

## HEALTH RISK ASSESSMENTS – ADA CONSIDERATIONS

Recently, the Equal Employment Opportunity Commission (EEOC) issued an informal letter addressing whether the Americans with Disabilities Act (ADA) prohibits an employer from requiring employees to complete a Health Risk Assessment (Assessment) in order to be eligible for, and receive reimbursement from, a Health Reimbursement Arrangement (HRA).

In brief, the EEOC official indicated this program would violate the ADA to the extent disability-related inquiries are made of the employees. While this letter is informal and does not reflect an official EEOC opinion, it provides some insight into the EEOC's thinking on this issue.

### *FACTS*

In this situation, the employer provides employees who complete an Assessment an HRA (a tax-favored reimbursement account for qualified medical expenses funded entirely by the employer).

The Assessment asks a variety of questions covering several topics, including:

- Family health history,
- Personal health,
- Women's health,
- Older adult health,
- Nutrition,
- Physical activity,
- Alcohol and tobacco use,
- Safety, and
- Health changes.

Employees who do not complete the Assessment do not receive an HRA.

## ANALYSIS

In its commentary, the EEOC official indicated that the ADA strictly limits when an employer may obtain medical information from applicants and employees.

Once employment begins, an employer may only make a disability-related inquiry or require medical examination of employees if it is job-related and consistent with business necessity.

There are very limited exceptions to the above rule, including when disability-related inquiries and medical examinations are part of a *voluntary wellness program*. **A wellness program is voluntary if employees are *neither required to participate nor penalized for non-participation*.**<sup>1</sup>

In analyzing the specific facts of this case, the EEOC official concluded that the program was not job-related, nor consistent with business necessity. Further, the program was not a voluntary wellness program **because the Assessment made disability-related inquiries and employees who did not complete the Assessment were penalized, as they were not eligible for the HRA.**

Interestingly, the official highlighted that the ADA is only concerned with disability-related inquiries, and that not all questions posed in the Assessment were disability-related.

Examples of disability-related inquiries included:

- How often employees felt depressed;
- Whether the employee had certain medical conditions (e.g. asthma, cancer, heart disease or diabetes);
- The number of prescription drugs the employee was taking; and
- How much alcohol the individual consumed.

Such questions, unless offered under a voluntary wellness program, are impermissible under the ADA.

However, non-disability related inquiries, including the following examples, may not necessarily elicit information about a disability and therefore may not be subject to ADA restrictions.

- Do you have a health care directive?
- How many servings of fruits and vegetables do you eat a day?
- Do you take a vitamin supplement?
- Do you eat breakfast?
- Do you exercise?

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<sup>1</sup> The EEOC official acknowledged that no formal position on this issue has been made by the agency.

## *INTERACTION WITH GINA*

Title II of the Genetic Information Nondiscrimination Act (GINA) takes effect November 21, 2009. The EEOC official indicated that Title II will prohibit an employer from obtaining any genetic information (including family medical history) from an employee, except in very limited scenarios. One such scenario is a voluntary wellness program. However, the official commented that this specific program was not a voluntary wellness program and therefore would violate GINA with respect to the collection of family medical history information via the Assessment.<sup>2</sup>

## *CONCLUSION*

To reiterate, this information does not reflect the formal position of the EEOC and only pertains to the specific facts addressed in this letter. However, it does provide perspective from the EEOC on this issue and raises additional questions for many programs. Employers providing Health Risk Assessments tied to financial incentives may want to review the terms of their program to determine whether specific questions are disability-related. Additionally, formal guidance from the EEOC on this issue is greatly needed.

A copy of the informal EEOC letter is available at [http://eeoc.gov/foia/letters/2009/ada\\_health\\_risk\\_assessment.html](http://eeoc.gov/foia/letters/2009/ada_health_risk_assessment.html).

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<sup>2</sup> Moreover, while not addressed in the EEOC letter, Title I of GINA prohibits a group health plan from financially rewarding an individual for completion of a health risk assessment where genetic information (including family medical history) is collected. Further, GINA prohibits the collection of genetic information (including family medical history) prior to or in connection with enrollment. For more information on these group health plan rules see our *Technical Bulletin* October 9, 2009 <http://www.kpcom.com/newsletters/documents/GINA%20GHP%20Regs.%2010.9.09.pdf>.