

The GINA Regulations Are Here!

The Genetic Information Nondiscrimination Act, commonly referred to as GINA, is the federal law which prohibits employers from using, requesting, requiring, purchasing and disclosing genetic information about employees or their immediate family members. Although the very idea of genetic information sounds like the plotline for a sci-fi television drama, as the new regulations issued by the Equal Employment Opportunity Commission (“EEOC”) point out, scientists have made such significant advancements in the field of genomic medicine that new employment laws had to be enacted just to keep pace.

GINA, which applies to the same employers covered by “Title VII,” became effective in November, 2009. As a refresher, GINA prohibits the use of genetic information as a basis for any employment decision, including hiring, firing, or any other term or condition of employment. It also restricts employers from requesting, requiring, or purchasing genetic information and strictly limits such entities from disclosing genetic information. GINA defines genetic information as any information about the genetic testing of an employee or his or her family members, up to the fourth degree, and information about the manifestation of a disease or disorder in an employee’s family members (in other words, family medical history). GINA also prohibits harassment of employees concerning genetic information and retaliation against an employee for exercising any rights provided for under GINA (including filing a charge with the EEOC or assisting others in filing a charge).

The EEOC’s new GINA regulations just became effective on January 10, 2011. The regulations attempt to add some clarity to the definition of genetic information by noting that information about the sex, race, ethnicity or age of the individual or his/her family members is not genetic information and that HIV tests, cholesterol tests and drug or alcohol tests are not

genetic tests. The regulations also make clear that a family member includes not only the employee's dependants as the result of marriage or birth but also as the result of adoption or placement for adoption.

A major part of the EEOC's focus in the new regulations concerns the acquisition of genetic information. Under GINA, an employer does not violate the law by inadvertently requesting or requiring genetic information. This so-called "water cooler" exception essentially protects an employer who either overhears or has a casual conversation with an employee and unwittingly receives information that otherwise would be prohibited under GINA. The new regulations also extend this exception to the "virtual world" of social networking sites, such that if an employee's recent tweet or Facebook status reveals forbidden information, the employer likely will not be subject to liability. These protections will not, however, apply if the employer explores the virtual world hoping to discover such information or knowing that it is likely that such illegal information will be discovered there. Essentially, the regulations prohibit employers from actively attempting to discover genetic information about its employees or their family members.

The regulations also establish a "safe harbor" for employers when they make lawful requests for an employee's current health status which may result in genetic information being shared with the employer (such as a request for a reasonable accommodation under the Americans With Disabilities Act or for leave under the Family and Medical Leave Act). In such cases, the regulations recommend the following specific language to be included in any written request for current health status made to the employee and/or the employee's health care provider:

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.

If the employer receives genetic information despite telling the requestee to not provide it, it is protected by the regulations’ “safe harbor” exception.

The new regulations also address the impact of GINA on employee wellness programs. GINA has an exception which allows employers to acquire employee genetic information when the employers offer their employees a wellness program or a similar health or genetic service. This exception applies as long as the program meets specific requirements, which include an employee’s knowing, voluntary and written authorization for participation in the program. While the participating employee would be entitled to receive any genetic information resulting from participation in the program, the employer may only receive such information in the aggregate for all employees. In addition, if an employer has a program such as a health risk assessment, under the new regulations an employer has to disclose that an employee can receive the benefit of the program without completing portions of the assessment relating to genetic information. This means that an employer cannot make an employee choose between giving up this now-protected information and receiving the employee benefit.

Finally, the new regulations address the obligation to maintain the confidentiality of any genetic information which an employer receives. Essentially, the EEOC instructs employers to handle genetic information in the same manner as medical information is maintained under the Americans with Disabilities Act (“ADA”): requiring it be held separately from the personnel file but allowing it to be stored in the same file as the ADA-segregated medical information.

If they have not done so already, now is certainly the time for employers to review their human resources policies and forms to ensure compliance with GINA. The new regulations help clarify all employers' responsibilities in handling genetic information and provide proactive steps that can prevent headaches later (unless, of course, that's a genetic predisposition!).