

Employment, Labor and Benefits Advisory: Genetic Anti-Discrimination Law Becomes Effective on November 21, 2009 and EEOC Issues New EEO Poster

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Title II of the Genetic Information Nondiscrimination Act (GINA) will become effective on November 21, 2009. Signed into law on May 21, 2008, Title II of GINA prohibits employment discrimination on the basis of an individual's genetic information, such as a person's predisposition for cancer, sickle cell anemia, or diabetes.¹

Specifically, GINA broadly prohibits employers with 15 or more employees from acquiring or requesting genetic information from employees. GINA and the Equal Employment Opportunity Commission's (EEOC) proposed regulations provide for six exceptions to this prohibition. These are:

- where the employer inadvertently obtains genetic information on the employee (the EEOC refers to this as the "water cooler" exception)
- where the employer offers qualifying health or genetic services for employees, such as a voluntary wellness program
- where the employer requests family medical history to comply with the certification provisions of the Family and Medical Leave Act (FMLA) and state equivalent leave laws
- where the employer acquires family medical history from public or commercially available documents, such newspapers, magazines and books (but not medical databases or court records)
- where the employer acquires genetic information to monitor the adverse effects of hazardous workplace exposures
- where an employer that conducts DNA analysis for law enforcement purposes requires genetic information of its employees, apprentices, or trainees for quality control purposes to detect sample contamination.

In addition, GINA broadly prohibits the disclosure of any genetic information concerning employees. There also are six limited exceptions to this prohibition. These are:

- disclosing information relating to the employee upon the employee's request
- disclosure to an occupational or other health researcher if such research is conducted in compliance with the Department of Health and Human Services' regulations under 45 CFR Part 46
- disclosure in response to a court order

- disclosure to a government official investigating compliance with GINA
- disclosure in connection with compliance with the FMLA and state equivalent leave laws
- disclosure to a public health agency concerning a contagious disease that presents an imminent hazard of death or life-threatening illness.

Finally, GINA prohibits discrimination based on genetic information and prohibits employers from segregating, limiting, or classifying employees based on their genetic information.

Through GINA, Congress charged the EEOC with developing and implementing final regulations for Title II by May 21, 2009. While the EEOC issued proposed rules in February 2009 (for which the comment period has been long-closed), the final regulations are still pending publication. Although the EEOC has not issued its final rules on Title II, it has issued a new equal employment opportunity (EEO) poster to reflect GINA and other recent revisions to federal employment discrimination laws, including the Americans with Disabilities Act Amendments Act of 2008. For a copy of the EEOC's new EEO poster click here: http://www.eeoc.gov/self_print_poster.pdf

Action Items for Employers

In addition to posting the EEOC's new EEO poster, employers should immediately do the following:

- Confirm that the employer's equal opportunity statement and nondiscrimination policy explicitly include "genetic information" as a basis upon which it does not discriminate.
- Train human resources professionals and managers on rights of employees with regard to their genetic information.
- Implement procedures that maintain employee genetic information in separate files, treat such information as a confidential medical record, and prevent the illegal disclosure of this information.

Endnotes

¹ For information on Title I of GINA as it relates to health insurers and plans, see our client advisories from [October 16, 2009](#) and [October 23, 2009](#). In addition, please see our [May 16, 2008](#) client advisory concerning the enactment of GINA.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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