

## Update: EEOC Issues Final Genetic Nondiscrimination Rules

by Susan Huber and Dan Vorhaus

The Equal Employment Opportunity Commission (EEOC) [has issued](#) its final rules and regulations implementing the employment provisions of the Genetic Information Nondiscrimination Act of 2008 ([GINA](#)). Signed into law in 2008, [GINA took effect in two stages in 2009](#), with Title I (which applies to health insurers and plans) effective in May and Title II (which applies to employers) effective in November.

When GINA was passed, Congress instructed the EEOC to issue final rules and regulations no later than May of 2009 describing how the agency intends to interpret and enforce the legislation. Although the EEOC missed that deadline by a full 18 months, the Commission did issue [definitive rules and regulations](#) (pdf) for Title II of GINA last week. (In its defense, the departments responsible for the Title I – Labor, Health and Human Services and the Treasury – have yet to issue final regulations of their own.) The regulations take effect January 10, 2011.

**Reintroducing GINA.** Last November, [we reported](#) that Title II of GINA had joined ranks with the other federal antidiscrimination laws (the Americans with Disabilities Act of 1990 (ADA), Title VII of the Civil Rights Act of 1964 (Title VII) and The Family and Medical Leave Act (FMLA), to name a few), to provide federal protection against workplace discrimination, in this case on the basis of genetic information. Title II of GINA prohibits the use of genetic information in the employment context, and also restricts employers from acquiring or disclosing genetic information.

The EEOC's [proposed regulations](#) (pdf), issued last Spring, received 43 public comments during the 60-day comment period. In tomorrow's post, we will take a closer look at the substance of GINA as interpreted by the EEOC's final regulations, including some important ways in which the Commission revised the regulations to respond to commenters' suggestions.

First, however, we provide a few reminders for employers who are looking ahead to 2011 and their first year with GINA.

**A New Safe Harbor.** One of the most helpful additions to the EEOC's final regulations is the introduction of a new "safe harbor" provision to assist employers in complying with GINA's general prohibitions against requesting or receiving "genetic information," which includes information from genetic tests as well as family medical history information. The safe harbor (§ 1635.8(b)(1)(i)(B) of the regulations) provides that any genetic information received by an employer in response to a "lawful request for medical information" will be deemed "inadvertent and not in violation of GINA" if the request contains the following magic words:

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.

Note that genetic information may still be received inadvertently even if this exact warning is not used. This important clarification was supplied by the EEOC in response to comments from small businesses and their representatives who were concerned that their information requests and corresponding informational warnings are often provided in oral form, not written.

Nonetheless, most employers will likely want to adopt the EEOC's language to be sure they are availing themselves of the safe harbor any time they request medical information from an employee. Examples include an employer's request for documentation in support of a request from an employee under a federal or state law such as the ADA (for a reasonable accommodation) or the FMLA (for a requested leave due to a medical condition).

**A Familiar Look.** Many other aspects of GINA's Title II should look familiar to veteran employment lawyers and HR representatives, as the law and regulations incorporate many definitions and provisions from Title VII, the ADA and other federal antidiscrimination laws. For instance, like Title VII, "employee" includes former employees and job applicants, not just current employees. Similarly, while employers are required by GINA to keep genetic information in a confidential file separate from the rest of an employee's file, the EEOC reminds employers that this requirement already exists under the ADA for employee medical data, and the EEOC clarifies that "GINA does not require that covered entities maintain a separate medical file for genetic information."

The EEOC has also provided a [workplace poster updated to include GINA](#) and has committed to providing training and other compliance materials on its website. Indeed, so straightforward is GINA's implementation in the EEOC's eyes, that it estimates that "typical human resources professionals will need to dedicate, at most, three hours to gain a satisfactory understanding of the new requirements, either by attending an EEOC-sponsored event or reviewing the relevant materials on their own."

No matter how many hours employers spend attempting to understand GINA and adapt to its requirements, here are a few actions that employers and their attorneys should be carefully considering in order to ensure they stay on GINA's good side:

- [Post all required EEOC notices](#) advising employees of their rights to equal employment under GINA.
- Review handbooks and policy manuals, particularly social media policies, to ensure consistency with GINA's requirements.
- Train managers and supervisors to comply with GINA, including ensuring that such individuals understand the limited ways in which they can inquire about an employee's genetic information, including family medical history.
- Review all routine requests for medical information, particularly in the context of wellness programs, employee questionnaires,

leave-of-absence forms and other similar documentation, to ensure that genetic information is not requested or reasonably likely to be disclosed. Add appropriate safe harbor language to such forms where appropriate.

- Review internal policies to ensure compliance with existing employment law (in addition to GINA) such as the ADA and FMLA, including separating personnel files from files containing any confidential medical or genetic information.
- Closely examine any policies or procedures that might result in a request, requirement or acquisition of genetic information and, if genetic information may be obtained by the company, ensure that such information, however acquired, is not used to take prohibited employment-related actions or disclosed in violation of GINA's confidentiality provisions.

**More Questions?** At nearly thirty pages of three-column print in the Federal Register, the EEOC's final regulations are a lot to process. Tomorrow we will take a closer look at the substance of the regulations, including some important changes between the draft regulations and the final regulations. In the meantime, the EEOC has published a [helpful Q&A on its website](#). Although designed for small businesses, it is likely to be helpful for any employer seeking practical information about how to comply with Title II of GINA.