

EEOC Publishes Final Regulations Under Genetic Information Nondiscrimination Act

The new final regulations under the Genetic Information Nondiscrimination Act (GINA) were published by the Equal Employment Opportunity Commission (EEOC) in November and will take effect January 10, 2011. Title II of GINA, which went into effect November 21, 2009, prohibits discrimination and harassment based on genetic information; bars employers from acquiring genetic information except in certain narrow circumstances; and requires employers to keep any genetic information they have confidential. The new GINA regulations require employers to provide certain disclosures when requesting medical certifications in support of an employee's leave or request for an accommodation.

GINA applies to any employer covered under Title VII of the Civil Rights Act of 1964 (i.e., with 15 or more employees), as well as federal executive branch agencies and state and local government employers. The act covers employees as well as applicants. Covered employers requesting medical information permitted by the Family Medical Leave Act (FMLA), the Americans With Disabilities Act (ADA) or other federal or state laws need to be careful not to violate GINA in their request for, or receipt of, medical information.

The following information is considered "genetic information" under GINA:

- Information about an individual's genetic tests;
- Information about genetic tests of an individual's family members;
- Information about the manifestation of a disease or disorder in an individual's family members (i.e., family medical history);
- An individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member of the individual; and
- Genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual, and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.

Genetic information does not include 1) information about an individual's or family member's age or gender, or 2) the fact that an applicant or employee currently has a disease or disorder (i.e., a manifested condition). However, as noted above, the fact that an applicant's or employee's *family member* has a disease or disorder would be genetic information under the act.

GINA's prohibition on acquiring genetic information contains six narrow exceptions, one of which is "inadvertent" acquisition of such information by the employer. The act provides that employers who inadvertently receive genetic information in response to a request for medical information – for example, under the FMLA – will not be in violation of the act for obtaining such information. However, the new regulations promulgated by the EEOC make clear that employers can rely upon the inadvertent acquisition exception *only* if they affirmatively notify employees of GINA's limitations on requests for genetic information.

Under the new regulations, the acquisition of genetic information by an employer will not be inadvertent unless the employer "directs the individual and/or health care provider from whom it requested medical information not to provide genetic information." This notice is to be in writing, although the regulations provide that it can be verbal where the employer does not typically make requests for medical information in writing. The safer course is always to put the request for information and the required notice in writing so that the employer will have documentation to rely upon at a later date if needed.

The regulations provide employers with the following language that will satisfy the notice requirement:

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.

One of the other exceptions to GINA’s prohibition against acquiring genetic information allows employers to ask for family medical history to comply with the FMLA. Employers need to keep in mind that if requesting medical information for FMLA leave because of an employee’s family member’s serious health condition, the above notice language may need to be modified to make it clear that family medical history is required to the extent it is necessary to make the medical certification complete under the FMLA.

Employers who are covered under the act should update their medical certification forms and other requests for medical information to include the notice provided above. In addition, covered employers should ensure that their human resources managers are familiar with GINA’s provisions. GINA’s Title II employment provisions are enforced by the EEOC and the U.S. Attorney General. Any person alleging a violation of the act may file a private lawsuit.

Employment and Labor Law Group Welcomes Jimmy Byars

Our group has a new associate, Jimmy Byars. Jimmy is based in our Columbia office. Jimmy graduated from the Wake Forest University School of Law earlier this year. While at Wake, he was a member of the national moot court team and served as Counsel for the Respondent on the Honor Council. He earned his undergraduate degree in Criminal Justice from The Citadel. Jimmy is a Columbia native and he got to know the firm while working with us as a courier and as a law clerk.

This Employment Law Update is published as a service to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation.

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