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EEOC Issues Final Rule on the Genetic Information Nondiscrimination Act

On November 9, 2010, the Equal Employment Opportunity Commission (“EEOC”) issued final regulations implementing the employment provisions (“Title II”) of the Genetic Information Nondiscrimination Act of 2008 (“GINA”). Title II of GINA prohibits employment discrimination based on genetic information of employees, job applicants, and their family members, and restricts the acquisition and disclosure of genetic information, including genetic information of former employees.

GINA was signed into law by President George W. Bush on May 21, 2008, and became effective on November 21, 2009. GINA requires the EEOC to issue regulations implementing Title II. The EEOC published proposed regulations on March 2, 2009. A period of public comment followed.

Significantly, the final rule modified the proposed rule’s characterization of Title II as prohibiting the “deliberate acquisition” of genetic information. Under the final rule, a covered entity may violate GINA without a specific intent to acquire genetic information. The final rule simply restricts employers and covered entities from acquiring, requesting, requiring, or purchasing genetic information, and strictly limits such entities from disclosing genetic information.

RULE AGAINST DISCRIMINATION

The law incorporates by reference many of the familiar definitions, remedies, and procedures from Title VII of the Civil Rights Act of 1964, as amended, and other statutes protecting federal, state, and Congressional employees from discrimination. Under GINA, it is illegal to fire, demote, harass, or otherwise “retaliate”

against an applicant or employee for filing a charge of discrimination, participating in a discrimination proceeding (such as a discrimination investigation or lawsuit), or otherwise opposing discrimination.

The final regulations also clarify that although the language of the statute specifically prohibits actions that have the “purpose or effect” of limiting, segregating, or classifying individuals on the basis of genetic information, neither the statute nor the final regulation creates a cause of action for disparate impact. Indeed, Section 208 of GINA specifically prohibits disparate impact claims, and establishes the Genetic Nondiscrimination Study Commission to examine “the developing science of genetics” and recommend to Congress “whether to provide a disparate impact cause of action under this Act.” The final regulation does not address the establishment of this Commission, which is scheduled to begin its work on May 21, 2014.

DEFINITION OF GENETIC INFORMATION

“Genetic information” is defined broadly to include, among other things, information about individuals’ genetic tests and the tests of their family members; family medical history; requests for and receipt of genetic services by an individual or a family member; and genetic information about a fetus carried by an individual or family member or of an embryo legally held by the individual or family member using assisted reproductive technology. A “family member” under GINA includes a dependent and extends to a fourth degree relative (e.g., great-great grandparents, first cousins once removed-children of the individual’s first cousin).

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PROHIBITION AGAINST ACQUIRING GENETIC INFORMATION

It will usually be unlawful for a covered entity to obtain genetic information regarding employees, former employees and job applicants. The EEOC's final rule provides limited exceptions to this general ban, such as an inadvertent acquisition of genetic information in "water cooler" conversations. The rule also allows employers to offer limited financial incentives for some aspects of "voluntary wellness programs." Responses to employers' requests for medical data under the Family and Medical Leave Act and the Americans with Disabilities Act do not violate Title II.

GINA recognizes that persons requesting leave to care for a seriously ill family member under the FMLA may be required to provide family medical history. A covered entity that receives family medical history under these circumstances would not violate GINA. This exception also applies to an employer that is not covered by the FMLA but has a policy allowing for the use of leave to care for ill family members, as long as the policy is applied uniformly by requiring all employees seeking leave to provide documentation about the health condition of the family members. As for Americans with Disabilities Act documentation that is exchanged as part of the reasonable accommodation interactive process, employers generally should inform individuals that genetic information is not to be provided.

The regulations emphasize, however, that an employer must warn health care providers responding to FMLA or ADA

information requests not to disclose genetic information. The final regulations provide model language employers can use when requesting medical information from employees to avoid acquiring genetic information, and describe how GINA applies to genetic information obtained via electronic media, including websites and social networking sites. The general rule is that employers cannot search such sites with the intent of obtaining genetic information.

As alluded to above, the final regulations also clarify that employers may inquire about family medical history in the course of administering "voluntary wellness programs." Voluntary means that the covered entity neither requires the individual to provide genetic information nor penalizes those who choose not to provide it. Thus, Title II would not be violated when a covered entity offers individuals an inducement for completing a health risk assessment that includes questions about family medical history or other genetic information as long as the covered entity identifies those questions and makes clear that the individual need not answer the questions requesting genetic information to receive the inducement.

CONFIDENTIALITY AND POSTING REQUIREMENTS

An employer that does obtain an individual's protected genetic information

must keep such data private in a confidential file separate from the individual's personnel file, in the same manner that the ADA requires confidentiality of an individual's medical information.

The final rule also provides that every covered entity "shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this regulation and information pertinent to the filing of a complaint."

CHARGES FILED SINCE GINA'S NOVEMBER 21, 2009 EFFECTIVE DATE

On November 8, 2010, Peggy Mastroianni, the EEOC's associate legal counsel, stated that the EEOC had received about 200 charges alleging GINA violations since the act took effect last year. She said about three-quarters of those GINA charges also allege ADA violations. To date, the EEOC has yet to issue a complaint based on any of those GINA charges.

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.