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KNOW THE LAW:

New Provisions in Genetic Information Non-Discrimination Act Take Effect

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The Equal Employment Opportunity Commission's (EEOC) final regulations implementing the employment-related provisions (Title II) of the Genetic Information Non-Discrimination Act (GINA) recently took effect. As a result, employers must now be mindful of these new prohibitions and take the necessary steps to avoid potential GINA violations.

Title II of GINA is very specific in its application and restrictions. It restricts employers and others from deliberately acquiring genetic information, prohibits the use of even properly acquired genetic information in any employment decision (including hiring, promoting/demoting, termination and compensation), requires that properly acquired genetic information be kept confidential, and provides remedies for individuals whose genetic information is acquired, used, or disclosed in violation of GINA's protections. As used in Title II of GINA, "genetic information" includes not only the individual's testing information and medical history, but also an individual's family history as well, including the "manifestation of a disease" in family members (*e.g.*, "Has anyone in your family ever had cancer?").

Thus, an essential part of most medical examinations is now generally off limits and could result in a violation of GINA's new regulations if obtained by an employer. However, GINA provides six exceptions:

1. Where an employer inadvertently overhears casual conversation among employees that reveals some type of genetic information about the employee or the employee's family members.
2. Where an employer offers health or genetic services, including such services offered as part of a voluntary wellness program.
3. Where an employer requests family medical history to comply with the certification provisions of the Family and Medical Leave Act ("FMLA").
4. Where an employer inadvertently acquires genetic information included in documents that are commercially and publicly available for review or purchase.
5. Where an employer acquires genetic information for use in voluntary programs monitoring the biological effects of toxic substances in the workplace.
6. Where an employer conducts DNA analysis for law enforcement purposes as a forensic laboratory or for purposes of human remains identification, to the extent genetic information is used for quality control to detect sample contamination.

In order to avoid potential violations of GINA's new regulations, employers who request medical information from employees should make such requests in writing and include the EEOC's "safe harbor" notice in order to inform employees that they are not being asked to provide genetic information. This language reads as follows:

The Genetic Information Non-Discrimination 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.

To maximize an employer's protection against claims, this language should be included in *all* employer requests for medical information, including but not limited to medical certifications for leave under the Family and Medical Leave Act; post-off, pre-employment medical examinations; workers' compensation requests; and requests for information related to reasonable accommodation under the Americans with Disabilities Act.

For further information and details regarding GINA's new regulations and the corresponding obligations of employers, please visit: <http://www.eeoc.gov/laws/types/genetic.cfm>.