

## Final GINA Regulations Impact All Employers

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On November 9, 2010, the EEOC published its final regulations concerning the employment aspects of the Genetic Information Non Discrimination Act ("GINA").

Although very few employers consciously utilize genetic information or discriminate against individuals because of genetic information, the prohibitions in GINA impact all employers. Prohibited genetic information includes medical information about an employee's family members. The new regulations provide that an employer may violate GINA even if the employer does not specifically intend to acquire genetic (or family medical) information.

Many employers inadvertently come into contact with what the law defines as "genetic information" when they send employees for medical exams, when they request medical information in connection with requests for accommodation or requests for leave, when they provide employee wellness programs, when their supervisors engage in, or overhear, general, water cooler type conversations or even when supervisors look through Facebook posts.

In order to protect themselves, employers may need to update postings, policies and leave of absence or other medical request forms.

### ***Employers should take precautions to avoid receiving genetic information in connection with requests for medical information and medical exams.***

An employer who requests medical information from an employee or provider to support a request for an accommodation, FMLA leave or other leave, may inadvertently receive genetic information, including family medical information, that is already contained in the provider's file. The regulations provide that such receipt will not run afoul of GINA if either the employer informed the provider not to provide genetic information, with language similar to that suggested by the EEOC, or the request was so narrowly tailored that the request for medical information was not likely to result in the production of genetic information.

However, according to the final regulations, if an employer is requiring an employee to submit to a medical exam in connection with employment (either a pre-employment/post-offer exam or a fitness for duty exam), the employer "must" tell the health care provider not to collect genetic information, including family medical history, as part of the exam. If the provider nonetheless requests genetic information, the regulations provide that the employer may need to take additional reasonable measures, including potentially no longer using that health care professional's services.

### ***Wellness programs cannot include a financial incentive for the disclosure of genetic information.***



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Many wellness programs include a health risk assessment that often requests family medical history. Requesting genetic information in connection with a wellness program is permissible only if the employee's participation is knowing and voluntary (among other things). The final regulations clarify that "voluntary" means that an employer cannot offer a financial incentive to induce individuals to provide genetic information. If a health risk assessment includes questions concerning genetic information, the employer must inform the employees that any incentive will be provided regardless of whether the employee answers the particular questions identified as requesting genetic or family medical information.

***Information obtained through casual conversations or social network sites may still be inadvertent, as long as there is no intentional probing.***

The final regulations keep intact the exceptions for certain inadvertent acquisitions of genetic information, including a supervisor overhearing a conversation about an employee's genetic information or a family member's medical condition or a supervisor viewing similar information on a social media site that he or she had permission to access.

However, the new regulations clarify that although an employer may obtain genetic information inadvertently or through information that is publicly or commercially available, these exceptions do not apply if the employer has deliberately sought the information by asking probing questions or searching for genetic information on line.

GINA's requirements go far beyond simply prohibiting genetic testing.

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