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SUBJECT: GINA—a Brief Review of EEOC's Final Regulations

A Brief Summary of GINA's Final Regulations

by Ted Wellman and Gregory S. Fisher[1]

In November 2010, the Equal Employment Opportunity Commission issued its final regulations governing Title II of the Genetic Information Nondisclosure Act (GINA). This legal alert briefly summarizes key aspects of the regulations.

Why was GINA Enacted?

Access to genetic and genetic related information is becoming more commonplace. Congress did not want such information to be used to discriminate against individuals with respect to the terms and conditions of employment (Title II of GINA covers employment matters).

Who is Covered (What Employers)?

GINA applies to all private employers, state and local governments, and educational institutions that employ 15 or more individuals. GINA also covers private and public employment agencies, labor organizations, and joint labor management committees controlling apprenticeship and training.

Are ANCSA Corporations Subject to GINA?

Although no court has faced this question yet, preliminary analysis suggests that ANCSA corporations should not be subject to GINA. GINA incorporates Title VII's definition of "employer," meaning that Indian Tribes are excluded. ANCSA provides that Native Corporations, partnerships, joint ventures, trusts, or affiliates in which a Native Corporation owns not less than 25 per centum of the equity are excluded from the definition of "employer" under section 701(b)(1) of Title VII, the Civil Rights Act of 1964 as amended. *See* 43 U.S.C. 1626(g). GINA specifically incorporates Section 701(b)(1) to define employer. Therefore, since GINA incorporates Section 701(b)(1) to define "employer," and since ANCSA corporations are excluded or exempted from that definition, it would seem that ANCSA corporations should not be subject to GINA.

However, no court has faced or resolved that specific question yet. Therefore, ANCSA corporations should proceed with caution.

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What is "Genetic Information"?

Genetic information includes information about an individual's genetic test, a genetic test for a family member, and the manifestation of a disease or disorder in an individual's family members (or family medical history). This latter category is relevant because family medical history is often an indicator regarding an individual's risk or increased risk of disease, disorder, or medical condition.

What is Prohibited?

Employers may not request or acquire genetic information or use genetic information with respect to employment-related decisions. Harassment because of genetic information is also prohibited. GINA also prohibits any form of retaliation.

What is Required?

Employers must treat any genetic information as confidential and may not use genetic information to make decisions concerning the terms and conditions of employment.

Can You Provide Me Some Examples of Genetic Information?

Congress did not intend to impose liability when an employee voluntarily shares information that is overheard (the so-called "water cooler" qualification). The EEOC recognizes that Congress did not want casual conversations regarding health to trigger federal litigation whenever someone mentioned something that might constitute protected family medical history.

Employers would not be liable if a supervisor or manager receives family medical history directly from an individual following a general inquiry about the individual's health (e.g., "How are you?" or "Did they catch it early?" asked of an employee who was just diagnosed with cancer) or a question as to whether the individual has a manifested condition. Similarly, a casual question between colleagues, or between a supervisor and subordinate, concerning the general well-being of a family member would not violate GINA (e.g., "How's your son feeling today?", "Did they catch it early?" asked of an employee whose family member was just diagnosed with cancer, or "Will your daughter be OK?"), nor would the receipt of genetic information that was not solicited or sought by the employer (e.g., where a manager or supervisor receives an unsolicited email from a co-worker about the health of an employee's family member).

However, an employer that inadvertently acquires genetic information about someone's family member in response to a general question about the family member's health may not then ask follow-up questions that are probing in nature, such as whether other family members also have the condition, or whether the individual has been tested for the condition.

Is It Ever Permissible for an Employer to Acquire Genetic Information?

Yes, in certain rare instances employers may request or acquire genetic information without violating the law.

(1) Genetic information may be inadvertently acquired, as when an employee volunteers information.

(2) Genetic information may be acquired as part of an employer's health or wellness programs if certain specific requirements are met. The regulations generally specify that participation in the program must be voluntary, information may not be released to managers or supervisors, and any such information must meet confidentiality standards set forth in the regulations.

