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Published by Proskauer Rose, the "Employment Law Counseling & Training Tip of the Month" provides best practice tips to assist employers in meeting today's challenging workplace environment. Our Employment Law Counseling & Training Practice Group counsels employers with respect to the interplay of multiple federal, state, and local laws governing today's workplace, helping them avoid workplace problems, and improve employee satisfaction.

Tip of the Month

Tip: Have You Updated Your HR Policies To Comply With GINA?

How can employers offer wellness programs to employees which include disease management and mandatory Health Risk Assessments or make requests for medical information needed to grant their employees leave under the Family and Medical Leave Act (FMLA) or accommodations under the Americans with Disabilities Act (ADA) without violating the Genetic Information Nondiscrimination Act of 2008 (GINA)? The Equal Employment Opportunity Commission's (EEOC) final rules and regulations implementing Title II of GINA, which became effective on January 10, 2011, help clarify when and how employers can obtain and use medical information without running afoul of GINA. This Tip of the Month discusses the final GINA regulations and provides in-house counsel and Human Resources professionals with practical guidance on how to adapt company policies and procedures to comply with GINA's requirements.

Introduction

GINA prohibits employers and other covered entities from requesting, requiring, or purchasing an individual's genetic information and from making employment decisions based on such data, subject to certain limited exceptions. The statute also prohibits retaliation against individuals who exercise their rights under GINA. GINA incorporates by reference many of the definitions, remedies, and procedures from Title VII of the Civil Rights Act of 1964 and other statutes intended to protect employees from discrimination.

The EEOC's final regulations provide important guidance regarding GINA's prohibition against requesting, requiring, or purchasing genetic information, including how GINA applies to genetic information obtained through electronic media and social networking sites. Perhaps most significantly, the EEOC reversed its prior position which would have significantly hampered employer-sponsored wellness programs. The final rules make clear that employers are permitted to request genetic information as part of a voluntary wellness program without violating GINA. In the final regulations, the EEOC also provided "safe harbor" language which employers can use when requesting health-related information from employees.

Acquisition of Genetic Information

Although the new regulations clarify that an employer can violate GINA *without* a specific intent to acquire genetic information, they give employers wider berth for genetic information that is requested or obtained inadvertently. In that regard, the final regulations attempt to address the "water cooler problem" by establishing that an employer will *not* violate GINA when it "unwittingly receives otherwise prohibited genetic information" through "casual conversations with an employee" or overhears "conversations among co-workers." Despite this exception, the final rules expressly prohibit employers that may have "inadvertently" acquired genetic information from taking the next step and asking "follow-up questions that are probing in nature." Because the regulations do not establish a bright-line rule for determining when a follow-up question might transform a casual conversation into an inquiry prohibited by GINA, supervisors and managers should be advised about GINA so that they exercise caution in their daily interactions with employees. Indeed, a supervisor might well run afoul of GINA by inquiring about an employee's well-being even when the question was not intended to elicit genetic information. Although general questions will not violate GINA, such as, "How are you feeling today?" or "Did they catch it early?", the regulations state that employers should avoid more specific inquiries, such as whether an individual has been tested for a certain medical condition.

In addition, the inadvertent acquisition exception can also be applied to interactions taking place in the "virtual" world. Under the final regulations, employers do not violate GINA simply because a supervisor and an employee are connected on a social networking site such as Facebook and the employee provides family medical history on his page. Nonetheless, employers may violate GINA when they acquire genetic information as a result of a *targeted* internet search that is likely to reveal such information. The EEOC has explained that targeted searches would likely include information disclosed through the search of medical databases, court records, research databases available to scientists on a restricted basis, and social networking sites that can only be accessed with the individual's permission.

