The Employers' Association
People and Performance

BULLETIN

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Urgent Employer Action Needed: GINA Recommends Safe Harbor Language

The Genetic Information Nondiscrimination Act (GINA) was signed into law by President Bush on May 21, 2008 and became effective on November 21, 2009. Regulations concerning the law were issued by the Equal Employment Opportunity Commission (EEOC) on November 9, 2010. These regulations became effective on January 10, 2011. GINA primarily addresses the use of genetic information in health insurance, but also prohibits the use of genetic information in employment. It applies to private, state and local government employers with 15 or more employees.

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(GINA continued from page 1)

The new regulations implemented by the EEOC restrict an employer's ability to collect an employee's genetic information. The regulations specifically address what might happen if the employer "inadvertently" learns of an employee's genetic information pursuant to an otherwise lawful request for documentation related to an employee's current medical condition (e.g., to support an employee's leave of absence or request for reasonable accommodation). The regulations create a safe harbor for employers who request medical information from employees under these circumstances. Employers will not be in violation of GINA if they receive genetic information in response to such a request if they provide the following warning to the employee's health care provider:

"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 an individual or family member of the individual, except as specifically allowed by this law. 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."

The warning may be accomplished in writing or orally, but must be documented. (We would recommend that the warning be accomplished in writing). The warning is not mandatory, but employers who fail to provide the warning and receive genetic information in response to a request for medical information could potentially have their request for medical information reviewed by the EEOC (via a charge of discrimination). If the request is determined to have been made in such a way that "it was likely to result in the employer obtaining genetic information," the request will violate GINA.

As of the date of this article, requests for medical information using the Department of Labor's Family and Medical Leave Act (FMLA) form for certification of a family member's serious health condition is specifically exempted under the regulations; therefore employers need not include the safe harbor language on that specific form. There is a dispute about whether the safe harbor language must be included on the DOL/FMLA form for the employee's own serious health condition. It seems doubtful that the government/courts would find that the government's own form requests information in such a way that is likely to result in the provision of genetic information. However, employers who wish to take a conservative approach may wish to include the language until the matter is resolved.

(Kelly Hayden, JD, The Management Association of Illinois; 01/11)

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