



Legal Alert: EEOC Issues Final GINA Regulations

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On November 9, 2010, the Equal Employment Opportunity Commission published final regulations implementing Title II of the federal Genetic Information Nondiscrimination Act (GINA). The regulations are available at: <http://edocket.access.gpo.gov/2010/pdf/2010-28011.pdf>. As we previously outlined when the Act was first passed, Title II of GINA prohibits employers from making employment decisions on the basis of genetic information and family history. This statute also prohibits employers from acquiring genetic information and family medical history about applicants, employees, and former employees, subject to specific exceptions. (See our Legal Alert, *Employers and Insurers Meet GINA – The Newest Addition to the Federal Discrimination Law Family*, 05/23/2008, available on our web site at: <http://www.fordharrison.com/shownews.aspx?show=3735>).

While it's unlikely that employers are genetically screening applicants to create a workforce of "employees of the month," the implementation of the new regulations raises questions about some common employer practices that could be viewed as violating GINA. Following is a general discussion of the way certain issues likely would be addressed under the new regulations:

- Do your innocent questions about an employee's mother who has been diagnosed with cancer (or another inherited disease or disorder) now run afoul of federal law? Do you violate the law if you overhear the co-worker's conversation about this same mother's condition? *Probably not. The inadvertent acquisition of genetic information does not violate GINA; however, GINA prohibits asking more probing questions such as whether other family members also have the disease or whether the employee has been tested for the disease. GINA also prohibits actively listening to third-party conversations to obtain genetic information.*
- Do you "acquire" genetic information when an employee, unprompted by you, "overshares" information about themselves? *Probably not, if the statements are made during a casual conversation, such as a general health inquiry, and the employer does not follow up with probing questions likely to elicit genetic information.*
- Does obtaining medical information on one of your employees count as acquiring family medical history of another family member who also works for you? *No. The regulations state that an employer does not violate GINA by requesting information about the manifested disease or condition of an employee whose family member also works for the employer. For example, the employer does not violate GINA by asking someone whose sister also works for the employer to take a post-offer medical examination that does*

not include requests for genetic information.

- Can your requests for medical documentation in order to provide reasonable accommodation under the Americans with Disabilities Act or in connection with an employee's requested leave to attend to their own or a family member's serious health condition under the Family and Medical Leave Act possibly violate GINA? *In some situations such requests could result in the disclosure of genetic information that would violate GINA. The EEOC has provided sample language that employers can use when requesting medical documentation from health care providers that warns the provider not to disclose genetic information. The receipt of genetic information would be considered inadvertent if such a warning is given or if the request for medical information was phrased in such a way that was not likely to result in the acquisition of genetic information.*
- Can you violate GINA by accessing an employee's Facebook page where the employee/applicant has included information about a family member's cancer? *Not usually because the inadvertent exception applies to interactions that take place through social networking platforms. However, conducting an internet search on an employee or applicant that is designed to reveal genetic information would violate GINA.*
- Does the Wellness Program that you offer to your employees violate GINA? *Not if participation in the program is voluntary, as defined by the regulations, and the covered entity meets the requirements set forth in the regulation for the acquisition of genetic information as part of such a program.*

These and other potentially complicated situations are addressed in the final regulations implementing GINA. We will be providing a more detailed analysis of the regulation in the near future.

If you have any questions regarding the new regulations or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work. David P. Maram is the author of this Alert.