

GINA Final Regulations Take Effect

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Final regulations for Title II of the Genetic Information Non-discrimination Act (GINA) have been issued by the EEOC and took effect January 10, 2011. They provide guidance for employers on a number of topics. Employers need to familiarize themselves with the new rules and adapt their practices to avoid running afoul of the EEOC.

Prohibited Requests

The new final regulations state that a prohibited request for a person's genetic information includes conducting an Internet search in a way that's likely to result in obtaining the information. It is considered inadvertent if an employer learns genetic information through social media that it has an employee's permission to access (i.e. via Facebook or My Space). Prohibited request also includes actively listening to third-party conversations or searching an individual's personal effects to obtain genetic information or asking probing questions likely to elicit genetic information.

Clarifications

The final regulations clarify that the definition of employee includes both applicants and former employees. Further, GINA's prohibition of discrimination based on genetic information includes harassment claims. The final regulations also provide guidance on what is and what is not considered to be a genetic test. Genetic tests include: BRCA1 or BRCA2 variant (predisposition to breast cancer), the test for Huntington's disease, an amniocentesis, certain newborn screening tests, and paternity tests. Tests that are not considered genetic tests include: complete blood counts, cholesterol tests, and liver-function tests. The list of "non-genetic" tests includes many tests that are routinely included in health risk assessments.

Safe Harbor Language for Medical Inquiries

The final rule includes safe harbor language that employers may use in their otherwise lawful requests for medical information:

"The Genetic Information Non-discrimination 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."

If an employer provides the safe harbor warning when requesting medical information, it will not violate the regulations if genetic information is provided. Employers should include the safe harbor language with any request for medical information, including requests made under the Family Medical Leave Act (FMLA). The GINA regulations specifically provide that if family medical history is requested to comply with the certification provisions of the FMLA, other family and medical leave law, or to comply with a policy of providing leave to care for sick family members, then GINA is not violated. This exception is distinguishable from the inadvertent disclosure exception because information regarding a family member's health is being specifically requested in order to comply with family leave law or policy.

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