

EEOC Issues Regulations on Use and Disclosure of Genetic Information

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On November 9, 2010, the Equal Employment Opportunity Commission (EEOC) issued its Final Rule implementing the employment provisions found in Title II of the Genetic Information Nondiscrimination Act (GINA). The Final Rule, which went into effect on January 10, 2011, prohibits employers from using genetic information in making employment decisions and from requesting, procuring or disclosing such information. GINA will be enforced by the EEOC under the same procedures and remedies applicable to Title VII.

GINA has the same coverage as Title VII, meaning that it protects applicants, employees and former employees, and it applies to any employer or other entity now covered by Title VII (meaning employers with 15 or more employees).

“Genetic information” is defined as information relating to: (i) the genetic tests of an employee or the employee’s family members; (ii) family medical history; (iii) an employee’s request for, or receipt of, genetic services, or participation in clinical research that includes genetic services by the employee or a family member; and (iv) the genetic information of a fetus carried by an employee or by a pregnant woman who is a family member of the employee.

The regulations make clear that “genetic information” may not be used in making any type of employment decision.

It is a separate violation for an employer to request or obtain genetic information, with the following exceptions:

- When the information is obtained inadvertently (“water cooler talk”)
- As part of health or genetic services (including a wellness program) that a covered entity provides on a voluntary basis
- In the form of family medical history to comply with the Family and Medical Leave Act, state or

local leave laws or certain employer leave policies

- From sources that are commercially and publicly available, such as newspapers, books, magazines and electronic sources, but the information may not be used and the employer may not intentionally seek out such information
- As part of genetic monitoring that is either required by law or provided on a voluntary basis

Because family medical history is now considered genetic information, employers and their health care providers are expressly prohibited from asking applicants and employees about their family's medical history during post offer medical examinations, fitness for duty evaluations and accommodation or most leave requests. Although family health information may be requested to support an FMLA or other leave to care for a *family member's* serious health condition, it may not be obtained if an employee is requesting time off for his or her own medical condition or to request an accommodation under federal or state disability laws. The regulations provide safe harbor language that an employer should send to health care providers (or insert in appropriate forms) instructing them not to request genetic information during pre-employment and fitness for duty examinations and in connection with most leave or accommodation requests.

Genetic information may be disclosed under limited circumstances:

- To the employee or family member upon receipt of the employee's or family member's written request
- To a health researcher conducting federally regulated research
- In response to court order (not otherwise discoverable)
- To government officials investigating compliance with Title II of GINA
- In accordance with the certification process for FMLA leave or state family and medical leave laws
- To a public health agency concerning a contagious disease that presents an imminent hazard of death or life-threatening illness

As to storage, genetic information obtained after November 21, 2009 should be maintained separately and confidentially like other employee medical information. Genetic information obtained prior to November 21, 2009 may be retained in a personnel file, but the best practice would be to keep it in a separate medical file.

GINA complaints will be investigated by the EEOC, and the remedies available under GINA are the same as those under Title VII. Note that many jurisdictions do not have state or local laws prohibiting discrimination based on genetic information, which may make the charge-filing period under GINA only 180 days.

With the GINA regulations now in effect, employers should consider the following action items:

- (i) Revise nondiscrimination and antiharassment policies to include protection against discrimination

and harassment based on genetic information.

(ii) Revise forms or otherwise send the safe harbor instructions to internal and external health care providers, directing them not to request genetic information.

(iii) Educate your employees, particularly management and HR staff, to avoid inquiry into family history even when well intended.

(iv) Maintain separate and confidential medical files

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