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**Equal Employment Opportunity Commission Releases
Proposed Regulations to Prohibit Genetic Discrimination or Misuse of “Genetic Information”**

On March 2, 2009, the Equal Employment Opportunity Commission (“EEOC”) released proposed regulations¹ to implement Title I and Title II of the Genetic Information Nondiscrimination Act (“GINA”), which was signed into law in May 2008, and goes into effect on November 21, 2009. Title I amends portions of the Employee Retirement Income Security Act, the Public Health Service Act, and the Internal Revenue Code, and prohibits insurers and health care providers from discriminating on the basis of genetic information. Title II of GINA prohibits the use of genetic information in employment decision-making, generally prohibits the intentional acquisition of genetic information about applicants and employees, requires that genetic information be maintained as a confidential medical record, and imposes strict confidentiality requirements.

GINA generally defines “genetic information” as: (1) the genetic tests² for an individual, an individual’s family members or a related fetus or embryo; (2) family medical history; or (3) an individual’s or family member’s request for or receipt of genetic services. GINA explicitly states that “genetic information” does not include information about the sex or age of the individual or family member. The proposed rule states that most medical information about a manifested disease, disorder, or pathological condition (e.g., “that an employee has a disease, such as cancer”) would not be classified as genetic information, but remains subject to the privacy and confidentiality requirements of the American with Disabilities Act (“ADA”).

The general rule provides that employers may not request, require, or purchase genetic information with respect to an employee/applicant or family member³ of an employee/applicant. There are, however, six proposed exceptions to the general rule against acquisition of genetic information:

- (1) Inadvertent acquisition of genetic information. Six examples of inadvertent acquisition of genetic information are provided in the proposed regulations, and range from an employer inadvertently requesting or requiring the information to supervisors overhearing conversations and employees volunteering genetic information.
- (2) Where the covered entity offers health or genetic services.
- (3) Where an employer requests family medical history to comply with certification provisions of the Family and Medical Leave Act (“FMLA”).
- (4) Where the covered entity acquires genetic information from documents that are commercially and publicly available, excluding medical data bases and court records.
- (5) Where an employer conducts DNA analysis for law enforcement purposes.
- (6) Where the covered entity acquires genetic information through or for use in genetic monitoring of the biological effects of toxic substances in the workplace, subject to the significant conditions described below.

¹ 74 Fed. Reg. 9056 (March 2, 2009)

² GINA defines a “genetic test” as “an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detect genotypes, mutations, or chromosomal changes.”

³ Under GINA, a “family member” includes persons related from the first to fourth degree of an individual. This includes the individual’s children, siblings, parents, and extends to great-great grandparents, first cousins once removed, as well as individuals in between the individual and these persons (e.g. half-siblings, aunts, uncles).

Under the proposed rule, employers would be required to implement four basic requirements to qualify for the workplace genetic monitoring exemption. First, unless the monitoring is required by law, employers would have to obtain an individual's prior informed, written, and voluntary consent, which: (1) describes the type of genetic information that will be obtained and the general purposes for which it will be used; and (2) describes the limitations on disclosure of the genetic information. Second, the monitored individual would have to be informed of the results. Third, all genetic monitoring would have to comply with all applicable provisions of the law and implementing regulations, including the Occupational Safety and Health Act. Fourth, the employer could only receive the monitoring information in aggregate form that does not disclose the identity of specific individuals.

Regardless of how an employer acquires genetic information, it may not use that information in making employment decisions, under any circumstances. Furthermore, the an employer would be required to maintain that information in medical files that are separate from personnel files, and treat that information as a confidential medical record. Employers would be prohibited from disclosing genetic information except in the following six types of circumstances, and subject to further conditions: (1) to the monitored employee (or his/her family member if the family member is receiving the genetic services); (2) to an occupational or other health researcher, provided the research is being conducted in compliance with the Department of Health and Human Services regulations in 45 CFR part 46; (3) in response to a court order; (4) to government officials investigating compliance with Title II of GINA; (5) to the extent the disclosure is made in support of an employee's compliance with the certification provisions of the FMLA; and (6) to a public health agency to communicate about the manifestation of a contagious disease that presents an imminent hazard of death or life-threatening illness.

The remedies for a violation under Title II of GINA are the same remedies available under Title VII of the Civil Rights Act -- reinstatement, hiring, promotion, back pay, injunctive relief, compensatory and punitive damages, attorneys' fees, and costs. The cap on combined compensatory and punitive damages (excluding past monetary losses) ranges from \$50,000 for employers with 15-100 employees to \$300,000 for employers with more than 500 employees. Unlike Title VII, GINA does not allow disparate impact claims. Individuals filing discrimination complaints under Title II of GINA must allege that the employer committed discrimination intentionally. Even absent an allegation of discrimination, employees may collect damages and receive equitable relief for an employer's violation of the acquisition or confidentiality provisions of GINA.

Employers should also be aware that GINA will preclude certain practices that have been permitted by the ADA. Currently, the ADA permits employers to arrange for physicians to obtain family medical history or conduct genetic tests of job applicants once an offer of employment has been made. This course of action will be prohibited when GINA becomes effective on November 21, 2009. Therefore, employers should review their current policies and human resources practices. Employers should also train supervisors, managers, and HR staff about GINA. Employers should begin implementing policies and procedures to prevent inadvertent disclosure of genetic information. In addition, employers will be required to post notices in conspicuous places describing GINA's provisions. The EEOC will include the appropriate language for use in such notices in a *Federal Register* publication.

The 60-day comment period closes on May 1, 2009.

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