

EEOC Publishes Final Regulations Under Employment Provisions of the Genetic Information Nondiscrimination Act

November 11, 2010

On November 9, the Equal Employment Opportunity Commission (EEOC) published its final regulations under Title II of the Genetic Information Nondiscrimination Act (GINA). Title II of GINA, which became effective in November 2009, prohibits the use of genetic information in employment; restricts employers from requesting, requiring, or purchasing genetic information; and strictly limits the disclosure of genetic information.

We are in the process of reviewing and analyzing the new regulations, which comprise more than 100 pages of text, and are preparing a detailed analysis of the new regulations in order to guide employers in complying with them. In the meantime, we summarize the highlights of the final rules below.

Highlights of Final Rules

EEOC Clarifies That No Specific Intent Is Required to Violate GINA

The EEOC's proposed regulations on Title II of GINA, issued in March 2009, characterized Title II as prohibiting the "*deliberate acquisition*" of genetic information. This terminology suggested, at least to some, that an employer was required to have specific intent to acquire genetic information in order to violate the law. Prompted by comments in the rulemaking process, the EEOC removed the term "deliberate acquisition" from Section 1635.1 of the final regulations, explaining that "a covered entity may violate GINA without a specific intent to acquire genetic information."

EEOC Broadly Defines "Requests" for Genetic Information

The statute bars employers, as a general matter, from "request[ing], requir[ing], or purchas[ing]" genetic information from an individual or a family member of the individual. The final regulations adopt a broad view of the term "request," explaining that the term "includes conducting an Internet search on an individual in a way that is likely to result in a covered entity obtaining genetic information; actively listening to third-party conversations or searching an individual's personal effects for the purpose of obtaining genetic information; and making requests for information about an individual's current health status in a way that is likely to result in a covered entity obtaining genetic information." As a result, it will be important for employers to adopt policies that address this broad prohibition.

EEOC Clarifies Inadvertent Discovery Exception, Creates Safe Harbor

Title II of GINA exempts from liability “inadvertent” requests for family medical history. This exception reflects Congress’s concern that a supervisor would violate the law, for example, by accidentally overhearing a conversation about an employee’s family medical history. The EEOC’s final regulations expand on this statutory exception, listing examples of inadvertent disclosure beyond the “water cooler” conversation envisioned by Congress. The final regulations, for example, explain that genetic information received by a supervisor in response to a general inquiry regarding an employee’s health (e.g., “How are you?”) qualifies as inadvertent disclosure.

In addition, the final rule includes a safe harbor notice that employers may use for lawful requests for medical information to warn healthcare providers not to provide genetic information. Any receipt of genetic information in response to a lawful request for medical information that includes the “safe harbor” warning will be deemed “inadvertent” and will not violate GINA.

EEOC Clarifies Incentives for Wellness Programs

GINA itself permits employers and other covered entities to obtain genetic information in connection with employer-provided health and wellness programs—but only if the employer meets specific requirements, including, among other things, ensuring that participation in the program is knowing and voluntary. There was some concern, however, as to whether “voluntary” participation included situations where an employer offers financial or other incentives to participate in the program.

While Title II of GINA (and the interim regulations of Title I) prohibit employers from using financial incentives to collect genetic information, the EEOC concludes in the final regulation that employers would not violate Title II of GINA by offering individuals an incentive for participating in wellness programs, including Health Risk Assessments (HRAs), as long as the employer specifically identifies portions relating to family medical history or genetic information and makes it clear that the individual need not participate or answer the portions relating to genetic information or family medical history to receive the incentive.

EEOC Issues Helpful Q&A

The EEOC issued a question-and-answer pamphlet for small businesses about Title II of GINA and its implementing regulations, which is available to employers at http://www.eeoc.gov/laws/regulations/gina_qanda_smallbus.cfm. Because the pamphlet is a helpful overview of GINA and how it impacts employers generally, we encourage all employers to read it.

What the Final Regulations Mean for Employers

As a practical matter, employers will need to take affirmative steps to avoid liability under GINA, including, by way of example, ensuring that the GINA safe harbor is included with all legal requests for medical information in the workplace (e.g., fitness-for-duty exam forms and accommodation forms).

Morgan Lewis is well positioned to help employers deal with the EEOC’s new regulations and encourages employers to contact us with any comments or concerns. If you have any questions concerning the information in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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