In the final regulations, the EEOC has provided a "safe harbor" that is intended to protect employers who may receive genetic information about its employees in response to a lawful request for employee medical information, such as a result of a request for an accommodation under the ADA or a request for leave under the FMLA. In these situations, an employer's acquisition of genetic information will be deemed inadvertent and not in violation of GINA so long as the request contains an affirmative warning to individuals and healthcare providers *not* to provide genetic information. The final rules set forth specific language that employers should use when providing such notice to employees and healthcare providers. Significantly, the GINA regulations provide an exception permitting the disclosure of family medical history as part of the FMLA's certification process when an employee requests leave to care for a family member with a serious health condition. The exception is necessary because family medical history must be provided as part of the FMLA certification process.

Wellness Program Exception

Title II of GINA includes an exception to the prohibition on requesting, requiring, or purchasing genetic information for wellness and disease management programs that are voluntary.[1] Wellness programs are typically designed to help all employees become and stay healthier whereas disease management programs are geared toward helping employees who have or are at risk for developing chronic medical conditions. Often, Health Risk Assessments are used to identify wellness and/or disease management programs that would be particularly appropriate for an individual.

Before issuance of the final regulations, the guidance on "voluntary" wellness programs seemingly provided that employers could neither require participation nor penalize employees who did not participate. It was unclear what level of financial incentive, if any, could be provided without rendering the program involuntary in the eyes of the EEOC.

The final GINA regulations clarify that employers may offer certain kinds of financial inducements to encourage participation in wellness programs. GINA precludes employers from offering an inducement for individuals to provide genetic information itself. However, under the new regulations, employers may offer individuals an inducement for completing an HRA that includes questions about family medical history or other genetic information *so long as* the employer specifically identifies those questions *and* makes clear that the individual need not answer those questions to receive the inducement.

The EEOC also indicated that Title II allows employers to offer wellness and disease management programs and financial inducements for participation in such programs to individuals who, based on their voluntarily provided genetic information, appear to be at an increased risk of developing a health condition in the future. In order to avoid a violation of GINA Title II, however, employers must also offer the programs and inducements to individuals with current health conditions, and/or to individuals whose lifestyle choices put them at risk of acquiring a condition.

Unfortunately, the EEOC did not go so far as to explicitly set forth a formula employers can use to determine the level of financial inducement that is permissible under Title II of GINA. However, the EEOC's final regulations would appear to permit employers to rely on the 20 percent standard articulated in the Health Insurance Portability and Accountability Act.[2]

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[1] Title II of GINA applies only to wellness programs offered outside an employer's group health plan. If a wellness program is offered under the employer's group health plan, it will be subject to Title I of GINA. Wellness programs subject to Title I may not request genetic information, including family medical history, prior to or in connection with enrollment or at any time for underwriting purposes.

[2] Under the Health Insurance Portability and Accountability Act, a wellness program reward must not exceed 20 percent of the cost of coverage. Under the Patient Protection and Affordable Care Act, the 20 percent limit will increase to 30 percent for plan years beginning on or after January 1, 2014 and may be increased by federal administrative action to as high as 50 percent.

Keeping Genetic Information Confidential

Although GINA requires that employers maintain the confidentiality of genetic information, the final regulations do *not* require that a separate medical file be kept for such information. Rather, genetic information may be kept in the same file as medical information subject to the ADA. Furthermore, employers do not have to remove genetic information if it was placed in personnel files prior to November 21, 2009 (the date on which GINA took effect). However, the final rules make clear that GINA still prohibits the *use* and *disclosure* of any such genetic information obtained prior to the statute's effective date.

GINA and the ADA

The final regulations also clarify that GINA does *not* protect individuals who are discriminated against because they have an *actual* condition (such as breast cancer) even if the condition has a genetic basis, although a cause of action might exist under the amended Americans with Disabilities Act ("ADA") or local law. Because GINA is primarily concerned with protecting individuals who may be discriminated against because an employer thinks they are at an increased risk of acquiring a condition *in the future*, the statute only prohibits discrimination based on genetic information. Furthermore, the final regulations explicitly state that the ADA continues to prohibit discrimination against individuals on the basis of manifested conditions that meet the definition of disability.

