LEGAL UPDATES

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EEOC Issues Final Regulations Implementing the Genetic Information Nondiscrimination Act of 2008

Service

Labor & Employment

On November 9, 2010, the Equal Employment Opportunity Commission (EEOC) published its final rule on regulations implementing the Genetic Information Nondiscrimination Act of 2008 (GINA). There are few significant changes from the initial proposed regulations, but examples in the final regulations help clarify the EEOC's interpretation of the statute. These regulations become effective on January 10, 2011.

GINA, which became effective on November 21, 2009, precludes covered entities (employers, unions, employment agencies and joint apprenticeship organizations) from requesting or obtaining an individual's genetic information and from making any employment decisions on the basis of such information. Proposed regulations from the EEOC have been subject to public comment and Commission review for over 10 months.

These final regulations apply to the employment issues under Title II of GINA. Although the final regulations are largely consistent with the proposed regulations, there are a few significant changes. Further definition and clarification of the EEOC's interpretation of the statute is given by way of examples. A copy of the final regulations with the EEOC's commentary is available here. The more significant changes are noted below.

Section 1635.1. Purpose: Because a violation of GINA can occur without specific intent to acquire genetic information, the reference to "deliberate acquisition" of genetic information in the proposed regulations was removed.

Subsection 1635.1(b) was added to clarify that the final rules do not apply to medical examinations conducted for the purpose of diagnosis or treatment unrelated to employment conducted by a health care professional in the hospital or other health care facility where the individual is employed or to the actions of a law enforcement agency investigating criminal conduct, even where the subject of the investigation was an employee of that agency.

Section 1635.2. Definitions - General: The final regulations make it clear that the term “employee” extends to applicants and former employees, and explains that Indian tribes, and bona fide private clubs exempt from taxation under section 501(c) of the Internal Revenue Code are not employers.

Section 1635.3(a). Family Member: The EEOC has determined that dependents covered by Title II of GINA are limited to persons who are or become related to an individual through marriage, birth, adoption or placement for adoption. Placement for adoption is defined to mean the assumption and retention of a legal obligation for total or partial support of a child with whom the child has been placed in anticipation of the child’s adoption.

Section 1635.3(b). Family medical history: Although the statute did not contain a definition of "family medical history," the EEOC's definition protects the employee from the discriminatory use or disclosure of genetic information obtained from a family member who is also an employee of the covered entity. However, because the acquisition of information about an employee's manifested condition is permissible under the statute, the EEOC added Section 1635.8 to clarify that the employer does not violate GINA when it requests genetic information or information about a manifested disease or disorder from an employee's family member who is also an employee when that information is obtained in connection to health or genetic services are being provided on a voluntary basis (see Section 1635.3(c)).

Section 1535.3(c). Genetic Information: Information obtained by the employer about race and ethnicity not derived from a genetic test is not genetic information within the meaning of GINA.

Section 1535.3(d). Genetic Monitoring: A covered entity may acquire genetic information as part of genetic monitoring required by law or voluntarily undertaken provided certain conditions are followed to protect disclosure of individual genetic information.

Section 1635.3(f). Genetic Test: To give better clarity to the definition of genetic test, the final regulations have given specific examples of tests or procedures that are, and are not, considered genetic tests under GINA. It's made it clear that Title II of GINA does not limit other laws, including the ADA, protecting against disability discrimination.

Section 1635.3(g). Manifestation or Manifested: The final rule includes a definition of this term to mean, with respect to a disease, disorder of pathological condition, "that an individual has been or

could reasonably be diagnosed with the disease, disorder, or pathological condition by a health care professional with appropriate training and expertise in the field of medicine involved. For the purposes of this part, a disease, disorder, or pathological condition is not manifested if the diagnosis is based principally on genetic information or on the results of one or more genetic tests."

Thus, where a diagnosis of a disease, disorder or pathological condition depends on both the presence of signs and symptoms *and* genetic information, then it will be considered manifested within the meaning of GINA. The fact that an individual has the disease will not be considered genetic information, nor will information about the signs or symptoms the individual has.

Section 1635.4. Prohibited practices – In general: The final rule makes it clear that harassment on the basis of genetic information is a violation of GINA.

