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CLIENT E-NEWSLETTER

SPECIAL BULLETIN

The EEOC's Final GINA Regulations Take Effect

On November 8, 2010, the Equal Employment Opportunity Commission (EEOC) issued its final regulations implementing Title II of the Genetic Information Non-Discrimination Act of 2008 (GINA). The final regulations were published in the Federal Register on November 9, 2010, and took effect on January 10, 2011.¹

Title II of GINA prohibits employment discrimination based on an individual's genetic information (genetic information includes family medical history and the result of genetic tests such as those for cystic fibrosis). It also bans employers from requesting, requiring, or purchasing the genetic information of an individual or an individual's family member.

GINA does, however, provide several exceptions to this ban, including (1) "inadvertent" requests for genetic information, (2) requests for family medical history to comply with the certification provisions of the Family and Medical Leave Act (FMLA), (3) certain requests made in the context of a voluntary wellness program, and (4) when genetic information is acquired from publicly available documents (such as newspapers).

GINA also mandates that any employer records containing genetic information be maintained in separate, confidential medical files (any such records may be kept in the same file as medical information kept pursuant to the Americans with Disabilities Act (ADA)), although genetic information that was placed in personnel files before November 21, 2009, can remain in those files, if otherwise permissible. Along those lines, GINA does not impact employers' obligations under HIPAA and does not preempt any state laws that provide equal or greater protection than GINA (over 30 states have laws addressing genetic discrimination in employment).

Finally, as for enforcement, GINA incorporates many of the remedies and procedures found in Title VII of the Civil Rights Act of 1964 (including lawsuits and the potential for punitive damages and attorney's fee awards). The EEOC recently reported that over 200 charges of genetic discrimination were filed in 2010—indicating the likelihood that many more charges and, ultimately, lawsuits will follow.

What Are "Inadvertent" Requests for Medical Information?

As noted above, GINA's prohibition against requesting, requiring, or purchasing genetic information does not apply when an employer has "inadvertently" requested or required an individual's genetic information. The regulations spell out in some detail how this important exception will apply.

Most significantly, the regulations provide a "safe harbor" disclaimer that employers can use when requesting an individual's medical information. The EEOC's model language (noted below) should be used when an employer requests medical documentation to support a request for reasonable accommodation

¹The final regulations, which are some 69 pages in length, are available for review at:

<http://www.federalregister.gov/articles/2010/11/09/2010-28011/regulations-under-the-genetic-information-nondiscrimination-act-of-2008#p-3>

under the ADA or to support an employee's request for leave for his or her own serious health condition under the FMLA, among other situations (as noted below, different requirements apply when an employee requests leave to care for a sick family member). The model language provided in the final regulations that can be included as part of the request form(s), directed to the individual or to a health care provider, is as follows:

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.

In addition, other situations that are deemed "inadvertent"—and that thus do not violate GINA—include when information is learned by managers or supervisors during certain types of casual conversation with employees (such as when an employee "blurts" out information not in reaction to a question) or when a manager or supervisor overhears a conversation in which an employee discusses his or her genetic information with others. Of course, such an inadvertent acquisition of genetic information can become "advertent"—and thus potentially violative of GINA—if a manager or supervisor asks the employee any sort of probing follow-up question, so managers and supervisors should be warned to avoid such questions.

What About Voluntary Wellness Programs?

Another exception to GINA's prohibition against requesting genetic information applies when an employer offers health or genetic services as part of a voluntary wellness program. Assuming all the following requirements are met, genetic information can be acquired as part of such a program. The EEOC's final regulations explain that to be considered voluntary, an employer must not require anyone to provide genetic information and must not penalize those who choose not to provide genetic information. An employer should also ensure that employees who voluntarily participate in the wellness program and who wish to provide genetic information provide knowing, voluntary and written authorization for the employer to acquire genetic information. This is accomplished by using a form that, among other requirements, plainly describes the types of genetic information that will be obtained and how the information will be used.

What About Medical Examinations Related to Employment

The EEOC's final regulations make clear that GINA's prohibition on the acquisition of genetic information applies to medical examinations related to employment. **Accordingly, an employer must tell health care providers not to collect genetic information, including family medical history, as part of a medical examination intended to determine an individual's ability to perform a job.** The employer must also take additional reasonable measures within its control if it learns that genetic information is being requested or required by the health care providers who are conducting examinations of the employer's applicants or employees.

What About Requesting Family Medical History to Comply with the FMLA or Similar Laws?

The EEOC's final regulations make clear that if an employee requests leave to care for a sick family member and provides information about family medical history to the employer in connection with that request, the employer's request for information, to comply with the FMLA's certification requirements, does not violate GINA.

What Can Employers Do to Avoid Running Afoul of GINA?

As noted above, to be able to potentially take advantage of the above-referenced “safe harbor,” employers should incorporate the EEOC’s model language into all requests for employee medical information – including fitness for duty certifications, requests related to an employee’s request for leave for his or her own serious health condition under the FMLA, and requests made in conjunction with an employee’s request for a reasonable accommodation. Further, an employer that asks employees to complete health risk assessments as part of a voluntary wellness program should identify those questions that seek genetic information and should make clear that employees need not respond to those questions.

In addition, an employer should add genetic information as a protected class to all of its Equal Employment Opportunity (EEO) statements, if it hasn’t already, and should make sure that its EEO and anti-harassment policies include prohibitions against discrimination, harassment and retaliation based on genetic information. Finally, employers should train all managers and human resources employees about GINA’s requirements, particularly regarding the prohibition against acquiring genetic information and asking certain types of probing questions of employees related to genetic information.

In sum, knowledge of and compliance with GINA’s requirements are crucial. While the EEOC’s regulations are likely to result in an increase in the number of GINA claims that are brought against employers, those employers who are well-educated regarding GINA’s provisions and who take appropriate steps to comply should be well-positioned to minimize legal exposure should any issues arise.

The Kullman Firm regularly counsels employers regarding labor and employment issues such as the challenges provided by GINA. If you have any questions regarding this or any other labor and employment issue, please contact the Kullman attorney with whom you customarily work.



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