

EEOC Issues Final GINA Regulations [11-9-10]

After several delays, the Equal Employment Opportunity Commission (EEOC) has issued final regulations that interpret and implement the nondiscrimination requirements of the Genetic Information Nondiscrimination Act (GINA). For the most part, the final regulations don't differ substantially from the ones proposed by the agency nearly two years ago. However, they do provide specific examples of what employers must do (and refrain from doing) to comply.

Medical Information. The most important news for employers is that the regulations provide specific language they can use in medical inquiry forms, such as pre- and post-offer medical exams and fitness-for-duty exams. By using this "safe harbor" language, employers can avoid liability under GINA should they receive protected genetic information in response to those inquiries. (The specific language can be found at the end of this alert.) The regulations also provide that employers may choose to convey the information verbally if the request for medical information itself is also verbal.

Social media. Also of great interest to employers is the EEOC's discussion of situations in which protected genetic information may be obtained through the use of social media. In general, employers that obtain such information inadvertently probably don't violate GINA. Some examples of this would include:

- * an HR manager who learns protected information about employees or applicants by doing a simple Google search of their name; and
- * learning genetic information from employees' Facebook or other social media site if they have given you permission to access their information on that site (i.e., they have accepted you as their Facebook friend or LinkedIn contact).

What isn't allowed, however, is performing a search or asking questions on a social media site that are "likely to result in uncovering genetic info."

Wellness programs. Finally, the regulations clarify how GINA applies to voluntary wellness programs and the health risk assessments that are used in conjunction with such programs. In general, employers may not offer a financial inducement for employees to provide genetic information.

However, you may offer financial inducements for employees to complete a health risk assessment that includes questions about family medical history or other genetic information if:

- * the assessment specifically identifies which questions request genetic information; and
- * you make clear, in language that is reasonably likely to be understood by those completing the health risk assessment, that the questions are optional and the financial reward will be provided to employees whether they complete that portion of the assessment or not.

The regulations are effective 60 days after they are published in the Federal Register, which should happen some time this week. To read the regs yourself, go to <http://www.hrhero.com/downloads/GINA.pdf>.

Safe Harbor Language for Medical Inquiries

The final rule includes the following language that employers may use in their otherwise lawful 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 employees or their family members. In order 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."

If a medical provider discloses genetic information to the employer in spite of that warning, the disclosure will be deemed inadvertent and not in violation of GINA.