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EEOC Issues Final Regulations for the Genetic Information Nondiscrimination Act of 2008

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The Genetic Information Nondiscrimination Act (GINA) became law on May 21, 2008. Title II of GINA, which became effective on November 21, 2009, prohibits the use of genetic information in employment, restricts employers from requesting, requiring, or purchasing genetic information, and strictly limits the disclosure of genetic information. GINA and the regulations define "genetic information" to include, among other things: information about the genetic tests of an individual and/or a family member, family medical history, and requests and receipt of genetic services by an individual or family member. Title II of GINA is applicable to private employers with 15 or more employees and other entities.

On November 9, 2010, the EEOC issued regulations related to Title II of GINA. The EEOC is charged with investigating alleged violations of GINA.

The EEOC's regulations are very lengthy so only a few important provisions will be discussed in this article. The regulations make it clear that employers are not permitted to use genetic information in making employment decisions, including health benefits. In addition, the EEOC's regulations broadly define "request" for genetic information to include such actions as conducting an internet search on an individual that is likely to result in the discovery of genetic information and actively listening to third-party conversations with the intent of obtaining genetic information. The regulations provide examples in which an employer may obtain genetic information without violating GINA and these include inadvertently acquired information and necessary information for compliance with certification requirements of the Family Medical Leave Act. The regulations provide that inadvertent acquisition of genetic information could include a supervisor overhearing a conversation between employees, which includes a discussion that the mother of one of the employees has a health condition.

The regulations provide that when an employer makes a lawful request for health related information that it should warn the employee and/or the healthcare provider that they should not provide genetic information. If such a warning is provided in the request and the employer receives genetic information in response, then the receipt of the genetic information will be considered to be "inadvertent" and will not violate Title II of GINA. The employer is still required, however, to maintain the confidentiality of the received genetic information and not use said information as the grounds for an employment decision.

It is imperative that covered employers comply with Title II of GINA. Covered employers should modify all requests for medical information to include the proper warning to create a "safe harbor" in the event that it receives prohibited

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genetic information. In addition, employers should provide training to its employees in regard to the prohibitions related to requesting genetic information from applicants and/or employees.



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