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Genetic Information Nondiscrimination Act

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Comment on FR Doc # E9-22512

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Government Agency Type: Federal
Government Agency: IRS

General Comment

The following comments are provided in response to the request for written comments by the DOL, HHA and IRS on its Interim Final Rules under Title I of the Genetic Information Nondiscrimination Act of 2008.

Attachments

IRS-2008-0103-0056.1: Comment on FR Doc # E9-22512

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December 30, 2009

Submitted Via the Federal e-Rulemaking Portal: http://www.regulations.gov

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Compliance Assistance
Employee Benefits Security Administration
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U. S. Department of Labor
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Attn: RIN 1210-AB27

Centers for Medicare & Medicaid Services
Department of Health and Human Services
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CC:PA:LPD:PR (REG-123829-08)
Room 5205
Internal Revenue Service
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Ben Franklin Station
Washington, D.C. 20044

Re: Comments on Interim Final Rules Prohibiting Discrimination Based on Genetic Information in Health Insurance Coverage and Group Health Plans

Dear Sir or Madam:

Thank you for the opportunity to provide comments regarding the interim final rules on Title I of the Genetic Information Nondiscrimination Act of 2008 ("GINA Title I") published in the *Federal Register* on October 7, 2009 (the "Interim Final Rules"). Our firm represents various employer-sponsored group health plans and wellness program providers. As part of their wellness program offerings, our clients make wellness programs, including health assessments ("HAs") and disease management programs, available to plan participants. HAs that consider family medical history are important tools for purposes of creating targeted wellness program options that lead to more effective results. For instance, wellness program providers use the information gathered from a participant's HA to provide the participant with access to relevant disease management programs and lifestyle changes that work to reduce the risk of future health problems. It has further been our experience that incentives significantly increase employee participation, which in turn improves employee health and productivity. While Congress has stated numerous times that its ultimate goal is to improve the overall health of Americans, the

GINA Title I Regulations have the opposite effect by removing a very effective tool (incentives) to encourage participation in wellness programs.

Our clients fully support and recognize the importance of Congress' efforts to protect individuals from the improper use of genetic information in hiring practices and in the provision and pricing of health insurance. Our clients recognize the importance of handling participant's health information with the utmost care. We are, however, gravely concerned that the Interim Final Rules go far beyond the original intent of GINA Title I and threaten to dramatically decrease participation in wellness programs. In particular, the Interim Final Rules take an overly broad view of what constitutes "underwriting purposes," and by doing so, they restrict the ability of group health plans and wellness program providers to implement meaningful wellness programs.

Congress defined "underwriting purposes" as:

(i) "[r]ules for, or determination of, eligibility (including enrollment and continued eligibility) for benefits under the plan or coverage;" or

(ii) "the computation of premium or contribution amounts under the plan or coverage."

Congress set forth a precise and complete definition of "underwriting purposes" in GINA Title I. The statutory language of GINA Title I does not evidence an intent by Congress to further expand upon those definitions. To the contrary, the legislative history indicates that GINA Title I was not intended to create new regulatory schemes or change the way that group health plans use genetic information to highlight recommended tests and courses of action for plan participants.[1] Congress even acknowledged that group health plans can use genetic information to highlight recommended tests and courses of action for participants.[2] It is clear that, in drafting GINA Title I, Congress took care to balance its goal of prohibiting discrimination on the basis of genetic information with the need for effective delivery of wellness programs and other health care mechanisms.

The Interim Final Rules, however, upset this balance by expanding the definition of "underwriting purposes" so that conduct which has always been considered permissible is now prohibited. Per the Interim Final Rules, "underwriting purposes" now means:

(i) "[r]ules for, or determination of, eligibility (including enrollment and continued eligibility) for, or determination of, benefits under the plan, coverage, or policy ***(including changes in deductibles or other costsharing mechanisms in return for activities such as completing a health risk assessment or participating in a wellness program)***;" or

(ii) "[t]he computation of premium or contribution amounts under the plan, coverage, or policy ***(including discounts, rebates, payments in kind, or other premium differential***

[1] 154 Cong. Rec. H2974.
[2] *Id.*

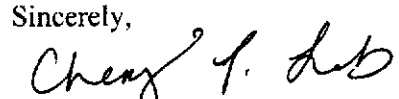
mechanisms in return for activities such as completing a health risk assessment or participating in a wellness program)" (emphasis added).

The addition of the added language redefines, rather than clarifies, "underwriting purposes" and unjustifiably expands the definition to encompass legitimate activities which Congress did not intend to limit or restrict. The Interim Final Rules also conflict with existing law. Provisions enacted as part of the "health status non-discrimination" requirements of the Health Insurance Portability and Accountability Act of 1996 permit employer-sponsored group health plans to establish premium discounts or rebates or modifying otherwise applicable co-payments or deductibles in return for adherence to programs of health promotion and disease prevention. Consequently, we strongly believe the reference to incentives in the definition of "underwriting purposes" should be removed so that the Interim Final Rules may truly carry out the Congressional intent of GINA Title I, as well as the Health Insurance Portability and Accountability Act of 1996.

Furthermore, we respectfully submit that the language prohibiting the use of incentives in connection with wellness programs threatens to dramatically decrease participation in such programs, and perhaps even more importantly, this language does nothing to further Congress' stated purpose of prohibiting discrimination on the basis of genetic information. Employees are more likely to participate in the wellness program and reap the intangible benefits of a healthier lifestyle if they know they will receive a tangible benefit upon completion of a HA or other wellness program offering. Incentives are merely used to encourage participants to take the initiative to fully participate in the valuable programs available to them. Therefore, the provision of incentives or rewards does not run afoul of Congress' stated purpose in enacting GINA—to prohibit the use of predictive genetic information in an adversely discriminatory manner such as denying coverage based on predictive genetic information, or raising premiums on the basis of predictive genetic information. For this reason, we urge the agencies to adopt the statutory definition of "underwriting purposes," without including incentive or reward programs within its scope.

While our clients have modified their HAs and wellness programs in a continuing effort to comply with GINA Title I and the newly-issued Interim Final Rules, we ask that you reconsider the adverse impact the Interim Final Rules will have on participation in wellness programs. In closing, we appreciate your willingness to consider our comments.

Sincerely,



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