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EEOC Issues Final Regulations Under Federal Genetic Nondiscrimination Law

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Almost a year after the Genetic Information Nondiscrimination Act (GINA) took effect, the Equal Employment Opportunity Commission (EEOC) issued on November 9, 2010 the regulations for the employment provisions of GINA. The final regulations are effective January 10, 2011 and provide helpful guidance and examples regarding the scope of GINA and its several exceptions. Even employers with no intention of engaging in genetic testing are affected by GINA's broad protections for all genetic information, including family medical history. See full text of regulations by clicking here.

GINA applies to employers with 15 or more employees. GINA broadly prohibits using genetic information in employment decision-making, such as hiring, promotions, re-assignment, or discharge, regardless of any intent to help the employee through these decisions (i.e. reassigning an employee to a less demanding position due to known genetic information). It also bars employers from requesting, requiring or purchasing genetic information regarding applicants or employees (including former employees), and imposes confidentiality and recordkeeping requirements for employers. Harassment, discrimination, and retaliation are all cognizable claims under GINA, as well as violations related to obtaining, disclosing or using protected genetic information. GINA's enforcement provisions mirror Title VII's, including requiring plaintiffs to file a charge with the EEOC, and allowing for recovery of front pay, back pay, compensatory, and punitive damages. In GINA's first year, the EEOC received approximately 200 charges alleging violations of GINA-most commonly in conjunction with alleged violations of the Americans with Disabilities Act (ADA). GINA does not pre-empt state laws which provide more extensive protection for genetic information.

I. Key Definitions in GINA Demonstrate Breadth of Coverage

- "Genetic tests" includes tests that analyze human DNA, RNA, chromosomes, proteins, or metabolites to determine genetic predisposition to various diseases, including breast cancer, colon cancer, Huntington's Disease, and alcoholism; carrier screening to determine risks of certain conditions in future children; amniocentesis and other evaluations of genetic abnormalities of a fetus; evaluations of embryos created using invitro fertilization; newborn screening tests; pharmacogenetic tests regarding potential reaction to a drug; DNA testing for genetic markers; as well as DNA tests to determine family relationships such as DNA tests.
- Genetic tests do not include tests for the presence of drugs, alcohol, or a virus, or that solely analyze proteins and metabolites, blood count levels, cholesterol, or liver-function.
- "Genetic information" is not limited to the results of genetic tests. It includes information about an employee's or family member's request for or receipt of genetic testing services and information concerning any manifestations of a disease in family members (otherwise known as family medical history), including genetic information of a fetus or embryo of the employee or family member.
- The relevant "family members" include the employee's dependents through birth, marriage or adoption as well as relatives of the employee, or of the employee's dependents up to the fourth degree. This includes the individual's children, siblings, parents, grandparents, and even great-great grandparents and first cousins once removed (the children of a first cousin).
- "Requests" for genetic information include the deliberate acquisition of genetic information as well as acts that are likely to result in the acquisition of genetic information, such as searching Internet websites, eaves-dropping on employee conversations, searching employee belongings, and asking questions about an individual's health status in a way that is likely to reveal genetic information.

II. Exceptions to Prohibition on Collecting Genetic Information

There are several exceptions to the prohibition of requesting, requiring, or purchasing genetic information, including the following:

- Inadvertent acquisition: The regulations provide that employers are not liable for certain types of inadvertent acquisition of genetic information. Examples include when an employer receives genetic information (1) through casual conversations with employees (i.e., "at the water cooler"); (2) in response to ordinary expressions of concern (i.e. How are you/family member? Did they catch it early? Will your child be ok?); (3) social networking sites if given permission to access by the site's creator; (4) unsolicited emails from employees discussing health; or (5) in response to lawful general requests for medical information from the employee's medical provider,

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if the employer affirmatively warned the provider against sending genetic information.

- Wellness programs: If the employer meets certain requirements, and offers health or genetic services, including services offered as part of a voluntary wellness program, it may acquire genetic information.
- Requests for medical information supporting FMLA or other leaves or for ADA reasonable accommodation requests: An employer is allowed to acquire genetic information to comply with requests for FMLA or other leaves or for accommodation requests, so long as the request is limited to medical information necessary to support the claim for leave or other accommodation.
- Public knowledge: Genetic information which is commercially or publicly available for review or purchase is excepted. However, information acquired by searching court records, medical databases or social networking sites (where permission by the site creator was not granted), are not within the exception.
- Occupational safety and health monitoring: Subject to certain qualifications, an employer may acquire genetic information for use in the genetic monitoring of the biological effects of toxic substances in the workplace.

Employers should be aware that while obtaining genetic information under an exception is allowed, using that information as the basis for an employment decision, failing to maintain such information in protected confidential medical information files (which can be the same as those files used to keep confidential medical information under the ADA), and disclosing such information or otherwise allowing it to cause any discrimination or harassment are always prohibited. Therefore, employers should avoid obtaining genetic information, even under one of these exceptions, unless absolutely necessary.

III. GINA Compliance Action Items for Employers

Employers should evaluate certain employment forms and practices to ensure compliance with GINA. Some suggestions include:

- Train supervisors and HR professionals on the broad coverage definitions and the concept of genetic bias.
- Instruct healthcare providers determining an employee's ability to perform a job not to collect genetic information, including family medical history.
- Review medical questionnaires, HIPAA releases, FMLA and other leave forms, medical record authorizations, employment applications, and ADA accommodation request forms to limit any inquiries to only the information needed. Include the EEOC's disclosure warning health care providers not to provide genetic information to avoid inadvertent acquisition of such information:

"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."

- Review voluntary wellness programs and forms used with them to ensure compliance with GINA.
- Adopt procedures and policies for ensuring that genetic information is kept confidential and separately maintained in employee medical files to prevent unlawful disclosure.
- Update equal opportunity statements, employee manuals, workplace posters, and other internal documents to include genetic information as a prohibited basis for employment decisions.

As always, we are happy to assist you with any questions you may have.

About the Authors:

Hanna Norvell is Board Certified in Labor and Employment law, she exclusively represents employers in matters related to compensation, wrongful termination, retaliation, harassment and discrimination (Title VII of the Civil Rights Act), wages and hours, disability accommodation (ADA), leaves of absence, Family and Medical Leave Act (FMLA), federal contractor obligations (OFCCP and other statutes), layoffs, unemployment compensation, workplace violence, employee privacy, internet/social media use, workplace investigations, drug testing, medical exams, employment handbooks and policies, and employee and management training.

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