HR and Employment Law News

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GINA Regulations Are Now Final

The Equal Employment Opportunity Commission (EEOC) announced recently that its much-debated regulations interpreting the Genetic Information Nondiscrimination Act (GINA) are now in final form. For many, they raise at least as many questions as they answer, but we'll review some of what they contain here.

"Inadvertently acquired" data is a focus. We asked David Gevertz to discuss the regs with us. He is vice chair of the labor and employment department at Baker, Donelson, Bearman, Caldwell & Berkowitz in its Atlanta office. He noted initially that so-called "water-cooler conversations" were a controversial topic in the proposed regulations and received much attention in comments to EEOC. Here's a sample scenario: An employee goes to HR to request leave under FMLA, saying, "My mother has breast cancer, and I need to take care of her." Whoops! HR has just received genetic information.

We've heard of one such instance in which the HR manager said, "I'm sorry. This conversation has to end." And, unfortunately, that's how the final regs read. Gevertz explained that "if an initial detailed employee response to a question brings genetic information, no follow-up questions are allowed. Essentially, the conversation must be shut down." He feels that's going to be impractical in most workplaces; supervisors and HR need to know why an employee is asking for leave and about personal health problems or those of relatives that may distract an employee.

Further, Gevertz notes, EEOC says in the regs that case law under Title VII—harassment based on race, ethnicity, religion, or gender—must be extended to genetic information. He finds such harassment hard to imagine, positing that when co-workers discuss a colleague's condition, they usually do so with sympathy rather than intending to harass. He stresses the original intent of GINA, which was to encourage people to take advantage of emerging tests for inherited conditions without fear of reprisal from insurers or employers—a far cry from preventing workplace conversations. Says Gevertz, "We can hope that courts will inject a note of realism in this realm."

What else is in the regs? If employers must collect medical information, EEOC provides "safe harbor" language to be used on such forms as FMLA notices and orders for background checks. The language is an employer's protection in case it accidently acquires genetic information. Healthcare providers conducting screenings, in fact, must specify that the employer cannot be given genetic information.

EEOC has also carved out an exception for "publicly available" information, such as that found in the newspaper obituary for an employee's family member. But if the information is on

someone's Facebook page, that's considered private. There are looser rules for Google alerts set up by an employer on its company if genetic information surfaces from that source.

For more information, visit GINA: A Resource Center for Employers.