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EMPLOYER ALERT

EFFECTIVE JANUARY 10, 2011, NEW GINA REGULATIONS WILL IMPACT COMMON HR PRACTICES *By Adam R. Long*

In November, the EEOC issued final regulations implementing the Genetic Information Nondiscrimination Act of 2008 ("GINA"). GINA prohibits the use of genetic information in employment decisions and restricts an employer's ability to request, require, or purchase genetic information. GINA also requires employers to treat all genetic information as confidential medical information and places restrictions on the disclosure of genetic information. GINA applies to all employers who are covered by Title VII of the Civil Rights Act of 1964. The EEOC's new regulations take effect on January 10, 2011, and clarify a number of GINA's key employment-related requirements and prohibitions.

Broad Definition of "Genetic Information"

Under GINA and the EEOC regulations, "genetic information" includes any information about an individual's genetic tests, the genetic tests of that individual's family members, or the manifestation of a disease or disorder in any of that individual's family members (i.e., family medical history). The term "family members" also is defined broadly and includes spouses, natural and adopted children, parents, siblings, half-siblings, grandparents, great-grandparents, great-great-grandparents, grandchildren, great-grandchildren, great-great-grandchildren, uncles, aunts, nephews, nieces, first cousins, and first cousins once-removed.

"Safe Harbor" for Employer Requests for Employee Medical Information

Employers regularly ask employees to have their health care providers provide medical information, such as in connection with a request for medical leave or a reasonable accommodation. Because of the broad definition of "genetic information," these general requests potentially can violate GINA's prohibition on requesting genetic information. The EEOC regulations provide employers with a "safe harbor" in such situations. Specifically, the regulations state that if an employer includes the following (or similar) instruction in any general request for employee medical information, any disclosure of "genetic information" in the response will be deemed inadvertent and not a violation of GINA:

> 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.

Employers should include this language in each general request for employee medical information made to health care providers. Also, employers should instruct any health care provider who is asked to perform a medical examination of an applicant or employee, including pre-employment

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and fitness-for-duty examinations, not to collect or disclose family medical history or other genetic information.

Casual Conversation and "Probing" Questions

The regulations recognize that employers inadvertently may obtain family medical history and other genetic information through innocent means, such as casual conversations between supervisors and employees. The regulations specifically exempt disclosures in response to general health or well-being inquiries from GINA's prohibitions. While disclosures in response to general inquiries during casual conversations are not prohibited, the regulations state that follow-up questions that are "probing in nature" regarding family medical history are not similarly exempted. Thus, employers should educate managers and supervisors on this issue and the EEOC's distinction between generalized and "probing" questions. Similarly, the regulations attempt to make a distinction between inadvertently overhearing third-party conversations that disclose family medical history, which is not prohibited, and "actively listening" to such conversations or searching an individual's personal effects for the purpose of obtaining genetic information.

Maintain All Genetic Information in Separate Confidential Medical File

All genetic information in an employer's possession must be maintained in a confidential medical file for the employee separate from the employee's personnel file.

Wellness Program Implications

The EEOC regulations allow employers to request family medical history and other genetic information as part of voluntary wellness programs, including those that use "health risk assessments," but only if the offering of genetic information is voluntary and the employer offers no financial incentive for the employee to provide genetic information. Employers may offer financial incentives, such as prizes or reductions in premiums, to employees to complete health risk assessments, only if the assessment either (1) does not request family medical history or other genetic information or (2) explicitly informs employees that they are eligible for the incentive even if they do not respond to certain identified questions that request genetic information.

Finally, employers should ensure that they also include "genetic information" in the list of protected traits in their equal employment opportunity policies. ■

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