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EEOC Issues Regulations on Genetic Information

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On Nov. 9, the Equal Employment Opportunity Commission (EEOC) published its final regulations implementing the Genetic Information Nondiscrimination Act of 2008 (GINA). GINA is meant to prevent misuse of emerging genetic testing. Title II of GINA applies to employers with 15 or more employees, preventing them from actively seeking out or using genetic health information for discriminatory purposes.

According to the law and corresponding regulations, genetic information includes information from an employee or an employee's family member's genetic tests or requests for genetic tests. It also includes the employee's family medical history. Genetic information does not include information such as age, gender, race or ethnicity. Title II of GINA is enforceable through the procedures and remedies of Title VII of the Civil Rights Act of 1964. Title II also prohibits harassment and retaliation.

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Using genetic health information in making employment decisions may not be of great concern to many individuals right now, but Congress enacted GINA to ensure that people feel comfortable using genetic testing and to protect against family medical histories affecting employment status. According to the regulations, GINA serves to prevent against situations such as an employer reassigning an employee to a lower stress position because the employee has a family history of heart disease. Also, GINA can protect against an employer using knowledge of an employee's family history of Alzheimer's disease in decisions about health insurance coverage.

The EEOC regulations clarify when an employer has violated GINA. For the most part, an employer cannot request or require genetic information. "Requesting" genetic information includes not only just asking an employee for information, but also more passive means of seeking out the information. This includes conducting Internet searches likely to produce results showing genetic information, actively listening to third party conversations, or purposefully asking about an employee's health status in such a way that would be likely to elicit genetic health information. Therefore, while an employer may legitimately ask an employee how his mother's cancer treatment is going, the employer may not ask probing follow-up questions about whether anyone else in the family has had cancer screenings. And an employer may conduct an Internet search for an employee's name, but not the employee's name and "heart disease."

Congress also provided an exception for "water cooler" conversations, allowing that an employer does not run afoul for learning family medical history from casual conversations with employees. The EEOC regulations extend this to include any genetic information, as it is perceivable that employees may discuss genetic issues beyond family medical history, such as going for genetic testing.

The EEOC clarified that an employer is not in violation of the law by learning genetic health information from such means as a Facebook update. If someone has permission to see a social networking website profile, there is no violation of GINA for learning information from that profile. Thus, if an employee is "friends" with his or her boss on Facebook or other social networking sites, and that employee posts health information and the boss sees it, the boss has not violated the law. But if an employer learns the information as a result of actively searching the Internet for information or by using someone else's LinkedIn login information to view an employee's profile, there has been a GINA violation.

Recognizing the vast sources of media and information available to employers, the regulations find no violation of the law if genetic information is learned through publicly and commercially available means, such as newspapers, television and books. These means do not include court records or medical databases. To avoid claims of deliberate searches, employers should ensure that, if they are engaging in an activity that may produce employee health information, they are using publicly available resources and have the proper permissions to be viewing the material.

The regulations discuss more specific situations, such as employers providing health and wellness programs that require providing medical histories and information. These appear to be fine, as long as the employee can choose not to respond to questions that would reveal private genetic health information. The regulations provide suggestions on how to handle being able to provide appropriate services to individuals with a genetic medical condition or history without hampering employee privacy.

Because there are legitimate reasons for an employer to request an employee's medical information, the regulations provide a safe harbor for an inadvertent receipt of genetic information. Thus, GINA does not change an employer's ability to request medical documentation for such things as an employee trying to take a leave under the Family and Medical Leave Act (FMLA) or an employee requesting an accommodation under the Americans with Disabilities Act (ADA). A receipt of genetic information in response to a legitimate medical request is not unlawful — if the employer warns individuals and health care providers from whom they are seeking medical documentation not to provide genetic information. Thus, employers should revise their relevant forms and procedures accordingly. The EEOC regulations provide sample language for this.

It is possible that employers already have genetic information in employee files. GINA does not require that this information be purged, however the law still applies to that information. Therefore, that genetic information cannot be used in making employment decisions. Employers should be advised to ensure medical information — such as that received for purposes of ADA accommodations — is in confidential separate files and not in the general personnel files, if it needs to be kept at all.

An employer has violated GINA by merely requesting genetic health information, as well as using that information — even if discovered unintentionally — in employment decisions. Employers need to be advised about what types of medical information they are permitted to ask for, and what constitutes a wrongful acquisition of genetic information. Particularly because genetic information can be discovered inadvertently, it is important that employers understand what is and is not lawful under GINA. Information about GINA and the EEOC regulations can be found on the EEOC website, www.eeoc.gov. The EEOC has also authored an instructive and helpful guide titled "Questions and Answers for Small Businesses: EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008" with which employers and employees would be wise to familiarize themselves. The new regulations provide significant guidance for practitioners, however, GINA will assuredly provide fertile ground for litigation as the law unfolds. •

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