

Employers' Genetic Information Obligations

Law360, New York (January 4, 2011) -- On Nov. 9, 2010, the Equal Employment Opportunity Commission finalized its regulations for the Genetic Information Nondiscrimination Act. The new regulations define the term "request," and clarify when employers may inadvertently obtain genetic information without running afoul of GINA. The regulations also provide sample language for employers to use when requesting medical information in connection with requests for accommodations or leaves of absence. Finally, the regulations address employer obligations in connection with voluntary wellness programs, as well as employer confidentiality obligations.

What Is a Request for Genetic Information?

GINA expressly prohibits employers from requesting genetic information of an individual (employee or applicant) or a family member. The regulations define a request for genetic information broadly to include: a) conducting an Internet search on an individual in a way that is likely to result in obtaining genetic information; b) actively listening to third-party conversations; c) searching an individual's personal effects for the purpose of obtaining genetic information; and d) making requests for information about an individual's current health status in a way that is likely to result in obtaining genetic information.

Inadvertent Requests for Medical Information

The regulations recognize, however, that employers may inadvertently obtain genetic information without violating GINA. In some instances, the regulations create safe harbors for employers who do not seek the genetic information directly and take the required steps to avoid receiving it.

Requesting Medical Information For Leave or Reasonable Accommodation Purposes

Employers routinely request that health care providers complete certification forms to support a leave under the Family and Medical Leave Act (or any state law equivalent) or an accommodation under the Americans with Disabilities Act (or any state law equivalent). The regulations recognize that health care providers may inadvertently disclose genetic information pursuant to these employer requests. The regulations create a safe harbor for employers who use the following language when requesting medical information:

"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."

Overhearing Conversations Between Employees and Learning Information From Third Parties

An employer does not violate GINA by unexpectedly obtaining genetic information about an employee from a third party or by overhearing an employee's conversations. To avoid liability, the employer must not have solicited the information.

Obtaining Information Directly From an Employee During Casual Conversations

Employers do not violate GINA if they obtain information directly from an employee during a "casual conversation, including in response to an ordinary expression of concern that is

the subject of a conversation.” The regulations explain that a supervisor may ask a subordinate who has cancer, “How are you?” or “Did they catch it early?” Similarly, a question concerning the well-being of a parent or child such as, “Will your daughter be OK?” does not violate GINA. However, the regulations caution that an employer risks liability if a supervisor follows up with questions that are more probing. For example, employers should not ask whether other family members have the condition, or whether the employee has been tested for a condition of a family member.

Learning About Genetic Information Through Social Media

Inadvertently obtaining genetic information about employees through social media platforms will not violate GINA so long as the employee granted the employer permission to access the employee’s profile. Similarly, employers who unintentionally acquire genetic information from commercially and publicly available sources such as the Internet, newspapers, magazines or books, do not violate GINA. This exception does not apply to searches of medical databases, court records, restricted research databases and searches of sources where an employer is likely to obtain genetic information such as websites and online discussion groups that discuss genetic testing and genetic information.

Voluntary Wellness Programs

GINA permits employers to obtain genetic information in connection with a voluntary wellness program under the following circumstances:

- The provision of genetic information must be voluntary.
- The employee must sign a written authorization containing a description of the type of genetic information that will be obtained, the general purpose for which it will be used and the legal restrictions on disclosing genetic information.
- The information may be shared only with a licensed health care professional or board-certified genetic counselor providing services and not with others in the workplace.
- Individually identifiable genetic information may only be disclosed in aggregate terms that do not disclose the identity of specific individuals.

Employers are prohibited from offering financial incentives for providing genetic information. However, employers can offer financial inducements for completing health risk assessments that include questions about genetic information, so long as employees receive the financial inducement regardless of whether they answer those questions.

Monitoring the Effect of Toxic Workplace Substances

The new GINA regulations also permit employers to acquire genetic information to monitor the effects of toxic substances in the workplace, if:

- The testing is required by law and conducted in compliance with federal regulations.
- The employer provides written notice of the testing.
- The employee provides prior, knowing, voluntary and written consent to the testing.
- The employer receives aggregate, not individual, test results.

Confidentiality of Genetic Information

Genetic information, like medical information, should be maintained in a separate file and may not be part of an employee’s personnel file. Employers who receive genetic information may only disclose the information under the following limited circumstances:

- To an employee or his or her family member upon request.
- To an occupational or other health researcher conducting research in compliance with federal regulations.
- To public health agencies if related to a contagious disease that presents an imminent hazard of death or life-threatening illness, upon prior notification to the employee or family member.

- To government officials investigating GINA compliance.
- In connection with the employee's compliance with leave certification requirements.
- In response to a court order upon prior notification to the employee or family member.

Significance For Employers

Since GINA took effect on Nov. 21, 2009, the EEOC has already received more than 200 charges alleging GINA violations. Although the new regulations are helpful in providing employers with some guidance on how to comply with GINA's requirements, gray areas remain. In particular, employers need to take affirmative steps to reduce the risk of inadvertently obtaining genetic information about its employees. Training managers and supervisors about what constitutes protected genetic information, and how to avoid asking for this information, is key. Many managers may not recognize that expressing concern and asking questions about an employee's health can create a liability risk under GINA.

Besides training managers, to ensure compliance with GINA, employers should:

- Revise their medical certification forms to include the language suggested by the EEOC above.
- Communicate in writing to any health care practitioner conducting medical examinations on behalf of the company that genetic information should not be disclosed.
- Post the new EEO poster which has added information about GINA.

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