

Final GINA Regulations Issued

Congress enacted the Genetic Information Nondiscrimination Act (GINA) in early 2008 to address its concerns that genetic information might be used as a basis for denial of health coverage or as a basis for employment decisions. Proposed regulations to implement GINA concerning the prohibition of use of genetic information in the employment context were issued by the Equal Employment Opportunity Commission (EEOC) on March 2, 2009. On November 9, 2010, final regulations were issued regarding the employment-related provisions of GINA. Those regulations take effect on January 10, 2011. Good faith compliance with GINA is required now and has been required since November 21, 2009, pending issuance of final regulations.

Under GINA, employers are generally prohibited from requesting, requiring, or purchasing genetic information and are prohibited from using genetic information in making decisions related to any terms, condition, or privileges of employment. Employers are also strictly limited from disclosing genetic information in their possession. Finally, GINA prohibits employers from retaliating or otherwise discriminating against an employee who refuses to participate in genetic monitoring that is not specifically required by law.

There are six narrowly-defined situations in which an employer may acquire genetic information without being in violation of GINA. An employer may lawfully obtain such information 1.) where the information is acquired inadvertently; 2.) as part of health or genetic services (including a wellness program) provided on a voluntary basis; 3.) in the form of family medical history to comply with the certification requirements of the Family and Medical Leave Act, state or local leave laws, or certain employer leave policies; 4.) from sources that are commercially and publicly available, such as newspapers, books, magazines, and even electronic sources; 5.) as part of genetic monitoring that is either required by law or provided on a voluntary basis; and/or 6.) by employers who conduct DNA testing for law enforcement purposes as a forensic laboratory or for human remains identification.

Acquisition of genetic information is considered inadvertent if a manager or supervisor learns about genetic information by overhearing a discussion between co-workers or receives genetic information in response to a question about an employee's general well-being. Examples of the latter situation might include inquiries such as "How are you?" or "Did they catch it early?" asked of an employee who was just diagnosed with cancer. A supervisor's receipt of an unsolicited communication about an employee's family member (e.g., an email indicating that an employee's mother has cancer) would similarly be considered inadvertent. The regulations also provide that the inadvertent acquisition exception applies to interactions that take place in the "virtual" world, i.e., through a social media platform (e.g., Facebook) where a supervisor and employee are *voluntarily* connected on a social networking site and the employee provides family medical history on his page. Likewise, a general Internet search for the employee/applicant's name that reveals genetic information is "inadvertent." However, an Internet search for the name of an employee/applicant coupled with a genetic marker is not permitted.

Importantly, the final regulations provide “safe harbor” language to be used by employers in pre- and post-offer medical examinations and in the case of fitness-for-duty examinations. Use of this language protects the employer in the event that protected genetic information is obtained incident to such an examination. The final regulations provide further assistance to employers by giving numerous examples of tests that are and are not considered to be genetic tests.