EEOC ISSUES GINA FINAL REGULATIONS

16. November 2010 By Steve Palazzolo

I know all of you have been dying to see the final regulations issued by the EEOC under the Genetic Information Nondiscrimination Act (GINA). Well, wait no more. On November 9, 2010, the EEOC issued those final regulations. The first thing the final regulations provide is specific definitions for many of the terms that the law itself simply defines by making reference to other laws (for example, Title VII). The regs then go on to tell you what you can't do. For example, you can't "limit, segregate or classify" employees because of genetic information. As an example, the regs say "an employer could not reassign someone whom it learned had a family medical history of heart disease from a job it believed would be too stressful. . ." In addition, the regs prohibit discrimination or retaliation based on genetic information. No surprise there.

So, what is new? Well, the regs do help clarify what is meant by "requesting" genetic information. For example the regs say "Request 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 a third-party conversation of 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." Ok? So you can't do an internet search looking for genetic information. But what if you are a Facebook friend of one of your employees and you just happen to see some genetic information (i.e., "took mom to the Dr. today. Her Parkinson's is acting up."). Have you violated the statute? The regs say no. In fact, they provide a specific exception for overhearing a conversation, expressing sympathy to a co-worker, and finding information "inadvertently":

. . . from a social media platform which he or she was given permission to access by the creator of the profile at issue (*e.g.*, a supervisor and employee are connected on a social networking site and the employee provides family medical history on his page).

But don't forget, this exception only applies if you have permission to access the profile by the creator of the profile. In other words, Not "friends" not allowed.

The regs also provide a so called "safe harbor" for employers who "inadvertently" receive genetic information in the course of seeking other permissible medical information. Like say on your FMLA medical certification form. To take advantage of the safe harbor, the employer must include language in the request for medical information. The regs give the following sample language:

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.

Oh, one last thing. An employer who offers health or genetic services as part of a wellness program is allowed to receive genetic information as part of the program as long as participation in the program is knowing and voluntary. Voluntary means that when an employer offers incentives for participation in the program, the incentives must be paid even if the employee decides not to answer any question requesting genetic information.

From a practical perspective, at the very least you will want to update your FMLA, workers' comp, and ADA forms (and any other form seeking medical information about an employee like disability leave forms) to include the safe harbor language. You might also want to take a look at your wellness plan to make sure that it complies with the new final regulations.