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## **[EEOC Issues Regulations Interpreting The Genetic Information Nondiscrimination Act 2008](#)**

On May 21, 2008, President George W. Bush signed the Genetic Information Nondiscrimination Act of 2008 ("GINA") into law. As many know, advances in medical technology have made it possible to perform genetic tests to determine if an individual may be at risk of developing a disease or a disorder due to their genetic makeup. GINA was passed in order to prevent the potential misuse of such genetic information by prohibiting employers or health insurance companies from discriminating against individuals based on their genetic information.

On November 9, 2010, the Equal Employment Opportunity Commission ("EEOC") issued its final regulations interpreting the employment provisions of GINA. GINA generally prohibits an employer, employment agency, labor organization, or training program from discriminating against an individual because of genetic information. GINA, however, goes beyond simply outlawing discrimination and makes it illegal for an employer, employment agency, labor organization, or training program, with several minor exceptions, to "request, require, or purchase genetic information."

The recently released regulations clarify many aspects of the law. Importantly, the regulations interpret what it means to improperly "request" genetic information. The EEOC broadly interpreted what constitutes a "request" and found that it includes "conducting an Internet search on an individual in a way that is likely to result in a covered entity obtaining genetic information; actively listening to third-party conversations or searching an individual's personal effects for the purpose of obtaining genetic information; and making requests for information about an individual's current health status in a way that is likely to result in a covered entity obtaining genetic information." 29 C.F.R 1635.8. Accordingly, under the new regulations, an employer does not have to directly ask an employee for genetic information to violate GINA. It can violate GINA by seeking that information through an internet search, searching personal effects, or even actively listening to a third-party conversation.

The EEOC offers some limited protection for an employer that "inadvertently" requests or obtains genetic information by clarifying that such "inadvertent" requests are generally not illegal. 29 C.F.R 1635.8(b)(1). What constitutes such "inadvertent" requests is discussed at some length and includes a manager or other employer representative accidentally overhearing information in a third party conversation, learning of the information from a social media platform such as Facebook that he/she has permission to view, or acquiring the information from certain documents that are commercially and publicly available such as newspapers, magazines, or books.

One other important provision of the regulations addresses an employer's potential liability for the disclosure of genetic information resulting from an employer's lawful request for medical information. The regulations provide incentive for an employer to actively inform health care providers or individuals to not produce genetic information when making lawful requests for employee medical information. If the employer preemptively informs the health care provider or individual to not produce genetic information, any disclosure of genetic information will be deemed "inadvertent." However, if the employer fails to include such a prohibition, any disclosure of medical information, even if not specifically sought, will not be considered "inadvertent" unless the employer can establish that the request was not "likely to result in a covered entity obtaining genetic information." 29 C.F.R 1635.8(b)(1)(i). The regulations contain example "safe harbor" language that can be

included in any request for medical information in order to prevent a possible violation.

The provisions discussed above are merely a few important highlights from the new regulations, which are detailed, specific, and lengthy. In general, employers should be aware that GINA not only makes it illegal to discriminate against employees based on genetic information, but also regulates what type of information employers can access and how they can access that information. Employers should consult counsel regarding the many technical obligations and prohibitions of the new regulations to ensure that they are complying with GINA.