Section 1635.5. Limiting, segregating and classifying: Confirms that neither the statute nor the final regulation creates a cause of action for disparate impact. The regulation also clarifies that limitations or restrictions on an employee's job duties based on genetic information because or requirements of law or regulation mandating genetic information, such as regulations administered by the Occupational and Safety Health Administration (OSHA) is not a violation of GINA.

Section 1635.8. Acquisition of genetic information: The prohibition against acquisition of genetic information applies to the family members of individuals, as well as to that of the individuals themselves. The rule also interprets a "request" for genetic information to include conducting an Internet search in a way that is likely to result in obtaining genetic information, actively listening to third-party conversations, searching personal effects to obtain genetic information and making requests about current health status in a way likely to result in obtaining genetic information.

Social Media: The exception for the acquisition of inadvertently acquired information has been more fully defined by examples and clarifies that it applies in situations where information is acquired through a social media platform from which a covered entity unwittingly receives genetic information.

Authorized Requests for Medical Information: The final rule provides a safe harbor where the genetic information is received in response to a lawful request provided that the requesting entity makes it clear in the request that genetic information is not to be included in the response. Specific approved language is included in the final regulation, 1635.8(b)(1)(i)(B):

> "The Genetic Information 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."

This warning language is *required* where a covered entity requests a healthcare professional to conduct an employment-related medical examination on its behalf.

Wellness Programs: A covered entity may obtain genetic information as part of a voluntary wellness program with prior knowing, voluntary, and written authorization from the individual, which the regulations clarify can be in electronic format. An employer may not offer a financial inducement to provide genetic information, but may offer financial inducements for completing a health risk assessment, provided that the inducement is available to those individuals who do not respond to the genetic information questions.

Family and Medical Leave Act: Family medical history received from individuals requesting leave to care for a family member under the FMLA or similar state or local law would not constitute a violation of GINA. This exception applies to an employer that is not covered by FMLA or comparable statute provided it has a policy of allowing leave to care for ill family members.

Commercially and Publicly Available Information: This exception does not include genetic information contained in medical databases or court records. Media sources (e.g. Facebook, Linked In, My Space) where access to that information requires permission of an individual or is conditioned on membership in a protected group, are not deemed commercially and publicly available and not an exception to GINA. The rule also makes it clear that the exception does not apply where the information acquired from commercially and publicly available sources is obtained with the intent of obtaining genetic information.

Genetic Monitoring: There is no violation of GINA if a covered entity receives information only in the aggregate, but is able to identify the genetic information to specific individuals for reasons outside its control and with no effort on its part, e.g. the small number of employees involved in the monitoring. The rule also concludes that GINA prohibits a covered entity from retaliating or discriminating against an employee who refuses to participate in genetic monitoring when not specifically required by law.

Section 1635.8(c): Subsection (c)(1) was added to make it clear that a request for information about whether an individual has a manifested disease, disorder or pathological condition does not violate GINA simply because a family member also works for the same employer, is a member of the same labor organization, or is participating in the same apprenticeship program. Subsection (c)(2) clarifies that the collection of information about the manifested disease or disorder of a family member in the course of providing health or genetic services to the family member is not a violation of GINA.

Section 1635.8(d) was added to cover situations where external healthcare professionals conduct examinations for covered entities and request genetic information, including family history, as part of that examination. The final rule requires the covered entity to advise the healthcare professional not to connect genetic information as part of a medical examination intended to determine ability to perform a job and to take additional measures as necessary to preclude that practice, including no longer using the services of healthcare professionals who continue to request the information after being advised not to do so.

What This Means to You

In the year since the GINA became effective, the EEOC has received about 200 charges of employment discrimination under that law, most of which have also alleged ADA violations. These claims are likely to increase as employees become aware of the statute. As is the case with any new statute, it is important that employers make sure their human resources and management employees become familiar with the obligations under the law and the final regulations that will become effective on January 10, 2011. Employers should be sure that any requests for medical information use the "safe harbor" language approved by the EEOC in Section 1635.8(b)(1)(i)(B), the text of which is included above. Standard form waivers and releases should include references to claims under GINA, and employee records should be reviewed to ensure that genetic information and other medical information is maintained in a separate file as required by both GINA and the ADA.

Contact Info

Should you have any questions about GINA or the final regulations, please contact your Husch Blackwell attorney.

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