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Legal Alert: GINA Rules

On May 21, 2008, the Genetic Information Nondiscrimination Act (“GINA”) was signed into law to protect Americans against discrimination based on their genetic information when it comes to health insurance and employment. The employment provisions cover employers with 15 or more employees. On November 9, 2010, the Equal Employment Opportunity Commission (EEOC) published new final regulations implementing Title II of GINA. The new final GINA regulations were effective as of January 10, 2011. This legal alert describes the new GINA rules and includes information on how these rules affect employers.

Introduction to GINA

Title II of GINA (i) prohibits the use of genetic information in the employment context, (ii) restricts employers and other entities covered by Title II from requesting, requiring, or purchasing genetic information, and (iii) strictly limits such entities from disclosing genetic information.

GINA Section 201(4) defines “genetic information” as:

- An individual’s genetic tests.
- The genetic tests of family members of an individual.
- The manifestation of a disease or disorder in family members of an individual.
- An individual’s request for, or receipt of, genetic services, or participation in clinical research which includes genetic services, by such individual or any family member of an individual.

The term “genetic information” does not include information about the sex, race, ethnicity or age of any individual. GINA Section 209(b) and the regulation add that “genetic information” includes 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.

Title II of GINA prohibits discrimination based on genetic information by stating that employers may not use genetic information in making employment decisions and by limiting employers’ ability to access, possess, and use genetic information about their employees. As a result of GINA, employers cannot acquire genetic information except in limited circumstances and employers must keep any genetic information they acquire confidential.

Genetic Information in the Workplace

The new rules raise questions as to how careful employers need to be with regard to issues of genetic information in the workplace. For example, can an employer ask about an employee's family member who the employer knows was recently diagnosed with cancer? What if the employer overhears a conversation about an employee's family member who has diabetes? Under an exception in Title II, an employer that "inadvertently requests or requires family medical history" does not violate GINA. Congress intended this exception to address what it called the "water cooler problem" in which an employer unintentionally receives otherwise prohibited genetic information in the form of family medical history through casual conversations with an employee or by overhearing conversations among co-workers. For example, an employer would not likely be liable for the acquisition of genetic information because it overhears a conversation in which one employee tells another that her mother had a genetic test to determine whether she was at increased risk of getting diabetes. The inadvertent exception also applies to interactions over social networking websites as long as the employer is not conducting an internet search on an employee that is intended to uncover genetic information about the employee.

Tips for Employers

In response to GINA, employers should consider taking certain affirmative actions as these rules may affect employer policies and practices. For example, an employer should review its employment applications and employee questionnaires to make sure it is not intentionally or inadvertently requesting information about an employee's or applicant's family medical history. Further, the new rules state that an employer making a request for health-related information should warn the employee/ and or health care provide not to provide genetic information. The warning can be in writing or oral (if the employer typically does not make such requests in writing). The EEOC's suggested language is as follows:

"The Genetic Information and 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."

An employer should be aware of how GINA affects obtaining information about a family member's illness for purposes of determining whether a request for leave qualifies for Family and Medical Leave Act ("FMLA"), state law leave coverage, or an employer's voluntarily adopted family leave policy. GINA's prohibition on acquiring genetic information does not apply to an employer's request for family medical history in a lawful request for certification under a legally mandated or voluntary policy, but employers can only rely on this safe harbor if they affirmatively notify employees of GINA's limitations on requests for genetic information.

Employers should also make sure the information requested is only what the employer needs to know to make the determination under FMLA.

If medical information an employer receives on an employee contains genetic information, the employer should maintain and treat the information as it would a confidential medical record. Genetic information is included as “protected health information” for HIPAA purposes and should be treated accordingly.

Employers should note that the new regulations impose a posting requirement on covered entities to post in the workplace a notice prepared by the EEOC summarizing employee rights under GINA and its new regulations.

This alert is meant to provide general information only, not legal advice. Please contact Judith Moldover at Lawyers Alliance for New York at (212) 219-1800 x 250 or visit our website www.lawyersalliance.org for further information.

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