50 if only the employee completes an HRA, then the employer's reduction of the incentive to the employee is arguably based on provision of (or failure to provide) genetic information in violation of GINA.

Although not discussed at the May 10, 2012 meeting, another way of looking at the issue is to simply apply 29 C.F.R. 1635.8(b)(2). This exception to GINA's prohibition on requesting, requiring, and purchasing genetic information allows for the acquisition of genetic information through employer-provided health or genetic services, including voluntary wellness programs, which meet certain requirements, including a requirement that financial inducements may not be offered for individuals to provide genetic information. An inducement that depends in whole or in part on information about a spouse or family member's current health status would arguably violate this section of the regulations.

The EEOC staff thought that the incentive issue might be solved by providing separate incentives for the employee and the spouse (e.g., a \$50 gift card to each HRA participant) The EEOC staff

understands that this might present logistical problems in that an incentive paid to the spouse would be taxable to the employee.

It also would not violate Title II of GINA to offer family members incentives for answering questions about lifestyle choices that may affect health, while allowing, but not requiring as a condition of receiving any incentive, the option of answering questions about manifested conditions if the individual so desires (i.e., a version of the split HRA that would work for family members of employees). Nor is there a prohibition on offering incentives to spouses for participating in wellness programs that do not require medical tests or questions about current medical conditions. For example, it would not violate Title II of GINA to offer family members incentives to participate in a weight management program that encourages exercise and healthy eating and/or incentives for losing a certain amount of weight.

Question 8: Enforcement Activity

Have charges related to employee benefits increased or changed in nature during the past year?
Can you breakdown the types of charge you have seen over the past year?

EEOC Answer: *Analyzing all benefits-related charges together as a group, allegations increased by almost 11% between fiscal years 2010 (3,721 allegations) and 2011 (4,128 allegations). This analysis includes allegations involving benefits generally, pension/retirement benefits, insurance benefits, waivers, severance pay, early retirement incentives, recall, reinstatement, involuntary retirement, seniority, and tenure. This 11% increase is not evenly spread among benefits-related issues; only 4 separate issues increased – benefits generally (29% increase), pension/retirement benefits (97% increase), waivers (86% increase, although waiver claims concern very small raw numbers, relative to other issues), and tenure (6% increase, also involving small raw numbers). The frequency of charges alleging any other benefits-related issue actually decreased, with the largest decreases involving failure to recall (40% decrease), reinstatement (23% decrease); and seniority (9% decrease).*

The most frequently cited bases for all benefits-related allegations in FY2010 were disability (1,593), age (1,323), retaliation (975) and race (908). In FY2011, benefits-related allegations declined for all of these groups, except for age, which increased by over 55% (to 2056) to become the most frequently alleged basis for benefits-related allegations in FY2011. Similar to the total figures for all bases, the increase in age-based allegations stems from only 3 issues -- benefits generally (155% increase), pension/retirement benefits (143% increase), and waivers (162% increase, which, again, concerns very small raw numbers). All other age-based issues related to employee benefits declined in FY2011.

Please also note that a single charge may involve multiple allegations of discrimination related to benefits, each of which would be counted separately. For example, a single charge may allege discrimination in retirement benefits, insurance benefits, and the denial of severance pay on multiple bases. Thus, it would be inappropriate to compare these figures for benefit-related allegations to the total number of charges received.