

Employment, Labor and Benefits Advisory

NOVEMBER 29, 2010

EEOC Issues Final GINA Title II Regulations

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On November 9, 2010, the Equal Employment Opportunity Commission (EEOC) issued final regulations regarding Title II of the Genetic Information Non-Discrimination Act (GINA). Title II of GINA, which became effective on November 21, 2009, regulates an employer's acquisition and use of its employees' genetic information. To access Mintz Levin's November 6, 2009 alert regarding GINA, [please click here](#). To access the May 16, 2008 alert regarding GINA, [please click here](#).

The recently issued regulations clarify GINA's scope and impact on employers with respect to the following topics (among others):

- *Definitions*: The regulations highlight and clarify key definitions under GINA. For instance:
 - "Employers" are defined as they are defined under Title VII of the Civil Rights Act of 1964 (i.e., 15 or more employees).
 - "Genetic Information" is broadly defined to include: (a) genetic tests of an individual or his/her family members; (b) an individual's family medical history; (c) an individual's request for or receipt of genetic services or participation in clinical research that includes genetic services; and (d) genetic information of a fetus carried by an individual or a pregnant woman who is a family member of the individual, and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.
 - "Genetic Tests" are defined to include: (a) carrier screening for adults using genetic analysis to determine the risk of conditions such as cystic fibrosis, sickle cell anemia, spinal muscular atrophy, or fragile X syndrome in future offspring; (b) tests to determine if someone has the BRCA1 or BRCA2 variant evidencing a predisposition to breast cancer; and (c) DNA testing that reveals family relationships, such as paternity. Notably, the regulations also describe tests that do not qualify as genetic tests (e.g., complete blood counts, cholesterol tests, and liver function tests).
- *Prohibition on Discrimination*: The regulations clarify the scope of GINA's basic prohibition against: (a) discriminating against employees on the basis of genetic information; (b) limiting, segregating, or classifying employees on the basis of genetic information; and (c) retaliating against employees based on opposition to unlawful conduct under GINA or participation in investigations or proceedings under GINA.

- *Prohibition on Acquisition of Genetic Information:* The regulations explain the scope of GINA's prohibition against requesting, requiring, or purchasing genetic information. For instance, the regulations explain that an unlawful "request" includes conduct such as: (a) conducting Internet searches likely to result in obtaining genetic information; (b) actively listening to conversations or searching personal effects for the purpose of obtaining genetic information; or (c) making requests for information about an individual's current health status in ways that are likely to result in the disclosure of genetic information.
- *Exceptions for Lawful Acquisition of Genetic Information:* The regulations also provide a detailed explanation of the ways in which employers may lawfully acquire genetic information. In brief, such information may be obtained: (a) as a result of "inadvertent" requests for genetic information (e.g., by overhearing a conversation "at the water cooler" or receiving responses to an ordinary expression of concern about an employee's health, *provided* that the employer does not follow up with questions likely to elicit genetic information); (b) as part of a wellness program (note that employers may not offer a financial inducement for genetic information, but may offer financial inducements to complete health risk assessments including questions about family medical history or other genetic information, if the assessments specifically identify the questions requesting genetic information and clearly state that the questions are optional and the inducement will be provided regardless of whether those questions are answered); (c) pursuant to requests for information under the Family and Medical Leave Act (FMLA); (d) through commercially and publicly available documents; (e) via the monitoring of effects of toxic substances; or (f) pursuant to DNA analysis for law enforcement purposes.
- *Specific Guidance on Medical Requests:* The regulations state that in order for the acquisition of genetic information to be "inadvertent" in the context of a request for medical information (e.g., pre- and post-offer medical exams, certification of family and medical leave, certification of health status for a reasonable accommodation under the Americans with Disabilities Act (ADA), return-to-work forms, etc.), employers must specifically inform employees and/or health care providers that they should not provide genetic information in response to such request. In this regard, the regulations provide the following "safe harbor" language that employers may use in connection with such requests:

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

- *Specific Guidance Regarding Confidentiality of Genetic Information:* The regulations also expand on GINA's confidentiality requirements. For instance, the regulations state that genetic information placed in personnel files prior to November 21, 2009 need not be removed, but that information placed in personnel files after November 21, 2009 must be maintained in forms and medical files that are *separate* from personnel files

(including information existing in electronic form). The regulations also require employers to maintain genetic information in strict confidence unless certain specific exceptions apply (e.g., in response to a written request by an employee, request by an occupational health researcher, court order, or government official investigating GINA compliance, disclosure in support of an employee's FMLA certification, or disclosure to a public health agency of information about the manifestation of a disease or disorder that concerns a contagious disease presenting an imminent hazard of death or life-threatening illness).

Employers must ensure that their human resources practices comply with GINA regulations. In particular, employers should promptly: (a) revise their equal employment policies to prohibit discrimination based on genetic information; (b) train managers and supervisors on how to avoid unlawful acquisition of genetic information; (c) revise all requests for medical information to employees to include the "safe harbor" language described above; and (d) institute strict recordkeeping guidelines regarding the segregation of medical and genetic information from employee's personnel files. Employers should feel free to contact their Mintz Levin employment counsel if they have any questions about the steps described above or otherwise about the application of GINA to their business.

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0787-1110-NAT-ELB