Final GINA Regs Delayed: GINA & Social Media Considerations for Employers

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Title II of the Genetic Information Nondiscrimination Act of 2008 ("GINA") makes it illegal to discriminate against employees or applicants because of genetic information. It prohibits using genetic information to make employment decisions, prohibits acquisition of genetic information by employers, and limits disclosure of genetic information by employers. (Harassment and retaliation are also forbidden.) Title II took effect on November 21, 2009. The proposed regulations were published last year, and the final regulations were initially expected to be published in May of 2010, but publication of the final rule has been delayed.

This leaves employers (and their lawyers) in interpretation-limbo a while longer. With respect to social media issues specifically, GINA makes the mere *acquisition* of genetic information illegal. Because the Act broadly defines the term "genetic information" (including even medical conditions of family members), checking out an employee's or applicant's Facebook profile could easily result in a violation. For example, if an employer found an employee's status update saying he is raising money for multiple sclerosis in honor of his father who is suffering from it – just getting that information could be a violation.

Some acquisitions of genetic information aren't illegal; the law provides six exceptions. One of those exceptions is inadvertent acquisition. "Well, I didn't know I was going to find this information on his profile." This probably isn't going to protect employers. If a supervisor or human resources manager intentionally accesses a profile, the information found there isn't acquired inadvertently. (Depending on the facts, I suppose this could change. If an employee sends a friend request to his supervisor, and weeks later, the employee's status update appears in the supervisor's Facebook news feed – there may be a better argument for the inadvertent acquisition defense.)

The better possibility is the exception for "commercially and publicly available information." The statute identifies newspapers, magazines, periodicals, and books as potential source of genetic information. The proposed regulation adds to the list information obtained through electronic media (internet, television, and movies). This suggests social media would be exempted – but the EEOC then specifically invited public comment on whether "personal Web sites, or social networking sites" would be a prohibited or exempted source of genetic information. So, it's still not clear whether social media profiles would fall under the "commercially and publicly available information" exemption. If it doesn't fall within the scope of this exception, an employer that obtains genetic information by checking an applicant or employee profile would likely be violating GINA.

Of course, even if a social networking profile turns out to be an excepted source of information, employers still must be careful in how they use the information they acquire. As is the case with any other kind of unlawful discrimination, an adverse employment action taken after the employer becomes aware of an employee's protected status might suggest the employment decision was because of the protected status and not performance. (Not only true in the context of current employment relationships, but also in the context of hiring.)