GINA also places limitations on employers' ability to obtain genetic information as a part of a disability-related inquiry, such as in connection with employee discussions of reasonable accommodations, or medical examination. While employers are permitted to conduct fitness for duty and post-job offer medical exams under the ADA and, as appropriate, in connection with efforts to reasonably accommodate an employee who claims a disability, the final GINA regulations preclude employers from asking questions regarding an applicant or employee's family medical history and from conducting genetic tests as part of those exams.

Potential Litigation Issues Addressed in the Final Rules

As noted above, GINA also prohibits retaliation against persons who oppose discrimination based on genetic information. In the final regulations, the EEOC advises that the standard for GINA retaliation claims is the same as that announced for Title VII claims in *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53 (2006) because GINA contains the same anti-retaliation language used in Title VII. In *Burlington Northern,* the United States Supreme Court held that Title VII's anti-retaliation provision protects an individual from conduct – whether or not related to employment – that a reasonable person would have found "materially adverse," meaning that the action "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 57–58 (citations omitted).

Consistent with the vast majority of anti-discrimination laws, the final rules also clarify that GINA does *not* preempt state or local laws that provide equal or greater protection from discrimination on the basis of genetic information or improper access or disclosure of genetic information. The EEOC's regulations further state that GINA does not limit the

rights or protections under federal, state, or local laws that provide greater privacy protection to genetic information.

The final regulations also explicitly state that GINA does *not* provide a cause of action for disparate *impact* even though the language of the statute specifically prohibits actions that have the "purpose or effect" of limiting, segregating, or classifying individuals on the basis of genetic information. However, Congress directed that a commission be formed six years after GINA's enactment to report on the possibility of allowing disparate impact claims.

Recommended Tips for Employers

Employers should take the time to review their practices and procedures to ensure that they are in compliance with GINA and the new regulations. Consideration should be given to the following non-exhaustive list of action-steps:

- Modify EEO, anti-discrimination, and anti-harassment policies to include genetic information as a protected category.
- Train management and human resources personnel about the obligations imposed by GINA, including the statute's prohibition against making employment decisions based on genetic information and the requirement that employers keep genetic information confidential.
- Amend relevant policies and forms to incorporate the EEOC's "Safe Harbor" language.[3]
  - Review policy documents and incorporate "safe harbor" language in any policy which addresses an employer's need to obtain employee medical information in connection with requests leave under the FMLA, state law, or other sick leave policy, as well as policies governing requests for medical information for requests for accommodation under the ADA.
  - Include "safe harbor" language in any forms requesting employee medical information, such as requests for accommodation under the ADA.
- Review wellness programs, disease management programs, and health risk assessments for compliance with GINA. As noted above, any financial incentive offered to employees for participating in a wellness program must: (i) specifically identify any questions requesting genetic information; (ii) state that employees will receive the financial incentive regardless of whether they answer the identified questions; and (iii) comply with HIPAA's 20% rule.
- Review record-keeping practices to ensure that employees' genetic information is maintained in a manner consistent with GINA's confidentiality requirements.
- Modify any forms used in connection with reasonable accommodation disability requests, fitness for duty, and/or post-job offer medical exams so that they do ***not*** include requests for genetic information or family medical history.

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[3] Since the new GINA regulations create an FMLA exception that permits the disclosure of family medical history in situations where the employee is seeking leave to attend to a family member's serious health condition, we would suggest a slight modification to the EEOC's "Safe Harbor" language, making clear that employees need not provide "genetic information" when responding to information concerning their own serious health condition.

If you have any questions or need assistance revising pertinent policies to comply with GINA, please contact your Proskauer relationship lawyer, or any of the lawyers listed on this Counseling Tip of the Month.

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The Proskauer Rose Employment Law Counseling and Training Practice Group is a multidisciplinary practice group throughout the national and international offices of the firm which advises and counsels clients in all facets of the employment relationship including compliance with federal, state and local labor and employment laws; review and audit of employment practices, including wage-hour and independent contractor audits; advice on regulations; best practices to avoid workplace problems and improve employee satisfaction; management training; and litigation support to resolve existing disputes.

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