



LABOR & EMPLOYMENT DEPARTMENT

ALERT

NEW GINA REGULATIONS NECESSITATE REVIEW OF EMPLOYER MEDICAL CERTIFICATION FORMS

By Todd A. Palo and Steven K. Ludwig

The Equal Employment Opportunity Commission (EEOC) issued final regulations on Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA or the Act) on Nov. 9, 2010. GINA generally prohibits employers from requesting, requiring or purchasing an individual's genetic information and making employment decisions based on such genetic data. Although Title II of GINA has been in effect since Nov. 21, 2009, the new regulations impose additional requirements upon employers requesting medical certifications with respect to leave of absence or accommodation requests—notably those requests related to the Family and Medical Leave Act (FMLA) or the Americans With Disabilities Act (ADA).

Background

GINA was enacted in 2008 in response to concerns patients and employees alike would decline the opportunity to take advantage of genetic testing because they could risk losing their jobs or health insurance if such tests revealed adverse information. Congress expressly stated in the Act: "New knowledge about genetics may allow for the development of better therapies that are more effective against disease or have fewer side effects than current treatments. These advances give rise to the potential misuse of genetic information to discriminate in health insurance and employment."

Coverage Basics

GINA prohibits the use of genetic information to make employment decisions. It also prohibits discrimination and harassment on the basis of genetic information and/or retaliation for complaints filed regarding genetic information. Strict limitations are placed on the request,

purchase and disclosure of any inadvertently obtained genetic information as well. GINA applies to employers with 15 or more employees where the term "employee" expressly includes both applicants and former employees.

The GINA regulations define genetic information broadly to include:

- An individual's genetic tests;
- Genetic tests of an individual's family members;
- The manifestation of disease or disorder in family members;
- An individual's request for, or receipt of, genetic services, or participation in clinical research that includes genetic services by an individual or family member; or
- The genetic information of a fetus carried by an individual or by a pregnant family member using an assisted reproductive technology.

Employers must take notice of the expansive nature of the definition but recognize it specifically excludes information about the sex or age of the individual or of family members or information about race or ethnicity not derived from genetic testing.

Exceptions Under the New Regulations

GINA's broad prohibitions against obtaining covered genetic information are lessened by a number of exceptions that are clarified under the new regulations.

- **Inadvertent Disclosure Exception:** An employer's inadvertent acquisition of genetic information applies to situations where an employer—acting through a

supervisor or other representative—overhears a conversation, receives an unsolicited communication or following a general inquiry, obtains information about an individual's or family members' genetic information. The new regulations make clear these "water cooler" disclosures of genetic information do not expose an employer to liability under GINA.

• **Request for Medical Information and Safe Harbor Exception:**

The new regulations include a "safe harbor" provision to address the situation when an employer seeks medical data for the purposes of evaluating individual claims for sick leave, requests for leave pursuant to the FMLA and requests for reasonable accommodations under the ADA and other laws. When employers are lawfully requesting medical information pursuant to these circumstances, GINA stipulates employers should direct individuals and their health care providers to not supply genetic information. Specifically, the regulations recommend the following language be included in requests:

- *The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers 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.*

According to the new regulations, to obtain the safe harbor protection, a request for medical information should include the model notice or similar language.

• **FMLA Exception:** The new regulations specifically recognize employers may receive genetic information from individuals or health care providers in conjunction

with requests for leave to care for seriously ill family members pursuant to the FMLA. In fact, FMLA requests sometime necessitate the receipt of genetic information so the employer can appropriately evaluate the request. While pursuant to the new regulations, an employer that receives family medical history or genetic information under an FMLA request will not violate GINA, we still advise the safe harbor provision be included.

It is important to note genetic information or family medical history received from individuals in any of the above situations is excepted from GINA liability for possession, but employers are still subject to GINA's confidentiality requirements—requiring genetic information to be placed in a separate medical file and treated as a confidential record.

Moving Forward

In light of the new GINA regulations, employers should take the following affirmative steps to reduce the risk of inadvertently exposing themselves to liability for obtaining employees' genetic information:

- Employers should review and revise their policies and procedures to make them GINA-compliant.
- Companies should provide basic employment law training to supervisors and should generally require them to inform Human Resources (HR) whenever an employee requests leave for a health or medical reason.
- HR personnel should be trained on what constitutes protected genetic information.
- All requests for medical information, including FMLA certification forms, should be revised to include a notice to the individual or medical provider that genetic information, including family history, should not be included.
- Employers should ensure all genetic information obtained remains separate and confidential.

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