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LABOR & EMPLOYMENT LEGAL ALERT

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FINAL GINA RULES NOW IN EFFECT

The Genetic Information Nondiscrimination Act (GINA) is one of the federal laws that affects how and when employers can obtain certain type of medical information from employees. Although GINA was passed in 2008, the U.S. Equal Employment Opportunity Commission (EEOC) did not issue its final regulations interpreting the law until November 2010, which went into effect on *January 10, 2011*. These regulations apply to all employers covered by Title VII (employers with 15 or more employees). Covered employers should be mindful of GINA's new regulations as they review and update policies and audit HR compliance.

GINA prohibits employers from discriminating based on genetic information and from requesting *or obtaining* genetic information, including family medical history, about employees or applicants, except in limited circumstances. The EEOC regulations offer some clarification regarding GINA and provide sample language for medical information requests to health care providers. The use of the recommended language will provide the employer with protection against GINA violation claims if it acquires the protected genetic information.

With regard to the prohibition against employer requests for "genetic information," the regulations define such requests as including: 1) 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; 3) searching an individual's personal effects for the purpose of obtaining genetic information; or 4) making requests for information about an individual's current health status in a way that is likely to result in obtaining genetic information.

"Genetic information" is defined as including information about an individual's genetic tests, genetic tests of that individual's family members, or the manifestation of a disease or disorder in any of that individual's family members (i.e., family medical history). The term "family members" also is defined broadly and includes spouses, natural and adopted children, parents, siblings, half-siblings, grandparents, great-grandparents, great-great-grandparents, grandchildren, great-grandchildren, great-great-grandchildren, uncles, aunts, nephews, nieces, first cousins, and first cousins once-removed. According to the regulations, "genetic test" means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes.

On the other hand, the regulations expressly state that the following are examples of tests or procedures that are *not* genetic tests: 1) an analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes; 2) a medical examination that tests for the presence of a virus that is not composed of human DNA, RNA, chromosomes, proteins, or metabolites; 3) a test for infectious and communicable diseases that may be transmitted through food handling; 4) complete blood counts, cholesterol tests, and liver-function tests; 5) alcohol and drug testing.

The regulations allow the employers to:

1) Request family medical history to comply with the certification provisions of the Family & Medical Leave Act (FMLA) or state or local family leave laws;

2) Request family medical history as part of health or genetic service offerings, including voluntary wellness programs. To be permissible under GINA, a wellness program must meet the following requirements:

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a. Participation must be optional;

b. Genetic information may not be collected without the employee's voluntary, informed and written authorization;

c. Individual medical information may be obtained only by the health care provider or the employee, not by the employer;

d. Employers may not offer employees a financial incentive to provide genetic information. Financial inducements for answering health risk assessments ("HRA") questions about family medical history or other genetic information are allowed as long as the following conditions are met: (1) The HRA specifically identifies questions requesting genetic information; (2) The employer makes clear that answering the genetic information questions is optional and employees will receive the financial reward even if they don't complete that portion of the assessment; and (3) to participate in a disease management program to employees who have voluntarily provided genetic information, as long as they offer the same inducement to those who did not provide the genetic information but whose current health profile indicates a risk of developing the condition targeted by the disease management program.

3) Respond to a written request from the employee (or family member) of what the information is about;

4) Respond to a court order, only to the extent expressly authorized in the order;

5) Respond to government officials investigating GINA compliance;

6) Respond to a request from public health agencies with regard to a contagious disease that presents imminent hazard of death or life-threatening illness.

The regulations state that an employer is not liable under GINA if it inadvertently learns of the genetic information of the employee or of the employee's family member. These situations arise in circumstances when a manager or supervisor overhears an employee talking about a family member's illness or learns of genetic information during the course of a casual conversation with an employee. In such a scenario, the acquisition of genetic information will not be deemed inadvertent if the manager follow-ups with questions that are "probing in nature" regarding family medical history or "actively listens" to third-party conversations. Therefore, it is recommended that employers train managers and supervisors to be aware of the difference between inadvertent and purposeful acquisition of genetic information.

Further, if an employer comes across genetic information through a commercially and publicly available source (Google; social media sites after receiving the employee's permission to access his information on that site, such as Facebook), then the employer likely has not violated GINA. On the other hand, performing a search or asking questions on a social media site that are "likely to result in uncovering genetic information" would most likely be a violation of GINA.

Related to the problem of inadvertent disclosure, employers are also advised to safeguard against liability under GINA when requesting health-related information from employees. To that end, the EEOC regulations provide a model warning for employers to use when lawfully requesting medical information. Including such a warning, which puts the healthcare provider or employee on notice that genetic information should not be disclosed to the employer, permits the employer to invoke the "inadvertent disclosure" defense if the employer happens to receive genetic information through the medical request. Inclusion of a warning is mandatory, however, when an employer requests that a healthcare professional conduct an employment-related medical exam on behalf of the employer. The model warning language included in the final regulations is the following:

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 employees or their family members. In order 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.

The EEOC regulations further state that any files or forms containing genetic information must be maintained separately from personnel files and treated as a confidential medical record. Employers do not need to remove genetic information placed in personnel files before November 21, 2009 (the effective date of Title II of GINA), and they are not liable under GINA for the existence of the information on file. Employers, however, may not disclose such information to a third party.

Finally, employers are required to post on their premises, in conspicuous places where employees are employed, a notice of the rights provided to them under the GINA. The EEOC's poster presently incorporates GINA.

In sum, employers must be aware of these new regulations and should review their practices for compliance with GINA per the final regulations. Employers, among other things, may: 1) review its policies to include prohibitions against discrimination and harassment on the basis of genetic information; 2) add the above described "safe-harbor" warning language to all requests for medical information, such as reasonable accommodation and FMLA medical authorization documents and fitness for duty certificates; 3) identify all questions on health risk assessments that seek genetic information as defined under GINA and expressly inform employees that they do not have to respond to those questions in order to receive any offered financial incentive; 4) train managers and human resource professionals regarding GINA's requirements, with particular emphasis on the difference between inadvertent versus purposeful acquisition of genetic information; 5) maintain all documents containing medical information or genetic information in separate medical files, with appropriate limitations on access and disclosure; and 6) avoid the disclosure of any genetic information in a litigation context.

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Note: *Because of the general nature of this Labor News Flash, nothing herein should be considered as legal advice or a legal opinion.*

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