



legislativeUPDATE

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The Equal Employment Commission Issues Final GINA Regulations

The Equal Employment Opportunity Commission (EEOC) has recently released final regulations implementing Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA). Although GINA was originally effective November 21, 2009 the new regulations do not take effect until Jan. 10, 2011. Given the potentially wide ranging impact of these regulations, covered employers (those with 15 or more employees) need to carefully review their internal policies dealing with the acquisition, use, disclosure, and/or maintenance of sensitive employee medical information. As a result this issue goes beyond an employer's medical benefit plan although the new clarifications do offer guidance on how GINA impacts wellness plans and potential incentives.

Although the new regulations do not interpret Title I of GINA, which prohibits genetic discrimination in health coverage, they do clarify that such discrimination could result in significant sanctions being imposed on an employer under Title II. This is in spite of the fact that sanctions may also be imposed on a group health plan under Title I for the same actions. GINA and its newly implemented regulations:

- Prohibit the use of genetic information in employment decisions, including those concerned with hiring, firing, compensation, and terms and conditions of employment;
- Generally bar an employer from requesting, requiring, or purchasing genetic information, other than to comply with the Family and Medical Leave Act (FMLA) or similar laws, for use in genetic monitoring related to toxic substances in the workplace, or for DNA analysis for law enforcement purposes;
- Permit employers to request genetic information in connection with a wellness program, provided, among other things, that an employee consents to receive such request, and any financial inducement for providing such information is also available to employees participating in the program who do not do so (e.g., they provide other information that is not genetic information);
- Require that genetic information be maintained as a confidential medical record, strictly limiting its disclosure; and
- Provide broad remedies for individuals whose genetic information is acquired, used, or disclosed in violation of GINA, and protect employees from retaliation for exercising rights under GINA.

The regulations broadly define "genetic information" to include things like an employee's family medical history and the receipt of genetic counseling or testing, regardless of the results. Genetic

information acquired by an employer and filed in a “general personnel file” before the law’s effective date (November 21, 2009) does not need to be moved to a confidential file, although employers may be advised to do so in order to safeguard the information and protect it from disclosure and use in violation of GINA. Genetic information acquired after GINA’s effective date must be stored in confidential medical files.

The impact of GINA and its new regulations may be significant for employers and plan sponsors. Employer policies and practices that may be affected by the new regulations include record retention policies and procedures (with respect to regulations’ confidentiality requirements), wellness programs that may lead to the acquisition of genetic information, work-related medical examinations, and nondiscrimination policies (which should be revised to address discrimination based on genetic information). Additionally, the new regulations impose a posting requirement on covered entities that directs employers to post an EEOC notice in the workplace that summarizes employee rights under GINA and its new regulations.

It is important that employers evaluate all aspects of their policies and procedures related to the handling of confidential personnel data. They must also examine wellness plans and features as well. The new EEOC updates provide clarity, but also guidance that must be complied with by January 10, 2011. Should you have questions or need assistance in reviewing the GINA issues, please call your Conner Strong account representative at 1-877-861-3220.

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