

EEOC's Final GINA Regulations Become Effective January 2011: Are you prepared?

By Karen S. Aframe, Esq. | December 13, 2010

On November 9, 2010, the Equal Employment Opportunity Commission published its final regulations implementing the portions of the Genetic Information Non-Discrimination Act of 2008 (GINA) that affect employers. [See our previous alert on GINA here](#). GINA covers all employers with fifteen or more employees and prohibits discrimination and harassment on the basis of *genetic information*, as well as prohibits employers from acquiring or disclosing genetic information. These new rules become effective January 10, 2011, and require immediate attention by employers.

"Genetic Information" Includes More Than You Might Think

The law and regulations define genetic information broadly and go beyond what one would intuitively consider to be genetic information. Under GINA, genetic information includes, but is not limited to the following:

- Information about an individual's genetic tests;
- Information about the genetic tests of a family member;
- Family medical history;
- Requests for, and receipt of, genetic services by an individual or a family member; and
- Genetic information about a fetus carried by an individual or family member, or about an embryo legally held by the individual or family member using assisted reproductive technology.

Under GINA's final rules, the term "family members" is defined very broadly and extends beyond immediate family to the following persons: spouse; children (natural and adopted); siblings and half-siblings; aunts, uncles, nieces and nephews; grandparents and grandchildren; great- and great-great-grandparents and grandchildren; and first cousins and first cousins once removed.

Employers Beware: Wrongful Acquisition of Genetic Information Is Easier Than You Think

GINA generally prohibits an employer from acquiring genetic information. This means an employer may not request, require, or purchase genetic information of an individual or the individual's family member. Under GINA's regulations, a "request" may be as informal as "actively listening to third-party conversations for the purpose of obtaining genetic information" or "conducting an Internet search on an individual that is likely to yield a result containing genetic information." The final rules do provide exceptions to this broad prohibition. However, employers must be cautious because the final rules make it clear that the application of the exception is intended to be narrow. Some of the likely areas of concern follow:

1. **Inadvertent Acquisition.** The EEOC regulations provide an exception from the general prohibition of acquiring genetic information for an employer that inadvertently acquires genetic information by overhearing a conversation, receiving an unsolicited email about the health of an employee or the employee's family member, or receiving genetic information directly from an employee or third party in response to an expression of ordinary concern, such as "How are you?" or "Did they catch it early?". However, the EEOC clarifies that the inadvertent acquisition exception will *not* apply when a manager follows up a casual conversation about an employee's illness or the illness of an employee's family member with a question such as "Does cancer run in your family?" or "Has your cousin been tested for BRAC1?" This is because the EEOC thinks these sorts of probing questions are likely to yield genetic information.

2. **Publicly Available Information.** GINA also provides an exception from its general prohibition of acquiring genetic information, if the employer acquires the genetic information from a publicly available source, such as a newspaper, television, or the Internet. However, the final rules specify that GINA prohibits conducting an internet search on an individual in a way that that is *likely to result* in the employer obtaining genetic information. GINA also excludes from the "publicly available" exception information that an employer learns through a site such as Facebook or another social networking site, in which access has been restricted to those with permissions. In some circumstances the acquisition of genetic information through a social networking site will be covered by the inadvertent acquisition exception, such as where a manager is a "Facebook friend" of an employee and inadvertently learns of family medical history from the site. However, it is possible that where a site has ongoing conversations of health concerns, that an employee could argue the acquisition by the manager was not "inadvertent." To limit potential liability, employers must consider GINA's implications on employee use of social media, and address these concerns in its social media policy.

3. **Requests for Medical Information.** Employers may also violate GINA if they receive genetic information from a health care provider in response to an otherwise lawful request for medical information, such as a fitness for duty verification or a leave request, including leaves under the FMLA and/or in connection with a request for a reasonable accommodation. However, the EEOC has created a safe harbor for employers who seek such medical information if the employer instructs the health care provider and/or individual from whom it requests the medical information not to provide genetic information. The final rule has set forth specific language that employers may use in connection with such requests for medical information. See Question 17 in the attached EEOC guidance:
http://www.eeoc.gov/laws/regulations/gina_ganda_smallbus.cfm

4. **Wellness Programs.** Employers that offer voluntary wellness programs and/or health risk assessments must also consider GINA's restrictions. The employer must ensure that the employee provides knowing, voluntary and written authorization when providing any genetic information. The EEOC specifies that the authorization and program meet certain criteria in order to meet the standards of the exception. In addition, the final rules clarify that an employer may offer a financial inducement to participate in a health risk assessment only if the inducement is available irrespective of whether the questions about family medical history/genetic information are answered.

What Employers Can Do?

Unlike the Title VII and state discrimination laws with which employers are familiar, GINA creates liability for a situation in which there may not be an adverse employment action, i.e., the acquisition of genetic information. Violations of GINA may result in costly damages. Remedies available for wrongful acquisition of genetic information include reinstatement, injunctive relief, backpay, compensatory and punitive damages, and attorney's fees and costs, as well as monetary fines of up to \$100 per day per individual. Thus, because the regulations become effective January 10, 2011, as employers, you are advised to revise your human resources practices and policies to ensure compliance with GINA, such as adding safe harbor language to your FMLA and fitness-for-duty forms, making sure that your social media policy is crafted in a way to limit potential liability under GINA, as well as training managers on the limits of permissible conduct under GINA.

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