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EEOC Issues GINA Final Regulations

The Equal Employment Opportunity Commission (EEOC) recently issued its final regulations interpreting and implementing the employment-related provisions in Title II of the Genetic Information Non-Discrimination Act of 2008 (GINA). The regulations will become effective on January 10, 2011.

An Overview of Title II of GINA

Title II of GINA applies to employers with 15 or more employees, and its protections extend to current and former employees, as well as employment applicants. Generally, the employment provisions of GINA (1) prohibit employers from harassing, discriminating and retaliating against employees based on genetic information; (2) require employers to keep genetic information confidential; and (3) restrict employers from requesting, requiring or purchasing genetic information. "Genetic information" includes:

- Information about an individual's or his/her family member's genetic tests (e.g., tests used to determine an individual's genetic predisposition to a disease);
- Family medical history;
- Requests for and receipt of genetic services by an individual or family member; and
- Genetic information about a fetus carried by an individual or his/her family member or of an embryo legally held by the individual or family member using assisted reproductive technology.

GINA's Limitations on Employers Acquiring Genetic Information

As noted above, GINA prohibits employers from "requesting" genetic information relating to employees and applicants. The EEOC regulations provide confusing examples of improper "requests" for genetic information, such as (1) conducting an Internet search on an individual in a way that is likely to result in obtaining genetic information; (2) actively listening to third-party conversations or searching an individual's personal effects for the purpose of obtaining genetic information; and (3) making requests for information about an individual's health status in a way that is likely to result in obtaining genetic information.

The EEOC provides six exceptions to the prohibition on an employer requesting, requiring, or purchasing genetic information:

- Information acquired inadvertently;
- Information obtained as a part of a wellness program provided by an employer on a voluntary basis;
- Information obtained in the form of family medical history to comply with the Family and Medical Leave Act (FMLA), state or local leave laws, or certain employer leave policies;

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- Information received from sources that are commercially and publicly available, such as newspapers, books, magazines and electronic sources;
- Information acquired as part of genetic monitoring of the effects of toxic substances in the workplace (as required by law or voluntarily provided); and
- Information acquired by employers who conduct DNA testing for law enforcement purposes as a forensics lab, or for human remains identification.

The “Safe Harbor” for Medical Inquiries

Importantly, the regulations clarify that for the inadvertently acquired exception to apply when an employer receives genetic information in response to a lawful request for medical information, the employer’s request should specifically warn the healthcare provider and/or employee not to provide such information. We can provide you with the necessary language to include in such requests.

Genetic Information Received Through Voluntary Wellness Programs

The regulations explain that an employer may acquire genetic information when it offers voluntary wellness programs. To fall within this exception, an employee participating in such programs must give prior voluntary, knowing and written authorization. Additionally, if an employer offers financial inducements to employees for participating in a voluntary wellness program, the inducement must be made available regardless of whether the participant answers questions regarding genetic information.

Personnel Files

If an employer inadvertently acquires records containing genetic information, the records must be maintained in separate, confidential medical files. However, any genetic information placed in personnel files before November 21, 2009 may remain there.

What Steps Should Employers Take?

- Update request for medical information forms and other related materials to include “safe harbor” language.
- Review and revise existing non-discrimination and anti-harassment policies and handbooks to include genetic information as a protected class, and post the new EEOC non-discrimination poster that incorporates GINA prohibitions.
- Review and revise health risk assessments provided to employees as a part of a wellness program to identify any questions that seek genetic information and explain that employees are not required to respond to those questions in order to receive any offered financial incentive.

If you require assistance in connection with GINA compliance, please contact a member of our Labor and Employment Law Department.

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