Reinhart

Final Regulations Issued for Title II of the Genetic Information Nondiscrimination Act

Almost one year after Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA) became effective, the Equal Employment Opportunity Commission (EEOC) issued its final regulations to implement and clarify the law. Employers should take steps now to ensure compliance with the final regulations, which take effect on January 10, 2011. As further detailed in our December 2009 e-alert, GINA applies to employment agencies, labor unions, joint labor-management training programs, and private, state and local government employers with fifteen (15) or more employees. GINA prohibits these entities from discriminating against or harassing covered employees based on their genetic information, and generally restricts employers from acquiring, requesting, requiring or purchasing the genetic information of covered employees and those individuals' family members.

However, the regulations explain that an employer does not violate GINA when it acquires genetic information through a lawful medical information request if the employer directs the employee and/or health care provider from whom it requested medical information not to provide genetic information in response to the request. If employers acquire genetic information despite this direction, the EEOC would consider such an acquisition to be inadvertent and not a violation of GINA. The regulations include the following model statement that employers may use in their medical information request forms to take advantage of this safe harbor provision:

> 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.

POSTED:

Dec 9, 2010

RELATED PRACTICES:

Labor and Employment
https://www.reinhartlaw.com/practices/labor-and-employment

RELATED PEOPLE:

Katie D. Triska
https://www.reinhartlaw.com/people/katie-triska

Reinhart

Because employers often request medical information in connection with Family and Medical Leave Act (FMLA) leaves of absences, such requests could expose employers to liability under GINA if the requests do not include the above safe harbor language and the employer cannot establish that the request for medical information was not likely to result in the disclosure of genetic information. However, the EEOC has indicated that the Department of Labor's model FMLA certification form may be sufficient for employers to claim the safe harbor, and employers need not revise their FMLA certification forms to include the GINA safe harbor language. Nonetheless, until the EEOC provides official guidance for employers, employers may want to include the GINA safe harbor language in all medical information requests, including FMLA certification forms.

The final regulations also include other provisions that affect employers, including the following:

- **The definition of an "employee**." The regulations clarify that GINA applies to applicants and former employees, in addition to current employees. Employers should therefore ensure compliance with GINA as to all of these individuals.
- **Inadvertent acquisition of genetic information**. The regulations explain that acquiring genetic information by overhearing conversations or engaging in casual conversations does not generally violate GINA. For example, asking "How are you?" or "Did they catch it early?" of an employee recently diagnosed with cancer is not a violation of GINA. However, an employer may not ask probing follow-up questions that are likely to result in the acquisition of genetic information.
- **Employee wellness programs**. The regulations provide that employee wellness programs are generally permissible and that employers may obtain aggregated genetic information if participating employees give prior, voluntary, knowing and written authorization and if the employer does not condition any financial inducements on participants providing genetic information.
- **Acquiring genetic information from commercially and publicly available sources**. The regulations state that, with limited exceptions, employers are not liable for acquiring genetic information of a covered individual from commercially and publicly available sources—including the internet—so long as employers do not intend to obtain genetic information.

To avoid potential liability under GINA, employers should promptly take affirmative steps to bring their policies and practices into compliance with the final regulations, including, for example:

- Revising equal employment opportunity, harassment and discrimination policies to include a nondiscrimination statement on the basis of genetic information;
- Updating separation agreements to include a release of GINA claims;
- Modifying medical information request forms and FMLA certification forms to include the GINA safe harbor language;
- Revising job applications and reviewing employee wellness programs to comply with GINA;
- Training supervisors and managers regarding prohibited acts under GINA; and
- Reviewing practices involving the use of the internet to ensure compliance with GINA.

Please contact your Reinhart attorney or any member of our Labor and Employment Practice if you have any questions about GINA.