Employment Edge 119th Edition—Regulations Implementing GINA Take Effect

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On January 10, 2011, the regulations implementing the employment aspects of the Genetic Information Nondiscrimination Act (GINA) went into effect. There are several rules included in the new regulations that employers need to know.

GINA, which passed into law in 2008 and became effective in November 2009, forbids employers from collecting, requesting, using, or disclosing genetic information about their employees. Genetic information is defined under the Act to include information regarding an individual's or a family member's genetic tests, family medical history, the individual's use of genetic services, and genetic information about a fetus being carried by the individual or a family member. Some of the new rules in the regulations include:

- **Employers should make clear, whenever requesting medical information from employees, that they are not requesting genetic information.** An employer does not violate GINA if it inadvertently acquires genetic information about an employee. One way employers may inadvertently acquire such information is in response to an otherwise lawful request for medical information, such as a request for an FMLA medical certification, documentation related to a reasonable accommodation request, or a fitness-for-duty test. The new regulations provide that such an acquisition of information "will not generally be considered inadvertent" unless the employer directs the individual and/or health care provider not to provide genetic information. The regulations provide sample "safe harbor" language that employers can use to direct an individual and/or health care provider not to provide genetic information. The sample safe harbor language states:

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.

Alternative language may also be used, as long as individuals and health care providers are informed that genetic information should not be provided. Employers should update any forms or letters that include requests for medical information to include the basic information in the regulations' "safe harbor" language.

- **Employers should not ask probing questions about family medical history.** The regulations state that an employer does not violate GINA when a manager or supervisor learns genetic information about an individual during a casual conversation. For example, if in response to news of a cancer diagnosis, a manager or supervisor asks an employee "how are you?" or "how is your dad?" or "did they catch it early?" or "will your daughter be okay?," these questions would not be considered a violation of GINA. However, the manager or supervisor could violate GINA by following up with questions that are more probing in nature, such as whether other family members have the condition, or whether the individual has been tested for the condition, because the manager or supervisor should know that these questions are likely to result in the acquisition of genetic information.
- **Acquisition of genetic information via Internet and social media sites.** The regulations provide that an Internet search on an individual that is likely to result in obtaining genetic information constitutes an unlawful "request" for genetic information. However, the regulations also provide that acquisition of information from a social media platform where the employee has given the supervisor permission to access the profile is considered to be inadvertent acquisition of genetic information.
- **Employee wellness programs and health risk assessments.** The GINA regulations provide guidance for employers on the circumstances in which employers may acquire genetic information in connection with voluntary employee wellness programs and health risk assessments. Employers with these programs should be aware of the restrictions contained in the new regulations.
- **Record keeping.** Employers must keep records containing genetic information about an employee in a confidential file separate from the personnel file. Similarly, the ADA requires that medical records related to an employee be kept in a separate confidential file. The GINA regulations make clear that the requirement to keep records containing genetic information in a separate confidential file applies regardless of whether the record is kept in paper or electronic format, so employers that store records electronically need to be sure to put appropriate organization and security protections in place. The regulations also state that genetic information placed in personnel files prior to November 21, 2009, does not need to be removed. However, employers may not use or disclose such genetic information.

Employers should make sure that their policies, procedures, and files comply with GINA and should provide training to managers about the law and about questions they should avoid asking employees.

The attorneys of Gray Plant Mooty's Employment and Labor practice group are available to assist employers with workplace policies, training, and compliance, as well as litigation and dispute resolution. If you have questions about GINA, or other workplace issues, please contact any member of Gray Plant Mooty's Employment and Labor practice group.

specific legal questions you may have.