Questions for the EEOC Staff for the  
2011 Joint Committee of Employee Benefits Technical Session  
May 5, 2011

Question 1: GINA II Regulations

An employer is a covered entity under Section 1635.2 of the Nov. 9, 2010 GINA II regulations. The employer sponsors a 401(k) plan. The 401(k) plan includes a hardship withdrawal provision which allows distribution for certain medical expenses. The participant is required to provide documentation of the medical expense in order to substantiate the withdrawal. A participant could submit a request for a medical expense that involves genetic information within the meaning of the GINA II regulations (e.g., BRCA1 or BRCA2 testing for the breast cancer gene). The genetic information might or might not be part of the same employer’s group health plan (e.g., the 401(k) participant is not covered by a health plan; the BRCA testing was done independently at the employee’s own cost).

a. Is the employer subject to possible Section 1635.8 GINA II liability by virtue of the 401(k) plan hardship withdrawal medical expense substantiation requirement? Does the answer change if the employer uses a third party administrator to process hardship withdrawals?

b. Given that some medical expenses might include genetic information, is there an exception under Section 1635.8 that applies? Could the employer put the inadvertent disclaimer into the appropriate document? Would the appropriate document include the 401(k) Summary Plan Description? Plan document? Hardship withdrawal forms? Would the employer need to comply with the voluntary, knowing, and written authorization requirements of Section 1635.8(b)(2)?

c. How do the confidentiality provisions of Section 1635.9 apply to the 401(k) hardship withdrawal records? How will this requirement affect records held by a third party administrator or reviewed by an independent auditor as part of the annual audit of the 401(k) plan?

Proposed Answer for a:

Yes. The GINA II regulations are drafted broadly enough to include information submitted to the 401(k) plan. The employer might need to require genetic information in order to determine if the hardship withdrawal is allowable under Internal Revenue Code of 1986 Section 401(k) and the 401(k) plan. This is true even if the employer uses a third party administrator to process hardship withdrawals.

Answer: A general question such as “Why do you need to make a hardship withdrawal?” is not requesting, requiring, or purchasing genetic information even if one of the possible responses is the need to pay medical expenses related to a genetic test or to the current health status of an employee’s family member. Since this type of question is not a request for medical information, the staff would not expect hardship withdrawal forms to include the safe harbor language. If an employee happened to provide genetic information in response to
the question, it would be an inadvertent acquisition of genetic information and not a violation of GINA. However, the employer would then be responsible for the protection of genetic information and could not use that information to discriminate. As discussed below, none of the regulatory exceptions to the rule generally prohibiting employers from requesting, requiring, or purchasing genetic information specifically apply to this type of situation; however, it would be highly unlikely that someone who sought the hardship withdrawal would then file a charge with EEOC claiming that the employer improperly acquired genetic information.

**Proposed Answer for b:**

The exception under Section 1635.8(b)(1) for inadvertent acquisition does not apply. This is an employer request for medical information permitted by Federal law. The participant in some cases may need to provide genetic information in order for the hardship withdrawal to be processed.

- The exception under Section 1635.8(b)(2) does not apply since the employer 401(k) plan is not offering health or genetic services.

- The exception under Section 1635.8(c) for manifested disease, disorder, or pathological condition of family members does not apply.

- The exception under Section 1635.8(b)(3) for FMLA does not apply.

- The exception under Section 1635.8(b)(4) for publicly available information does not apply.

- The exception under Section 1635.8(b)(5) for genetic monitoring does not apply.

- The exception under Section 1635.8(b)(6) for forensics purposes does not apply.

Although there are no explicit exceptions under Section 1635.8 that would allow the employer to request the genetic information in relation to the 401(k) plan, there is an implied exception due to the conflict between Code Section 401(k) and the GINA II regulations. This hardship withdrawal request would be deemed not to be a violation of Section 1635.8.

This is not an inadvertent requirement under Section 1635.8(b)(1). It is not necessary for the employer to give participants the inadvertent disclaimer notice.

This is not a health or genetic service under Section 1635.8(b)(2), so the knowing, voluntary, and written authorization provisions do not apply.

**Answer:** The staff disagreed with the proposed response. The exception under Section 1635.8(b)(1) for inadvertent acquisition would apply in the event that an individual provided genetic information in connection with a request for a hardship withdrawal.

**Proposed Answer for c:**
Section 1635.9 confidentiality provisions would apply to the 401(k) plan record. The provisions would allow access by a third party administrator or independent auditor, but the employer may wish to contractually require that any such party similarly treat the information as a confidential medical record. (A third party administrator or independent auditor will not be independently subject to the GINA II regulations by virtue of engaging in work for an employer plan.) There is no definition of what it means to be a “confidential medical record” so a good faith interpretation of the phrase will be sufficient. Since the 401(k) plan is not subject to HIPAA privacy, Section 1635.9(c) is not applicable. To the extent there are no explicit exceptions under Section 1535.9 that would cover administration of the 401(k) plan, such exceptions will be implied.

