

EEOC Issues Regulations Relating To the Genetic Information Nondiscrimination Act of 2008

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Over two years ago, President George W. Bush signed into law the Genetic Information Nondiscrimination Act of 2008 ("GINA"), which, among other provisions, prohibits discrimination in employment on the basis of genetic information. GINA defines "genetic information" as information regarding an individual's genetic tests, the genetic tests of a family member or the manifestation of a disease or disorder. This week, the Equal Employment Opportunity Commission ("EEOC") issued regulations implementing Title II of GINA, which is the portion of the law applicable to employers. The following is a summary of the new regulations.

Most importantly, the regulations prohibit employers from "requesting, requiring, or purchasing genetic information" regarding an employee. Such a prohibited "request" would include conducting an Internet search on an individual in a way that is likely to result in the employer obtaining genetic information; "actively listening" to third party conversations or searching an individual's personal effects for the purpose of obtaining genetic information; and making requests for information about an individual's health status in a way that is likely to result in a covered entity obtaining genetic information. Because employers often obtain medical information regarding employees which may include "genetic information" as defined by GINA, the regulations recognize an exception when the employer "inadvertently requests or requires" genetic information from employees or their family members, including as part of a lawful request for medical information. To fall within the exception, the employer must give notice to the employee that he or she should not provide genetic information. The regulations provide model language that will satisfy the notice requirement.

The exception to the rule against "requesting" genetic information also applies when the disclosure takes place as part of a health or genetic service offered by the employer, including services offered as part of a voluntary wellness program. To be within the exception, the employee's provision of genetic information must be both voluntary and authorized, and the individually identifiable genetic information must be provided only to the employee and the licensed health care professionals or board certified genetic counselors involved in providing such services. The information may not be accessible to anyone else in the workplace. If an employer offers a financial inducement to employees for participating in a wellness program, the inducement must be made available regardless of whether or not the participant answers questions regarding genetic information.

The regulations also impose confidentiality requirements on employers. Employers must maintain genetic information separately from personnel files and treat such information as a confidential medical record. The employer may not disclose genetic information, except in certain limited circumstances.

The regulations are effective January 10, 2011. At a minimum, employers will need to update forms used to obtain medical information to include the required notice regarding genetic information.