

## **EEOC Issues Genetic Information Nondiscrimination Act Final Regulations**

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### **A Financial Institutions and Labor and Employment Legal Update 11/22/10**

Title II of the Genetic Information Nondiscrimination Act of 2008 ("GINA") prohibits employment discrimination based on genetic information. Title II became effective on November 21, 2009. Nearly one year later, on November 9, 2010, the U.S. Equal Employment Opportunity Commission ("EEOC") issued final regulations under Title II of GINA. Highlights of the new regulations, which will become effective on January 10, 2011, are summarized below, along with best practices for employers.

#### **The Final Regulation Illustrates How an Employer May Violate GINA by Broadly "Requesting" Genetic Information**

GINA bars covered entities, including employers, from requesting, requiring or purchasing genetic information regarding an individual or family member of an individual. "Genetic information" is defined as an individual's genetic tests and the genetic tests of an individual's family members, as well as information about the manifestation of a disease or disorder in an individual's family members (*i.e.*, family medical history). In further defining the term "request," the final regulation explains that an employer may violate GINA by:

... 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 third-party conversations or 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.

Thus, employers must avoid both explicit requests for genetic information, as well as activities that are likely to result in acquiring such information.

#### **Specific Intent Not Required to Violate GINA**

An employer may violate GINA without any specific intent to do so. The final regulations have removed the term "deliberate intent" from the statute. Any request, requirement or purchase of genetic information may be prohibited. Employers should be wary of engaging in acts that may

present a heightened risk of acquiring genetic information.

### **"Commercially and Publicly Available" Further Defined**

In contrast to information acquired by request, requirement or purchase, where genetic information is received through a commercially and publicly available source, the EEOC will look to intent to determine whether GINA has been violated. This is an exception to the general rule that a violation of GINA can occur without any specific intent to violate the statute. For example, an employer would not violate GINA by reading a news article detailing an employee's struggle with cancer, because GINA already exempts material found in newspapers, magazines, periodicals and books. The final regulation further discusses information acquired through electronic media, such as the internet, television and movies. Here, the EEOC focused on whether or not these media sources have "limited access." That is, whether the media source requires permission from a specific individual or membership in a group to access content. Where access is limited to individuals or requires membership in specific groups, the material will not be considered "commercially and publicly available." Accordingly, information acquired from social networking sites will most likely *not* fall within the exemption for "commercially and publicly available" information.

### **Inadvertent Acquisitions Are Not Covered**

Inadvertent or "passive" acquisitions of genetic information are not covered by the rule prohibiting requests for information. A passive acquisition might include accidentally overhearing an employee's conversation about his or her family medical history. The EEOC has also exempted information acquired through general inquiries regarding an employee's health (*e.g.*, "How are you feeling?"), as well as information acquired through unsolicited updates about an employee's family. However, where such general inquiries are followed by more probing questions, an employer may run afoul of GINA.

### **Final Regulation Includes Safe Harbor Language**

When an employer lawfully requests medical documentation, the employer *must* include "safe harbor" language, such as that included in the final regulation. For instance, an employer often needs medical information to provide a reasonable accommodation to a disabled employee. As long as the employer includes the safe harbor language when requesting medical information, the employer's receipt of any genetic information in response to a lawful request for medical information will be deemed inadvertent and not in violation of GINA. The EEOC provides the following example of safe harbor 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 employees or their family members. In order 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.

Alternative language may also be used, as long as both individuals and health care providers are informed that genetic information should not be provided. Without this or a similar statement, lawful medical information requests could violate GINA if the provider supplies unrequested genetic information. Employers, therefore, should update their medical questionnaires and other forms requesting medical information to include the safe harbor language.

### **Voluntary Wellness Programs Can Be Exempted**

GINA does permit employers to acquire genetic information when health or genetic services are offered by the employer, including such services offered as part of a wellness program, and if the covered entity meets specific requirements. These wellness programs may not require an individual to provide genetic information, nor penalize an individual who refuses to provide information. While an employer may provide financial inducements to complete a health risk assessment that includes family medical history or genetic information, it must be made clear that the employee need not answer genetic or family medical history questions to receive the inducement.

- To ensure that the disclosure of genetic information is voluntary, any authorization form used to receive such information must:
- Be written so that the individual from whom the genetic information is being obtained is reasonably likely to understand it;
- Describe the type of genetic information that will be obtained and the general purposes for which it will be used; and
- Describe the restrictions on disclosure of genetic information.

### **What This Means for Employers**

- In light of the EEOC's final regulations, the following are some best practices for employers:
- Avoid activity involving a heightened risk of acquiring protected genetic information.
- Never actively seek out genetic information. While general inquiries regarding the health of an employee or family members are appropriate, avoid probing further.
- Ensure that all requests for business-related medical information, including during the disability accommodation process, include "safe harbor" language.
- Ensure wellness programs do not require genetic information and clearly communicate that participation is voluntary.

Employers with concerns regarding whether their current forms and inquiries comply with the final regulations under GINA should contact counsel for further information or advice.

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