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## New Regulations Interpreting the Genetic Information Nondiscrimination Act Become Effective January 9

Regulations interpreting the Genetic Information Nondiscrimination Act (“GINA”) go into effect on **January 9, 2011**. Issued by the Equal Employment Opportunity Commission, the regulations provide guidance for complying with the law. Briefly, GINA prohibits the use of genetic information when making employment decisions. Employers are also restricted from acquiring employees’ genetic information and are limited in the disclosure of such information, if acquired. Genetic information includes (1) an employee’s or family member’s genetic tests; (2) family medical history; (3) an employee’s request for, or receipt of, genetic services, or participation in clinical research that includes genetic services by the employee or family member; or (4) genetic information of a fetus carried by an employee or by an employee’s pregnant family member and the genetic information of any embryo legally held by the individual using an assisted reproductive technology.

Employers are prohibited from requesting genetic information. This includes conducting an Internet search to obtain genetic information; listening to conversations or searching an employee’s personal effects to obtain genetic information; and asking about an individual’s current health status to obtain genetic information.

The regulations make clear that employers can violate GINA, even without an intent to violate the law, by engaging in an activity that presents a “heightened risk” of acquiring genetic information. One example is failing to inform an employee, from whom medical

documentation is requested, that he/she is not to provide genetic information. In order to be protected, a warning must be given when an employer requests a health care professional to conduct an employment-related medical examination. To view sample language an employer can use to gain this protection, please [click here](#) or visit <http://www.shipmangoodwin.com/files/upload/sampleGINAlanguage.pdf>.

This language should be provided to employees whenever medical documentation is requested. For example, the statement should be given when asking for medical information relating to a reasonable accommodation for a disability.

GINA allows employers to obtain genetic information in connection with employer-provided health or genetic services, including wellness programs. The individual participating in such a program must provide prior knowing, voluntary, and written authorization. The rule requires employers to use an authorization form that is written and is easy to understand. It must describe the information being requested and the safeguards to protect against unlawful disclosure. To view a sample of an authorization form, please [click here](#) or visit <http://www.shipmangoodwin.com/files/upload/sampleGINAAuthorization.pdf>.

The final rules allow employers to offer financial inducements for participation in disease management programs based on voluntarily provided genetic information as



long as the employer offers the program and inducements to individuals with current health conditions and/or individuals whose lifestyle choices put them at increased risk of developing a medical condition.

It is not a violation of GINA for an employer to inadvertently learn about genetic information through casual conversation or in response to a question such as “how are you?” What happens to that information, however, may result in a violation.

Information obtained from publicly available sources will likely not be a violation of GINA. However, websites with limited access (i.e., sites that require membership to access), would not fall under the “publicly available” exception. The determining factor is “whether access requires permission of an individual or is limited to individuals in a particular group, not whether the source is categorized as a social networking site, personal website, or blog. However, the rule also notes that an employer’s intent will be measured in determining if a violation has occurred. In other words, an employer that actively looks for an employee’s genetic information would run afoul of the statute.

## What You Should Do Now

- Include a prohibition against discrimination based on genetic information in EEO policies.
- Add a written statement that family medical histories or other genetic information should not be provided in connection with a post-offer, pre-employment medical examination, a fitness-for-duty exam, a request for a reasonable accommodation or a request for a leave of absence.
- Train all employees who are responsible for collecting employee medical information on the new regulations.

## Questions or Assistance?

This Alert is intended to highlight the new regulations and cannot discuss all the changes and nuances that may go into effect on January 9th. If you have specific questions, please contact Eric Lubochinski at (203) 324-8154 or Henry Zaccardi at (860) 251-5737.

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