**Answer:** The staff agreed that the Section 1635.9 confidentiality provisions would apply to any genetic information received in connection with a request for a hardship withdrawal.

**Question 2: Health Plan Assessments**

An employer decides to offer its employees the opportunity to take a voluntary health risk assessment. The health risk assessment asks questions about the employee’s health, age, weight, exercise habits, diet, and medication. The employee is asked to provide blood pressure and cholesterol measurements if known, but no actual biometric screening is done (the employee answers the questions on-line at the provider’s web site). If the employee takes the health risk assessment, the employee receives a 5% discount on premiums for the next year. In addition, the employer offers an addition 5% discount for the employee achieving specified goals with respect to cholesterol, body mass index, and blood sugar level. The program is designed to comply with the bona fide wellness program requirements under the HIPAA nondiscrimination regulations. See 26 C.F.R. § 54.9802-1(f)(2); 29 C.F.R. § 2590.702(f)(2); 45 C.F.R. § 146.121(f)(2). Cumulatively, the employee can receive a 20% discount on the health premiums.

Is the health risk assessment aspect of the program, which provides a 5% discount for taking the health risk assessment regardless of outcome, a voluntary program? Is the overall structure of the program, which provides a 20% discount, a voluntary program? Does the EEOC have any other concerns regarding the design of this program, which is intended to satisfy the HIPAA nondiscrimination regulations?

**Proposed Answer:**

The health risk assessment aspect is a voluntary program. In addition, the overall structure of the program with the possibility of a 20% discount is a voluntary program. See Regulations Under the Genetic Information Nondiscrimination Act of 2008, Preamble, 75 Fed Reg. 68,912, 68,923 (Nov. 9, 2010).

**Answer:** The EEOC has not taken a position as to the level of inducement that is permissible. They are looking at Seff v. Broward County (S.D. Fla. Apr. 11, 2011), but have no comment at this time. The staff reiterated that no incentives may be tied to the provision of genetic information.

**Question 3: Health Risk Assessments**
An employer decides to offer its employees the opportunity to take a voluntary health risk assessment. The health risk assessment asks questions about the employee’s health, age, weight, exercise habits, diet, and medication. The employee is asked to provide blood pressure and cholesterol measurements if known, but no actual biometric screening is done (the employee answers the questions on-line at the provider’s website). The employer hires a provider to conduct the health risk assessment. As part of the agreement, (i) the employer agrees to pay provider $50 for each employee who takes the health risk assessment, (ii) the provider will provide employer aggregated data based on the employees who take the health risk assessment, but not the names of the employees or other individually identifiable information, and (iii) the provider states it will give a $25 gift card to each employee who takes the health risk assessment. Is the health risk assessment a voluntary program if the employee receives payment of the $25 gift card? Assuming the health risk assessment does not ask any questions regarding family health history, does the EEOC have any other concerns regarding the design of this health risk assessment?

Proposed Response:

A health risk assessment program that offers an employee a $25 gift card to take the assessment is a voluntary program for purposes of the Americans with Disabilities Act (ADA). See 42 U.S.C. § 12112(a) (2006). See also H.R. Rep. No. 101-485, pt. 2, at 75 (1990). In addition, because the health risk assessment does not ask questions about family medical history, it does not violate Title II of the Genetic Information Nondiscrimination Act (GINA). See Regulations Under the Genetic Information Nondiscrimination Act of 2008, Preamble, 75 Fed Reg. 68,912, 68,923 (Nov. 9, 2010) (stating, “[T]he Commission concludes that it would not violate Title II of GINA for a covered entity to offer individuals an inducement for completing a health risk assessment that includes questions about family medical history or other genetic information, as long as the covered entity specifically identifies those questions and makes clear, in language reasonably likely to be understood by those completing the health risk assessment, that the individual need not answer the questions that request genetic information in order to receive the inducement.”).

Answer: As discussed in connection with Question 2, the EEOC has not taken a position as to the level of inducement that is permissible. However, the level of inducement posed in Question 3 is less than the level of inducement posed in Question 2 and is therefore safer.

Question 4: Downsizing and Involuntary Termination Programs

As has been the case for the past couple of years, employers continue to make adjustments to their workforces to address current economic conditions. Has the EEOC seen the number of EEOC charges relating to waivers under the Older Workers Benefit Protection Act increase or the nature of such charges change? Has the EEOC litigated any cases related to waivers recently or has it modified its position on OWBPA waivers?

Answer: No, the EEOC has not seen an increase in the number of charges related to waivers or a change in the nature of the charges. The staff provided statistics on ADEA charges filed October 1, 2006 through September 30, 2010 where the issues of discharge and/or waiver were alleged. There have been very few charges related to waivers. The staff attributes that
to the available guidance and the expertise of individuals practicing in this area. The EEOC has not changed its position related to waivers.

**Question 5: 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?

**Answer:** The staff provided a breakdown of charges filed October 1, 2006 through September 30, 2010 related to benefits.