The Latest On GINA

Insights
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The new regulations issued by the EEOC under the Genetic Information Nondiscrimination Act of 2008 (GINA) became effective on January 10, 2011. The regulations make clear that the law protects applicants, current and former employees, trainees, and apprentices. The EEOC has already received hundreds of charges alleging violations of GINA. Employers must now post new information and take other steps to comply, including the use of "safe harbor" language when requesting health-related information from an employee or healthcare provider.

"But We Don't Collect Genetic Information, So Who Cares?"
Many employers mistakenly believe that they will not likely be affected by the new law to any great extent. But the broadly written regulations point out that due to the "many achievements in the field of genetics, the decoding of the human genome and the creation and increased use of genomic medicine" there is great potential for discrimination and misuse of genetic information by employers. Title I of the law applies to group health plans sponsored by employers. Title II prohibits the use of genetic information by employers, restricts employer requests for genetic information and strictly limits disclosure of genetic information.

The EEOC wrote the regulations to provide that an employer may violate the law even when there is no specific intent to obtain genetic information. Genetic information broadly includes information from genetic tests, the genetic tests of family members, and family medical history. "Family members" is defined very broadly to include relatives to the 1^{st}, 2^{nd}, 3^{rd}, and 4^{th} degrees, as well as adopted children and step-siblings. It also includes information about an individual's or family member's request for or receipt of "genetic services." Genetic services include genetic tests, genetic counseling, and genetic education. Under GINA and the ADA, all health-related information must be maintained confidentially in a file separate from an employee's other personnel records.

Making an employment decision based on knowledge that an individual has received genetic services violates GINA even if you are unaware of the specific nature of the genetic services received or the specific information exchanged in the course of providing them. Therefore, employer requests for medical information for FMLA, ADA accommodation or other similar purposes may now violate GINA if not properly handled in accordance with the new regulations. An exception may apply where requests such as FMLA necessarily require disclosure of family medical history.

What To Do When Requesting Health-Related Information

When an employer requests health-related information it must warn the provider of information not to provide genetic information. This "safe harbor" protection provides that any receipt of genetic information in response to a lawful request for medical information will be deemed inadvertent and not in violation of GINA if the request contains such a warning. The warning to be included with any such request is very specific, and is mandatory in all cases where a covered entity asks a health care professional to conduct an employment-related medical examination.

Alternative language may be used as long as individuals and healthcare providers are informed that genetic information should not be provided. In the case of post-offer medical examinations or fitness-for-duty medical examinations, an employer "must tell the healthcare professional not to collect genetic information as part of a medical examination intended to determine the ability to perform a job, and must take additional reasonable measures within its control if it learns that genetic information is being requested or required."

Educate Supervisors And Managers; Notify Employees

Other innocent scenarios may also cause an employer to violate GINA by requesting or inadvertently acquiring health-related information. A request includes: 1) conducting an Internet search on an individual in a way that is likely to result in receipt of genetic information; 2) actively listening to third-party conversations or searching an individual's personal effects for the purpose of obtaining genetic information; and 3) making requests for information about an individual's current health status in a way that is likely to result in receipt of genetic information.

As an example, the inadvertent acquisition of genetic information may occur if a supervisor asks follow-up questions of an employee about whether other family members also have the condition, or whether the individual has been tested for the condition. A supervisor can also violate GINA by inadvertently obtaining genetic information from a social media platform to which the supervisor was given access (such as when a supervisor and employee are connected on a social-networking site on which the employee has provided family medical history).

And you must also post notices in conspicuous places describing GINA's applicable provisions. The GINA poster is available at www.eeoc.gov.

And There's More On The Way

Anytime a new law is passed it takes time for the unanticipated consequences to become apparent, and for the agency and courts to interpret and apply provisions so employers know what must be done to ensure compliance. In that regard, compliance with GINA is even more difficult because it is a highly technical law in a developing area of medical science. The EEOC admits that GINA includes terms outside the area of its expertise and uses terms uncommon to employment discrimination law.

But whether it's common or uncommon, compliance is required.

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