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Trials&TRIBULATIONS

New regulations shed light on GINA

New regulations promulgated by the Equal Employment Opportunity Commission, interpreting the Genetic Information Nondiscrimination Act go into effect on Jan. 10.

These regulations provide additional guidance on the interpretation of Title II of GINA, which restricts the use and dissemination of genetic information in the workplace. As discussed below, the regulations broadly define genetic information and detail the many ways an employer can inadvertently obtain this information.

By SARAH MERKEL
Daily Record Columnist

GINA generally prohibits discrimination in employment or in the provision of health care coverage on the basis of genetic information. GINA's Title I addresses health coverage and requires the Secretary of Health and Human Services to issue regulations clarifying that the Health Insurance Portability and Accountability Act covers and prohibits the disclosure of genetic information. Although HHS has issued a notice of proposed rulemaking, no final rule has been promulgated — 74 F.R. 51698. The recent regulations promulgated by the EEOC do not address Title I, and will not be discussed in this article.

Pursuant to GINA, it is an unlawful employment practice for an employer to discriminate against an employee "because of genetic information with respect to the employee" and "to limit, segregate, or classify" an employee in a way that would deprive the employee "of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee" 42 U.S.C. § 2000ff-1(a)(1) & (2). Likewise, with limited exceptions, an employer may not "request, require, or purchase genetic information with respect to an employee or a family member of the employee." *Id.* at § 2000ff-1(b).

In short, GINA protects individuals whose genetic information is obtained or used by an employer, regardless of whether that individual would otherwise be able to raise a claim under Title VII.

Genetic Information

Both the statute and the regulations broadly define genetic information. "Genetic information" is information concerning:

(i) An individual's genetic tests;

(ii) The genetic tests of that individual's family members;

(iii) The manifestation of disease or disorder in family members of the individual (family medical history);

(iv) An individual's request for, or receipt of, genetic services ... ; or

(v) The genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology. 29 C.F.R. § 1635.3(c)(1).

Significantly, knowledge of an employee's family medical history can give rise to a GINA claim. Specifically excluded from this definition is information about gender or age. In its rulemaking, the EEOC further clarified that information regarding race or ethnicity is likewise not considered genetic information, as long as the information is not derived from a genetic test *Id.* at § 1635.3(c)(2).

Employers and Employees Subject to GINA

The definition of "employee" encompasses both current and former employees 29 C.F.R. § 1635.2(c). The explicit inclusion of former employees was a cause for concern for some commentators. However, the EEOC determined that this inclusion was necessary because, as with other Title VII statutes, GINA contemplated relief for former employees. For example, GINA prohibits an employer from disclosing "to a prospective employer an individual's genetic information" 75 F.R. at 68914.

Consistent with Title VII, an employee is further defined as "an individual employed by a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year and any agent of such a person" 29 C.F.R. § 1635.2 (c)(1).

Through its regulations, the EEOC sought to consolidate the meanings of the term "employer," which are defined in GINA by reference to other statutes. An "employer" is anyone who "employs an employee defined in § 1635.2(c) of this part, and any agent of such person," with the exception of Indian tribes and private clubs exempt from taxation under 501(c). *Id.* at § 1635.2(d).

Despite case law to the contrary, plaintiffs and complainants

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at times allege that individuals should be subject to personal liability under Title VII. Although some commentators suggested that the EEOC should clarify that individuals cannot be personally liable under GINA, the EEOC declined to specifically include such language in its rulemaking. Relying on the prevalence of existing case law, the agency determined that the inclusion of such language was unnecessary 75 F.R. at 68914.

Information about Family Members

Interestingly, information about a family member's medical history is protected even if that family member is not genetically related to the employee. The definition of a family member includes: "[a] person who is a dependent of that individual as the result of marriage, birth, adoption, or placement for adoption" 29 C.F.R. § 1635.3(a)(1). Some argued that this definition is overly inclusive, as information revealed about family members not related by consanguinity would not indicate whether a person protected by GINA may "acquire a disease or disorder" 75 F.R. at 68915. The EEOC determined that GINA's explicit statutory references made it clear that Congress intended this inclusive definition.

