

## **EEOC's GINA Regulations Create New Notice Obligations for Employers<sup>1</sup>**

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The EEOC issued final regulations implementing the Genetic Information Nondiscrimination Act of 2008 (“GINA”), which took effect on January 10, 2011. The regulations clarify a number of GINA’s employment related prohibitions and requirements. The regulations also impose new notice requirements applicable to employer requests for medical information, including requests for medical documentation under the FMLA. The following highlights some of the important issues for employers as a result of GINA and the new EEOC regulations.

### **GINA Generally**

GINA applies to all employers with fifteen or more employees. GINA prohibits discrimination against an employee based on his or her “genetic information.” The Act also contains an anti-retaliation provision. GINA further prohibits the use of genetic information in employment decisions and restricts an employer’s ability to request, require, or purchase genetic information. GINA requires employers to treat all genetic information as confidential medical information and places restrictions on the disclosure of genetic information.

Under GINA and the EEOC regulations, “genetic information” is defined broadly. The definition, as expected, includes information about an individual’s genetic tests and the genetic tests of that individual’s family members. Employers may be surprised to learn that the definition also includes “the manifestation of disease or disorder in family members of the individual (family medical history).” Thus, if an employer learns that an employee’s family member has a disease, the employer is in possession of information covered by GINA, and must be careful about how the information is recorded and used.

GINA’s broad prohibitions against obtaining genetic information are mitigated by a number of exceptions. The final regulations provide clarification on the scope of the exceptions.

### **Inadvertent Disclosure Exception**

GINA’s prohibitions do not apply to situations involving “inadvertent disclosure” of

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genetic information or family medical history. This exception was included to address the so-called water cooler situation, where an employer overhears an employee discuss a test to determine an increased risk of cancer. Similarly, a GINA violation does not occur if an employer receives too much information in response to an otherwise legitimate inquiry about the employee or an employee's family member (e.g., "How is your mom doing" results in the employee telling the employer that his mother has a genetic disease). However, employers risk losing this protection by following up on casual conversations/comments with probing questions relating to the genetic information. GINA's exception to inadvertent discovery of an employee's genetic information also extends to information obtained through the internet and social media websites like Facebook and LinkedIn, but only if the employer had permission to access the particular information (e.g., if a supervisor is "friends" with an employee on Facebook and passively learns about genetic information).

### **Limitation on Inadvertent Disclosure Exception if Employer Requests Medical Information from Employees**

The regulations note, however, that if an employer specifically asks an employee to provide medical information (for example, a doctor's note to justify a sick day) and the employee or doctor provides genetic information in response to the request, the employer's acquisition of that genetic information will generally *not* be considered inadvertent unless, at the time the employer made the request, the employer specifically informed the employee and/or healthcare provider that genetic information should not be provided. If the request for medical information was made in writing, then such instruction must be in writing as well.

This provision of the regulations creates a potential liability trap for employers. For example, most employers require that, if an employee is seeking leave under the Family and Medical Leave Act (FMLA) due to his/her own serious health condition, the employee must return a completed "Certification of Healthcare Provider for Employee's Serious Health Condition" form. If the form does not specifically instruct the doctor to exclude genetic information, and the doctor provides such information, the employer may be deemed to have "requested" genetic information, in violation of GINA. Conversely, if the form includes a specific instruction that the doctor should not include any genetic information in the response, but the doctor does so anyway, the employer's receipt of such information will be deemed "inadvertent," and would not give rise to liability under GINA.

### **Notice to Include With Requests for Medical Information**

The EEOC regulations provide the following model notice language for employers to use when requesting medical information from an employee:

*"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 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."*

The above notice can and should be used by employers any time they or their agents request medical information from an employee, for example:

- if the employer asks an employee to submit a doctor's note to justify an absence;
- if an employer requires an employee to provide medical documentation to support an employee's request for reasonable accommodation;
- if a healthcare provider working for an employer is performing a pre-employment, fitness-for-duty or other medical examination of an employee, or an applicant to whom a conditional offer of employment has been made; or
- when an employer requests that an employee submit a completed "Certification of Healthcare Provider Form" in connection with a request for FMLA leave due to the employee's own serious health condition.

Employers should update all forms and templates used in connection with these and other work-related requests for medical information and/or documentation to include the EEOC model language.

### **Interplay Between FMLA and GINA**

The final regulations recognize that an employer may inadvertently receive genetic information about an employee's family member through an employee's request for leave under the FMLA or similar state or local laws. As set forth above, an employer receiving genetic information in connection with a request for leave related to the employee's own serious illness will not violate GINA if the employer includes the EEOC model notice affirmatively warning the individual and healthcare provider not to provide genetic information. Employers can either amend the Department of Labor's "Certification of Healthcare Provider for Employee's Serious Health Condition" to include the EEOC model language, or staple a sheet with such language onto the Department of Labor form, so that it is seen by both the employee and the healthcare provider.

Per the regulations, when FMLA or other leave is being requested for to care for a family member, as opposed to for the employee's own illness, the warning is not needed. That is because, as a practical matter, the employee will have to provide family medical history in order to justify the need for such leave. The new regulations extend this exception to businesses that are not covered by the FMLA or a similar state or local law but that have a policy allowing for the use of leave to care for an ill family member so long as the policy requiring documentation is applied evenhandedly.

## **Wellness Program Implications**

The EEOC regulations allow employers to request genetic information as part of voluntary wellness programs, so long as the offering of genetic information is truly voluntary and the employer offers no financial incentive for the employee to provide genetic information. Employers may offer financial incentives, such as prizes or reductions in premiums, to employees to complete health risk assessments, only if the assessment either (1) does not request family medical history or other genetic information or (2) explicitly informs employees that they are eligible for the incentive even if they do not respond to certain identified questions that request genetic information.

## **Confidentiality**

Genetic information must be treated as confidential and must be treated the same way as medical information. If the information is in writing, employers and other covered entities must keep it apart from other personnel information in separate medical files. (Genetic information may be kept in the same file as medical information).

## **Steps for Employers**

Employers should consider taking the following steps now:

- If the employer is subject to the FMLA, update the FMLA policy and “Certification of Healthcare Provider for Employee’s Serious Illness” form to include the EEOC model notice.
- Include the model notice in any policies, forms or templates that reference an employee’s need to provide medical documentation, including policies related to sick time, leaves of absence, workers’ compensation and reasonable accommodation.
- Educate managers and Human Resources professionals concerning GINA and the new regulations.