EEOC Issues Final Regulations To Title II Of GINA

Title II of the Genetic Information Nondiscrimination Act (GINA), which took effect on November 21, 2009, prohibits employers from discriminating against employees and applicants based on genetic information, regulates employers' collection of genetic information and requires employers to keep genetic information confidential. On November 9, 2010, the Equal Employment Opportunity Commission (EEOC) issued final regulations to Title II of GINA. The EEOC's final regulations adopt a number of Seyfarth Shaw's comments to the proposed regulations, which can be accessed *here*.

"Genetic Information" And "Genetic Tests" Are Expansively Defined

The regulations broadly define "genetic information" to include: the genetic tests of an individual or his or her family members; an individual's family medical history; an individual's request for or receipt of genetic services or participation in clinical research that includes genetic services by the individual or his or her family members; and the genetic information of a fetus carried by an individual or a pregnant woman who is a family member of the individual, and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.

The regulations also list tests that qualify as "genetic tests" (e.g., carrier screening for adults using genetic analysis to determine the risk of conditions such as cystic fibrosis, sickle cell anemia, spinal muscular atrophy or fragile X syndrome in future offspring; tests to determine if someone has the BRCA1 or BRCA2 variant evidencing a predisposition to breast cancer; and DNA testing that reveals family relationships, such as paternity). The regulations also identify tests that do not qualify as genetic tests (e.g., complete blood counts, cholesterol tests and liver function tests).

Limits On Acquiring Genetic Information

In addition, the regulations augment GINA's general prohibition on collecting genetic information. For example, they prohibit employers from: conducting Internet searches aimed at or likely to result in the acquisition of genetic information; actively listening to third-party conversations or searching an individual's personal effects for the purpose of obtaining genetic information; and making requests for information about an individual's current health status in ways that are likely to result in the disclosure of genetic information.

However, the regulations provide that employers do not run afoul of GINA by inadvertently obtaining genetic information. This exception contemplates situations where an employer inadvertently acquires genetic information by overhearing a conversation "at the water cooler" involving genetic information or receiving responses to an ordinary expression of concern

about an employee's health. But an employer may not be able to avail itself of this exception where it follows-up on the disclosures with probing questions likely to elicit genetic information.

Significantly, moreover, the regulations provide that an employer needs to direct an individual and/or healthcare provider not to provide genetic information in response to a request for medical information in order to assert that its receipt of genetic information in response to the request was inadvertent. In this regard, the regulations provide the following "safe harbor" language that employers may use in connection with requests for 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."

Another exception to GINA's general bar on employer acquisition of genetic information exists for voluntary wellness programs. However, employers using wellness programs may not require an individual to provide genetic information or penalize an individual who declines to provide it. Moreover, an employer may not offer a financial inducement to specifically provide genetic information, but may offer financial inducements for completing health risk assessments that include questions involving genetic information so long as the employer makes it clear that the inducement will be made available whether or not the employee answers the questions regarding genetic information. (The regulations provide examples to illustrate how this provision operates.)

Further, to ensure that an individual's decision to provide genetic information in connection with a wellness program is voluntary, employers must use authorization forms that: are written in a manner that the individual is reasonably likely to understand; describes the type of genetic information being obtained and the purposes for which it will be used; and describes the restrictions on disclosure of genetic information. In addition, genetic information obtained through a wellness program only may be disclosed to the employer in aggregate terms that do not disclose the identity of specific individuals.

Personnel Files

The regulations do not require employers to remove genetic information from personnel files where such information was placed in the files before November 21, 2009. As a matter of prudence, however, employers should remove all genetic information from personnel files and place it in separate, confidential medical files. Genetic information may be maintained in the same file as other confidential medical information subject to Section 102(d)(3)(B) of the Americans with Disabilities Act (ADA).

Distinguishing GINA from the ADA/ADAAA

There is a possibility that employees who believe they were discriminated against on account of a physical condition that has *manifested* will file errant claims under GINA (as opposed to or in addition to the ADA). In an apparent attempt to minimize this risk, the regulations provide that an employer does not violate GINA based on its use, disclosure or acquisition of medical information that is not genetic information about a manifested disease, disorder or pathological condition even if the disease, disorder or pathological condition has a genetic basis or component. In this vein, the regulations further clarify that the ADA governs the acquisition, disclosure and use of such medical information.

Best Practices

In light of the risks that these regulations pose, employers should take the following steps: update equal employment policies to prohibit discrimination based on genetic information; include claims based on genetic information in waivers and releases; remove GINA-protected information from personnel files and place it in separate, confidential medical files; abandon requests for genetic information (particularly requests that seek family medical history); use the above-referenced "safe-harbor" language when requesting medical information or making requests that could be construed as seeking genetic information; train supervisors to understand and comply with GINA; and post notices advising employees of their rights under GINA.

If you would like assistance in connection with GINA compliance, please contact any Seyfarth Labor and Employment attorney on our website.

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