The Acquisition of Genetic Information

In addition to prohibiting discrimination on the basis of genetic information, GINA's Title II also restricts employers from "requesting, requiring, or purchasing genetic information," requires that such information must be kept as "a confidential medical record," and limits its disclosure 29 C.F.R. § 1635.2. The statute recognizes several exceptions to the acquisition of genetic information, including the inadvertent receipt of such information.

Under certain circumstances, where genetic information is acquired as part of a lawful request, such as to support a request for a reasonable accommodation under the ADA, or to support a request for leave under the Family Medical Leave Act, the acquisition of genetic information can be considered inadvertent. 29 C.F.R. § 1635.8. Significantly for employers, the regulations suggest that the use of certain language in requests for information will ensure that such a receipt will be viewed as inadvertent:

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.

Id. at § 1635.8(b)(1)(i)(B).

The regulations also attempt to address the myriad ways that a manager or supervisor could become aware of genetic information, including family medical history. For example, the acquisition of genetic information will also be considered inadvertent where such information is "overheard" by a manager or is disclosed in response to casual conversation *Id.* at § 1635.8 (b)(1)(ii)(A), (B). The EEOC cautions that this exception will not apply if, for example, a manager follows up with "questions that are probing in nature, such as whether other family members have the condition, or whether the individual has been tested for the condition, because the covered entity should know that these questions are likely to result in the acquisition of genetic information." *Id.* at § 1635.8 (b)(1)(ii)(B). Parsing out when a casual conversation crosses the line will no doubt prove frustrating for GINA litigants.

In a nod to the digital era, where information is obtained in an unsolicited e-mail, or through access to a socia medial platform like Facebook, the receipt of this information is also deemed inadvertent. *Id.* at § 1635.8 (b)(1)(ii)(C), (D). The regulations likewise discuss when an employer may obtain such information as part of a voluntary wellness program. See *Id.* at § 1635.8 (b)(2).

As the regulations make clear, an employer (through its representative) can easily acquire information that qualifies as "genetic information" under GINA. The extent to which information relayed in informal ways can lead to GINA liability has yet to be established.

Maintaining Confidential Information

Regardless of how the information is obtained, where employers posses genetic information, they are required to maintain such information separate from an employee's personnel file 29 C.F.R. §1635.9(a). Of note, genetic information present in an employee's file prior to Nov. 21, 2009 need not be removed. *Id.* at §1635.9(a)(4).

The Practical Realities of GINA

GINA has now been in effect for one year. As of yet, there is no guidance from the courts on the application or interpretation of GINA's substantive provisions. Moreover, the EEOC has processed few charges raising discrimination claims under GINA.

For example, the EEOC estimates that in fiscal year 2010, 509 charges alleging discrimination under GINA will be filed. See EEOC Fiscal Year 2011 Congressional Budget Justification, p. 31. By way of comparison, the EEOC estimates that 14,622 charges alleging discrimination under the Americans with Disabilities Act will be filed. *Id.*

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The EEOC also estimated that 1,000 GINA charges will be filed concurrent with other charges of discrimination. Of all the GINA charges filed, the EEOC estimates that 330 will be resolved. No increase in these numbers was projected for fiscal years 2011, 2012 or 2013.

Still, the recent regulations should give employers some pause. "Genetic information" is broadly defined. It is a workplace reality that employees and managers at times exchange information that could be considered genetic information under GINA. A casual conversation that includes one follow-up question too many may give rise to a GINA claim. Indeed, certain diseases with known genetic components, such as breast cancer, are frequently discussed in the workplace, especially during national "awareness" campaigns.

Likewise, employers must use caution when they acquire medical information as part of the reasonable accommodation process or in verifying leave. Any genetic information that is acquired, even inadvertently, must be segregated.

In short, as GINA's provisions become more widely known, the EEOC's predictions regarding charges claiming violations of this statute may prove to be overly cautious.

Sarah Merkel is an attorney with The Wolford Law Firm LLP, where she concentrates her practice in employment and commercial litigation.