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EEOC's Final GINA Regulations to Take Effect and Impact Employers

On January 10, 2011, the EEOC's final regulations implementing Title II of the Genetic Information Nondiscrimination Act of 2008 ("GINA") will take effect. So as the new year begins, employers should become familiar with the regulations and take certain steps aimed at making their policies and procedures GINA-compliant.

Overview Of GINA

Title II of GINA, which has been in effect over a year, prohibits employment discrimination based on genetic information and restricts the circumstances under which an employer may acquire genetic information of an employee or applicant. If an employer acquires genetic information under a permitted circumstance, the employer must maintain the genetic information as a confidential medical record and faces strict limitations regarding disclosure of such information.

Regulations Broadly Define "Genetic Information"

The GINA regulations define "genetic information" broadly to include: genetic tests of an individual or the individual's family members; manifestation of a disease or disorder in an individual's family members (i.e. "family medical history"); an individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member of the individual; and the genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology. Employers need to take heed of this expansive definition, so that they can readily recognize the types of information covered.

Regulations Expand Limitations On An Employer's Acquisition Of Genetic Information But Also Provide Exceptions

The GINA regulations expand GINA's basic prohibition on an employer's acquisition of genetic information. Employers cannot, for example, request information about an employee's current health status if the request is likely to elicit the disclosure of genetic information. Employers also cannot search for genetic information or any information that is likely to result in the acquisition of genetic information.

Notwithstanding the express limitations on the acquisition of genetic information, the GINA regulations contain significant exceptions for inadvertent acquisition and voluntary wellness programs. Thus, an employer will not violate GINA if it acquires genetic information either inadvertently or as part of a compliant voluntary wellness program. To be compliant, a voluntary wellness program may neither require an employee provide genetic information nor penalize an employee who declines to provide genetic information.
The inadvertent acquisition exception covers circumstances where the employer is requesting information in a way that is ***not likely*** to solicit information about genetic information. For example, in circumstances where a supervisor overhears an employee discussing a family member's illness, GINA is not violated. Similarly, in a casual conversation, where a supervisor asks an employee about how their child is feeling, GINA is not violated. But, if the supervisor then follows up with "probing" questions that are likely to result in the disclosure of genetic information (such as "Have you been tested for that condition?" or "Have others in your family had that disease?"), GINA would be violated.

The GINA regulations clarify that the inadvertent acquisition exception applies in the virtual world as well as the physical workplace. For example, an employee may send an unsolicited e-mail to its employer containing genetic information. That situation would fall within the inadvertent acquisition exception. Similarly, a supervisor's unintentional discovery of genetic information from a social media website would not violate GINA, provided, however, that the supervisor had permission to access the employee's profile.

Regulations Provide That Employers Need To Direct Individuals And Their Health Care Providers To Not Provide Genetic Information

When employers are lawfully requesting medical information, whether under the Family Medical Leave Act of 1993 ("FMLA"), Americans with Disabilities Act ("ADA"), or other law, the GINA regulations provide that employers should direct individuals and their health care providers to not provide genetic information. Specifically, the GINA regulations provide the following "safe harbor" language for employers to use in connection with requests for medical information:

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.

Only an employer who avails itself of this safe harbor language will fall within the inadvertent acquisition exception if it subsequently receives genetic information in response to the request for medical information.

Regulations Permit Family Medical History Information For FMLA

The GINA regulations specifically provide that if ***family medical history*** is requested to comply with the certification provisions of the FMLA, other family and medical leave law, or to comply with a policy of providing leave to care for sick family members, then GINA is not violated. This exception is distinguishable from the inadvertent disclosure exception because information regarding a family member's health is being specifically requested in order to comply with family leave law or policy.

Genetic Information Must be Kept Confidential

If an employer permissibly acquires genetic information, the information must be maintained as a confidential medical record and may only be disclosed under very narrow exceptions. Genetic information reduced to writing must be placed in a file separate from the employee's personnel file but may be kept in the same file as other medical information subject to the ADA.

Conclusion

Employers should review and revise their policies and procedures to make them GINA-compliant. As soon as possible, EEO policies should be revised to prohibit discrimination based on genetic information and related retaliation, and, even more importantly, all requests for medical information should include a notice to the individual or medical provider that genetic information, including family history, should not be included. In particular, FMLA certification forms should be revised to include such a notice. Lastly, human resources professionals and managers should be made aware of the unique requirements of GINA with respect to genetic information (including family medical history).

For additional information or for assistance in implementing GINA-compliant policies and procedures, you are invited to contact the authors or their colleagues in Venable's Labor & Employment practice group.
