

GINA Final Regulations Require Modification to Requests for Medical Information

For more information regarding this or any other employment-related issue, please contact your Vorys attorney or a member of the Vorys Labor and Employment Group by calling 614.464.6400.

The Genetic Information Nondiscrimination Act of 2008 (GINA) generally limits employers' collection and use of genetic information and prohibits employers from discriminating against employees, applicants, and their families on the basis of their genetic information. Previously, the Equal Employment Opportunity Commission (EEOC) issued proposed regulations which provided examples and explained the interplay between GINA and other employment laws, including the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA). Recently, the EEOC issued Final Regulations, effective on January 10, 2011, which include important changes and helpful clarifications.

As provided in the Final Regulations, GINA restricts an employer from "requesting, requiring, or purchasing genetic information" of job applicants and current and former employees, as well as their family members. Moreover, employers cannot ask about an individual's health in a manner that is likely to result in the acquisition of genetic information. Under GINA's broad definition, the term "genetic information" includes any information relating to genetic tests, genetic monitoring, family medical history, and an individual's

request for, or receipt of, genetic services. GINA's definition of "family member" encompasses all persons who become related to an individual through marriage, birth, and adoption, ranging from siblings to great-great grandparents and cousins once removed.

GINA does not prevent certain "inadvertent" acquisitions of genetic information, such as information obtained through: (1) "water cooler" conversations; (2) employee participation in a voluntary wellness program; (3) public information including social networking sites; and (4) lawful requests for information under the ADA or FMLA, if the employer affirmatively warns individuals and health care providers from whom they are seeking medical documentation not to provide genetic information. Nonetheless, employers should take proactive measures to limit the inadvertent acquisition of genetic information. As a best practice, any employer that asks for employee health information should explicitly request that genetic information not be provided.

Safe Harbor Notice

GINA creates a "safe harbor" for employers who receive genetic information in response to a lawful request for health-related

information from employers who warn the employee and/or health care provider from whom it requested the information not to provide genetic information. To best ensure compliance with GINA, employers should take advantage of the “safe harbor” provision by including the following language in any request (oral or written) for information regarding an individual’s current medical condition:

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 employees or their family members. In order 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 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.

This “safe harbor” applies to all lawful requests for documentation: (1) where an employee requests accommodation under the ADA; (2) where an employee requests FMLA leave; and (3) to comply with FMLA return to work certification requirements. Employers currently using FMLA forms issued by the Department of Labor can continue to use these standard forms; however, the safe harbor language should be included as an addendum or attachment to each form.

Mandatory Notice to Health Care Providers

Separate and distinct from the safe harbor notice, GINA requires a mandatory notice whenever an employer asks a health care professional to conduct an employment-related medical examination, such as a “fitness for duty” examination, where the acquisition of genetic information would be likely in the absence of a warning. In these instances, the employer must explicitly instruct the physician not to collect genetic information.

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