

ALERTS AND UPDATES

EEOC Issues Final Regulations Regarding Title II of the Genetic Information Nondiscrimination Act

November 22, 2010

On November 9, 2010, the U.S. Equal Employment Opportunity Commission ("EEOC") published its [final regulations](#) for Title II of the Genetic Information Nondiscrimination Act ("GINA"). Title II of GINA became effective on November 21, 2009, before the final regulations were finalized. This *Alert* is a follow-up to our [December 9, 2009 Alert](#), which dealt with compliance for employers under GINA in advance of the publication of the final regulations.

These regulations, which take effect January 10, 2011, will be codified at 29 C.F.R. Part 1635.

General Prohibition

Title II of GINA prohibits discrimination on the basis of genetic information of employees and their family members. GINA prohibits employers from requesting, requiring or purchasing genetic information from or about an individual or an individual's family members.

The final regulations take a broad and expansive view of this prohibition. For instance, the regulations make clear that an employer may violate GINA without a specific intent to acquire genetic information. Further, the regulations broadly interpret the term "request" to include:

- the conducting of Internet searches on an individual in a manner likely to result in the obtaining of genetic information,
- the searching of an individual's personal effects to obtain genetic information or
- the making of requests for information about an individual's current health status in a manner likely to result in obtaining genetic information.

GINA prohibits retaliation against individuals who complain about the acquisition, use or disclosure of their genetic information or the genetic information of their family members. The preamble to the final regulations recognizes a potential claim for harassment on the basis of genetic information. However, the regulations specifically note that GINA does not create a cause of action on the basis of disparate impact. GINA provides remedies consistent with Title VII for individuals whose genetic information (or the genetic information of their family members) was acquired, used or disclosed in violation of GINA.

Key Definitions

The final regulations define employee to include not only current employees but also applicants and former employees. In addition, the regulations define family member to cover persons who are or who become related to an individual through marriage, birth, adoption or placement for adoption. Thus, even if an adopted child is not related genetically to a covered employee, GINA prohibits the acquisition of genetic information regarding the employee's adopted child.

The definition of genetic information includes information about: (i) an individual's genetic tests, (ii) the genetic tests of an individual's family members or (iii) the manifestation of a disease or disorder in an individual's family members.

The final regulations clarify what constitutes a genetic test under GINA and provide examples of tests for purposes of GINA that are considered and are not considered genetic tests. For instance, tests for infectious and communicable diseases, complete blood counts, cholesterol tests and liver-function tests are not considered genetic tests. Genetic tests include:

- screenings to determine the risk of certain genetic disorders, such as sickle cell anemia or cystic fibrosis;

- amniocentesis and other evaluations to determine potential fetal genetic abnormalities;
- newborn screenings and DNA testing regarding family relationships or
- the presence of genetic markers associated with an individual's ancestry.

Inadvertent Disclosure and Safe-Harbor Language

GINA exempts employers from liability for "inadvertent" receipt of medical history or genetic information of an individual or his or her family members. For example, accidentally overhearing a conversation by an employee or generally inquiring "How are you?" regarding an employee's health qualifies as an inadvertent disclosure under the regulations. In addition, genetic information that may be received in connection with an employee's request for FMLA leave would not violate GINA.

Employers are required under GINA to affirmatively inform healthcare providers not to collect genetic information as part of a medical examination intended to determine an individual's ability or fitness for work. The final regulations include specific safe-harbor provision language to include on forms or questionnaires in which a lawful request for medical information is made. The purpose of the safe-harbor language is to caution healthcare providers not to provide a company with genetic information.

The safe-harbor language contained in the regulations is as follows:

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.

If an employer receives any genetic information in response to a lawful request that contained the required safe-harbor language, the disclosure will be deemed inadvertent—and not a violation of GINA. Thus, the inclusion of this specific language, located at 29 C.F.R. Part 1635.8(b)(1)(i)(B), is strongly advised.

Wellness Programs

GINA allows employers to obtain genetic information in connection with employer-sponsored health services or wellness programs, as long as any identifying genetic information is accessible only to the employee and the healthcare provider. Employees participating in an employer-sponsored wellness program are required to provide knowing, voluntary and written authorization that describes the information being requested, from whom it is being sought and the safeguards to protect against unlawful disclosure.

The final regulations allow for employers to offer financial incentives to encourage employee participation in a wellness program, but employers cannot offer financial incentives to employees to provide genetic information. Thus, if an employer is offering an incentive for employees to complete a health-risk assessment that includes questions concerning the employee's medical history (or the medical history of the employee's family members), the employer must identify such questions and indicate that the employee need not respond to them in order to receive the incentive.

What the Final GINA Regulations Mean for Employers

Employers should take steps to avoid liability under GINA, including:

- **Replace an outdated EEOC poster.** If this has not already been done in connection with GINA's earlier effective date, be sure the EEOC's revised "EEO is the Law" poster is posted at the workplace.
- **Review the company's EEO policy.** Revise EEO policy and procedures to include genetic information as a prohibited basis for discrimination, harassment and retaliation.
- **Include safe-harbor provision language on relevant forms.** Review and revise any documents, such as applications, FMLA certifications and other employment-related forms and questionnaires, that may seek genetic information and ensure that the specific safe-harbor language is included on all lawful requests for medical information.
- **Protect Genetic Information.** Ensure that any genetic information that may exist is treated as confidential and is placed in a confidential medical file, separate from an employee's personnel file or an applicant's application file. Implement procedures to prevent the disclosure of genetic information.
- **Train Managers and Supervisors.** Provide training to managers and supervisors on GINA and how it affects and changes the company's policies and procedures.

For Further Information

If you have any questions about this *Alert* or would like more information, please contact any [member](#) of the [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

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