



Maria F. Manuel
Onebane Law Firm
P. O. Box 3507
Lafayette, Louisiana 70502
337-237-2660
manuelm@onebane.com
www.onebane.com

EEOC Issues Final Regulations under The Genetic Information Nondiscrimination Act

The Equal Employment Opportunity Commission (EEOC) issued its final regulations interpreting the Genetic Information Nondiscrimination Act (GINA). GINA generally prohibits discrimination based on a person's genetic information or family medical history. Under the law, employers may not request, require or purchase an individual's genetic information or make employment decisions based on this information. The regulations provide important guidance for employers in key areas.

Medical Information: Employers cannot request an employee's family medical history when doing medical exams and may not gather this information for other purposes, such as for documenting the need for a leave of absence. Importantly, the regulations provide employees with specific language that they can use on medical inquiry forms to avoid receiving this type of information from a health care provider. The "safe harbor" language is as follows:

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'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.

If employers use this language on forms sent to health care providers and genetic information is still provided, the disclosure will be considered inadvertent, and employers can avoid liability.

Inadvertent Acquisition of Genetic Information. As all employers know, employees engage in “water cooler” talk at work and may themselves disclose genetic information or family medical history in casual conversations with supervisors or co-workers. The EEOC's final regulations address the issue of receiving information through “casual conversations.” In general, employers are not liable for inadvertently receiving genetic information in this way.

Employers may also inadvertently acquire genetic information through the use of social media or the Internet. In general, employers are also not liable if they inadvertently obtain genetic information through these means. For example, if an employee has given a supervisor permission to view information posted on a Facebook or other social media site by making that supervisor a “friend,” the employer is not liable if the supervisor discovers genetic information or family medical information posted on the employee’s site. Another example would be the discovery of genetic information or family medical history by conducting a general search of the Internet using the applicant or employee’s name. This would be considered an inadvertent disclosure for which an employer would not be liable. Notably, employers cannot perform searches or ask questions of employees on social media sites that are “likely to result in uncovering genetic information.”

Wellness Programs. The final regulations provide guidance on voluntary wellness programs and the health assessments that are usually part of these programs. Generally, an employer may not offer any financial inducements for participation in wellness programs, and participation in wellness programs has to be completely voluntary. However, the regulations outline specific circumstances under which an employer may offer financial inducements for employees to complete a health risk assessment that includes questions about family medical history or other genetic information. First, the assessment has to specifically identify for employees which questions request genetic information or family medical history. Second, employers must include on the form language that is reasonably understandable that informs employees that answering the questions about genetic information or family medical history is optional and employees who choose not to complete these questions will still receive the financial inducement.

Of course, employers should always keep in mind that even if they receive genetic information or information on family medical history, they must keep this information confidential and cannot use the information to make any employment decisions.

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