(3) Family medical history may be acquired as part of the FMLA certification process if the leave is being sought to care for a family member and the information is necessary to substantiate the need for leave.

(4) Genetic information may be acquired from publicly available sources so long as the employer does not search for that information.

(5) Genetic information may be acquired through a genetic monitoring program that monitors the biological effects of toxic substances in the workplace where monitoring is required by law or under some circumstances a voluntary program. Written notice must be provided to employees, and the regulations specify other conditions that govern this exception.

(6) Finally, acquisition is permissible where DNA testing is conducted for law enforcement or related purposes.

Interaction with Other Laws.

GINA provides that Title II is not intended to apply to uses and disclosures of health information governed by the HIPAA Privacy Rule. Thus, entities that are subject to both the HIPAA Privacy Rule and GINA, such as a hospital that treats a patient who also is an employee of the hospital, must apply the requirements of the HIPAA Privacy Rule, and not the requirements of Title II of GINA, to genetic information that is protected health information.

With respect to FMLA, GINA recognizes that employees and their healthcare providers often provide unrequested genetic information in support of an employee's request for medical leave. If that occurs, genetic information that is acquired will not violate GINA if the request for documentation was lawful. Employers must be sure that genetic information that is obtained inadvertently is treated as confidential and maintained in a separate medical file.

Concerning the Americans with Disabilities Act Amendment Act of 2008 (ADAAA), employers may request that employees undergo fitness for duty examinations under certain specified circumstances. GINA constrains these rights slightly. Employers should not request or obtain family medical history or conduct genetic tests.

Employers may request medical information related to an employee's request for a reasonable accommodation or fitness for duty. Unrequested genetic information that is obtained is treated the same as such information inadvertently acquired for a FMLA medical certification; that is, it does not violate GINA. However, GINA's prohibition against acquiring genetic information governs the interactive process during which the employer and employee discuss appropriate reasonable accommodation. Moreover, employers should include a disclaimer or advisement with any such requests emphasizing that they are not asking for genetic information in order to minimize potential risk and liability.

Regarding other state, local, or tribal laws, GINA was not intended to, and does not, limit the rights of individuals under any other laws. GINA does not preempt or displace any laws that provide for greater rights or offer broader protections.

What Should Employers Do?

Employers should include qualifying language in any request for a fitness for duty examination or FMLA medical certification to ensure that employees understand that no genetic information is being requested (except where it pertains to a request for FMLA leave to care for an immediate family member).

The documentation transmitted to healthcare practitioners should include similar disclaimers and emphasize that no genetic information is to be provided (again, except where the request pertains to a request for FMLA leave to care for an immediate family member).

The regulations include the following sample language:

> 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.

Employers should ensure that supervisors and managers are trained so that they do not ask inappropriate questions during interviews, performance evaluations, or at other times that would result in acquiring genetic information.

Employers should update their policies to make sure that those polices include GINA anti-discrimination and anti-retaliation provisions, and that procedures are specified for maintaining confidentiality of any genetic information that may be acquired.

Employers should check their recordkeeping policies and procedures to ensure that any potential genetic information is accorded due confidentiality.

Employers that have a health or wellness program should have counsel reviews the program's terms and procedures to make sure the program complies with GINA.

Conclusion

This summary is provided solely for educational purposes and is not intended as legal advice for any particular case.

Employers seeking additional information should confer with counsel or review the EEOC's website or the Federal Register for the final regulations:

http://www1.eeoc.gov//eeoc/newsroom/release/11-9-10.cfm?renderforprint=1

http://www.federalregister.gov/articles/2010/11/09/2010-28011/regulations-under-the-genetic-information-nondiscrimination-act-of-2008#p-259

Businesses seeking particular advice should contact and confer with counsel.[2]

[2] Aside from traditional litigation, Davis Wright Tremaine offers employers full service counseling and training. Employers seeking assistance should please feel free to contact us for a conferral to see how we might help your business adopt policies to reduce legal risks. Ted Wellman and Gregory Fisher, (907) 257-5300, tedwellman@dwt.com or gregoryfisher@dwt.com.